

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.)

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, September 13, 2022
9:07 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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 15 A remote hearing was taken pursuant to
 16 notice before Ellen Corbett Hannum, Registered Merit
 17 Reporter, Wilmington, Delaware, on Tuesday, September 13,
 18 2022, beginning at approximately 9:00 a.m., there being
 19 present:

20
 21 BEFORE: DEAN WALDEN, EAB CHAIRPERSON
 MICHAEL HORSEY, EAB BOARD MEMBER
 ROBERT MULROONEY, EAB BOARD MEMBER
 22 FRANCES RIDDLE, EAB BOARD MEMBER
 23 KEVIN MALONEY, DAG, EAB ATTORNEY
 JANELLA SAPP, EAB ADMINISTRATIVE ASSISTANT
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15 ALSO PRESENT:

16 RON DeJESUS, MANKO, GOLD, KUTCHER & FOX, LLP,
17 IT

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1 CHAIRPERSON HOLDEN: Good morning. The
2 purpose of today's hearing is the consideration of
3 motions in limine by various parties to EAB Appeals No.
4 2021-08 through 2021-10. It will also be referred to as
5 the consolidated appeals today.

6 The Board will hear oral arguments on the
7 motions in the following order. First we will hear from
8 Port Operators, next the Delaware State Port
9 Corporation's motions, and then following we will hear
10 from DNREC.

11 The Board expects the parties to
12 consolidate those motions to the extent they can be done
13 today. The order chosen for arguing the motions reflects
14 the order in which they were filed. The moving party
15 will be afforded up to 15 minutes to argue, parties other
16 than the movant will be afforded up to 10 minutes to
17 respond, and the moving party will be provided five
18 minutes for rebuttal argument.

19 Please remember that today's hearing is to
20 address the aforementioned motions and only those
21 motions. This is not the hearing on the merits of the
22 Secretary's decision. As you know, the merits hearing is
23 scheduled for October 11th with the continuation on
24 October 25th, if necessary.

1 I want to now introduce the Board members
2 and a few other individuals. My name is Dean Holden and
3 I am the Board Chairperson. Today we have Ms. Riddle,
4 Mr. Horsey, and Mr. Mulrooney with us. Ms. Janella Sapp
5 is the Board's Administrative Assistant; Mr. Kevin
6 Maloney is the Board's Deputy Attorney General.

7 At this time I would ask for each party
8 and/or counsel to introduce themselves. And first I
9 would ask for Philadelphia Regional Port Authority.

10 MS. POLENSKY: Good morning. Joelle
11 Polensky from Stradley Ronon, and joining me is my
12 colleague, Andy Levine, who has been admitted pro hac
13 vice, and will address the Board with the Board's
14 permission.

15 CHAIRPERSON HOLDEN: Thank you very much.
16 Port Operators?

17 MR. WEAVER: Thank you, Mr. Chairman,
18 Members of the Board, my name is Thaddeus Weaver. I am
19 here representing Greenwich Terminals LLC, GMT Realty and
20 Gloucester Terminals LLC. I am with the firm of Dilworth
21 Paxson. I am joined from the Manko, Gold, Katcher & Fox
22 firm, namely, Shoshana Schiller, Jill Kaplan and Steve
23 Daly. Ms. Kaplan and Ms. Schiller have been admitted pro
24 hac vice. Mr. Daly is a member of our Delaware bar.

1 Thank you, Your Honor.

2 CHAIRPERSON HOLDEN: Thank you, sir.

3 Water Curran?

4 MS. SKJOLDAL: Good morning, Chairperson
5 Holden, Members of the Board. My name is Michelle
6 Skjoldal representing Mr. Curran, with the law firm
7 Eckert Seamans. I am a member of the Delaware bar and I
8 am joined today by Dave Rockman, who has been admitted
9 pro hac in this matter. And we will be sharing argument
10 at today's hearing.

11 CHAIRPERSON HOLDEN: Thank you very much.
12 And Diamond State Port Corporation?

13 MR. BURTON: Thank you, Chairman Holden.
14 My name is William Burton of Barnes & Thornburg, and I
15 represent Diamond State Port Corporation.

16 CHAIRPERSON HOLDEN: Thank you, sir.

17 And for DNREC?

18 MS. SCOTT: Good morning, Chair Holden.
19 My name is Devera Scott, Deputy Attorney General with the
20 Delaware Department of Justice, and with me today is my
21 co-counsel, Jameson Tweedie.

22 CHAIRPERSON HOLDEN: Thank you, Ms. Scott.

23 Today's hearing is being held remotely via
24 the WebEx videoconferencing platform. With that being

1 said, I ask the participating individuals to mute your
2 microphones unless you are actively speaking. If you are
3 having videoconferencing issues, you may try to make them
4 known by calling Ms. Sapp at (302)739-9009 or emailing
5 her at the email address you all have.

6 Please turn off all phone ring tones or
7 set them to silent. We will conclude the hearing no
8 later than 4:30 p.m. We may take a midmorning break,
9 expect to take a lunch break, and possibly other breaks
10 if the hearing runs into the afternoon.

11 The Board may deliberate at any time and
12 will do so in Executive Session as permitted by 7 Del.
13 C. Section 6008(a).

14 Notice of today's hearing was posted on
15 the State of Delaware Secretary of State's public meeting
16 calendar and at the Richardson & Robbins Building, 89
17 Kings Highway in Dover. In addition, public notice of
18 this hearing was published in the News Journal and
19 Delaware State News.

20 The Board is a quasi-judicial body created
21 by the General Assembly to hear appeals of decisions of
22 the Secretary. The manner in which the Board fulfills
23 its duties and responsibilities, including conducting
24 hearings, is established and governed by Delaware Code,

1 the Board regulations, and case law. The Board intends
2 to issue a written decision within 90 days of the
3 conclusion of the hearing. Pursuant to 7 Del. Code
4 Section 6009(a), any person or persons aggrieved by any
5 decision of the Board may appeal to the Superior Court
6 within 30 days of receipt of the written opinion.

7 If there are no preliminary matters, we
8 will move on to oral arguments at this time.

9 And with that, I hand it to Port
10 Operators, Mr. Weaver.

11 MS. SCOTT: Chair Holden, this is Devera
12 Scott on behalf of DNREC. I have one preliminary matter.
13 The hearings are scheduled for October 11th and 25th, if
14 necessary. In an earlier email from Mr. Maloney, he
15 indicated that the parties were encouraged to conclude
16 the hearing in one day, on October 11th.

17 And I was just asking whether or not
18 there's any issue for the 25th or any reason that we
19 won't be able to proceed on the 25th?

20 CHAIRPERSON HOLDEN: Well, you raise a
21 good question. The Board has one Board member that's
22 stepping off, and there are a few seats that the Governor
23 is working to fill, so there is a potential concern over
24 a quorum for the Board. I don't have a conclusive answer

1 for you, but that is a potential issue that we have in
2 front of us.

3 MS. SCOTT: I am sure all the parties will
4 make good efforts to conclude and consolidate as much as
5 possible on October 11th. If we have to continue and we
6 can't continue with the same Board on the second day
7 because we have a new Board member, does that raise an
8 issue in terms of continuity?

9 MR. MALONEY: This is Mr. Maloney
10 speaking.

11 I don't believe it's an insurmountable
12 issue. I believe there are some ways -- it obviously
13 would not be ideal, but I think it would not necessarily
14 preclude the continuation of the hearing with different
15 Board members.

16 MS. SCOTT: I understand. Thank you.

17 MR. LEVINE: This is Andy Levine on behalf
18 of PhilaPort. Could you elaborate? I am embarrassed,
19 and it seems extremely important, are we talking about a
20 majority of the Board rotating off or just one member?

21 CHAIRPERSON HOLDEN: Mr. Levine, it will
22 be a single member that is going to be stepping off the
23 Board. And I think that the parties can probably discuss
24 this post-hearing here to come to some concurrence about

1 how we move forward. We may have some further
2 information in the coming week or weeks with regard to
3 this as well.

4 All right. If we have nothing else,
5 Mr. Weaver.

6 MR. WEAVER: And I will defer to my
7 co-counsel at this point. Thank you, Chair Holden.

8 MS. SCHILLER: As Mr. Weaver indicated, my
9 name is Shoshana Schiller. I am one of the attorneys
10 representing the Port Operators. I am going to be
11 arguing our first motion regarding evidence of
12 economic -- the economic impact and my co-counsel,
13 Mr. Daly, will be arguing our other motion.

14 So the motion at issue is to exclude
15 evidence of, and in particular the testimony of Jerry --
16 and I am going to try to pronounce his name correctly --
17 Diamantedes. He was disclosed by Diamond State to
18 testify about the social economic impact of the project
19 on the local disadvantaged community, the social economic
20 work that was done on the project, and, finally, it
21 appears as an expert about -- and I am going to quote
22 this -- "the interplay between ports and the core
23 navigation between channels."

24 And with the exception of navigation,

1 which I will get into, none of these topics are actually
2 relevant to the upcoming hearing. In determining
3 relevancy, the issue is whether the evidence relates to a
4 fact of consequence in determining the action. The Port
5 Operators and none of the Appellants filed an appeal nor
6 do they intend to put on evidence regarding every aspect
7 of Diamond State's application or all the factors that
8 the Secretary considered. If they had, we would probably
9 need to clear up a year for the Board's calendar for the
10 hearing.

11 The Port Operators and the Appellants were
12 judicious in identifying, at least for the Port Operators
13 a single basis for their appeal, and that's navigation.
14 And the same is true of PhilaPort, navigation. The
15 social economic impact of the project, and particularly
16 its relationship to the disadvantaged communities, that
17 was a subject matter of the individual Appellants, and
18 their appeal has been dismissed. Therefore, as to the
19 Port Operators, the only fact of consequence is whether
20 there's sufficient evidence in the record to support the
21 Secretary's determination based on the incorporated
22 Hearing Officer's report and the technical response
23 memorandum that navigational concerns were adequately
24 considered and addressed.

1 To the extent that Mr. Diamantedes intends
2 to testify as an expert on the interplay between the
3 ports or the core navigation between channels, his
4 opinions on these issues were not in the record and they
5 have not been adequately disclosed in any regard.

6 Indeed, it doesn't even appear that Diamond State has in
7 its exhibit list identified a single document created by
8 Mr. Diamantedes that provides Appellants notice of the
9 substance -- and here I am actually quoting Diamond
10 State's motion in limine, one of its motions in limine --
11 the substance of the facts and opinions to which the
12 expert is expected to testify and a summary of the
13 grounds for each opinion.

14 Indeed, there's nothing in
15 Mr. Diamantedes' background as an economist that would
16 even qualify him to testify as to core navigation between
17 the channels. And I have to confess, I don't even know
18 what that means.

19 So unlike the proffered testimony of the
20 Port Operators, Captain Kichner and Dr. Jones, where we
21 did have expert reports in the record in our comments,
22 Mr. Diamantedes' proposed expert testimony is beyond the
23 scope of his expertise. It's not found in the record.
24 It hasn't been properly disclosed. And, again, other

1 than navigation, it has no relevance to these
2 proceedings.

3 So for these reasons, for a lack of
4 relevance and a failure to proffer expert testimony,
5 evidence of economic impact and Mr. Diamentedes'
6 testimony should be excluded.

7 MR. BURTON: Chairman Holden, William
8 Burton from Diamond State Port Corporation. Just a quick
9 response. In the first motion in limine the Port
10 Operators seek to exclude evidence concerning the
11 economic impact of the proposed project, including
12 testimony from Jerry Diamentedes. In doing so, the Port
13 Operators rely on the broad and liberal relevancy
14 standard, which states that evidence is relevant if it
15 has any tendency to make the existence of any fact more
16 or less probable than it would be without the evidence.

17 This is an extremely low burden. Here
18 evidence concerning the economic impact of the proposed
19 project was considered by and included in the Hearing
20 Officer's report which was incorporated into the
21 Secretary's order. Diamond State Port Corporation should
22 be permitted to show the Board the complete picture of
23 what went into the Secretary's decision.

24 Certainly, evidence of what was considered

1 is relevant to the ultimate question of whether the
2 Secretary's order is supported by the record evidence
3 before him. It is independently relevant and should not
4 be excluded. Alternatively, this evidence may become
5 even more relevant depending on what evidence the
6 Appellants put forth in their case in chief.

7 As courts have recognized, a party's
8 ability to identify rebuttal witnesses in testimony is
9 limited because it's difficult to know in advance whether
10 and to what extent rebuttal evidence will be required.
11 As a result, we ask that should the Board find the
12 economic impact evidence and Mr. Diamantedes' testimony
13 not independently relevant, that it defer ruling on this
14 issue until after Appellants have put on their case in
15 chief and this issue can more appropriately be decided.

16 Thank you.

17 CHAIRPERSON HOLDEN: Thank you,
18 Mr. Burton.

19 Does any other party wish to respond?

20 MS. SCHILLER: If I could briefly reply in
21 the absence of other opposition.

22 CHAIRPERSON HOLDEN: Ms. Schiller, thank
23 you. Let me ask if there are any questions from any of
24 the Board?

1 (No response.)

2 Ms. Schiller, please go ahead.

3 MS. SCHILLER: Certainly, we don't want to
4 preclude any rebuttal evidence, and that's not the point
5 of our motion, again, except to the extent that there are
6 undisclosed expert opinions.

7 Mr. Burton left out a very important term
8 in his quoting of the standards of relevance. He said
9 evidence can be admitted of any fact relevant to the
10 proceedings. That's not actually true. It's any fact of
11 consequence. The economic impact of the project is not
12 of consequence to this hearing. The Port Operators are
13 not challenging whether or not there's economic benefit
14 to this project to the State of Delaware. We acknowledge
15 that there is some economic benefit. But the challenge
16 here at issue before this Board is whether or not there
17 is sufficient evidence regarding navigation upon which
18 the decision of the Secretary was based; namely, whether
19 those issues of navigation were sufficiently and
20 adequately considered.

21 That's what is at issue in this hearing.
22 We could, again, spend many, many sessions going over
23 every single aspect of the Secretary's order, but in fact
24 what Mr. Burton seeks to do is to derive only evidence

1 that is beneficial to his case. It's more prejudicial
2 than probative. It proves nothing with regard to this
3 case. Its only basis is to advise the Board of the
4 benefits of the project. And, again, that's not a fact
5 in dispute here, and therefore the evidence regarding it
6 is not relevant.

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

9 Any other closing argument there, rebuttal
10 issue on that matter?

11 MR. BURTON: Chairman Holden, I would just
12 note that our case is in rebuttal to what evidence the
13 Port Operators and PhilaPort and the other Appellants
14 wish to put on at the hearing. I think it's a little bit
15 too early right now to determine what is and is not
16 relevant having not heard their case in chief. So,
17 again, I would just ask that the Board defer ruling on
18 this until we know exactly what is of consequence in
19 these appeals.

20 Thank you.

21 CHAIRPERSON HOLDEN: Thank you.

22 Any questions from the Board on that
23 motion in limine and discussion?

24 (No response.)

1 All right. Mr. Weaver, further motions in
2 limine?

3 MR. DALY: Yes, Mr. Chairman, I can jump
4 in here. This is Steve Daly, also on behalf of the Port
5 Operators, with the law firm Manko, Gold, Katcher & Fox.
6 I will be arguing the second of two motions that have
7 been filed by the Port Operators, the motion to exclude
8 David Small's conversations with regulators.

9 Just to give the Board some background
10 about what we are talking about here, so in their
11 proposed witness list Diamond State identified as one of
12 their witnesses an employee of their environmental
13 consultant, Duffield Associates, by the name of David
14 Small, who they propose will testify about a number of
15 different subjects, including specifically what's at
16 issue in this motion, which is discussions that occurred
17 with various regulatory agencies concerning and about the
18 proposed project.

19 So Diamond State here is proposing that
20 they are going to have their environmental consultant
21 testify to various discussions that their consultant had
22 with various regulatory agencies. We have moved, the
23 Port Operators have moved to exclude this evidence for
24 two reasons: One is relevance and the second is hearsay.

1 And I will start with relevance. The only
2 agency decisionmaker at issue before this Board in these
3 proceedings is the Secretary of DNREC. To the extent
4 that Diamond State's environmental consultant had
5 conversations with other agencies that are not DNREC,
6 those are completely irrelevant to these proceedings
7 regarding the Secretary's decision. With respect to
8 DNREC, Mr. Small's communications with DNREC would only
9 be relevant to these proceedings if those conversations
10 somehow formed the basis for the record that was how the
11 Secretary rendered his decision.

12 DNREC has been very clear repeatedly
13 throughout these proceedings about what the record is
14 before the Secretary. It's the public comments, it's
15 what was in the Hearing Officer's report, and the
16 exhibits included therein. That record does not include
17 these various discussions that Diamond State's
18 environmental consultant had with these regulatory
19 agencies.

20 Indeed, Diamond State in their opposition
21 does not contend that these discussions that Mr. Small
22 had with various regulatory agencies somehow were part of
23 the record before the Secretary. Instead, they make a
24 different argument on relevance. Specifically, they say

1 that this evidence about these discussions with various
2 regulatory agencies will be used for rebuttal. They
3 contend that Mr. Small's private conversations with
4 regulatory agencies will go to the transparency of the
5 project, which they claim has been put at issue.

6 The problem with that is that that
7 rebuttal doesn't rebut anything. Mr. Small's private
8 conversations with DNREC does not go to the transparency
9 which, frankly, the Port Operators are not really arguing
10 about transparency except in the sole respect of the
11 extent how DNREC informed the general public about the
12 proposed project. Whether Diamond State communicated
13 with different agencies, that's not the kind of
14 transparency that's been put at issue by the Port
15 Operators, if at all, in the statements of appeal.

16 Shifting to hearsay. There's no question
17 that Mr. Small's conversations with various regulatory
18 agencies, including what Mr. Small said to those
19 agencies, as well as what those agencies told him, those
20 would constitute out-of-court statements offered to prove
21 the truth of the matter asserted and therefore would
22 constitute hearsay. There's no question about that.
23 And, indeed, Diamond State, in their opposition papers,
24 don't contend that this would not constitute hearsay if

1 it was offered for the truth of the matter asserted.

2 Instead, they make a different argument.
3 They contend that this is being offered for a non-hearsay
4 purpose. And I want to quote what they say because it's
5 important here. They say that the testimony will be
6 offered -- this is from pages 4, 5 -- the bottom of page
7 4 of their response. They say, "The testimony will be
8 offered to show the discussions occurred. In fact, it
9 does not matter what was actually said during the
10 discussions."

11 The problem here is that this non-hearsay
12 purpose is completely irrelevant to the appeals. None of
13 the Appellants, including the Port Operators, have
14 contended that Diamond State's environmental consultant
15 did not communicate, discuss various issues with
16 different regulatory agencies, that's not what is at
17 issue in any of the statements of appeal before this
18 Board.

19 Accordingly, both because it's irrelevant
20 and if offered to prove the truth of the matter asserted
21 it would be inadmissible hearsay, the Port Operators have
22 offered to exclude this testimony regarding Mr. Small's
23 discussions with various regulatory agencies.

24 MR. BURTON: Mr. Chairman, Members of the

1 Board, the Port Operators' second motion attempts to
2 exclude testimony from David Small regarding Diamond
3 State Port Corporation's discussions with regulatory
4 agencies about the proposed project.

5 The motion lacks merit and should be
6 denied. As we discussed in our papers, Diamond State
7 Port Corporation intends to put on David Small as a
8 rebuttal witness for the Appellants' case in chief. As a
9 result, we are not entirely sure what evidence may or may
10 not be relevant at this time. However, based on the
11 arguments counsel have made thus far and what we have
12 just heard this morning, we believe they intend to argue
13 the size of the project required more and the process
14 that led to the Secretary's decision was not transparent.
15 Such arguments are not supported by the record.

16 The fact that Diamond State Port
17 Corporation had conversations with regulatory agencies
18 and held public forums about the project prior to
19 submitting the permit application goes directly to rebut
20 the Appellants' argument that this process was
21 rubber-stamped and not transparent. In reality, the
22 permit application was the result of a robust process
23 that included public and regulatory input. The permit
24 application itself was subject to public debate and an

1 extended public comment period.

2 Diamond State Port Corporation, as the
3 permit application applicant under Rule 5.2, should be
4 permitted to present this rebuttal testimony in full
5 should it be required. Counsel's argument that these
6 decisions are hearsay is without merit. The Rules of
7 Evidence say that hearsay is an out-of-court statement
8 being used to prove the truth of the matter asserted.
9 Diamond State Port Corporation is not seeking to
10 introduce any specific statement made to a regulatory
11 agency or the public at large to prove the truth of those
12 statements.

13 Instead, we intend to introduce such
14 evidence to show that regulatory agencies and the public
15 were consulted and had an input into the project to show
16 the process was transparent. Such evidence falls outside
17 the definition of hearsay. It's not being used to prove
18 the truth of the matter asserted.

19 Because this is rebuttal evidence, the
20 arguments the Port Operators and Mr. Curran appear intent
21 on making, we submit this evidence is relevant and is
22 admissible and the motion should therefore be denied.

23 Thank you.

24 MR. DALY: Mr. Chair, may I briefly

1 respond?

2 CHAIRPERSON HOLDEN: Mr. Daly, please
3 continue.

4 MR. DALY: Thank you, I appreciate that.
5 Very quickly.

6 Members of the Board, Diamond State has
7 now said again, as they did in their papers, that they
8 are offering this testimony about discussions with
9 various regulatory agencies because it goes to the issues
10 of transparency. To the extent there are any issues at
11 all in these proceedings about transparency, it is with
12 respect to one issue, and that's whether DNREC, and when
13 DNREC disclosed to the public that shoaling fans were
14 being removed from the project and how that was not
15 offered for public comment. That changed the project
16 after the public comment period had closed.

17 Whether Diamond State's environmental
18 consultant had these private discussions with various
19 regulatory agencies, not including members of the public,
20 they are again irrelevant. And it's clear now, as
21 Diamond State has conceded in their argument, as well as
22 in their papers, that they are not offering this for the
23 truth of the matter asserted but just to show that these
24 discussions occurred, which again is irrelevant.

1 For that reason, I would ask that the
2 Board grant the motion.

3 CHAIRPERSON HOLDEN: Any questions from
4 the Board?

5 (No response.)

6 All right. Mr. Daly, are you going to
7 argue another motion in limine?

8 MR. DALY: No. Mr. Chair, that is the two
9 motions in limine that the Port Operators have filed in
10 connection with these proceedings.

11 CHAIRPERSON HOLDEN: Good. Thank you,
12 sir.

13 MR. DALY: Thank you.

14 CHAIRPERSON HOLDEN: Unless the Board has
15 got any questions at this point, there are several
16 motions in limine filed by Delaware State Port
17 Corporation to move to.

18 MR. MALONEY: Chairman Holden, excuse me.
19 This is Mr. Maloney. I am just wondering as a point of
20 order how the Board wants to proceed. I was kind of
21 thinking that after each set -- after each party had
22 presented their motions, the Board might want to enter
23 into deliberations. This particular set obviously is not
24 as complex at least as I anticipate the next two sets

1 being. And I am a little concerned that there might be
2 an overflow of information for the Board to consider and
3 separate.

4 So I am just putting that out there. It's
5 obviously up to the Board how they would like to proceed
6 with this. And I realize it's early to be going into an
7 Executive Session already, but, like I said, I think the
8 next two sets of motions in limine are going to be more
9 thoroughly argued and contain a lot more information, a
10 lot more arguments.

11 So, again, it's up to you. We could also
12 just split the baby, if you will, and listen to the next
13 set and then go into Executive Session and come back for
14 the third and final and go into a second Executive
15 Session. I will leave it up to the sound discretion of
16 the Board how you would like to proceed.

17 CHAIRPERSON HOLDEN: Thank you,
18 Mr. Maloney. And I would take some comment from the
19 Board. I had wondered if we heard DSPC's motion in
20 limine with regard to expert witness testimony and
21 testimony from the Secretary and Hearing Officer, the
22 conjunction of those or the joining of those with what we
23 have heard might be a good place to move to Executive
24 Session and seek some discussion outside of the hearing

1 for those.

2 MR. MULROONEY: I would agree with that.

3 CHAIRPERSON HOLDEN: Mr. Maloney, if you
4 don't have any further comment, I think we move to hear
5 both the motions in limine with regard to expert witness
6 testimony and testimony from DNREC's Secretary and
7 Hearing Officer with the expectation that we may move
8 ourselves to Executive Session at that point.

9 MR. MALONEY: Very good.

10 CHAIRPERSON HOLDEN: Mr. Burton.

11 MR. BURTON: Thank you. Chairman Holden
12 and Members of the Board, in our first motion in limine
13 we seek to exclude or narrow Appellants' use of purported
14 expert witness testimony and related exhibits because
15 Appellants failed to provide expert witness disclosure or
16 expert report. We also raise the issue that most of the
17 proffered testimony was not before the Secretary.

18 Delaware law, and law across the country,
19 requires parties to disclose and identify experts, the
20 subject of their expert testimony and the facts and
21 opinions on which the experts will testify. As we noted
22 in our papers, Appellants have proffered very little, if
23 any, information on these subject matters. Indeed, after
24 we filed our motion, Mr. Curran's counsel acknowledged

1 their failure and circulated an expert report for
2 Mr. Tomasi. I apologize if I pronounced his name wrong.

3 As I will discuss in a minute, that does
4 not address the fact that this purported expert's
5 opinions are not part of the record before the Secretary,
6 and therefore should be excluded under the Board's rules.

7 In further response to our motion,
8 Appellants argue that we have somehow waived our right to
9 bring this challenge, which was routinely the subject of
10 motions in limine, because we failed to account for
11 expert disclosures in the scheduling order and failed to
12 raise this issue in the prehearing conference. Both
13 arguments are without merit.

14 First, when crafting the scheduling order,
15 we were unaware that Appellants would seek to violate the
16 Board's rules by attempting to admit evidence that was
17 not before the Secretary, or to introduce testimony
18 beyond the scope of what was presented during the public
19 comment period. As a result, there was no submission of
20 expert disclosures in that stipulation since the record
21 before the Secretary and the record on appeal was already
22 developed.

23 Secondly, there was no need to bring this
24 issue up at the prehearing conference as the deadline to

1 submit motions in limine had already been agreed to by
2 the parties. This is a proper subject of motions in
3 limine and is routinely raised by such motions.

4 In any event, when originally setting the
5 schedule for motions in limine, I circulated a proposed
6 stipulation that included a date by which the parties
7 would identify the subject of their proposed motions in
8 limine, which was to occur before the prehearing
9 conference. The Port Operators' counsel responded
10 accusing me of attempting to provide "unnecessarily
11 restrictive timeframe" knowing Appellants were "generally
12 and variously unavailable during the last three weeks of
13 August."

14 I responded stating that we were not
15 attempting anything of the sort, but rather were
16 attempting to set a schedule that worked for all the
17 parties involved, and provided the Board enough time to
18 review all the submissions.

19 I then welcomed Appellants to make a
20 counterproposal for a time period for submitting motions
21 in limine to the Board. The result was a stipulation
22 that removed the notice of the subject matter of the
23 motions in limine prior to the prehearing conference.
24 The fact this was not discussed during the prehearing

1 conference was not because of anything Diamond State Port
2 Corporation did, it was the result of counsel's decision
3 not to exchange the subject of their submitted motions
4 prior to the hearing. This issue was of Appellants own
5 making.

6 Appellants next argued that the gatekeeper
7 role courts play in the decisions we cited only apply to
8 jury trials. The Appellants failed, however, to address
9 why the Court of Chancery, which every Delaware attorney
10 knows only has jurisdiction to preside over bench trials,
11 was exercising this very gatekeeping role they say is
12 only applicable in jury trials.

13 The simple fact is that the Daubert
14 standard applies across the board, not just to protect
15 the jury but to limit unreliable expert testimony and
16 streamline proceedings.

17 Lastly, the Port Operators argued that
18 certain of their expert witnesses provided reports or
19 opinions during the comment period that serves as the
20 basis for their expert testimony. They further argued
21 that these reports and opinions were also part of the
22 record before the Secretary. That is only true for some
23 of the expert witnesses identified. For others, such as
24 Mr. Tomasi, the opinions were not part of the record

1 before the Secretary and should not be presented at the
2 hearing pursuant to Board Rule 5.3.

3 For those witnesses who did provide
4 reports or opinions during the comment period, such as
5 Mr. Jones and Mr. Kichner, we ask that their testimony be
6 limited to what was included in those reports and
7 opinions, and that the witnesses be prohibited from going
8 beyond what was part of the record before the Secretary,
9 consistent with Rule 5.3. That is, however, subject to
10 the Board's other rulings on our pending motions in
11 limine which seek to streamline these consolidated
12 appeals and eliminate issues that are not relevant to the
13 Secretary's decision.

14 Thank you.

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

17 Any other parties?

18 MS. SKJOLDAL: Chair Holden, Members of
19 the Board, Michelle Skjoldal on behalf of Mr. Curran, if
20 I can proceed with a response.

21 CHAIRPERSON HOLDEN: Please.

22 MS. SKJOLDAL: So Mr. Burton seems to be
23 focused on again many of the procedural rules and back
24 and forth between the parties I think in an effort to

1 really hide from the Board what is important here.
2 Essentially, the motions in limine, specifically Diamond
3 State's Motion in Limine No. 1, as well as -- I know we
4 are going to get to this later in the proceeding, but
5 DNREC's motion in limine with respect to exclusion of
6 certain evidence that was not before the Secretary. They
7 touch upon the issue of expert testimony in that as well.
8 So at times I might discuss about that.

9 But both of those motions should be denied
10 for the following reasons: First, Mr. Curran complied
11 with the scheduling order and the Board's rules regarding
12 timely identification of witnesses. All parties have
13 been put on sufficient notice of the proposed expert
14 testimony.

15 Second, as everyone knows, the strict
16 Rules of Evidence do not apply to Board proceedings, and
17 the rules permit inclusion of relevant and reliable
18 expert testimony.

19 Third, Mr. Curran has fulfilled the
20 criteria for expert witness identification under the
21 traditional civil procedural rules if the Board believes
22 such strict rules do indeed apply here.

23 And, finally, big picture, expert witness
24 testimony will be helpful to the Board in this case.

1 So let me just drill down a little bit
2 further on each of those points. So, first, Mr. Curran
3 complied with the Board's rules and orders. And as
4 acknowledged by Diamond State, Mr. Curran submitted his
5 list of hearing exhibits and witnesses in accordance with
6 the Board's scheduling order, and he did so timely on
7 July 29th.

8 All parties to the matter participated in
9 a prehearing conference. Again, as Mr. Burton raised
10 during his argument just now, Section 3.3 of the Board's
11 rules require the parties to raise all objections to
12 witnesses and documents at the prehearing conference.
13 And Diamond State did not do that nor did DNREC, and Rule
14 3.3 requires them to do so.

15 I think it's important to note, as well,
16 Diamond State and DNREC did not offer proffers with
17 respect to their witnesses. Now, they did later correct
18 those omissions after the Appellants requested them to do
19 so.

20 So, second, and I think this is key for
21 the Board members to understand, is the strict Rules of
22 Evidence do not apply, and expert testimony is allowed in
23 Board appeals. So specifically under Del. Code Title 7
24 Section 6008(b), the record before the Board is to

1 include the entire record before the Secretary.

2 "Include" being the operative word. And all parties may
3 produce any competent evidence in their behalf.

4 So that gives the parties quite a bit of
5 leeway and flexibility with respect to offering competent
6 evidence. So the record before the Board consists of the
7 entire record that was before the Secretary and any other
8 competent evidence that the parties produce during the
9 appeal. So despite the arguments to the contrary being
10 made by Diamond State, and I think later we will hear by
11 DNREC, the Board had the power really to expand the
12 record by accepting competent evidence produced by any
13 party -- again, any party. As discussed in our papers
14 and also in the papers of the Port Operators, expert
15 testimony as to matters before the Board is permissible.

16 And it seems like, based on what I am
17 hearing from Mr. Burton, that they are not disputing that
18 general precedent. The Board can hear the testimony of
19 witnesses and the Board has the ability to evaluate and
20 give appropriate weight to the testimony at the hearing.

21 So it appears that Diamond State and DNREC
22 are seeking to disallow presentation of arguments and
23 expert evidence, really where such argument and
24 explanation is necessary to articulate our argument,

1 which is the errors and omissions that DNREC made as part
2 of the permit review process underlying the issuance of
3 the Secretary's order. And seeking to preclude that
4 really is directly contrary to Section 6008(b).

5 Moving on, let me briefly touch on the
6 issue of Section 5.3 of the Board's rules. So, in part,
7 Board Rule 5.3 states that "Appellants other than permit
8 other than permit applicants or an alleged violator may
9 only introduce evidence which was before the Secretary."
10 So, as noted, all of Mr. Curran's experts and the
11 substance of their opinions were thoroughly set forth in
12 witness and exhibit lists.

13 Also, with respect to Mr. Preziosi and
14 Dr. Jones, both of those individuals submitted detailed
15 memos to DNREC as part of the public comment process.
16 And that occurred back in October of 2020, which
17 amazingly enough was almost two years ago. So their
18 testimony, Preziosi and Jones, were indeed part of the
19 record if the Board does believe that the rule, that rule
20 applies here, Rule 5.3. So with respect to Dr. Theodore
21 Tomasi -- and Toe-mas-ee is the proper pronunciation of
22 his name -- again, he was identified by Mr. Curran in his
23 witness list, including a very detailed proffer of his
24 expected testimony. And there also was a complete

1 listing of documents utilized by Dr. Tomasi in
2 formulating his opinion. That also was provided at the
3 stage of exchanging witness and exhibit lists.

4 So, again, DNREC and Diamond State did not
5 object to Mr. Tomasi's testimony at the prehearing
6 conference. And I know Mr. Burton touched upon this,
7 counsel for Mr. Curran, we did provide Dr. Tomasi's
8 expert report to the other parties last week. We did not
9 do that -- and that's not an admission saying, Oh, we
10 should have done this in the first instance -- actually,
11 to the contrary, we do not believe we were required to do
12 that for Dr. Tomasi or for any of our experts, but we did
13 that in an effort to respond to the motions in limine
14 being filed.

15 So the following point I am going to touch
16 upon very briefly -- this will be discussed a little bit
17 more in detail today regarding the issue of admissibility
18 of evidence outside of what was considered by the
19 Secretary. I at least want to mention it now, that it's
20 critical that Mr. Curran's argument is that DNREC failed
21 to give adequate consideration to its regulations.
22 That's part of what he argues.

23 So in making such an argument, he can't
24 fully know until after the point that the Secretary's

1 order was issued what actually was considered or perhaps
2 what appeared to be considered or what was not considered
3 by the agency. So practically, Dr. Tomasi -- how could
4 he have provided comments prior to the issuance of the
5 Secretary's order?

6 And I should have said this before, but
7 just for purposes of informing the Board, Dr. Tomasi, the
8 nature of his testimony is evaluation of impact to
9 recreation by the project.

10 So just shifting quickly to my next point,
11 in looking at the traditional civil procedural rules
12 governing expert witness identification and disclosure,
13 Mr. Curran has fulfilled the criteria for that. First,
14 he timely identified his experts, timely disclosed their
15 opinions and the bases for such, as I have previously
16 discussed.

17 Furthermore, Diamond State and DNREC
18 really had each been provided a fair opportunity to
19 understand and meet Mr. Curran's arguments and objections
20 to the Secretary's order. The grounds for that were in
21 his statement of appeal and the experts and their
22 testimony were identified in the witness and exhibit list
23 that Mr. Curran provided to the parties.

24 So the last point I would like to make is,

1 again, stepping back, big picture, expert witness
2 testimony will be helpful to the Board in this matter.
3 This matter involves technical issues. And under the
4 Delaware Rules of Evidence, specifically 702, a witness
5 who was qualified can offer testimony if the testimony is
6 based on sufficient facts or data, the testimony is the
7 product of reliable principles and methods, and the
8 witness has applied the principles and methods reliably
9 to the facts of the case.

10 And we are confident that the Board, if it
11 permits the testimony of -- if it permits Mr. Curran's
12 expert witnesses to testify, that they will see that
13 those criteria will be met.

14 Also, again, with respect to Daubert, if
15 the Board believes the Daubert test does indeed apply
16 here, each of Mr. Curran's witnesses are properly
17 qualified. The evidence that they would offer is
18 relevant. Their opinions are based on information of
19 reasonably relied on experts in that field, and the
20 testimony will help the Board. And it certainly will not
21 cause prejudice or confusion.

22 So, in conclusion, outside of the
23 procedural arguments offered by Diamond State and the
24 argument offered -- again, this will be discussed

1 later -- but the argument offered by DNREC that expert
2 testimony really shouldn't be allowed unless such was
3 part of the public comment period prior to issuance of
4 the Secretary's decision, the simple question I think for
5 the Board here is: Will the testimony be helpful to the
6 Board? Yes, it will be, and that's the answer.

7 Each of Mr. Curran's expert witnesses have
8 technical and specialized knowledge that's really outside
9 of the knowledge of anyone who does not otherwise
10 practice in each of their respective fields. And such
11 testimony therefore has great value in this matter and we
12 believe can really be of assistance to the Board.

13 So for those reasons, we request that the
14 Board rule that Diamond State's Motion in Limine No. 1 be
15 denied.

16 CHAIRPERSON HOLDEN: Thank you, Ms.
17 Skjoldal.

18 Other parties?

19 MS. SCHILLER: Yes, Your Honor. Shoshana
20 Schiller on behalf of the Port Operators.

21 First of all, I appreciate Mr. Burton
22 acknowledging that the Port Operators have in fact
23 supplied expert reports and that the testimony of Captain
24 Kichner and Mr. Jones is -- that their motion does not

1 seek to exclude that testimony. I would like to just
2 raise a couple of additional points.

3 First of all, I am somewhat confused by
4 Mr. Burton saying that he had submitted an email or a
5 schedule that had some deadlines for disclosing the
6 subject matter of motions in limine. To be honest, while
7 argument was just going on, Ms. Kaplan and I reviewed our
8 emails. He did propose a schedule for the dates for
9 filing of the motions and responding to the motions, and
10 we did say that the dates that he had proposed were a
11 little bit difficult for us. And we eventually, as the
12 Board knows, came to an agreement on the submission dates
13 for that.

14 Any suggestion that there was a separate
15 deadline for disclosing the topics of motions, at least
16 as of right now, we can't find any email or proposal for
17 that.

18 Putting that aside, I just want to kind of
19 emphasize the argument you just heard about some of the
20 testimony. Again, we have submitted in the record and in
21 our comments, well in advance of the hearing, expert
22 reports by Captain Kichner and by Mr. Jones. We also
23 submitted over a year ago, in connection with our notice
24 of appeal, a memorandum, an additional memorandum having

1 to do with the issue of the shoaling fans and the
2 navigational concerns that would arise as a result of the
3 issue of dredging, which we have discussed several times
4 and will be a subject of later argument.

5 As you just heard, this testimony really
6 could not have been submitted any earlier because we
7 didn't know -- nobody knew that the shoaling fans were
8 being removed from the project. And we have had argument
9 on this before and again we will have argument on the
10 importance of that later. But, again, the issue here is
11 that that testimony has been, that proposed testimony,
12 that proposed report, has been in front of Diamond State
13 and DNREC for over a year.

14 So the arguments about surprise and not
15 being able to prepare with regard to that particular
16 aspect of the testimony, the shoaling fans and their
17 impact on navigation, that's been fully disclosed. So
18 those arguments about procedural arguments really don't
19 hold any water here.

20 And then I would just like to talk just a
21 little bit more about why expert testimony will be and
22 should be admitted by the Board. It's not duplicative,
23 and to a certain extent it may go outside the four
24 corners of the reports, and that is precisely what the

1 case law here provides for. I mean, we cited three
2 cases, and in all three of those cases the boards heard
3 additional evidence from an expert witness that, again,
4 helped explain the issue, explain the issue.

5 So here the issue is: Did the Secretary
6 adequately consider navigation? And to get there, you
7 really need to have experts testify what is the impact
8 because the impact here is substantial. We have a
9 turning basin that will completely block the Delaware
10 River when these ships are coming in and out of the Port.
11 Right? So, it's a major issue. And expert testimony
12 will indeed help the Board understand the significance of
13 that.

14 So, for example, in the Hegman case, which
15 was a challenge to a municipal waste permit, the Board
16 heard testimony from several experts in bird and wildlife
17 hazards, the aircraft -- regarding the hazards created by
18 birds attracted to municipal landfills. And that
19 assisted it in understanding the dangers that would
20 result from the proposed landfill, just as the Port
21 Operators experts will do with regard to navigation.

22 In Swift, which involved a challenge to a
23 sewage disposal facility, there was an expert who
24 testified that the sewage system was inadequate and posed

1 a health risk. Again, that's exactly the same as the
2 testimony of the experts here to identify in our case the
3 navigational planning for the proposed facility and how
4 its inadequacy poses a safety risk.

5 And then, finally, in the case of a
6 subaqueous lands permit application, that's Grove, and it
7 was a challenge to such a permit. And two experts, one
8 from each party, from the applicant and from the
9 challenger, testified as to the need for erosion control
10 measures. And that's really almost identical to what
11 much of the testimony of the Port Operators' experts will
12 be: the need to address maintenance dredging to ensure
13 navigability of the Delaware River.

14 So Diamond State's contention that
15 allowing expert witness testimony would be contrary to
16 the administrative code, that's really erroneous and it's
17 without legal support. Again, we appreciate that Diamond
18 State has acknowledged that our two witnesses did submit
19 expert reports and should be allowed to testify, and we
20 just would encourage the Board that their testimony not
21 be so limited and that we be allowed to put on testimony
22 that again would assist the Board in understanding the
23 issues and that would deal with, again, this issue of
24 removal of the shoaling fans, which was not disclosed at

1 all before the issuance of the Secretary's order.

2 Thank you.

3 CHAIRPERSON HOLDEN: Any questions from
4 the Board at this point?

5 (No response.)

6 Any other parties?

7 MR. BURTON: Chairman Holden, if I could
8 respond briefly.

9 CHAIRPERSON HOLDEN: Who is speaking?

10 MR. BURTON: William Burton for the
11 Diamond State Port Corporation.

12 CHAIRPERSON HOLDEN: You may respond.

13 MR. BURTON: Thank you, Chairman Holden.

14 I think Mr. Curran's counsel had asked
15 should the court apply Rule 5.3 of its regulations. I
16 would just say that the Board should apply 5.3 and limit
17 the record on appeal to what was before the Secretary. I
18 think the Board has been pretty clear that that's how it
19 handles these appeals. It gave a forewarning, I believe
20 at the prehearing conference, that was the Board's
21 intention. So I think that should be the standard that
22 the Board uses in this appeal. I don't think it's
23 appropriate or permitted to go outside the record before
24 the Secretary unless you are an applicant or a violator.

1 And so with respect to Mr. Curran's
2 purported expert, it was not in the record, it should not
3 come in at the hearing.

4 And the Port Operators' experts likely
5 should be restricted to what information they put in the
6 record during the comment period.

7 With regard to this -- and I don't want to
8 belabor this point -- but with regard to the stipulation
9 that was sent around -- on August 5th, I sent a
10 stipulation, the first line item reads: "The parties to
11 this consolidated appeal shall identify any motions in
12 limine they anticipate filing on or before August 10th,
13 2022."

14 The prehearing conference occurred on
15 August 11th, so that provided that we would identify our
16 subjects of our motions in limine prior to the prehearing
17 conference so that we could identify any issues that was
18 removed from the actual stipulation that was submitted to
19 the Board.

20 I do also want to note that should the
21 Board permit Mr. Tomasi -- and I apologize if I am
22 mispronouncing his name -- to present evidence, we think
23 it also should be limited. First of all, we don't think
24 it should be admitted because it wasn't before the

1 Secretary, but should the Board admit it, it should be
2 limited to what was contained in the expert report
3 received only a short time ago. I think that's all I
4 have.

5 Thank you.

6 MS. SKJOLDAL: Chairperson Holden, may I
7 have one minute to respond to a point that Mr. Burton
8 just made?

9 CHAIRPERSON HOLDEN: Yes, Ms. Skjoldal.

10 MS. SKJOLDAL: Thank you.

11 Just so the Board isn't confused,
12 Mr. Curran is seeking to offer expert testimony from
13 three different experts. Mr. Damian Preziosi and
14 Dr. Craig Jones, both of those individuals did provide
15 comments and issue memoranda at the public comment stage
16 of the proceeding. Again, the substance of their
17 testimony is in those memos, and it really is outlined in
18 the witness list. It's a natural overlapping
19 continuation of the substance in those memos that they
20 previously submitted.

21 So Preziosi and Jones, they were indeed
22 included. I just want to make sure the Board is clear
23 that those folks aren't just attributable to the Port
24 Operators.

1 And, also, with respect to Dr. Theodore
2 Tomasi, we appreciate Mr. Burton's argument concerning
3 Dr. Tomasi, but again there was no way Dr. Tomasi could
4 have provided any type of comments before the issuance of
5 the Secretary's order because he would not have known
6 what he was commenting on.

7 So, again, that's just my brief reply.
8 Thank you.

9 CHAIRPERSON HOLDEN: Thank you,
10 Ms. Skjoldal.

11 Any questions from the Board?

12 MR. MALONEY: Chairman Holden, this is
13 Mr. Maloney. Can I ask a question?

14 CHAIRPERSON HOLDEN: Please.

15 MR. MALONEY: This is for the Port
16 Operators who mentioned the three case decisions that
17 were cited in their papers. And my question is, if you
18 know -- and I apologize that you had no warning for this
19 question -- but if you know, were any of those case
20 decisions subject to a public hearing before the
21 Secretary rendered his decision? If you don't understand
22 the question, I will try to rephrase. I can understand
23 why you would not understand the question.

24 MS. SCHILLER: I do understand the

1 question. I don't recall reading in any of those
2 decisions -- if you give me a minute, I am going to look
3 real quickly because I do have the cases in front of me.
4 I hope you don't mind.

5 MR. MALONEY: Of course not.

6 MS. SCHILLER: I don't recall whether or
7 not they referenced any public hearings. Let's see
8 Groves -- I can't say. If you would like, during
9 Executive Session I can look at these cases more clearly
10 and maybe send an email to you and let you know whether
11 there was a public hearing in any of them. I don't want
12 to take up the time now, but I do have the cases in front
13 of me and I can review them.

14 MR. MALONEY: I would very much appreciate
15 that. I will leave it up to your discretion whether or
16 not you want to do that. I can also take a look at the
17 cases.

18 MR. DALY: Mr. Chairman, this is Steve
19 Daly, also on behalf of the Port Operators. My
20 recollection is -- and obviously we should follow up --
21 but in the Hegman case there was a reference to a Hearing
22 Officer's report in that particular decision, which
23 indicates that there was a prior public hearing in that
24 particular instance.

1 MR. MALONEY: Thank you.

2 CHAIRPERSON HOLDEN: Mr. Maloney, anything
3 else?

4 MR. MALONEY: No, that's all. Thank you.

5 CHAIRPERSON HOLDEN: All right. With
6 that, Mr. Burton, I would ask that you address the DSPC
7 motions in limine with regard to the testimony for the
8 DNREC Secretary and the DNREC Hearing Officer.

9 MR. BURTON: Thank you, Chairman Holden.

10 In our second motion in limine we ask that
11 the Board exclude any testimony from DNREC's Secretary
12 and the Hearing Officer. The purported testimony raises
13 issues of public policy, is against Delaware Rule of
14 Evidence 605, could raise concerns with the integrity of
15 DNREC and this Board's process. We think it is wholly
16 inappropriate to seek such testimony. By analogy, having
17 the Secretary or Hearing Officer testify would be like
18 having a district court judge or a magistrate judge
19 testify at an evidentiary hearing. It simply does not
20 happen and should not happen here.

21 In response to the motion, the Port
22 Operators concede stating they would not call the
23 Secretary at the hearing, but nonetheless reserved their
24 right to call the Hearing Officer to purportedly

1 establish the contents of the record. We submitted that
2 record before the Secretary does not need to be
3 established in this case. Simply because some
4 information was not included in the chronology but was
5 later provided to Appellants should not allow the Port
6 Operators' and Mr. Curran's counsel to go on a fishing
7 expedition during the hearing and call the Hearing
8 Officer to question her on what she did and did not
9 consider.

10 Appellants have had the ability to
11 determine what was part of the record during these
12 prehearing proceedings. The Hearing Officer's report
13 also outlines what was considered in the record. As we
14 mentioned in our papers, such testimony is wholly
15 improper. It will call into question the witness process
16 and goes against Delaware's Rules of Evidence.
17 Appellants have shown only a sliver of a need for the
18 Hearing Officer's testimony, which falls woefully short
19 of the rare circumstances described by Delaware courts in
20 putting judicial officers on the stand.

21 We submit that the motion should be
22 granted and the Secretary and the Hearing Officer's
23 testimony be excluded.

24 Thank you.

1 CHAIRPERSON HOLDEN: Thank you,
2 Mr. Burton.

3 Other parties?

4 MS. SCHILLER: Yes, Shoshana Schiller on
5 behalf of the Port Operators.

6 As Mr. Burton noted, we do not intend to
7 call the Secretary, so that's not at issue.

8 I would like to respond just to the
9 general proposition. What occurred with the issuance of
10 this permit was not a trial. There was a public hearing,
11 but there were no parties litigating against one another.
12 It was an administrative process for the issuance of a
13 permit. Thus, the law stated by Diamond State, none of
14 which, not a single one of those cases relates to an
15 administrative decision to issue a permit. None of those
16 cases are relevant in determining whether or not the
17 Hearing Officer can testify. That being said, as we
18 noted, we are only interested in calling the Hearing
19 Officer on rebuttal if the testimony is relevant.

20 And I find it very interesting that
21 Mr. Burton is kind of arguing on both sides of this
22 issue, right? In response to our motion he indicated
23 that the record should be held open for rebuttal
24 testimony. Here he says, no, it should not. And this

1 actually -- the Hearing Officer's testimony relates
2 directly to evidence that Diamond State intends to put
3 on, that is, as we heard, Diamond State intends to put on
4 this evidence of communications with DNREC, kind of
5 behind the scenes, about what information was provided
6 and what information was received. So that is
7 information that the Hearing Officer -- or it may be
8 information that the Hearing Officer has. We won't know
9 that until that testimony arises, if it does.

10 And to say that we had time to figure this
11 out, there's no discovery in these proceedings. Right?
12 I mean that's an issue. Discovery doesn't exist here so
13 it's not as though we could have deposed anyone to find
14 out what was behind these conversations and what was
15 included in these conversations, and whether the Hearing
16 Officer, in making the recommendation, relied on any of
17 this information. It's not a fishing expedition.

18 We would like to reserve our ability to
19 call the Hearing Officer in rebuttal if in fact Diamond
20 State or DNREC puts on testimony that purports to support
21 the decision of the Secretary but that information is not
22 in the record. Right? And that's crucial. I mean, it's
23 very one-sided. If testimony can be put on to say, oh,
24 we provided X, Y, and Z and we had these ten

1 conversations with the Hearing Officer or with the DNREC
2 employees preparing the response memorandum, but then we
3 can't go and call the Hearing Officer and say: Did you
4 really receive this information? And did you rely on
5 this information? That's the only way that we can get at
6 whether or not -- again, a key issue in this case --
7 whether or not the Secretary's decision was supported by
8 sufficient evidence.

9 So, again, we are not intent on calling
10 the Secretary. We would request that we could call the
11 Hearing Officer solely on rebuttal if information comes
12 out in testimony as to communications, information,
13 evidence provided to the Hearing Officer or to the
14 Secretary that is not in the chronology record.

15 MR. TWEEDIE: Chairman, this is Jameson
16 Tweedie. We did not file a brief on this motion, but we
17 did touch on this same issue in one of our motions. So I
18 thought it might be appropriate -- it seems like it's a
19 fairly discrete issue -- to chime in now rather than
20 later.

21 It sounds like there really is not too
22 much of an issue between the parties. We appreciate that
23 the Appellants will not call Secretary Garvin, and I
24 think that the sort of narrow circumstance that

1 Ms. Schiller just identified in which they would even
2 want to can call Hearing Officer Vest is not going to
3 occur. But I did just want to say from DNREC's
4 perspective, both the Secretary and the Hearing Officer's
5 testimony should be excluded, that that should not be in
6 bounds. And we would analogize it to circumstances in
7 which a judicial officer was attempted to be called as a
8 witness. And Delaware law plainly does not permit that.

9 Again, I don't think that this will become
10 an issue because I don't think -- at least for DNREC's
11 part, we have no intention of offering any evidence along
12 the lines that Ms. Schiller just identified.

13 Thank you.

14 CHAIRPERSON HOLDEN: Thank you,
15 Mr. Tweedie.

16 Any other parties?

17 MR. ROCKMAN: Yes, Mr. Chairman, Dave
18 Rockman on behalf of David Curran.

19 CHAIRPERSON HOLDEN: Mr. Rockman.

20 MR. ROCKMAN: We did name the Hearing
21 Officer in our witness list, but we are in concurrence
22 with the response from Ms. Schiller on behalf of the Port
23 Operators and agree to the same stipulation that the
24 Hearing Officer would only be called in rebuttal.

1 I guess my only additional comment is
2 Mr. Burton raised the specter of some kind of fishing
3 expedition during that rebuttal testimony, and I would
4 suggest that that is not a real concern for the Board
5 should it have the fear that any questioning of the
6 Hearing Officer, in the unlikely event she is actually
7 called, strays into the area of a fishing expedition.

8 Certainly, you can make that decision at
9 the time of the hearing and cut off that line of inquiry.
10 And it's probably more effective for the Board to do that
11 as it's occurring rather than take action now to prevent
12 that from being a concern in the future.

13 CHAIRPERSON HOLDEN: Thank you,
14 Mr. Rockman.

15 Let's pause and ask any questions from the
16 Board?

17 (No response.)

18 Mr. Maloney, any clarifying points there?

19 MR. MALONEY: No, Chairman.

20 CHAIRPERSON HOLDEN: Mr. Burton, anything
21 final on this?

22 MR. BURTON: Thank you, Chairman Holden.
23 Just a couple of brief comments.

24 First, I want to address that the

1 relevancy of the Delaware Rules of Evidence and the cases
2 that we cited, when the Board's rules don't specifically
3 address an issue, this Board typically does look to
4 Superior Court and other court cases to kind of fill that
5 gap. And that's precisely what we believe should be done
6 here and is appropriate.

7 I think the Port Operators' counsel
8 touched on the fact that there's no real discovery in
9 this appeal. I would note that they did -- one of the
10 Appellants, I'm not sure if it was the Port Operators or
11 PhilaPort or Mr. Curran, but there have been FOIA
12 requests made. There has been an attempt to get
13 discovery, so I don't know if that's entirely an accurate
14 statement.

15 And then I would say that the Port
16 Operators' counsel had said that they cannot get this
17 testimony elsewhere, if there were to be testimony about
18 communications or information that was provided to the
19 Secretary. And I would submit that the witness who is
20 putting on that testimony at the hearing can be
21 cross-examined on that information, and that that is a
22 more than adequate way of getting that testimony in the
23 record.

24 Thank you.

1 CHAIRPERSON HOLDEN: Thank you,
2 Mr. Burton.

3 MS. SCHILLER: If I could just briefly
4 respond to those points. The issue I raised with regard
5 to the cases is not that the general proposition that a
6 judicial officer should not be called to testify is not
7 relevant, my point was that I don't see any law or
8 support for the idea that the Hearing Officer or the
9 Secretary -- and again, the Secretary, we are not going
10 to call -- are in fact -- stand in the shoes of a
11 judicial officer. The issuance of the permit is not a
12 judicial proceeding, so that's one issue.

13 We did make FOIA requests and our FOIA
14 requests were denied because there's litigation pending.
15 So for Mr. Burton to say you did conduct discovery by
16 submitting FOIA requests is a bit of a tautology because,
17 again, our FOIA requests were denied because of pending
18 litigation. That's what we were advised in response.

19 So those are just the two quick points I
20 wanted to make.

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

23 One last time: Any questions from the
24 Board?

1 (No response.)

2 All right. As discussed previously this
3 may be a good time for the Board to go to Executive
4 Session and seek some legal counsel.

5 Is there any motion from the Board towards
6 that direction? Mr. Horsey?

7 BOARD MEMBER HORSEY: I move that we go
8 into Executive Session.

9 CHAIRPERSON HOLDEN: Is there a second?

10 BOARD MEMBER RIDDLE: Second.

11 CHAIRPERSON HOLDEN: All in favor say aye.

12 BOARD MEMBER MULROONEY: Aye.

13 BOARD MEMBER RIDDLE: Aye.

14 BOARD MEMBER HORSEY: Aye.

15 CHAIRPERSON HOLDEN: The Board is going to
16 move into Executive Session. We will take five, ten
17 minutes to get refreshed. For the parties, I would ask
18 that you ensure that Ms. Sapp has good contact info for
19 you. We will endeavor to get back as quickly as we can.
20 We will endeavor to give you some heads up. And we will
21 reconvene in public session here shortly.

22 Thank you very much.

23 (The Board went into Executive Session
24 from 10:18 a.m. until 12:00 p.m.)

1 CHAIRPERSON HOLDEN: All right. We are
2 here at 12 o'clock.

3 From the Board, are there any motions to
4 be heard?

5 BOARD MEMBER MULROONEY: Yes, I will make
6 a motion. I move to deny motions 1, 2 and 3 in limine
7 regarding economic impact, discussions with regulatory
8 agencies, and expert testimony are denied to the extent
9 the testimony complies with Board Regulation 5.3.

10 CHAIRPERSON HOLDEN: Is there a second?

11 BOARD MEMBER HORSEY: I second.

12 CHAIRPERSON HOLDEN: Mr. Horsey seconded
13 it.

14 Any discussion from the Board? I will do
15 a roll call vote.

16 Ms. Riddle?

17 BOARD MEMBER RIDDLE: In favor.

18 CHAIRPERSON HOLDEN: Mr. Horsey?

19 BOARD MEMBER HORSEY: In favor.

20 CHAIRPERSON HOLDEN: BOARD MEMBER
21 MULROONEY?

22 BOARD MEMBER MULROONEY: In favor.

23 CHAIRPERSON HOLDEN: I vote in favor of
24 the motion as well. The motion carries.

1 Anything else from the Board?

2 BOARD MEMBER HORSEY: Mr. Chairman, I move
3 to approve the Diamond State Port Corporation's motion in
4 limine to exclude the testimony from the Secretary and
5 the DNREC Hearing Officer.

6 CHAIRPERSON HOLDEN: Is there a second?

7 BOARD MEMBER RIDDLE: Yes. This is
8 Frances Riddle, I second.

9 CHAIRPERSON HOLDEN: Thank you,
10 Ms. Riddle.

11 Any discussion from the Board?

12 I will take a roll call vote here.

13 CHAIRPERSON HOLDEN: Mr. Mulrooney?

14 BOARD MEMBER MULROONEY: In favor.

15 CHAIRPERSON HOLDEN: Ms. Riddle?

16 BOARD MEMBER RIDDLE: In favor.

17 CHAIRPERSON HOLDEN: Mr. Horsey?

18 BOARD MEMBER HORSEY: In favor.

19 CHAIRPERSON HOLDEN: I vote in favor of
20 the motion. The motion carries.

21 Thank you, Board Members.

22 So with that I believe we have some
23 additional motions in limine from Diamond State Port
24 Corporation still to be heard.

1 Are we ready to move into those?

2 MR. BURTON: Thank you, Chairman Holden.
3 During the break I had a conversation with DNREC and I
4 think the next two motions that I have overlap with two
5 of their motions, so if it pleases the Board, I was going
6 to propose that I would give my opening argument followed
7 by DNREC and then hear from the other parties if that
8 seems to make sense to the Board.

9 CHAIRPERSON HOLDEN: I think the Board
10 would appreciate that. Would you expand a little bit on
11 what you think the overlap is and then you could dive
12 into the motion, if you would?

13 MR. BURTON: Yes, Chairman Holden, the
14 water quality certification, which is my Motion in Limine
15 No. 3, and I believe DNREC has another motion that's on
16 that same topic, and then my Motion in Limine No. 4,
17 which is on matters that were not before the Secretary, I
18 think that overlaps with their motion that also seeks to
19 eliminate evidence that was not before the Secretary.

20 CHAIRPERSON HOLDEN: Thank you,
21 Mr. Burton. Please proceed.

22 MR. BURTON: Thank you, Chairman Holden.
23 In our third motion in limine we seek to
24 exclude any testimony, evidence or argument regarding the

1 water quality certification under Section 401 of the
2 Clean Water Act, as that issue, other than a minor math
3 error, was the sole addition to Mr. Curran's amended
4 appeal. As the Board is aware, that amended appeal was
5 stricken from the record at our last hearing.

6 Based on that ruling and the fact that no
7 other appeal raised the water quality certification, we
8 now seek to streamline the hearing by avoiding any
9 appellant from attempting to bring up the water quality
10 certification during the hearing. In doing so, we rely
11 in part on the law of the case doctrine which holds that
12 issues which were previously decided, absent a change in
13 facts and circumstances, are required to be followed.

14 We also argue, similar to DNREC, that
15 since the Board struck Mr. Curran's amended appeal, the
16 water quality certification is simply no longer at issue
17 in these appeals.

18 In response to the motion, Mr. Curran
19 acknowledged the motion appears "completely unnecessary."
20 And we agree. No appellant should raise the water
21 quality certification at the hearing. Neither Mr. Curran
22 nor the Port Operators identify any change in
23 circumstances or facts that make the water quality
24 certification an issue in these appeals or serves as a

1 ground to overturn the prior ruling. Instead, they
2 simply argue that a May 20 letter from the DNREC
3 Secretary to the Army Corps of Engineers should be the
4 subject of testimony, because it purportedly makes
5 admissions about the size and nature of the proposed
6 project.

7 Evidence concerning the size and nature of
8 the proposed project will likely be duplicative and
9 cumulative of other evidence Appellants will attempt to
10 introduce. In addition, this letter was not in the
11 record before the Secretary, and it's therefore outside
12 of the scope of these appeals pursuant to Rule 5.3.
13 Appellants attempt to sidestep this issue by arguing that
14 it's the Secretary's letter, and therefore he knew about
15 the letter when the decision was rendered, but that's not
16 the standard. The record on appeal is the record that
17 was before the Secretary. It is not what the Secretary
18 knew or should have known at the time that the decision
19 was rendered.

20 Mr. Curran's counsel admitted at the last
21 hearing this letter was the exact reason the amended
22 appeal was filed. He stated, "The 401 water quality
23 certification issue was inserted as a line of evidence
24 and is not a separate claim." He further stated, "We are

1 adding a new fact to put them on notice."

2 Indeed, recognizing that getting this
3 exact letter into evidence was going to be an issue,
4 Mr. Curran served an amended appeal. The Board struck
5 that amended appeal, which Mr. Curran thought was
6 necessary to get this "line of evidence" admitted.

7 The Board should not alter its rulings.
8 It should now preclude any evidence, testimony or
9 argument regarding the 401 water quality certification,
10 including the May 20 letter, from being admitted into
11 evidence at the hearing. The law of the case doctrine
12 demands such a result.

13 Thank you.

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

16 Ms. Scott or Mr. Tweedie, are you going to
17 speak to this issue as well?

18 MS. SCOTT: Yes. Chair Holden, I will
19 speak to the water quality certification issue and
20 Mr. Tweedie will address the second issue, which is the
21 record before the Secretary.

22 At the hearing on the motion to dismiss in
23 July, DNREC had argued that Mr. Curran's amended
24 statement of appeal was untimely, among other arguments.

1 And at the hearing and in their papers, Mr. Curran is now
2 saying that -- he said we sort of concur that we are not
3 seeking relief on the particular inaction as DNREC to
4 respond to the Army Corps' water quality certification
5 request. It's a bit confusing, because at the hearing
6 the parties stated that they weren't raising this as a
7 separate issue, but that they intended to use it as
8 evidence at the hearing. And the transcript isn't
9 completely clear about how they intended to use it
10 because they said they intended to raise water quality
11 certification as evidential of DNREC's initial
12 recognition of the importance of this project and the
13 level of scrutiny it required. That's part 1.

14 And to that I will state that we agreed
15 with Appellants, who cited Secretary Garvin as saying
16 that the expansion of the Port of Wilmington is a major
17 activity in the state of Delaware and one of if not the
18 largest project that's ever been reviewed for its impact
19 within the State's subaqueous lands. And it was for that
20 reason that DNREC went above and beyond and asked a lot
21 of questions, gathered information. And at the end of
22 the day when DNREC was confident it had all the
23 information necessary to consider the permit application,
24 they proceeded.

1 But because DNREC sort of did realize this
2 was a large project and they were doing their due
3 diligence, asking questions, trying to find out, you
4 know, what was relevant to the permit process, so, again,
5 DNREC shouldn't be punished for that due diligence and
6 asking those questions.

7 The permit at issue is a subaqueous lands
8 permit to construct the new Port, which requires state
9 and federal permits. These permits are not mutually
10 exclusive processes, but they are separate. And the
11 water quality certification, as you know, is part of the
12 Clean Water Act requirements for the federal -- under the
13 federal law.

14 But going to the comments at the hearing,
15 which I wanted to highlight, the Appellants also said
16 they intended to raise water quality not just to, you
17 know, cite DNREC's recognition of how important and large
18 in scope this project was, but they said but then DNREC
19 didn't follow through on that adequately enough to meet
20 the requirements of the regulations, all to be addressed
21 at the merits hearing.

22 So to the extent that the Appellants
23 intend to use DNREC's -- the fact that DNREC did not
24 weigh in on the water quality certification process,

1 which, as we had argued before, wasn't necessary, first
2 of all, because under DNREC regulations if there is a
3 parallel process that addresses the same type of issues,
4 then DNREC is not required to make that -- weigh in on
5 the federal water quality certification process.

6 However, it would be unfair and misleading if the
7 Appellants intended to use this document and the fact
8 that the water quality certification that was approved by
9 the federal parties and that DNREC did not weigh in as,
10 you know, some sort of character evidence that, see,
11 DNREC didn't do all the steps that they needed to do in
12 the regulatory process because they didn't even weigh in
13 on the water quality certification process.

14 First of all, that's unfair and would be
15 misleading, would unduly confuse the state permit
16 process, which doesn't require that water quality
17 certification component in the state permitting process.
18 So I would object and request that the Board exclude the
19 use of this water quality certification process for that
20 purpose. We maintain that any evidence on the water
21 quality certification process is irrelevant, including
22 record evidence or testimony.

23 Separately, we will argue that the only
24 relevant evidence is the evidence before the Secretary,

1 and the water quality certification is a subset of that
2 irrelevant evidence that is outside the record before the
3 Secretary.

4 Thank you.

5 CHAIRPERSON HOLDEN: Thank you, Ms. Scott.
6 Other parties?

7 MR. ROCKMAN: David Rockman for
8 Mr. Curran, Mr. Chairman.

9 I'm not clear, was Mr. Tweedie going to
10 argue here on DNREC's behalf in support of this motion?

11 MR. TWEEDIE: No, Devera has covered
12 DNREC's position on this motion.

13 MR. ROCKMAN: Thank you.

14 By way of response, I guess, as we
15 indicated in our papers with regard to the two motions
16 regarding the 401 water quality certification process, we
17 remain surprised that we are spending more time on that
18 issue again here as we thought we had made abundantly
19 clear at the prior hearing we are not seeking any relief
20 with respect to the 401 water quality certification
21 process. That was never our intent.

22 We thought our amended statement of appeal
23 made that pretty clear and the relief requested. But,
24 nevertheless, we talked about this before and what we

1 said before still goes. We are not seeking relief on
2 that issue. We are focused on the subaqueous lands
3 permit and the federal consistency certification be the
4 two subjects of the Secretary order that was timely
5 appealed leading to the three consolidated appeals here.

6 I think listening to both DNREC and
7 Diamond State that the motion here, to the extent we can
8 test it, really comes down into introduction of evidence
9 of the May 20, 2020 letter from DNREC to the U.S. Army
10 Corps of Engineers in which DNREC acknowledges how large
11 and unprecedented this project is and how much -- how
12 many issues are presented by it, how much risk to the
13 project resources are presented by it and how much
14 evaluation it will need.

15 We believe that that letter is an
16 admission by DNREC of the need for a serious review of
17 the project that our case in chief says it didn't get, at
18 least on issues such as impacts to recreation that affect
19 Mr. Curran.

20 And that we also put forward that this
21 letter is properly part of the record and the evidence
22 before the Secretary with respect to this permit, because
23 it was written by the Secretary, so it is his letter and
24 it relates to this Port expansion project. We

1 acknowledge that there are a myriad of issues before the
2 Secretary and before the agency at any one point in time,
3 and that the mere fact that something is before the
4 Secretary in an unrelated project doesn't put it into the
5 record for any other project, you have to keep those
6 projects distinct. But here, this letter deals with this
7 very project.

8 And so we believe that it is therefore
9 appropriately part of the record regarding the Diamond
10 State Edgemoor Port expansion project. The fact that
11 DNREC didn't include it in its chronology or in the
12 Hearing Officer's report should not be determinative on
13 this subject. The question is: What's the evidence and
14 what's the information before the Secretary that relates
15 to the decision that he was making, not does DNREC cherry
16 pick the information it chooses to include in the Hearing
17 Officer's report or the chronology, or through, you know,
18 inadvertence leave something off that is properly there.

19 So sort of in conclusion, we oppose the
20 two motions in limine to the extent that we do not
21 believe that the Board should disallow presentation of
22 the May 20th, 2020 letter as evidence. Diamond State
23 argues that it would be duplicative. We have no interest
24 in introducing multiple lines of evidence on the same

1 issue, but we should be allowed to choose which of those
2 is the most probative and efficient to produce when we
3 get to the hearing.

4 Ms. Scott mentioned that introducing -- or
5 seemed to allude that introducing this letter into
6 evidence would be some form of punishment for the agency.
7 Nothing of the sort. This is the agency's letter. We
8 agree with much of the content of the letter. And we are
9 seeking to use it to set the stage during the hearing.

10 Thank you.

11 MR. DALY: Mr. Chairman, I would just like
12 to briefly jump in on behalf of the Port Operators. We
13 generally agree with Mr. Curran's position on this issue
14 which we laid out in our papers. Although, in the Port
15 Operators' case, we have not challenged the water quality
16 certification, but we agree with respect to the admission
17 of the May 20, 2020 letter signed and executed by
18 Secretary Garvin, that that should be admissible in these
19 proceedings.

20 It's pretty clear, based on both the
21 Board's rules, as well as its rulings here today, that
22 the scope of admissibility in this proceeding is very
23 broad. And the Delaware Supreme Court has emphasized
24 that recently in the Delmarsh case saying that any

1 evidence that could shed light on the controversy before
2 the Board should be admitted.

3 And here we have a letter from the
4 Secretary in which he is saying that these are
5 unprecedented impacts on subaqueous lands, the very type
6 of permit that's at issue in the appeals. And Ms. Scott,
7 DNREC's counsel, conceded that the magnitude of impacts,
8 this magnitude of the project, that corresponds to the
9 amount of due diligence that DNREC believes it needs to
10 have implemented.

11 So DNREC has conceded really everything in
12 Secretary Garvin's letter already. And it's just a
13 matter of ensuring that this document makes it into
14 evidence.

15 And so the Port Operators have included
16 with their opposition to Diamond State and DNREC's motion
17 in this regard an order that would allow the admission of
18 the May 20th letter for the purpose of establishing the
19 nature and size of the project as well as DNREC's
20 understanding thereof.

21 Thank you.

22 MS. SCOTT: Chair Holden, this is Devera
23 Scott, if I may. I don't want to overstep Mr. Burton if
24 he wants to go first. But I would, first of all, say

1 that Delmarsh is distinguishable. In that case the
2 appeal was made by the applicant, and here none of the
3 Appellants are the applicant. So the 5.3 standard for
4 the record before the Secretary, it's not analogous to
5 the Delmarsh hearing because again that was the permit
6 applicant appealing that decision.

7 But, again, I would just want to point out
8 that Mr. Curran argued that he wants to introduce this
9 letter just to talk about the magnitude, and certainly
10 the letter speaks for itself. However, to the extent
11 that you are going to try and fold in some other issues,
12 like the magnitude of the impact to the aquatic
13 resources, things that were properly addressed in the
14 permit decision, the state permit process, and I think
15 there's a lot of sort of overlap and muddying of like how
16 these decisions are made.

17 I mean, first of all, DNREC is guided by
18 the statute. The statute gives DNREC the authority to
19 promulgate regulations to flesh out the statutes. And
20 here we do have the Subaqueous Lands Act, Chapter 72, and
21 the regulations that were promulgated under that
22 authority. So the issue, the relevant issues are the
23 regulations and how they, how DNREC applied the permit
24 application to those regulations. Any federal processes

1 that are outside of those regulations, that statutory
2 authority really is not relevant.

3 And then I think the next layer is what
4 was in the record before the Secretary. Just because
5 someone comes to a public hearing and stands up and makes
6 a statement about something completely irrelevant to that
7 regulatory process does not necessarily make it relevant
8 to the appeal.

9 So I just wanted to make that distinction
10 because the record before the Secretary again is like the
11 third layer, I think, in that consideration. But, again,
12 this document itself, it speaks for itself. It's part of
13 that federal process. It wasn't part of the state
14 process. It's not required for the state process. And
15 any inclusion of this document in the record would just
16 be duplicative, confusing, because, again, you are mixing
17 the federal process with the state process. And that
18 shouldn't be the focus of this hearing. It should be the
19 regulations at issue and how DNREC made its decision,
20 which is all encompassed in that record before the
21 Secretary.

22 Thanks.

23 MR. DALY: Just to very briefly respond,
24 and I just want to hit on one point, which is regulation

1 5.3 refers to what was before the Board. It actually
2 doesn't use the phrase record before the Secretary, which
3 I think is an important distinction in that DNREC is
4 saying that record is synonymous with before the
5 Secretary. And if that's what the Board meant, then it
6 would have used the word record. And I think the record
7 before the Secretary is what he's specifically learned
8 from the Hearing Officer's report and made as part of the
9 basis for his decision. But I would contend that before
10 the Secretary, without reference to the record, is
11 actually a broader concept.

12 MR. BURTON: Chairman Holden, if I can
13 reply.

14 CHAIRPERSON HOLDEN: Yes.

15 MR. BURTON: I think we heard from
16 Mr. Rockman earlier kind of a dangerous precedent to set
17 here. I think when he was talking about what was known
18 to the Secretary on this permit application, I think that
19 causes a slippery -- if it is admissible at the hearing,
20 I think that causes a slippery slope here. Where do we
21 really stop? Is it the Secretary, the Hearing Officer,
22 is it a DNREC employee? Where does that precedent get us
23 to?

24 And I think we have to really look to the

1 guidance that's in the Board Rule 5.3. And it's pretty
2 clear there that it's not what the Secretary knew, it's
3 not what the Hearing Officer knew, it's not what any
4 DNREC employee knew, it's what the record was before the
5 Secretary. And I think this just gets to the point we
6 just heard, the concept is what's the record before the
7 Secretary. I think that's laid out in the case law,
8 that's been the Board's precedent.

9 It's pretty clearly established that the
10 record before the Secretary is what's relevant on these
11 appeals, unless you are the permit applicant or a
12 violator. So I would submit the motion should be
13 granted.

14 Thank you.

15 MS. SCOTT: Not to belabor the point --
16 this is Devera Scott again -- 5.3 does say appellants
17 other than permit applicants or an alleged violator may
18 only introduce evidence which was before the Secretary.
19 Naturally, at a hearing, which is confined to that record
20 before the Secretary, there is going to be testimony on
21 the record. So the record before the Board, which
22 necessarily includes the entire record before the
23 Secretary, I don't think that should cause anyone to
24 expand the meaning of 5.3 to say that, you know, you have

1 got the clear language that anyone that's not a permit
2 applicant cannot introduce evidence that was before the
3 Secretary.

4 I don't think that first sentence can be
5 used to expand the fourth sentence to include extraneous
6 evidence that was not before the Secretary. Any record
7 before the Board, whether it's testimony, the actual
8 documents in the record before the Secretary, that is the
9 appropriate scope of the hearing. And the first sentence
10 can't be used to expand the scope here.

11 CHAIRPERSON HOLDEN: Thank you, Ms. Scott.

12 MR. ROCKMAN: A brief further response,
13 Mr. Chairman?

14 CHAIRPERSON HOLDEN: Let me ask the Board
15 if the Board has any questions at this point.

16 (No response.)

17 To Ms. Scott or Mr. Burton, I do have a
18 question. Back to the first sentence there, the record
19 before the Board includes the entire record before the
20 Secretary. The commentary on whether the letter is
21 inclusive of or not included in the entire record before
22 the Secretary.

23 MS. SCOTT: Chair Holden, this is Devera
24 Scott. I would argue that it is not in the record before

1 the Secretary. This was a separate federal process,
2 permit process. It was not a DNREC, a state permit, part
3 of the state permit process, and it is outside of the
4 record before the Secretary. Just because the Secretary
5 wrote a letter that was related to the Port project, and
6 there are federal permits required, state permits
7 required, there was a DRBC proceeding as well, none of
8 those records, evidence outside of the state permit
9 process are relevant and are not in the record before the
10 Secretary.

11 CHAIRPERSON HOLDEN: If I said that
12 differently, the intent, you would contend the intent of
13 5.3 is the entire record before the Secretary is the
14 entire record as it relates to the state's subaqueous
15 lands permit application permit process?

16 MS. SCOTT: Correct.

17 CHAIRPERSON HOLDEN: Thank you.

18 Any other questions from the Board?

19 (No response.)

20 MR. DALY: Chairman, just to follow up on
21 that.

22 CHAIRPERSON HOLDEN: Mr. Rockman had a
23 point and then we will follow up with you.

24 MR. DALY: Absolutely. Thank you.

1 MR. ROCKMAN: Thank you, Mr. Chairman.
2 Listening to Ms. Scott's immediately prior comments, I do
3 believe that the Army Corps permit is a component of the
4 record here on this permit, and therefore before the
5 Secretary and the Board. The set of exhibits that were
6 introduced at the hearing by the various DNREC divisions
7 includes a reference to the Army Corps permit.

8 Actually, on the listing, when you go to
9 the Web page it says permit application to the Army
10 Corps. Although, when you click on it, it comes up with
11 the same permit application that we have seen that is the
12 one we believe that was submitted to DNREC. So perhaps
13 they were one in the same application, but it does appear
14 from that information that the Army Corps permit is a
15 part of the record for the subaqueous lands permit, was
16 submitted by Diamond State.

17 And so then I think the distinction that
18 DNREC is trying to draw that this letter pertains to some
19 completely separate process, even if coincidentally the
20 same Port project, is a little bit of a false
21 distinction.

22 Thank you.

23 CHAIRPERSON HOLDEN: Mr. Rockman, a
24 question for you. Are there subaqueous lands permits

1 that don't require U.S. Army Corps permits?

2 MR. ROCKMAN: I would have to guess at
3 that answer, Mr. Chairman. There may be some very minor
4 subaqueous-lands-type projects that might somehow escape
5 Corps review. I don't have an conclusive answer for you
6 on that one.

7 I think clearly this project did, so
8 that's all I can offer you on that question.

9 CHAIRPERSON HOLDEN: Thank you.

10 Mr. Daly?

11 MR. DALY: Thank you. And I second
12 Mr. Rockman's comments about how these were basically the
13 same process. The water quality certification -- DNREC
14 has represented in this proceeding that there didn't even
15 need to be a separate water quality certification because
16 this was proceeding under the Subaqueous Lands Act. So
17 in DNREC's own view they consider the water quality
18 certification and the subaqueous lands evaluation to be
19 one in the same.

20 And here it's the same project. It was
21 basically following the same track as far as public
22 notice and procedure. It's really a false distinction
23 that DNREC is trying to draw between these two separate
24 approvals.

1 MS. SCOTT: It's Devera Scott again. I
2 just want to clarify, I did not say that the subaqueous
3 lands permit process is the same as the federal water
4 quality certification process. They are two separate
5 processes. There's a federal permit process and there's
6 a state permit process.

7 If DNREC weighs in on the water quality
8 certification, similar to the federal, which I will argue
9 later, that is not part of DNREC's state permit process.
10 It is separate. And it is not relevant. The only
11 relevant information is -- evidence is what was in the
12 record before the Secretary on the subaqueous lands
13 permit application and how DNREC applied, considered that
14 permit application with respect to the statute and its
15 regulations.

16 CHAIRPERSON HOLDEN: Any questions from
17 the Board?

18 (No response.)

19 Mr. Burton, I think we are moving into
20 your next motion in limine.

21 MR. BURTON: Thank you, Chairman Holden.

22 MR. DALY: Sorry to interrupt you,
23 Mr. Chairman.

24 My understanding is that, Mr. Burton, you

1 are going to discuss the motion in limine to exclude
2 evidence that wasn't before the Secretary, your motion
3 and then DNREC will proceed.

4 My only request of the Board would be
5 DNREC's argument is kind of different with respect to its
6 5.3 argument as well as it's kind of a separate
7 maintenance dredging argument. I guess my only request
8 would be that we proceed and address the maintenance
9 dredging issues all at once, and then to the extent DNREC
10 has other 5.3 arguments, that we address those further.
11 Although, to be honest, a lot of arguments have already
12 been thrown out about Regulation 5.3 already.

13 MR. TWEEDIE: This is Jameson Tweedie for
14 DNREC.

15 I think if we are trying to combine
16 motions and handle this efficiently, it makes sense for
17 DNREC's record before the Secretary motion and Diamond
18 State's record before the Secretary motion be burdened
19 together. If there are bits of that that overlap with
20 another motion in limine, then they can obviously be
21 addressed again, but I would not agree to sort of
22 bifurcate our motion.

23 MS. SCHILLER: If I could ask a question.
24 Isn't DNREC's motion solely on navigation?

1 MR. TWEEDIE: Our separate motion is on
2 navigation, yes.

3 MS. SCHILLER: So are you proposing to
4 argue that now that doesn't seem to overlap?

5 MR. TWEEDIE: No. Our motion on the
6 record before the Secretary was going to be argued with
7 Diamond State's motion on the record before the
8 Secretary. DNREC has two more motions, one of which I
9 will argue and one of which Devera will argue. But I
10 don't think it makes sense to pull off part of our motion
11 and append it to a different motion.

12 MS. SCHILLER: I understand. There was
13 just a separate motion -- I am good. I apologize.

14 CHAIRPERSON HOLDEN: All right. So,
15 Mr. Burton, are you going to start then with evidence not
16 in front of the Secretary?

17 MR. BURTON: Yes. Thank you, Chairman
18 Holden.

19 In our fourth motion in limine we seek to
20 exclude certain evidence that was not before the
21 Secretary and that was not relevant to the Secretary's
22 decision; namely, the use of shoaling fans for the
23 proposed project and issues related to sturgeon strikes.
24 As we discussed at our last hearing, the permit here is a

1 construction permit, not a maintenance dredging permit.
2 The distinction between these two permits is very
3 important.

4 The removal of the use of shoaling fans
5 only potentially impacted the need for future dredging.
6 Maintenance dredging, however, is the subject of its own
7 permit application process. I specifically addressed
8 this issue at the last hearing when I said Diamond State
9 Port Corporation will submit an application to the Army
10 Corps of Engineers seeking then to assume maintenance
11 dredging for the access channels for the proposed
12 project.

13 And based on that application, how that
14 application goes, Diamond State Port Corporation may only
15 need to submit a maintenance dredging permit application
16 for areas outside the access channel.

17 On the other hand, it may have to submit a
18 maintenance dredging permit for the entire project.

19 As a result, Mr. Curran's argument that
20 the Diamond State Port Corporation has never stated
21 clearly that another permit may be required clearly
22 ignores the record. I said as much at the last hearing.
23 The fact is the scope of any future maintenance dredging
24 permit application is unknown. That is why Diamond State

1 Port Corporation did not submit a maintenance dredging
2 permit application with its construction application and
3 why the dredging, maintenance dredging is not an issue in
4 any of these appeals.

5 Diamond State Port Corporation will submit
6 a maintenance dredging permit application, and that will
7 be subject to its own notice, comment, and hearing
8 process, subject to the Army Corps of Engineers decision.
9 During that process the Port Operators, Mr. Curran, and
10 other members of the public can raise issues with
11 maintenance dredging, and that would be the appropriate
12 time to do.

13 Both Mr. Curran and the Port Operators
14 make the additional argument that because evidence
15 concerns the use of shoaling fans and sturgeon strikes
16 was in the record before the Secretary, it is relevant
17 and admissible in these appeals. That is not the case.
18 It is unquestioned that Mr. Curran and the Port Operators
19 put these two issues into the record before the Secretary
20 during the notice and comment period. That, however,
21 does not make them relevant to the permit application the
22 Secretary granted.

23 Indeed, it would be a slippery slope for
24 the Board to hold that anything in the record before the

1 Secretary is relevant to determine whether the
2 Secretary's decision was supported by the record before
3 him. One can only imagine the types of information and
4 evidence that parties and members of the public may place
5 in the public record and then present to the Board in an
6 appeal. Evidence is not relevant merely because it's in
7 the record.

8 Lastly, with regard to the issue of
9 sturgeon strikes, the Port Operators state in response to
10 this motion that "they will not introduce such evidence."
11 Mr. Curran similarly states that he "has not identified
12 sturgeons strike as a specific issue of concern in any
13 documents filed in this action."

14 Thus, he too has admitted sturgeon strikes
15 are not relevant to his appeal. By his own admission he
16 did not include such issue with any submission before the
17 Board. With those two concessions alone, the Board
18 should preclude any evidence or testimony regarding
19 sturgeon strikes. That is simply not relevant to any
20 appeal.

21 Nonetheless, Mr. Curran states that he
22 intends to introduce evidence that the proposed projects
23 will purportedly damage the habitat of sturgeon and other
24 thin fish in the Delaware River. In doing so, however,

1 he fails to acknowledge that this issue is properly being
2 addressed by the federal authorities, including the Army
3 Corps of Engineers and NOAA, and that the Secretary's
4 decision was subject to and expressly conditioned on
5 Diamond State Port Corporation obtaining additional
6 permits, including satisfying all terms and conditions
7 and all appropriate authorizations.

8 Mr. Curran fails to show how this issue
9 was relevant to his appeal and, in fact, expressly
10 acknowledged he has failed to raise this issue thus far
11 in these proceedings, including in his original appeal
12 notice.

13 The issues of maintenance dredging and
14 sturgeon strikes are not appropriate subjects of these
15 consolidated appeals and any evidence about them should
16 be excluded.

17 Thank you.

18 CHAIRPERSON HOLDEN: Sure.

19 Mr. Tweedie, are you speaking to a similar
20 issue here?

21 MR. TWEEDIE: Yes, Jameson Tweedie for
22 DNREC.

23 So from DNREC's perspective, the Board's
24 rules are very clear, and in particular Rule 5.3. As has

1 been stated earlier, appellants other than permit
2 applicants or an alleged violator may only introduce
3 evidence which was before the Secretary. That seems
4 crystal clear to us and is consistent with the Board's
5 past holdings. None of the Appellants here are either a
6 permit applicant or an alleged violator, and therefore
7 are precluded from introducing evidence that was not
8 before the Secretary.

9 Appellants earlier today, and in their
10 briefing, point to Rule 5.4 and a different part of 5.3
11 to try to get around this requirement of 5.3. Those
12 other provisions don't limit or undermine this very
13 specific portion of Rule 5.3 that applies to applicants
14 other than -- Appellants other than applicants or alleged
15 violators.

16 The application of this rule is
17 particularly clear here where each of the Appellants
18 offered comments on the information they thought was
19 relevant to the Secretary's decision in the public
20 comment process. And they are not permitted now to
21 expand the universe of evidence to support their appeals.
22 So under the plain language of 5.3, any evidence that was
23 not before the Secretary should be excluded from what
24 Appellants can introduce at the hearing.

1 A second basis, an independent basis that
2 reaches the same conclusion is that this evidence should
3 be excluded as irrelevant. The Board may exclude any
4 evidence, which is plainly irrelevant, immaterial,
5 insubstantial, cumulative, or unduly repetitive. And
6 here the scope of this appeal is over this order, No.
7 2021-W/CCE-0026. And the evidence that can be introduced
8 must be limited to that which has probative value to the
9 issues on appeal.

10 And the issues on appeal are in turn
11 limited by the applicable appeal standard where it is the
12 burden of proof is upon the appellant to show that the
13 Secretary 's decision is not supported by the evidence on
14 the record. So to succeed, the Appellants must prove to
15 the Board that the Secretary lacked evidence to support
16 his decision, and cannot try to show that the Board
17 should reach a different conclusion than the Secretary,
18 but rather must show that the evidence on the record is
19 not sufficient to support the Secretary's decision.

20 Here we have a detailed record that
21 includes extensive public comment, including the public
22 comment of the Appellants. All of that is compiled into
23 the Hearing Officer's report, along with the technical
24 response memo, and various exhibits from DNREC and from

1 the applicant and so forth. All of that is part of the
2 record, and that is the record upon which the Secretary's
3 decision is based.

4 DNREC went so far as to provide additional
5 information to Appellants related to the U.S. Coast Guard
6 correspondence when requested by Appellants. But this is
7 the record on which the Secretary's decision stands or
8 falls. And it is not appropriate and it's completely
9 inconsistent with Rule 5.3, as well as basic rules of
10 relevance, to introduce additional evidence by these
11 Appellants.

12 Just very briefly on the specific issue of
13 maintenance dredging. Maintenance dredging, as
14 Mr. Burton said, is not part of this process or this
15 order. The Secretary's order does not address
16 maintenance dredging. And if the Secretary's order does
17 not address maintenance dredging, then issues of
18 maintenance dredging are not relevant to a determination
19 of whether the Secretary's order was supported by the
20 evidence. Rather, as has been stated, and I won't
21 reiterate, that's part of a separate process before the
22 U.S. Army Corps of Engineers. And if and when a
23 maintenance dredging permit is required of DNREC, that
24 will be part of its own process, but that's not this

1 process.

2 So, in conclusion, DNREC urges the Board
3 to restrict the scope of evidence presented by the
4 Appellants to the record before the Secretary and exclude
5 any witnesses, expert witnesses or exhibits that were not
6 part of that record.

7 Thank you.

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

10 Comments from other parties?

11 MR. DALY: Mr. Chairman, I will start on
12 behalf of the Port Operators. I do want to focus
13 specifically on the maintenance dredging issue before
14 getting into the Rule 5.3 concerns that DNREC has raised
15 separately.

16 Admittedly, to your credit, Mr. Tweedie,
17 they are in the same motion, but, frankly, as Diamond
18 State has conceded, all of the evidence concerning the
19 sedimentation rates on the project, the future need for
20 maintenance dredging, all of that evidence about how much
21 anticipated sedimentation will be there, the 500,000
22 yards of cubic sediment, that is all in the record before
23 the Secretary rendered his decision. So the maintenance
24 dredging issues are not a Rule 5.3 issue.

1 But I do want to focus on this because
2 it's important. This argument that because the
3 Secretary's order did not address maintenance dredging,
4 that means that maintenance dredging is completely off
5 the table, any evidence relating to or regarding future
6 dredging is completely off the table, that argument is
7 frankly -- it's troubling and it's clearly wrong. And
8 the reason why I say that is because the Secretary's
9 decision did not address maintenance dredging in his
10 order, the order that he issued. That's a basis for
11 overturning that decision. It is not a basis for
12 excluding evidence regarding maintenance dredging.

13 And what I mean by that is, as DNREC's
14 counsel said earlier today and as they reiterated in
15 their papers, the process that DNREC conducts for a
16 subaqueous lands permit, this appeal concerns whether
17 DNREC filed its regulations, whether it followed the
18 Subaqueous Lands Act regulations. And the administrative
19 record here, as well as the Subaqueous Lands Act
20 regulations indicate that DNREC should and indeed is
21 required to consider the future needs for maintenance
22 dredging, including the amount and frequency of
23 anticipated maintenance dredging, and methods to reduce
24 that maintenance dredging.

1 Again, all evidence that the Port
2 Operators submitted comments on and challenged in
3 comments that were submitted to the Secretary, and
4 therefore again not a Rule 5.3 issue.

5 I do want to spend a little bit of time
6 focusing on the specific regulations at issue because,
7 again, the regulations dictate DNREC's process. DNREC's
8 counsel admitted that here today. DNREC's regulations,
9 Subaqueous Lands Act regulations, that dictates the
10 process. It's not what is said in the Secretary's order
11 issuing those approvals.

12 And so, Ron, if I could trouble you -- Ron
13 is my IT guy. I am going to have him share the screen.
14 Ron, can you pull up the Subaqueous Lands Act
15 regulations. Okay. Ron, can you turn to -- it's going
16 to be page, I believe it's 8 of those regulations.
17 Right.

18 So, Ron, can you highlight, first of all,
19 "Requirements For Every Application," that subsection,
20 like that entire paragraph under "Requirements For Every
21 Application."

22 So the Board might recall that this was --
23 there was some argument about this in connection with the
24 Port Operators' dispositive motion earlier in this case,

1 but here it says in Section 3.1.1 of the Subaqueous Lands
2 Act regulations that a person seeking a case or permit
3 submit shall submit to the Secretary a written request
4 using the appropriate forms available from the department
5 stating in detail the type of permit required.

6 Then it goes on in the next section,
7 3.1.12, and it says the application for every type of
8 activity, they will provide the information requested in
9 the appropriate application form.

10 And I just want you to keep that in the
11 back of your minds. I just want to turn to one other
12 section, a couple of other sections of the regs. Ron,
13 can you go to page 9. And then at the bottom, this is
14 under "Public Use Impact," there's some factors there.
15 Ron, can you pull that out? Okay.

16 And so just to orient the Board on what we
17 are looking at here, so in conducting an evaluation of a
18 permit application in connection with a Subaqueous Lands
19 Act permit request, DNREC has to consider a broad variety
20 of potential impacts that the project could have on the
21 public's interest. That's clear from the Subaqueous
22 Lands Act. And these regulations reflect this broad
23 consideration of impacts on the public interest with
24 respect to those subaqueous lands.

1 And so I want to focus on 4.6.4. The
2 second to last one there. It says the extent to which
3 any disruption of the public use of such lands is
4 temporary or permanent.

5 And then, finally, again I want you to
6 keep that in the back of your minds as I turn to the next
7 page. Ron, can you turn to the next page of the
8 regulations. Actually, go to -- can I have you turn
9 again to page 11. Sorry. And, Ron, can you pull out --
10 it's under 4.9.2, under that. There's some factors there
11 as well. I am going to be focusing on 4.9.2.2. Okay.

12 So this is talking about designing
13 structures, boat docking facilities, which would
14 undoubtedly include a port. And it says that structures,
15 in 4.2.2, it says structures should be constructed to
16 avoid dredging.

17 Okay. Ron, can you pull up the Subaqueous
18 Lands Act Revised Application. Okay. So we have looked
19 at these regulations where it says you have to provide
20 the information in the application form. You have to
21 consider whether impacts are temporary or permanent. You
22 also have to consider how you are going to avoid dredging
23 in designing your proposed project.

24 So, Ron, can you go to page 30 of this

1 application. This is DNREC's application form here we
2 are looking at. And I want to go up to the top. And
3 it's Question 5.

4 And, again, the Board heard some argument
5 relating to this issue earlier in these proceedings. And
6 it says -- this is DNREC's own form, it's for a new
7 dredging project, the very type of project that's at
8 issue here today. It says: "How often will maintenance
9 dredging be required?" And it asks: "What measures are
10 being taken to reduce the frequency of dredging?"

11 DNREC and Diamond State -- Ron, you can
12 take that down -- are asking the Board to not believe
13 their own eyes in reviewing the regulations, as well as
14 DNREC's own application form, which it designed for a new
15 dredging project. DNREC is saying don't look at anything
16 in the administrative record. Listen to what we are just
17 saying on the back end during this litigation proceeding.
18 And Diamond State itself has conceded in its brief, in
19 its own motion it says, quote-unquote, when DNREC
20 evaluates a construction permit application, the type at
21 issue, it considers whether future maintenance dredging
22 could be optimized or reduced, but it does not issue a
23 permit for maintenance dredging.

24 That admission in Diamond State's papers

1 which appeared earlier in briefing in this case, as well
2 as in their motion here today, that sinks their motion.
3 They admit that DNREC considers this information -- how
4 much maintenance dredging will be there, what is the
5 frequency, what is the amount, how can we take measures
6 to reduce that? That's what's before the Secretary, and
7 that's what the Appellants are seeking to submit evidence
8 in connection with.

9 It's, therefore, entirely relevant. And,
10 as I mentioned before, under the broad admissibility
11 standards before this Board, there's no question that
12 evidence should be admitted. And it's especially true
13 with this proposed project where the applicant had
14 submitted multiple reports to DNREC showing significant
15 sedimentation rates in the proposed project area, as much
16 as 500 to 600,000 cubic yards of sediment. That amount
17 of sediment per year on an annual basis indefinitely
18 means that these proposed project impacts will basically
19 be repeating themselves continuously until the project is
20 no longer there. It will be continuing indefinitely.

21 And, again, DNREC is required to consider
22 whether the impacts are temporary or permanent in
23 connection with its regulations.

24 And, finally, I do want to address this

1 point that appeared in DNREC's papers, as well as Diamond
2 State's papers, which is that the Army Corps is going to
3 be taking over some of this work. It's important to bear
4 in mind that regardless of whether it's the Army Corps or
5 Diamond State or someone else, for that matter, someone
6 is going to be doing a significant amount of maintenance
7 dredging. That shouldn't be a concern of DNREC's at this
8 stage. Their concern is, consistent with their own
9 regulations and application form, is how much and what
10 are you doing to reduce that amount and frequency?

11 And I do want to clarify even that point
12 further and say DNREC in their papers misstates actually
13 what the situation is with that Army Corps permit
14 application. Diamond State conceded today, and it
15 conceded elsewhere because it's just a fact in the
16 record, that the Army Corps will only take over
17 maintenance dredging for the approach channel, meaning
18 not the area near the docks. Diamond State will always
19 be handling the berthing area. And the fact is that the
20 fact that Diamond State originally proposed these rather
21 unusual sedimentation fans to get rid of all the
22 sedimentation, and that they are also seeking the Army
23 Corps to chip in to take over some of the cost and effort
24 in conducting this maintenance dredging indicates again

1 there are significant impacts associated with the future
2 dredging in this project.

3 So I am happy to address any questions the
4 Board has on that point and let the other Appellants
5 address that. Although, I do want to address
6 separately -- and I can do that after the maintenance
7 dredging issues are dealt with -- I can address
8 separately Mr. Tweedie's 5.3 arguments.

9 MR. ROCKMAN: This is Dave Rockman for
10 Mr. Curran. If it's okay with the Board, I will respond
11 on behalf of Mr. Curran.

12 CHAIRPERSON HOLDEN: Please do,
13 Mr. Rockman.

14 MR. ROCKMAN: Okay. Thank you.

15 Taking a step back here, you know, we do
16 not envy the task that is currently before the Board. We
17 know the Board has already ruled that Section 5.3
18 governs, but I think we all recognize that applying that
19 rule in practice can be really hard. One of the
20 challenges presented here in this case is: How does the
21 Board allow Appellants to show that DNREC failed to apply
22 its regulations and failed to make appropriate
23 consideration of issues that are required by the rules
24 when Appellants can't talk about those issues because

1 they are not part of the record?

2 You know, as Mr. Tweedie stated, the goal
3 and challenge for Appellants when making this kind of
4 appeal with a claim that the agency failed to apply and
5 follow its regulations is to show that there was
6 insufficient information before the Secretary. But we
7 still have the conundrum that we can't talk about what
8 isn't there because it isn't there.

9 On Mr. Curran's behalf, we submit that
10 Rule 5.3 doesn't disallow evidence to show what DNREC
11 missed. If that's the information -- if that's the
12 reason the information is relevant to show where DNREC
13 didn't make the appropriate considerations, then that is
14 distinct from introducing evidence, for example, to show
15 that the Secretary made an incorrect decision when
16 weighing the facts before him.

17 To start off here, our issue is
18 recreation. And although I don't have the magic pop-up
19 of copies of the regulations that Mr. Daly does, you
20 know, DNREC regulations require assessment of the impact
21 of a project that uses subaqueous lands on both
22 recreation and on fishing within the subaqueous lands
23 regulations Section 7504-4.6.2 and -4.7.1.2 state this
24 very clearly.

1 Diamond State's and DNREC's motion to bar
2 evidence of maintenance dredging and sturgeon strikes on
3 the basis that the issues were not before the Secretary
4 appear to be the contention -- appear to rest on the
5 contentions that the information both wasn't before the
6 Secretary and that these are issues that the Secretary
7 was not required to consider, and therefore the fact that
8 they weren't considered isn't a flaw in the permit.

9 The underpinning of this argument,
10 particularly per Diamond State's brief, is that the
11 permit is just a construction permit, so only issues
12 related to construction of the permit were relevant
13 before the Secretary and irrelevant before the Board.
14 And, therefore, concerns that arise from the use of the
15 Port and Port operation were not before the Secretary and
16 did not need to be considered by the Secretary. DNREC
17 makes parallel arguments in its motions.

18 We have several counters to this argument,
19 but taking a step back to start the underlying question
20 is whether a permit is required for Port operation as
21 opposed to Port construction. And, if so, whether the
22 permit here covers Port operation. Either it does, in
23 which case issues about Port operation, such as future
24 maintenance dredging, et cetera, are relevant or the

1 permit here does not cover operation use of the Port, in
2 which case it can be established that further permitting
3 will be required to operate the Port. As cited in our
4 brief, the subaqueous lands rules at, again, Title 7,
5 Section 7504-2.4.2.1 require permit for both construction
6 and for use of a structure on public subaqueous lands.

7 In their brief, it's our contention that
8 both Diamond State and DNREC equivocate and don't come
9 out clearly stating that a further subaqueous permit will
10 be required if the permit at issue here doesn't cover
11 operation.

12 Mr. Burton spoke to this. Although,
13 Mr. Burton, I heard you as referring to acknowledging
14 that other permits were required, but I think you were
15 referring primarily to U.S. Army Corps permits, and I
16 didn't hear a clear statement that a further subaqueous
17 lands permit will be required for use of the Port.

18 If you are able to make that
19 clarification, that would be helpful.

20 Overall, it's our impression that Diamond
21 State and DNREC appear to be having the proverbial cake
22 and then trying to eat it too. Potentially, one position
23 now and one position later. Their argument now is that
24 no further -- is that this permit covers just

1 construction of the Port. But we are concerned that in
2 the future it will be determined that this permit covers
3 both construction and operation of the Port, therefore
4 depriving us of any opportunity to contest or challenge a
5 subaqueous lands permit that covers use of the Port.

6 Overall, Diamond State's arguments in this
7 case advocate that DNREC take inconsistent positions when
8 weighing the benefits from operation of the Port while
9 rejecting and ignoring the harms that result from
10 operation of the project. Indeed, we would argue that
11 Diamond State has taken the same inconsistent positions
12 in its briefing.

13 As we sit here today, it's very clear that
14 the Secretary considered the benefits of the Port
15 operation. Look at the economic survey and all of the
16 other information submitted in support of the application
17 and then repeated in the Hearing Officer's report and
18 actually flagged in Diamond State's brief that responded
19 to one of the Port Operators' motion in limine where in
20 that brief Diamond State cites the very same language
21 from the Hearing Officer's report that we cited in our
22 brief on this current motion. All of which goes to show
23 that the reason, repeated over and over again in the
24 application documents and DNREC's documents approving the

1 permit application, are that the Port will provide
2 significant economic activity and benefits, but those are
3 benefits that derive not really from its construction but
4 from its operation.

5 The documents talk about the employment of
6 dock workers and truckers and other support industries,
7 and how this will revitalize and keep Delaware
8 competitive in international shipping markets. And we
9 don't challenge any of that. We just point out that if
10 you are going to use in support of a permit all of the
11 positive effects that come not from construction but from
12 operation, then you cannot disregard the negative impacts
13 that come from operation and instead limit the
14 consideration of negative impacts just to the
15 construction, ignoring the operation stage.

16 And so, in light of all of this, we note
17 and we would sort of mention to the Board that there are
18 a number of traps here. First, consistent with the
19 foregoing discussion, there's a trap in the proposition
20 that only the impacts of construction get considered,
21 because that risks the situation that when a major
22 facility is built without regard to the effects of its
23 operation, because certainly once a large facility,
24 including one like here built with public money, is

1 built, it becomes very hard to stop that facility or that
2 operation from moving forward and actually operating.

3 You know, it's a consistent theme
4 throughout U.S. environmental law that you figure out
5 whether the operation of a facility will be allowed and
6 will be able to be done consistent with the laws before
7 you allow it to be built. Otherwise, you risk
8 administrative agencies and entities, such as this Board,
9 from being put in an impossible situation. How do you
10 then turn around and tell a port or tell a facility and a
11 facility operator and the public that something that has
12 considerable resources poured into it now can't operate
13 because you have divided and segregated the operation
14 quest into some later stage?

15 That is just really bad public policy, and
16 we would encourage the Board not to fall into that trap.

17 There's a second trap here too. Diamond
18 State and DNREC seek to impose an unworkable structure on
19 the public comment process, which sort of underlies all
20 their arguments about what's in the record and how you
21 apply Rule 5.3. Ms. Skjoldal touched on this, and I will
22 take a moment to expand upon it.

23 And I am sorry, Mr. Chairman and Members
24 of the Board, but I can't sugarcoat this. To endorse the

1 limitations and requirements that they seek to impose on
2 public comment is really to make a mockery of the
3 opportunity for public comment and turn the entire
4 process into somewhat of a farce. This is especially
5 true here where the basis of a challenge is that DNREC
6 failed to or inadequately considered certain aspects of a
7 project that was required to be considered under the
8 subaqueous lands regulations, which is, of course,
9 unknowable until DNREC takes its final action. And also,
10 where a core element of the challenge derives from
11 changes to the permit application that occurred after the
12 public comment period and aren't disclosed to the public
13 until DNREC makes its final decisions.

14 This is really essentially putting forth
15 the following proposition for public comment that anyone
16 in the public who believes they might be affected by a
17 project needs to forecast that DNREC will not comply with
18 its regulations, needs to do the analysis that it is
19 concerned that DNREC will not do, needs to, you know,
20 retain experts and invest considerable resources on a
21 short amount of time to accomplish that so that public
22 comments are submitted during the public comment period,
23 and then needs also to look into its crystal ball and
24 identify every way in which the project may change after

1 the public comment period, and play out all of the
2 hypotheticals in terms of what might change and how it
3 might change, and provide public comment on the effects
4 and impacts of all of those theoretical changes, now a
5 myriad of possible changes that might occur, and needs to
6 submit all of those comments during the public comment
7 period in anticipation of what DNREC might later do,
8 where what DNREC might later do is not remotely apparent
9 to the public during that public comment period.

10 That is just a ridiculous burden to put on
11 the public for the public comment period and really
12 eviscerates the legitimacy of the public comment process
13 if that's the burden that's going to be imposed before a
14 permit challenger can later come in and challenge DNREC's
15 decision, to be told that you can only do that if you had
16 met all of those steps, all of that crystal ball, all of
17 that hypothetical dealing with, just in case it might
18 turn out later that DNREC didn't follow its own
19 regulations. That is too great a burden.

20 Turning here to the specific information
21 that Diamond State is seeking to exclude. In terms of
22 maintenance dredging, while the potential for impact to
23 recreation and fishing is obvious, you have got a lot of
24 equipment stirring up a lot of sediment on a large

1 section of the river for an extended period of time.

2 Now, whether that impact from maintenance
3 dredging is too extreme or whether DNREC failed to
4 adequately consider it, that's the evidence we are
5 seeking to present. Diamond State is using the just-the-
6 construction-permit argument here to prevent any of that
7 kind of evidence from coming in. That argument, as
8 discussed earlier, should not be allowed to succeed and
9 we should be able to present that information to the
10 Board.

11 Regarding sturgeon strikes, yes, as our
12 brief notes, we are a little confused by that issue. I
13 don't think we used that phrase anywhere. Although, I
14 don't think Diamond State in its arguments quite
15 accurately quoted our argument here. Certainly, impacts
16 on sturgeon is one of a number of impacts to the aquatic
17 environment, something that DNREC under its regulations
18 is required to consider. And we argued that it was
19 insufficiently considered, those effects along with a
20 number of others, when determining what compensatory
21 mitigation was required here.

22 And, certainly, no one can contend that
23 compensatory mitigation is not an issue in the record.
24 It is addressed in its own paragraph within the

1 Secretary's order. That is clearly part of the record
2 here.

3 And so, therefore, for those reasons, we
4 request that the Board deny both DNREC's and Diamond
5 State's motions to exclude the evidence that they contend
6 was not before the Secretary and apparently also contend
7 is not appropriate for the Board to hear here.

8 Thank you.

9 CHAIRPERSON HOLDEN: Thank you,
10 Mr. Rockman.

11 Arguments from other parties?

12 MR. LEVINE: Just one point of
13 clarification. Are we covering the navigation issues in
14 this argument or is that, in fact, being preserved for a
15 little later?

16 CHAIRPERSON HOLDEN: Mr. Levine, I
17 understand, and correct me if I am wrong, Mr. Tweedie,
18 that DNREC's motion in limine regarding navigation is to
19 still come.

20 MR. LEVINE: Thank you. I just wanted to
21 make sure.

22 CHAIRPERSON HOLDEN: Questions from the
23 Board?

24 (No response.)

1 Mr. Rockman, a couple of questions come to
2 mind and maybe for others too. Do you contend that no
3 changes can occur to a project post-public-comment period
4 for the permitting action to be valid?

5 MR. ROCKMAN: No, I don't make that
6 contention at all. Mr. Chairman, that would be an
7 unworkable restriction on DNREC or any other government
8 agency in that situation. However, the fact that we
9 didn't anticipate that change and provide public comments
10 in it during the preceding public comment period
11 shouldn't then be used as a basis to bar any evidence
12 contesting the project as it was modified in that post-
13 public-comment-period change.

14 MR. DALY: I think that's an important
15 point that Mr. Rockman just made, and I think it really
16 kind of goes to some of the real 5.3 issues that are here
17 present today. The argument on the dispositive motions,
18 DNREC was saying that we can't reissue public comment for
19 every change to a permit application because it would be
20 unwieldy and basically would destroy the integrity of the
21 permitting process and prevent permits from ever being
22 issued.

23 But now they are saying that if there are
24 changes to a project after the public comment period that

1 Appellants, like my client, Mr. Curran, that Appellants
2 you can't actually submit evidence about those changes
3 because that was never before the Secretary. But as
4 Mr. Rockman just pointed out, we didn't have an
5 opportunity in the narrow respect, with respect to the
6 change with the shoaling fans and how they potentially
7 affected the maintenance dredging issues, we didn't have
8 an opportunity to weigh in during the public comment
9 period about that.

10 So, on the one hand, DNREC, it's trying to
11 have it's cake and eat it too -- and you maybe used that
12 exact phrase, David. They want to say we don't need to
13 submit everything for public comment after there are
14 changes, but then they also want to say you are limited
15 to the record before the Board. And it's really
16 unworkable at this stage for an appellant.

17 CHAIRPERSON HOLDEN: So a question for
18 maybe both of the two of you. The difference between
19 identifying potential frequency of expected maintenance
20 dredging and other design considerations that are
21 alluded, related to what that frequency might be, is
22 different certainly from a maintenance dredging
23 construction activity; right? There are differences and
24 you see those across different permitting activities

1 where there is construction, and then operation, or
2 future. You get a home construction permit, then you
3 have to get a deck permit to do an activity that's
4 downstream. Where do you see that the appropriate
5 delineation of the activities that are permitted in the
6 future with relation to maintenance relative to what you
7 think should have been done by the Secretary or addressed
8 by the Secretary or made available to the public now for
9 the construction permit?

10 MR. DALY: Thank you, Mr. Holden. I think
11 that's a really good question. I think -- first of all,
12 I think there's no question that some consideration has
13 to be made, and I think that's clear from the application
14 as well as the regulations, and I think we have been
15 clear about that. But I think your question goes to: At
16 what point do we get to a situation where we are actually
17 permitting the maintenance dredging operation? And here
18 when we start talking about who is actually going to be
19 doing the dredging, like there's discussion about the
20 Army Corps should be doing it. Okay. If it's the Army
21 Corps that's actually going to be doing the work, then
22 they should need to obtain a permit to do that work.

23 And so, I think when you start getting
24 into a lot more specifics about: here is exactly where

1 all of our equipment is going to go, here is where all of
2 the disposal is going to go -- those sort of specifics,
3 you start to get a lot more to the maintenance dredging
4 side. But here about the anticipated amount, the
5 anticipated frequency, what is the applicant doing to
6 sort of take measures now so that we have an easier time
7 on the back end reducing the impacts on the maintenance
8 dredging operation, that also should be considered
9 initially.

10 MR. ROCKMAN: And I will add to that, I
11 think from our perspective, we believe that the agency is
12 required to look at the reasonably expected and
13 foreseeable impact of the project, not just from
14 construction but from operation, and apply its
15 regulations on the issues and subjects that the
16 regulations identified as being important and that the
17 agency needs to consider. So whether ultimately it's the
18 Army Corps doing the dredging, Diamond State, or someone
19 else, and under what jurisdiction and authorization,
20 isn't necessarily relevant or a prerequisite to the
21 Secretary being able to and being required to under the
22 subaqueous lands regulations consider those issues and
23 project out what impacts will those have on all of the
24 elements of environmental and public interest that the

1 subaqueous lands regulations require DNREC to consider.

2 MR. DALY: Mr. Chair, just finally and
3 real briefly, because I do think it's also important here
4 because the answer to that question, too -- it would be
5 interesting to hear from DNREC's permitting folks, like
6 what do they say? Right now it's basically DNREC's
7 litigation counsel telling us that the Secretary doesn't
8 consider that all. They haven't submitted any
9 affidavits. They haven't submitted no actual evidence
10 saying here is the scope of the review and this is what
11 we actually looked at in connection with this project.
12 They are just telling the Board in legal papers right
13 now.

14 And so to me I think the answer to that
15 question might ultimately be something we can suss out at
16 a hearing.

17 CHAIRPERSON HOLDEN: A question on a
18 different angle for you. There was obviously public
19 comments against the inclusion of the shoaling fans. Why
20 wasn't there appropriate opportunity for anyone to
21 provide commentary in the affirmative for the shoaling
22 fans, right, if there was obviously comments in the
23 record against them?

24 MR. ROCKMAN: I'm not sure if this is

1 helpful, Chairman Holden, but I think the best we can
2 answer is if there was support for the shoaling fans,
3 because that was clearly in the application, someone
4 could have mentioned that during the public comment
5 period. Although, ultimately I think the Hearing
6 Officer's report indicates that it was DNREC's own
7 objection to the shoaling fans that led to them being
8 removed.

9 CHAIRPERSON HOLDEN: I understood that
10 there was also public comments against the shoaling fans.
11 To me it seems like it was a point of contention. They
12 certainly offered the public an opportunity to make their
13 opinion known if they felt that they had one.

14 MR. DALY: Right. I think, just to
15 clarify, Mr. Chairman, I don't think that any of the
16 Appellants, at least here today -- honestly, I'm not sure
17 any party really liked the shoaling fans except for
18 Diamond State Port Corporation. From my client's
19 perspective, the shoaling fans created a host of their
20 own concerns. But, frankly, like the sedimentation
21 issues, about the amount of sedimentation, how much
22 maintenance dredging was going to be required, there were
23 a lot of uncertainties from my client's perspective about
24 what the fans were going to do or not do.

1 And so really a lot of those issues were
2 still before the Secretary. And part of my client's
3 public comments -- Dr. Craig Jones, one of our witnesses,
4 complained about the -- criticized the amount of
5 anticipated maintenance dredging, independent of the
6 shoaling fans.

7 And the change with the shoaling fans
8 really comes down to: What methods are you planning,
9 Diamond State, to reduce this maintenance dredging?
10 That's what the application says. It's their burden, as
11 the applicant, to supply that information.

12 CHAIRPERSON HOLDEN: Thank you, gentlemen.

13 Any other comments from the Board?

14 (No response.)

15 Mr. Burton or Mr. Tweedie, any closing on
16 this matter?

17 MR. BURTON: If I may briefly, Chairman
18 Holden. I think your question about what would be left
19 for the maintenance dredging permit application gets to
20 kind of the heart of the matter here. Essentially, the
21 Appellants are trying to wrap up maintenance dredging and
22 construction dredging all in one review for the Board,
23 and that's just simply not what was before DNREC. It's
24 not what is before the Board now. This is a construction

1 permit.

2 And so I just want to reiterate that
3 maintenance issue was not an issue, it's not relevant to
4 this appeal. There was a lot that was said, but that was
5 kind of my main comment was: What would be left to
6 consider on a maintenance dredging permit? And if they
7 were meant to be decided at the same place, is it not
8 superfluous to have two separate applications?

9 And I guess to one of the points that was
10 made about public policy and about creating a port and
11 not thinking about how it would operate, I think that's a
12 risk that the Port Operators or Diamond State Port
13 Corporation took on when it decided to apply for a
14 construction permit and not a maintenance permit at the
15 same time. It left itself open to the possibility that
16 it may construct the port and not be able to operate it
17 because it wouldn't have permitting. But that's a risk
18 that we took on when we decided to bifurcate the two
19 processes.

20 CHAIRPERSON HOLDEN: A question for you,
21 Mr. Burton. Is it fair that Diamond State Port
22 Corporation, your client, is going to have maybe a land
23 use permit with the county, a coastal zone permit, a
24 DelDOT entrance permit, stormwater permits, there are a

1 number of other permits necessary to ultimately either
2 construct or utilize the facility as envisioned that are
3 tied into the subaqueous lands permit?

4 MR. BURTON: That's certainly my
5 understanding. And none of those permit applications
6 would be relevant to the Secretary's decision and this
7 Board at this juncture. I mean, they are just not.
8 That's our position.

9 CHAIRPERSON HOLDEN: Thank you.

10 MR. ROCKMAN: Mr. Chairman.

11 CHAIRPERSON HOLDEN: Mr. Rockman.

12 MR. ROCKMAN: Yes, I think the argument
13 that we articulated, that I articulated earlier is this
14 distinction between construction and user operation. And
15 I quoted or cited the regulations that require a
16 subaqueous lands -- never mind any other permits, but a
17 subaqueous lands permit for construction and then for use
18 of a port facility like this. And I still think -- it's
19 not my role necessarily to pose questions to the other
20 attorneys here on the call, but I still think we have
21 unanswered the question as to whether Diamond State
22 acknowledges that it will need a subaqueous lands permit
23 to use the Port or whether it thinks that this permit
24 encompasses use of the Port.

1 MR. BURTON: To address that question,
2 this is why it's not ripe for this appeal, because we
3 just don't know because we don't have a decision from the
4 U.S. Army Corps of Engineers. It's my understanding that
5 there will be another permit for maintenance dredging,
6 but we need to wait for the Army Corps of Engineers to
7 weigh in and figure out what they are willing to take
8 over for the project. I think that articulates why it is
9 not in this permit and it's not relevant to this appeal.

10 MR. ROCKMAN: I will leave the subject to
11 the Board's consideration, pointing out that a subaqueous
12 lands permit for use of the port has not necessarily
13 anything to do with maintenance dredging per se. It is a
14 completely separate permit that would just authorize the
15 Port to be used because it is over subaqueous lands per
16 the subaqueous lands regulations.

17 And we still haven't heard an answer or
18 acknowledgment of whether this permit covers it or not,
19 all the more reason that the Secretary should have viewed
20 both operation impacts along with the construction
21 impacts.

22 MR. TWEEDIE: Mr. Chairman, if I may,
23 Jameson Tweedie for DNREC.

24 CHAIRPERSON HOLDEN: Go ahead, please.

1 MR. TWEEDIE: I think there are several
2 different issues addressed by Appellants' counsel and I
3 want to sort of keep them all separate if we can, because
4 I think they are separate.

5 So one I wanted to make sure we are clear
6 on is that there's a distinction between the application
7 of Rule 5.3 and the application of Rules of Relevance,
8 what is relevant to this appeal. They are both
9 independent bases to exclude evidence that either was not
10 before the Secretary or is not relevant to this appeal.
11 And they are each independent.

12 So various discussion, for example, of
13 maintenance dredging does not undermine the application
14 of Rule 5.3 to any other issue. I'm not sure if that was
15 what counsel was trying to do, but I just wanted to make
16 abundantly clear that those are separate and independent,
17 and that anything that is outside of the scope of the
18 record before the Secretary should be excluded
19 regardless.

20 We contend that maintenance dredging is
21 not relevant, but that is obviously for the Board to
22 determine.

23 There were also comments on the, sort of
24 the comment process and the separate permitting and

1 public policy. You know, on the public policy arguments,
2 I'm sure we could all have fascinating public policy
3 debates, but this is not the forum for those and that's
4 not the issue before the Board, nor is the Board the
5 appropriate body to be setting public policies.

6 So what we have before us is DNREC duly
7 promulgated regulations, the applications of those
8 regulations, and whether or not the Secretary's order
9 meets the applicable standard or not. Certainly, from
10 our perspective, if maintenance dredging is required,
11 there's going to need to be a separate permit for that.
12 I don't think that was unclear, but it certainly is our
13 view. And that's not unusual.

14 As Chair Holden pointed out, there are
15 lots of places where different permits are required for
16 different pieces, they are not handled altogether. And
17 there are various places and various regulations where
18 construction and operation permits are handled
19 differently, and that is the case here.

20 And just on the last one, the public
21 comment process. You know, that is the structure of our
22 permitting process and our public commenting process,
23 there are -- an issue is put out for public comment, and
24 interested parties are to submit comments on that. Here

1 maintenance dredging and the shoaling fans were clearly
2 part of that. They received extensive public comment,
3 and that is what is in the record.

4 It is DNREC's position that there should
5 not be an additional bite at the apple to put additional
6 evidence on the record on that issue. And that seems
7 especially true where each of these Appellants submitted
8 comments, submitted detailed comments.

9 Thank you.

10 MR. DALY: Mr. Chair, very briefly, it
11 occurred to me that I had not actually addressed
12 Mr. Tweedie's 5.3 argument. And we have separate
13 briefing on that issue, but with the Board's -- if the
14 Board could give me the opportunity to just very briefly
15 address these concerns that Mr. Tweedie has raised about
16 5.3.

17 CHAIRPERSON HOLDEN: Quickly, please.

18 MR. DALY: Thank you. As I have
19 reiterated a few different times during these
20 proceedings, the standard for admissibility under the
21 EAB's rule as well as have been articulated by the
22 Delaware Supreme Court in very recent decisions,
23 including Delaware Solid Waste Management Authority as
24 well as Delmarsh, is that any evidence that can throw

1 light on a controversy should be admitted. In fact, the
2 EAB rules go so far as to say shall be admitted. All
3 evidence having probative value commonly accepted by a
4 reasonably prudent person.

5 And so DNREC in their motion on 5.3 is
6 focused -- they ignore all of that. And they focus on
7 that single sentence in 5.3 that says that Appellants
8 other than permit applicants or an alleged violator may
9 only introduce evidence which was before the Secretary.
10 Setting aside that this section of 5.3 appears nowhere in
11 the Board's authorizing statute, and in fact the Delaware
12 Supreme Court has articulated that the evidence before
13 the Board is not limited to that which was before the
14 Secretary, but in fact the parties may submit any
15 competent evidence. Setting that aside, the evidence
16 that DNREC is challenging under 5.3 with respect to the
17 Port Operators was before the Secretary in, frankly, all
18 cases.

19 DNREC's argument is really that Rule 5.3
20 means that evidence must be presented in exactly the same
21 form as it was presented to the Secretary. And just to
22 use an example of how they go about this, so the Port
23 Operators submitted an expert report to the Secretary of
24 DNREC during the public comment period by Captain

1 Kichner. DNREC says that Captain Kichner cannot appear
2 at the hearing, the public hearing to testify because his
3 report was submitted in writing and it would be
4 inappropriate for the Board to rehear that evidence.

5 So really DNREC's concern is that, I
6 think, that it would be duplicative or it could be
7 inconsistent with 5.3 if it's not in exactly precisely
8 the same form as was submitted to the Secretary. That is
9 problematic for two reasons. The EAB rules are clear
10 that the Board can hear helpful evidence, can rehear
11 evidence that was presented to the Secretary as long as
12 it was helpful.

13 That's a pretty easy standard to meet in a
14 case like this where there are so many technical issues
15 involving navigation, as well as dredging, where the
16 Board might not be familiar with a lot of these topics.
17 And so to hear the witnesses and the experts testify,
18 with the ability to elaborate and explain and also be
19 cross-examined, is incredibly helpful to the Board and
20 meets that rather liberal standard.

21 And there's another concern here, which is
22 that DNREC's reading of 5.3 where evidence must be
23 presented to the Board in precisely the same form that it
24 was presented to the Secretary, that would basically

1 eviscerate the right to a public hearing before this
2 Board, that's clear from the Board's authorizing statute.
3 If witnesses -- if every witness was stuck to just
4 exactly what they said in the transcript at the public
5 hearing, there won't be a hearing. It will just be the
6 Board sitting in a room quietly going through the record
7 without any benefit of elaboration, explanation.

8 CHAIRPERSON HOLDEN: I am sorry to cut you
9 off. I have a question for you.

10 So I would ask, would you agree that it's
11 the Appellants' and the testimony from the witnesses' job
12 to prove why the Secretary's decision utilizing the
13 evidence that was in the record was incorrect, right?
14 And that's a different approach to what you have just
15 said, though, I think in line with what has been
16 generally discussed here.

17 MR. DALY: Can you just clarify? I think
18 I understand what you mean, but just clarify.

19 CHAIRPERSON HOLDEN: Is it not the role of
20 utilizing the Captain's testimony to prove that the
21 Secretary's decision was clearly wrong based upon the
22 evidence that was within the record, so that the
23 Secretary took the written evidence submitted and made a
24 clearly wrong decision utilizing that information, that

1 and the whole of the information; right?

2 MR. DALY: Right. I mean -- right. I
3 think we would agree with that point that Captain Kichner
4 can testify to his report and also explain perhaps why
5 the Secretary's decision doesn't address a certain issue
6 that was before him. I think that would be fair game,
7 that's correct.

8 CHAIRPERSON HOLDEN: Very good.

9 MR. DALY: That's all I have on this
10 issue. Thank you.

11 CHAIRPERSON HOLDEN: Thank you, sir. I
12 think we are at a point here where we can move to
13 Executive Session.

14 MR. TWEEDIE: Very briefly. Mr. Daly sort
15 of added his response to the Rule 5.3 argument after the
16 fact. If I could have one moment. I wanted to be clear
17 about a couple of things. As Ms. Scott pointed out
18 earlier, the cases they are relying on are
19 distinguishable because they are, unlike this situation,
20 they are applicant challengers, unlike here where they
21 are non-applicant, non-violator challengers.

22 In this Rule 5.3, that sentence in Rule
23 5.3 doesn't apply.

24 I also wanted to be clear that in the Port

1 Operators' response motion they identify some of their
2 motions and witnesses that were in the record but concede
3 that others weren't, they just wanted to be considered
4 anyway. We obviously disagree with that.

5 And I just wanted to say that as far as
6 Rule 5.3 goes, it does have various sentences in it that
7 address different specific things. And the sentence that
8 is most specific and applicable to these Appellants is
9 the fourth sentence that restricts non-applicant, non-
10 violator Appellants to only the evidence that was on the
11 record before the Secretary. That does not undermine or
12 conflict in any way with the other components of Rule
13 5.3.

14 Thank you.

15 MR. DALY: Mr. Chairman, could I just very
16 briefly -- and I will try to keep it --

17 CHAIRPERSON HOLDEN: No, I think we have
18 heard back and forth a couple of times. I think we are
19 comfortable with the arguments we have heard today.

20 I would like to focus us toward -- I think
21 we have two DNREC motions remaining, the issue of the
22 federal consistency determination and the issue of
23 navigation. Since we do have just a few hours left here
24 I would like to move on to those unless there's a strong

1 issue that we need to circle back on.

2 MR. DALY: No, Mr. Chairman, we will rely
3 on our papers with respect to the specific documents that
4 DNREC may be referring to about concessions.

5 CHAIRPERSON HOLDEN: I understand. Thank
6 you, sir.

7 Mr. Tweedie, Ms. Scott, if we are going to
8 move on to the motion in limine on federal consistency
9 determination, who is going to speak to that?

10 MS. SCOTT: Chair Holden, I will be
11 addressing the federal consistency certification argument
12 and Mr. Tweedie will be arguing the navigation motion.

13 CHAIRPERSON HOLDEN: Very good. Please
14 proceed, Ms. Scott.

15 MS. SCOTT: Thank you.

16 Chair Holden, Members of the Board,
17 Mr. Maloney, DNREC moved to dismiss the federal
18 consistency certification issue from this hearing. We
19 acknowledge that. The written decision on the motion to
20 dismiss hearing has not been issued yet. We understand
21 that it will be issued within 90 days of that hearing,
22 which is approximately October 24th, which is the day
23 before the second day of the hearing, if a second day of
24 hearing is necessary.

1 The motion wasn't substantively addressed
2 in the Board's oral decision. We agree with the Port
3 Operators when they stated that the State's Coastal Zone
4 Management Plan falls under the federal Coastal Zone
5 Management Act, which is page 4 of their response. We
6 maintain that the U.S. Department of Commerce has
7 jurisdiction over federal consistency, but for today we
8 are arguing that federal consistency certification is
9 irrelevant to these proceedings.

10 And I think there may be some confusion
11 about what federal consistency certification requires.
12 It's a federal law. States participate in that process
13 by adopting a Coastal Zone Management Plan. Our federal
14 counterparts approve that Coastal Zone Management Plan.
15 Again, it's all federal law. And the applicant
16 certifies.

17 Whenever an applicant needs a federal
18 permit that may affect a state's coastal zone, the
19 applicant must certify that the project complies with the
20 state's approved Coastal Zone Management Plan, not DNREC.
21 DNREC has the opportunity, like the other states that
22 participate in the program, to concur or object to the
23 applicant's certification that their project complies
24 with -- is consistent with the state's Coastal Zone

1 Management Plan.

2 There are strict deadlines by which the
3 states must respond, and no response is deemed a
4 concurrence. So here, if there is an objection, if the
5 state objects, then -- sorry, I lost my place for a
6 second there.

7 As we stated in our motion to dismiss, the
8 U.S. Department of Commerce hears those appeals. If
9 there is no federal permit at issue, but there is a DNREC
10 subaqueous lands permit application at issue, this
11 process doesn't need to occur. It's all, you know,
12 required by the federal permit process. And the parties
13 have stated that, well, if -- well, first of all, if the
14 state objects, the Commerce Secretary can overrule the
15 state's objection. But even if the state concurs with
16 the applicant that their project complies with the
17 Coastal Zone Management Plan, it is still, like I said, a
18 part of the federal permit. It is a small piece of this
19 larger federal permit. What is underlying is the federal
20 permit process.

21 So that even if a state concurred, those
22 federal permits could still be denied for other reasons.
23 And regardless, appeals in that case go to federal court.
24 I don't know if Appellants are going to challenge, intend

1 to challenge the federal permit process, but that would
2 be certainly their decision to make. And here there was
3 a concurrence by the state that this project is
4 consistent with the state's Coastal Zone Management Plan,
5 and if those federal permits issue, again, the Appellants
6 aren't precluded from taking whatever steps they deem
7 necessary to challenge those federal permits.

8 As we stated in our papers, this Coastal
9 Zone Management Plan, this federal consistency
10 certification process is part of the federal steps
11 permitting landscape. And the courts, the court in
12 Weaver Cove Energy, which I said it in the papers, stated
13 that separate state proceedings on related state law
14 issues, if allowed, would frustrate the underlying
15 federal law that provides for a federal consistency
16 certification. And the court ruled that for that reason
17 the state law is preempted.

18 We disagree that the Weaver case isn't
19 absent. To the contrary, the same delay that the court
20 considered in Weaver is applicable here. Allowing a
21 state, a separate state review of the federal permit
22 requirement could create a circular, sort of a multi-
23 faceted appeal process that could unduly delay or even
24 duplicate the federal review of that federal permit,

1 which includes, as part thereof, the federal consistency
2 certification.

3 Our position really is that this federal
4 consistency certification is a separate process under the
5 federal permit scheme and is not appealable to this
6 Board. If the Board found that this was a decision of
7 the Secretary that should be appealable, the only
8 appropriate board would be the Coastal Zone Industrial
9 Control Board. We maintain that the U.S. Department of
10 Commerce has jurisdiction, but if any state agency did
11 have jurisdiction it would be the Coastal Zone Industrial
12 Control Board, because the Coastal Zone Management Plan
13 was developed in reference to the state's Coastal Zone
14 Act, as we argued in our papers.

15 But for the required federal permits, the
16 federal consistency certification process would not even
17 be necessary. It's preempted by federal law and is
18 irrelevant to this appeal, and we are requesting that the
19 Board exclude it from the hearing on the merits.

20 Thank you.

21 CHAIRPERSON HOLDEN: Thank you, Ms. Scott.
22 Arguments from the other parties?

23 MR. DALY: Thank you, Mr. Chairman. I can
24 chime in on behalf of the Port Operators.

1 I think it's important to take a step back
2 here at this stage. We are here today to hear motions in
3 limine, motions to exclude evidence from the hearing that
4 will be held. The basis for DNREC's motion -- all of
5 that argument that we just heard from Ms. Scott, the
6 basis for that, for excluding the evidence here is a
7 motion to dismiss that DNREC previously filed that was
8 not granted by the Board.

9 And so sitting here today, in the
10 statement of appeal Appellants have, the Port Operators
11 have challenged the federal consistency certification
12 that was issued in the same Secretary's order that issued
13 the Subaqueous Lands Act permit. Those are all in play
14 right now, sitting here today. There is no legal basis
15 for excluding this evidence, as we all sit here today.

16 And it's important to also point out that
17 sort of the procedural improprieties of now rearguing
18 this motion is that there was full briefing. All the
19 parties submitted opening and response briefs in support
20 of and against DNREC's partial motion to dismiss, heard
21 argument on it. And now DNREC again filed, frankly, the
22 same motion, and we responded to it both substantively
23 and for the procedural issues. And so it's inappropriate
24 for the Board to consider DNREC's motion, and it's

1 especially inappropriate at the motions in limine stage
2 because, frankly, there is not really evidence at issue
3 here.

4 DNREC's motion, with one very minor
5 exception with respect to Mr. Curran's appeal, identifies
6 evidence that they say relates to the federal consistency
7 certification, but because the federal consistency
8 certification process tracked practically every step of
9 the Subaqueous Lands Act permit, it was included in the
10 same order, followed part of the same administrative
11 record. All of this evidence about navigation that the
12 Port Operators intend to submit also relates to the
13 issues in the coastal zone policies that are relevant to
14 the Coastal Zone Management Act consistency
15 certification. So there's really not evidence at issue
16 today.

17 And so, both because it's procedurally
18 improper as well as on its merits as before, it fails to
19 dismiss these issues, which I will refer the Board to our
20 papers on the substance given that the parties now have
21 briefed this fully twice. I would just ask that the
22 Board deny this motion and allow these issues to be heard
23 at the public hearing.

24 CHAIRPERSON HOLDEN: Thank you, Mr. Daly.

1 Any other arguments from other parties?

2 MR. ROCKMAN: Dave Rockman on behalf of
3 Mr. Curran. I concur with Mr. Daly's arguments and don't
4 feel the need to add anything else.

5 Thanks.

6 CHAIRPERSON HOLDEN: Thank you, sir.

7 Anything else from any other party?

8 (No response.)

9 Any questions from the Board?

10 MS. SCOTT: Chairman, just a few comments.
11 We acknowledge that we argued this issue in our motion to
12 dismiss with respect to jurisdiction. We are arguing it
13 now on the basis that this information is irrelevant. As
14 Mr. Burton said previously, just because something is in
15 the record does not necessarily make it relevant
16 evidence.

17 So, here again, we don't have the benefit
18 of the written decision from the Board on this issue of
19 federal consistency, so we just wanted to make clear that
20 this position was being made for relevancy and not for
21 jurisdiction. And we would ask for some latitude because
22 the transcript isn't clear and we don't have a written
23 decision from the Board on this issue.

24 CHAIRPERSON HOLDEN: Thank you, Ms. Scott.

1 A question for Mr. Rockman or Mr. Daly.
2 Do you find reference in DNREC regulations that leave an
3 appeal of Delaware's consistency certification here
4 appealable to the Environmental Appeals Board? And by
5 asking that I know that there are sections we have had in
6 other cases that are appealable directly to the Secretary
7 and there are issues that are appealable to the Coastal
8 Zone Board. Right? So not everything that occurs within
9 the Department of Environmental and Natural Resources via
10 the Secretary is appealable to this appellate board.

11 Is it clear that this issue, this action,
12 this consistency certification is appealable to the
13 Environmental Appeals Board?

14 MR. DALY: Mr. Chairman, to respond to
15 that, the answer, I would contend, is yes, because the
16 Board's authorizing statute says any final decision of
17 the Secretary is appealable. And while there are a few
18 specific exceptions to that, the Coastal Zone Industrial
19 Control Board being one of them relating to the very
20 separate but, unfortunately, similarly named, Delaware
21 Coastal Zone Act, those issues are addressed separately.
22 But here, where the Delaware coastal zone policy involve
23 DNREC reviewing a project and then issuing a final
24 decision, it's consistent with the Board's basic

1 fundamental job duty in Section 6008 of the Delaware Code
2 to hear that appeal.

3 CHAIRPERSON HOLDEN: Which is a different
4 answer then to say a DNREC regulation that covers the
5 federal consistency concurrence directly addresses an
6 appeal to the Environmental Appeals Board?

7 MR. DALY: To answer that question, my
8 recollection is there's no specific -- the coastal zone
9 policies do not specifically address that issue.

10 CHAIRPERSON HOLDEN: Thank you.

11 MS. SCOTT: Chair Holden.

12 CHAIRPERSON HOLDEN: Ms. Scott.

13 MS. SCOTT: Mr. Daly made the very broad
14 statement that all acts of the Secretary are appealable
15 to this Board. In fact, the citation, which is 6008, is
16 restricted to Chapter 60. And Chapter 60, which
17 addresses activities that require permits from DNREC, but
18 outside of Chapter 60, as you said, Chair Holden, that
19 not all acts of the Secretary are appealable to the
20 Board. And certainly any regulations that were
21 promulgated under a different section or chapter of Title
22 7 does not give, provide due process through the
23 Environmental Appeals Board, such as Chapter 70, which is
24 the Coastal Zone Act, those appeals going to the Coastal

1 Zone Industrial Control Board. That is an act of the
2 Secretary but is not appealable to this board.

3 So that phrase, as you noted, does not
4 apply to every action. The particular chapter of the
5 code must give that statutory authority, statutory
6 jurisdiction to the Board. And our argument is that, not
7 only is this just not a state permitting process, it's a
8 federal permit process, but to the extent those
9 regulations were promulgated, they were promulgated as
10 required by the federal law to participate in the
11 program. States have to promulgate regulations, have to
12 have a Coastal Zone Management Plan. And in those
13 regulations the reference is to the Coastal Zone Act,
14 which is Chapter 70.

15 Thank you.

16 MR. DALY: Mr. Holden, I would just refer
17 to our papers, both in opposition to DNREC's original
18 motion to dismiss, as well as in opposition to their now
19 sort of repackaged motions in limine on this issue.
20 Section 6008 says what it says, and it's not limited to
21 Chapter 60. It is basically the catchall provision that
22 allows for final decisions of the Secretary to be
23 appealed to this Board.

24 CHAIRPERSON HOLDEN: Thank you, sir.

1 Any questions from the Board?

2 (No response.)

3 I think, unless someone has got a notable
4 item here, I think we can move on to DNREC's motion in
5 limine regarding navigation.

6 MR. TWEEDIE: Jameson Tweedie for DNREC.

7 Our motion on navigation issues tried to
8 address the fact that very broad issues of navigation
9 appear to be, intended to be brought into the scope of
10 this hearing by Appellants. And while there are limited
11 aspects of navigation that are within the scope of the
12 regulations and appropriately before the Board, the broad
13 issues of impacts up and down the Delaware River and
14 broadly sort of on traffic, ship traffic up and down the
15 Delaware River, in our view, are not appropriately within
16 that scope.

17 So, again, I will do my best not to
18 belabor anything that we have already addressed in other
19 motions, given the time of day. But, again, the relevant
20 standard, of course, is whether or not the Secretary's
21 decision is supported by the record.

22 So here the Secretary's decision does not
23 address broad issues of navigation. And so trying to
24 interject broad issues of navigation up and down the

1 river does not aid in the Board's determination as to
2 whether or not the Secretary's decision is supported by
3 the record. So neither the Secretary's decision nor the
4 regulations open up these broad issues of navigation that
5 the Appellants want to bring in.

6 One of the reasons is one that we have
7 already touched on, so I will try again not to belabor
8 it, is that there are distinctions between the
9 construction permit that we are addressing here and the
10 maintenance permit in the future, if there is one, that
11 would lead to ongoing future actions. And applicants can
12 choose to file those together, but they don't have to,
13 and here they did not. And so this is what is in front
14 of us.

15 In our view, the regulations do not
16 require broad consideration of navigation. So there are
17 limited aspects of the applicable subaqueous lands
18 regulations that do address navigation, but in large part
19 those are not applicable here. For example, there are
20 regulations that prohibit mooring buoys that interfere
21 with navigation or putting in convenience structures that
22 create a navigation hazard. In our view, and I don't
23 think it's disputed, those are not at issue here.

24 The most relevant portion of the

1 regulations is Section 4.6.3, which requires that as one
2 subpart of a whole number of parts of the Department's
3 consideration of the public interest, does the Department
4 consider the potential affect on the public with respect
5 to commerce, navigation, recreation, aesthetic
6 appearance, natural resources and other uses of the
7 subaqueous lands.

8 So, in our view, this provision is
9 narrowly limited. It is only on the navigation uses of
10 the subaqueous lands covered by the permit. DNREC, of
11 course, can look at issues, can go sort of above and
12 beyond in its evaluation of a project, and in respects it
13 did that here, but that doesn't create a heightened
14 standard that's applicable to DNREC, rather the standard
15 remains the same. And so it's our position that not that
16 navigability can't be addressed at the hearing, but the
17 issues of navigability that are addressed have to be
18 consistent with the regulations and limited to the
19 aspects of navigability that were required to be
20 addressed in this permit application process.

21 Appellants point to Rule 4.8.4 as part of
22 their support that this more broad examination should be
23 appropriate. And 4.8.4 provides, in part, that
24 structures shall not interfere with navigation, public or

1 other rights. But the definition of -- let me pause --
2 the issue that the Appellants are concerned with is the
3 turning basin in the main channel, but the turning basin
4 is not a structure. The definition of structure clearly
5 contemplates a physical thing: a boat ramp, a slip, a
6 building, break water, bridge, bulkhead, culvert, dam,
7 derrick, dock, jetty, et cetera. And, in our view, the
8 turning basin is not such a structure and so that
9 provision is not relevant and certainly is not required
10 to be part of the determination.

11 PhilaPort, in its response, stated that
12 "The Secretary had no meaningful technical evidence to
13 evaluate and consider." DNREC obviously doesn't agree
14 with that assertion, but if that is PhilaPort's position,
15 then it can succeed in its appeal without the need to
16 bring in other evidence or witnesses or experts to
17 address broader issues of navigational concern. Rather
18 they can demonstrate that the Secretary hasn't met -- the
19 Secretary's decision is not supported on the record, if
20 their assertion is correct.

21 So again, in our view, such extra evidence
22 is not appropriate and should be excluded. And where
23 applicable, Rule 5.3 obviously applies. If this was not
24 part of the record before the Secretary, it should not

1 and cannot come in now, but I won't belabor that argument
2 given our discussion of the prior motion.

3 Similarly, anything that is irrelevant or
4 immaterial, again, is not appropriate. And that's where
5 we would point to issues like the turning basin.

6 I will not belabor this any further, but
7 for the reasons just articulated and set forth in our
8 brief, we urge the Board to restrict the scope of
9 evidence on navigation to only those issues germane to
10 the narrow scope of navigation applicable in the
11 regulations.

12 And there were points in the response
13 brief that pointed out specific evidence that we had
14 sought to exclude on the basis that it was not in the
15 record before the Secretary. And there were a couple of
16 items where it was pointed out that they were in fact in
17 the record before the Secretary. So for those items that
18 were in the record before the Secretary, we obviously do
19 not seek to exclude them on the basis of Rule 5.3, but
20 for everything else our argument stands.

21 Thank you.

22 CHAIRPERSON HOLDEN: Thank you,
23 Mr. Tweedie.

24 Arguments from the other parties?

1 Go ahead.

2 MS. SCHILLER: This is Shoshana Schiller
3 again on behalf of the Port Operators. I apologize.
4 Andy, do you want to go first?

5 MR. LEVINE: No, no. I just wanted to
6 make sure that we both wanted to respond.

7 MS. SCHILLER: Okay.

8 There was something that Mr. Tweedie said
9 that I kind of agree with. He said that the Secretary's,
10 the Hearing Officer's report that the Secretary's
11 decision was based on does not address broad issues of
12 navigation. We would agree that it does not adequately
13 address the broad issues of navigation. Where we do
14 disagree is that the regulations require the Secretary to
15 do so.

16 So, first of all, I want to start with --
17 first of all, I want to thank you; I know we are late in
18 the day. This is really the most important motion with
19 regard to the Port Operators and I think PhilaPort, as
20 well, since our appeal is based entirely on navigation.
21 So I appreciate the Board's attention to this matter and
22 I hope that the lateness of the day won't impede our
23 arguments.

24 So, first, DNREC's motion is not a motion

1 in limine. Kind of similarly to the FCC motion, it's a
2 dispositive motion. It's a dispositive motion as to
3 whether or not the Port Operators and PhilaPort -- and
4 again, PhilaPort will be arguing separately -- whether or
5 not their appeal can be heard. So to phrase it as a
6 motion in limine I think is not really what's going on
7 here.

8 And so similarly, with the federal
9 consistency certificate, they are trying to argue
10 narrowly and to an evidentiary rule what is properly a
11 dispositive motion that should have been filed and argued
12 quite some time ago.

13 Secondly, the motion is really an attempt
14 to argue the merits of the appeal by way of motion in
15 limine. DNREC's motion is entirely based on the premise
16 that it need only consider navigation in the most narrow
17 sense, something that we dispute, but that it did so
18 sufficiently. Throughout the motion, that's the argument
19 that this narrow -- and, in fact, Mr. Tweedie's argument
20 as well -- that this narrow, what they contend is a
21 narrow consideration was dealt with. And that's not
22 true. It was not dealt with, either the narrow or the
23 broader concerns were not adequately dealt with.

24 And that's the purpose of the hearing

1 that's going to occur next month, that's not the purpose
2 of motions in limine. A motion in limine is related to
3 discuss evidence. And Mr. Tweedie has not really
4 identified the evidence that's at issue. He is talking
5 about whether the regulations are broad or narrow and
6 whether we should be able to argue a broader point or a
7 more narrow point. And he hasn't identified, again, the
8 evidence that cuts through the difference between the
9 narrow and the broad.

10 Moving on. What the Secretary was
11 required to consider -- and this is really the key point
12 here -- with regard to navigation and what DNREC was
13 required to consider was not narrow. And it was
14 certainly not limited to navigation only in the proposed
15 port. In this regard it's important to remember this is
16 not a little dock. It's not even an ordinary marina.
17 It's a port. It's a very, very large port, and very,
18 very large ships will dock at that port, will unload
19 cargo. And then to turn around and head back out to sea
20 will transverse and block the entire width, not just a
21 portion of it, the entire width of the navigational
22 channel of the Delaware River. One of the most important
23 waterways not just on the East Coast but in the country.

24 So it's precisely for this reason -- Ron,

1 if you could pull up Section 7504.6.3. It's precisely
2 for this reason that Section 7504.6.3 provides that the
3 department shall consider the public interest, which
4 considerations include but are not limited to... So here
5 we have really broad language. So for DNREC to contend
6 that this analysis is narrow is belied even by the
7 introductory paragraph here.

8 So the factors that shall be considered
9 include and, again, I am going to read it here because I
10 think it's important. "The potential effect on the
11 public with respect to commerce, navigation, recreation,
12 aesthetic enjoyment, natural resources and other uses of
13 the subaqueous lands." Now, in the brief, they took out
14 that "and," the word right before subaqueous because they
15 tried to smush it altogether, but it's not.

16 Each one of these items is a separate
17 item. Navigation is separate from commerce, which is
18 separate from recreation, which is separate from
19 aesthetic enjoyment, which is separate from natural
20 resources, which is separate from other uses of
21 subaqueous lands.

22 So I think it's clear when you actually
23 look at the regulation, at the statute, it is not limited
24 to solely navigation in the subaqueous land that is at

1 issue.

2 If we can move on to 7.5, which is another
3 one of the regulations that we discussed, part of the
4 administrative code. It provides that the department
5 shall also consider -- also consider, shall -- the degree
6 to which the project represents an encroachment on or
7 otherwise interferes with public lands, waterways or
8 surrounding public interests.

9 So we are not talking about just the area
10 at the project at the Port. We are talking about the
11 degree to which it represents an encroachment and
12 interferes with areas outside, which in this case would
13 be the Delaware River and the navigational channel.

14 If we go to 7504.9.2 -- we can skip that
15 one for now Ron, thanks.

16 This is the boat docking facilities. And
17 if we look at 9.2, it provides that the siting of a boat
18 docking facility shall be -- again, shall be -- evaluated
19 on site-specific conditions including, but not limited
20 to -- again, we have this broad language again -- not
21 including, but not limited to, location of navigational
22 channel. Okay? Navigation. Right there in the statute.
23 Proximity of existing structures, aquatic habitat, and
24 with an orientation of the water body.

1 So, again, we have these statutes that are
2 very broad.

3 And we will just go to the last one, which
4 is 4.11.1. And that provides that the project shall --
5 again, that's shall, it's kind of on the page before --
6 shall be designed to maintain the navigability of
7 channels.

8 So here we have five separate provisions.
9 Each one very clearly dealing with navigability. And, by
10 the way, that doesn't even include the CZMA, which is
11 the -- when we look at the federal consistency
12 certification, because there are regulations there as
13 well that require specific consideration of navigation.

14 So I am almost not sure if there's any
15 topic that's more referenced in these regulations than
16 navigability, in very broad terms. And at least at the
17 time it was considering Diamond State's permit, DNREC did
18 not disagree with this broad reading. It recognized that
19 a full evaluation of navigability of the channel was
20 required.

21 So Diamond State submitted the MITAGS
22 report, and it wasn't just a throw-away. It was an
23 important aspect to be considered, and DNREC and the
24 Hearing Officer and the Secretary all recognized that.

1 I mean, if we look at the Technical Review
2 Memorandum -- if you could just pull it up real quickly,
3 Ron.

4 If you look at Section 12, and the
5 Technical Review Memorandum really did narrow down the
6 issues that were raised by the public. Right there, No.
7 12: Incomplete Insufficient Navigational Studies. It
8 made the short list. And, indeed, it was so important --
9 if we could go to some of those emails, Ron, that we
10 have. This issue was so important to this decision that
11 Laura Mensch reached out to the Coast Guard, on April
12 13th, and specifically solicited their input on the very
13 comments that were submitted by the Port Operators, which
14 are the basis of this appeal. She provided the Coast
15 Guard with the Port Operators' comments and the expert
16 reports.

17 So these are the comments that now DNREC
18 says are irrelevant. I'm not sure how that can be.
19 Particularly, since Ms. Mensch followed up, not once, but
20 twice, on September 1st and September 8th.

21 And, Ron, I think we have the September
22 8th email.

23 And in that September 8th email she wrote
24 that it was so important, this issue was so important

1 that they could not finalize the Technical Review
2 Memorandum until this outstanding piece was addressed.
3 This outstanding piece was: What is the impact of the
4 Port on navigation in the Delaware River?

5 So the significance did not even stop with
6 the Technical Response Memorandum. We go to the Hearing
7 Officer's report, which again is what the Secretary's
8 decision was based on. Right? And there it is again, a
9 discussion of -- not of navigation only in the port
10 facility, but of the effect on the existing navigational
11 channel, and on ships travelling on the existing
12 navigational channel. It was very clearly, very clearly
13 part of the consideration that was given to this by
14 DNREC, by the Hearing Officer, and by the Secretary.

15 So with all of this, there's really simply
16 no way that DNREC can possibly argue that consideration
17 of the effect of the port's operation, including the
18 effect on the proposed turning basin was not a factor
19 that the Secretary was not required or that the Secretary
20 did not consider. There really could be no evidence more
21 relevant than the evidence regarding the proposed project
22 impact on navigation in the main channel of the Delaware
23 River and particularly the turning basin.

24 And with that I am going to turn it over

1 to Mr. Levine, who I think is going to address the
2 structures argument that Mr. Tweedie made.

3 MR. LEVINE: Yes, thank you, Ms. Schiller.
4 I'm not going to repeat anything that she so eloquently
5 discussed, but the theme that I detect through DNREC's
6 review of these issues -- and it actually comes through
7 in these oral arguments -- is segmentation. How can we
8 segment this project into such little morsels that no one
9 of which seems to impose much of an environmental
10 concern?

11 Hence, for the first time ever, I have
12 heard an argument that most of my pipeline clients would
13 be embarrassed to make, that you separate construction
14 from operation. I mean, that's something -- that is a
15 new theme that DNREC may be setting here. But much more
16 importantly, what we have heard over and over again is
17 how they don't really understand navigation as a concept
18 and how they look to other parties to try to inform them
19 on this. Their view, as Mr. Tweedie pointed out, is
20 moors and rowboats. The structure -- I would honestly
21 take the view that the turning basin is a structure, but
22 more importantly the port is a structure. That's what we
23 are talking about here is that there is an affirmative
24 obligation, a cornerstone of these regulations stated in

1 the most clear terms possible, structures shall not
2 interfere with navigation. It is as clear a statement as
3 you could possibly make in a regulatory program. It
4 contains those five letters that regulatory agencies hate
5 the most: S-H-A-L-L. They have no discretion on this.

6 So the fundamental first analysis here is
7 not, oh, gee, what little impacts will it have in the
8 immediate vicinity of the little timbers that make up the
9 Port, but rather what impact is the Port going to have on
10 navigation? And this Port is going to have a mega effect
11 on navigation. And the only way that DNREC can persuade
12 its way through this process is to minimize the role of
13 the turning basin and the port as it intersects with the
14 main navigation channel. This is the foundational
15 element of this port's construction is its ability to get
16 to and from that main navigation channel.

17 And it's own documents -- we are not
18 bringing in any experts to bring in new information that
19 isn't already on the record. They are going to look at
20 that record and tell the Secretary that he had no idea
21 what he was looking at and talking about, and that what
22 they did with the Coast Guard was nothing more than a
23 back-of-the-envelope informal consultation.

24 What this board needs to understand is

1 that when a regulatory agency contacts a federal agency
2 like the Coast Guard on navigational safety, this is a
3 highly formalized procedure. And Ms. Mensch's email
4 stressing that we have to get this permit out by
5 September, so you have got to give me an answer quick,
6 that undercuts the creditability of any form of analysis
7 on navigational safety or protocols that could be
8 associated with this project.

9 This is not about going above and beyond,
10 as Ms. Scott tries to depict it. This is the minimal
11 standard. What DNREC guarantees to the public is that
12 the structural support shall not interfere with
13 navigation. And there is nothing in this record that
14 supports that proposition. The MITAGS study, yes, I will
15 agree two ships passing in the night, that does not
16 interfere with navigation, but it is a very deliberately
17 truncated study that was designed just to look at a
18 couple of elements that wouldn't bring up these
19 controversies.

20 Instead, DNREC had a fundamental
21 obligation to examine the manner in which that turning
22 basin and the Port could have any deleterious affect on
23 any aspect of navigation. And the record is utterly
24 devoid. I have nothing to really present to experts so

1 that they could form a detailed analysis of this. The
2 record is as shallow as could possibly be on an issue as
3 deep as navigation.

4 So, again, what PhilaPort will propose to
5 do with its expert witnesses is not try to introduce new
6 evidence, but rather show that, for example, when
7 PhilaPort went through its process of developing the main
8 navigation channel and DNREC repeatedly challenged it and
9 brought it to court for failure to strictly follow
10 regulatory protocols, we will be able to show that, no,
11 what Ms. Magee is being brought in to show is that when
12 you consult with the Coast Guard, this is the
13 administrative process that the Coast Guard follows.

14 And what Ms. Mensch did and what DNREC did
15 was at best an informal off-the-cuff consultation of a
16 minor nature.

17 And what Mr. Harman will be able to
18 discuss is not new information that needs to be brought
19 out about the turning basin, but because there is
20 actually no statement in the record that makes this, he
21 is there to say, yes, the turning basin consumes the
22 entirety of the main navigation channel. Consequently,
23 how could anyone with a straight face say that the
24 structure of the Port, which interferes entirely with the

1 entire width of the main navigation channel, doesn't have
2 an impact on navigation?

3 I mean, you have to retreat into such a
4 narrow little corner to reach that, and that is what
5 DNREC has done here. All it can do is point to
6 generalized notions of moors and buoys. The truth is the
7 regulation should be better. They should be more robust
8 and they should have explained it a lot better than they
9 do.

10 But there's no case law, no guidance and
11 no other documentation that really helps us understand
12 how 4.8.4 should be interpreted. And it should strike me
13 that DNREC of all agencies should be seeking the most
14 conservative interpretation, the most protective
15 interpretation that looks to how best to protect and not
16 interfere with navigation. And its attempts to wriggle
17 off that hook by saying, well, the feds will look at that
18 too, or that will be another day. No, that doesn't fly
19 here. This is foundational. This is a Step 1, 101
20 issue, and we need it addressed.

21 We need the Board to hear the testimony as
22 to why the existing administrative record is wholly
23 deficient on the issue of navigational safety.

24 And with that, I will end my presentation.

1 MR. ROCKMAN: I will offer a couple of
2 quick arguments on behalf of Mr. Curran. I promise I can
3 be brief on this one.

4 Listening to the arguments so far and then
5 looking back at DNREC's motion, the request to bar
6 evidence sort of in advance regarding navigation is very
7 broad and really presents almost an abstract question as
8 to what evidence they are seeking to preclude. Given
9 even their brief recognizes that navigation is called out
10 in the subaqueous lands regulations, and as Ms. Schiller
11 demonstrated, it's all over the subaqueous lands
12 regulations.

13 So I think that really makes this motion
14 translate into something for a request that, to the
15 extent that there is some piece of information that's
16 introduced at the hearing that is determined at that
17 point in time to be unique to itself, irrelevant to the
18 proceedings, that the Board should bar it. But that's
19 the kind of discussion that should happen during the
20 hearing. Some kind of blanket order now barring this
21 information in the abstract seems wholly unwarranted
22 given the strong regulatory structure that required DNREC
23 to consider navigation.

24 I note that we did hear from DNREC a

1 little bit of the argument that there will be other
2 permits that deal with things that relate to the Port
3 operation, but certainly as important as maintenance
4 dredging is here to this project and to these appeals,
5 it's very much of a red herring in this context because
6 whether or not they have a maintenance dredging permit or
7 whatever it says has absolutely nothing whatsoever to do
8 with whether ships entering and exiting the Port are
9 going to block traffic. So when Mr. Curran in his
10 fishing boat tries to go by and can't because there's too
11 much congestion, and has to wait for -- we have no idea
12 how long. Is it 20 minutes, two hours, six hours, 12
13 hours, after dark in a thunderstorm because he got
14 caught?

15 You are going to render this entire
16 section of the river completely impassable to small
17 pleasure craft potentially. Although, there is certainly
18 no information on that in the record one way or the
19 other. But this issue persists regardless of some claim
20 that, oh, there is a maintenance dredging permit to come,
21 go talk to the Army Corps. This navigational issue,
22 whether it's navigation, commerce or recreation, as
23 spelled out in Section 4.6.3, for our appeal, they are
24 all sort of the same way of addressing the same concept

1 and concern.

2 So, overall, this is a real issue. It's
3 called out by the regulations. And any attempt to order
4 certain information non-specific as being outside the
5 scope of the hearing at this point in time is simply too
6 great an ask and probably an impossible task for the
7 Board, and therefore we request that the motion be
8 denied.

9 CHAIRPERSON HOLDEN: Mr. Horsey.

10 BOARD MEMBER HORSEY: I apologize, I just
11 lost power where I was at. I lost it when Mr. Rockman
12 started speaking. I just wanted to tell everybody that,
13 but I am now back on, the power is back on.

14 MR. ROCKMAN: It was entirely persuasive;
15 I'm sorry you missed it.

16 BOARD MEMBER HORSEY: I am sure it would
17 have been the highlight of my day.

18 CHAIRPERSON HOLDEN: Other arguments for
19 the parties?

20 (No response.)

21 Any questions from the Board?

22 BOARD MEMBER MULROONEY: I do have one
23 question for DNREC. Is it your contention that there
24 should be no information presented regarding navigation

1 at all, or is it limited to specific issues?

2 MR. TWEEDIE: Thank you for the question.

3 Our position is not that navigation should
4 not be addressed, but that it should be addressed within
5 the limited scope of what is in the regulations.
6 Obviously, parties, as you have heard today, have a very
7 different view of what that scope is. But, for example,
8 in DNREC's view, the large implications of interstate
9 traffic up and down the Delaware River that might or
10 might not be impacted by the turning basin are not
11 appropriately within the scope of those regulations. And
12 so that's our position.

13 There are aspects like 4.6.3 that
14 certainly do require DNREC to consider navigation, but
15 navigation in a much more discrete sense of navigation,
16 the navigational impact of the permitted subaqueous
17 lands. And here those permitted subaqueous lands are, as
18 in the project itself, are the 5.5 acres along the new
19 bulkhead and extending to the boundary of the federal
20 navigation channel, but not the federal navigation
21 channel. So that is our view of what should be
22 considered in terms of navigation.

23 DNREC did, in fact, and some of the
24 arguments felt a bit ironic there, because DNREC did go

1 to great lengths to try and reach out to the experts, who
2 were experts in navigation, and seek their impacts.
3 Those experts being the pilots association that deals
4 with boats in this river constantly and the U.S. Coast
5 Guard. So DNREC did not engage in some pro forma effort,
6 but went to get the input of those entities as part of
7 this process, to ensure that they had that input along
8 the way.

9 BOARD MEMBER MULROONEY: So I guess if
10 DNREC did their due diligence in terms of addressing the
11 main navigation channel and the impacts of this project
12 on that, why would you not want that information
13 presented at the hearing?

14 MR. TWEEDIE: Because, in our view, what
15 is the appropriate scope of the hearing is what is within
16 the scope of the regulations. In our view here, DNREC
17 went over and above what it would typically do for a
18 project under these regulations, but it shouldn't be sort
19 of punished for having gone over and above.

20 BOARD MEMBER MULROONEY: But it would have
21 been part of the decision making of the Secretary on this
22 particular application?

23 MR. TWEEDIE: Specific things like the
24 pilots association and the U.S. Coast Guard's input, yes,

1 not the sort of MITAGS report that was so divisively
2 referred to earlier. DNREC went to all these lengths to
3 try to address and understand navigation.

4 What we understand the Appellants wanting
5 to do is bring in all sorts of other issues. And we have
6 listed some of those in our written brief of the experts,
7 the additional witnesses and evidence that they seem to
8 be wanting to bring in that are over and above and
9 outside the scope of the issues as we see them and
10 outside the scope of what was on the record before the
11 Secretary.

12 BOARD MEMBER MULROONEY: Okay. Thank you.

13 CHAIRPERSON HOLDEN: Any other questions
14 from the Board?

15 BOARD MEMBER RIDDLE: This is Fran Riddle
16 again. This may just be a clarification that I need, but
17 my question is to DNREC. Which specific witnesses are
18 you thinking should be excluded with reference to
19 navigation issues?

20 MR. TWEEDIE: In our motion we list these,
21 we list the witnesses and the exhibits on pages 7 and 8
22 of our motion. Hopefully, they are clear there, but in
23 particular Captain Kichner, except insofar as his
24 comments are already on the record in the report that he

1 has submitted as part of the public comment process. But
2 then additional witnesses, mostly expert witnesses,
3 and/or party witnesses. So David Whene, Craig Jones,
4 Peter Inskeep, Charles Harman, Lisa McGee, and David
5 Cuff.

6 BOARD MEMBER RIDDLE: Okay. Thank you. I
7 see that now.

8 MS. SCHILLER: If I could respond briefly
9 to that specific list?

10 CHAIRPERSON HOLDEN: Please do.

11 MS. SCHILLER: So Peter Inskeep and David
12 Whene, they are witnesses that will also testify as to
13 the Port Operators' standing in this case.

14 And, again, we go back to Captain Kichner
15 and Mr. Jones, that it's very clear that their testimony
16 is in the record and goes to the broad issues of
17 navigation, and the documents that they relied on which
18 are also some of the -- I think two or three of the
19 exhibits listed. Again, I don't even know how to
20 emphasize even further that 7.5 requires the Secretary to
21 consider the degree to which the project represents an
22 encroachment on or otherwise interferes with public
23 lands, waterways or surrounding private interests.

24 That 8.40 provides that structures shall

1 not interfere with navigation, public or other rights.

2 That 9.2 requires that boat docks be
3 situated with consideration of the navigational channel.
4 The navigational channel, which is exactly what we are
5 talking about here.

6 And that 4.1.1 provides that the project
7 has to be designed to maintain the navigability of
8 channels. Every single one of these statutes, every
9 single one discusses navigability of channels, of the
10 channel in the water body, of the surrounding interests
11 in the water body. And the witnesses and the exhibits
12 that have been identified go to that. They are in the
13 record, and they should be admitted.

14 CHAIRPERSON HOLDEN: Thank you, Ms.
15 Schiller.

16 Are there any other questions?

17 MR. TWEEDIE: This is just one comment,
18 responding to one discrete thing that Ms. Schiller said.

19 DNREC is not contesting the standing for
20 any of the current Appellants. So I think we would
21 reserve our right to object as to relevance as to such
22 testimony that Ms. Schiller just referenced for her
23 client.

24 Thank you.

1 MS. SCHILLER: We appreciate that
2 acknowledgment. We do believe that we need to put on
3 some evidence of that for the record, so...

4 CHAIRPERSON HOLDEN: All right.
5 Mr. Tweedie, do you want to close up on this issue unless
6 there are any other questions from the Board?

7 MR. TWEEDIE: I think I have said
8 everything I need to and I don't need to take any more of
9 the Board's time today. We certainly thank you for all
10 the time. I think we have done our best to clarify as
11 best we can all of these issues. And we would, of
12 course, ask the Board to grant our motion.

13 Thank you.

14 CHAIRPERSON HOLDEN: Thank you, sir.

15 For the Board, is there a motion to move
16 to Executive Session?

17 BOARD MEMBER RIDDLE: So moved.

18 CHAIRPERSON HOLDEN: Second?

19 BOARD MEMBER HORSEY: Seconded.

20 CHAIRPERSON HOLDEN: All right. For the
21 Board here, let's take five and we will reconvene in
22 Executive Session.

23 To the parties, we will notify you as soon
24 as we have a potential time to resume and keep you posted

1 there.

2 MR. BURTON: Chairman Holden, sorry to
3 interrupt. Can I ask for a clarification on the Board's
4 prior ruling, specifically as it relates to our motion
5 regarding expert testimony? I believe the Board denied
6 the motion except testimony that complies with Rule 5.3.
7 As we go into prehearing briefing, I would like a little
8 more guidance as to what the Board meant by that ruling.

9 CHAIRPERSON HOLDEN: Well, let me take
10 that back to the Executive Session. I think Section 5.3
11 is plain. I expect it will be a discussion that we will
12 circle back to multiple times on the hearing on the
13 merits, but let me see if we can come back from Executive
14 Session with anything else for you.

15 MR. BURTON: Thank you.

16 CHAIRPERSON HOLDEN: Thank you. I will be
17 in touch shortly.

18 ALL COUNSEL: Thank you.

19 (The Board went into Executive Session
20 from 2:32 until 3:30 p.m.)

21 CHAIRPERSON HOLDEN: We have 3:30.

22 From the Board, are there any motions to
23 be heard?

24 BOARD MEMBER RIDDLE: Yes. Chairman

1 Holden, this is Fran Riddle.

2 CHAIRPERSON HOLDEN: Ms. Riddle.

3 BOARD MEMBER RIDDLE: I move that DSPC's
4 and DNREC's motions in limine to exclude evidence and
5 arguments related to the water quality certification and
6 DNREC's motion in limine related to the federal
7 consistency determination be granted.

8 CHAIRPERSON HOLDEN: Ms. Riddle, is there
9 a second?

10 BOARD MEMBER HORSEY: I second.

11 CHAIRPERSON HOLDEN: Any discussion on the
12 motion?

13 (No response.)

14 CHAIRPERSON HOLDEN: All right.

15 Mr. Mulrooney?

16 BOARD MEMBER MULROONEY: In favor.

17 CHAIRPERSON HOLDEN: Mr. Horsey?

18 BOARD MEMBER HORSEY: In favor.

19 CHAIRPERSON HOLDEN: Ms. Riddle?

20 BOARD MEMBER RIDDLE: In favor.

21 CHAIRPERSON HOLDEN. I vote in favor. The
22 motion carries.

23 Any other motions from the Board?

24 BOARD MEMBER HORSEY: Mr. Chairman.

1 CHAIRPERSON HOLDEN: Mr. Horsey.

2 BOARD MEMBER HORSEY: I move that DNREC'S
3 motion in limine to exclude evidence as to navigation and
4 DNREC's and DSPC's motions in limine to exclude evidence
5 that was not before the Secretary are denied, and such
6 evidence shall be allowed to the extent that the evidence
7 complies with the requirements of the Board Regulation
8 5.3.

9 CHAIRPERSON HOLDEN: Thank you,
10 Mr. Horsey. Is there a second?

11 BOARD MEMBER MULROONEY: I second.

12 CHAIRPERSON HOLDEN: Thank you, Mr.
13 Mulrooney.

14 Any discussion on the motion?

15 (No response.)

16 Ms. Riddle, how do you vote on the motion?

17 BOARD MEMBER RIDDLE: In favor.

18 CHAIRPERSON HOLDEN: Mr. Mulrooney?

19 BOARD MEMBER MULROONEY: In favor.

20 CHAIRPERSON HOLDEN: Mr. Horsey?

21 BOARD MEMBER HORSEY: In favor.

22 CHAIRPERSON HOLDEN: I vote in favor of
23 the motion. The motion carries.

24 So that's going to conclude today's

1 hearing.

2 Mr. Burton, I hope the motion helps clear
3 up your question from before. I think the language for
4 5.3 is rather plain.

5 So that the order has to be issued within
6 90 days. Further communication will run through Ms.
7 Janelle Sapp as we move towards a hearing on the merits.

8 Thank you all for your participation today
9 and have a good afternoon.

10 MS. SCHILLER: Chairman Holden, can I just
11 raise one issue? The discussion that we had this morning
12 was a little bit of a surprise to the Appellants
13 regarding the makeup of the Board. And now that we have
14 had these motions heard, and it does appear that there
15 will be evidence taken, I think the Appellants would like
16 to hear a little bit more about potential issues
17 regarding the constitution of the Board and the
18 continuance of the hearing, and in particular whether or
19 not it might be better to hold this hearing after the
20 Board is reconstituted because we really don't want to be
21 in a position where we have to redo evidence.

22 CHAIRPERSON HOLDEN: Ms. Schiller, I
23 understand those comments. And I think that probably is
24 best discussed amongst the parties post-Board. I am

1 reluctant to weigh in with a personal opinion here. I
2 think the parties can discuss that. I think it's a
3 pertinent thing to discuss here in the coming days,
4 right, as we can get the legal folks together to come to
5 an answer to the issue that you are raising.

6 MS. SCHILLER: Okay. We will address it
7 that way.

8 CHAIRPERSON HOLDEN: Thank you.

9 All right. Thank you all. Have a good
10 afternoon.

11 ALL COUNSEL: Thank you.

12 (The hearing concluded at 3:34 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 remote 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 19th day of September A.D. 2022.



Notary Public

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