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BEFORE THE ENVIRONMENTAL APPEALS BOARD
FOR THE STATE OF DELAWARE

* * * * *

IN RE: DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENT CONTROL VS. PHILADELPHIA REGIONAL PORT
AUTHORITY, et al.

APPEAL NO.'S: 2021-08/2021-09/2021-10

PUBLIC HEARING

* * * * *

BEFORE: DEAN HOLDEN, Chair
Robert Mulrooney, Member
Michael Horsey, Member
Deborah Wicks,, Member

HEARING: Tuesday, February 13, 2024
9:24 a.m.

LOCATION: Richardson Robbins Building
89 Kings Highway
Dover, DE 19901

WITNESSES: NONE

Reporter: Nicole DeHaven
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13 ALSO PRESENT:

14 Tanesha Perry, Board Administrator

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NONE OFFERED

P R O C E E D I N G S

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3 CHAIR:

4 The purpose of today's hearing the
5 consideration of Appeal 2021-08, 09 and 10, by
6 Greenwich Terminals, LLC, Gloucester Terminals, LLC,
7 GMT Realty LLC, Philadelphia Port - Regional Port
8 Authority and Mr. Walter Curran, respectively.

9 These Appeals challenge the September
10 30th, 2021 Order of DNREC's Secretary to approve a
11 permit allowing development of a port facility by
12 Appellee Diamond State Port Corporation in Edgemoor,
13 Delaware. Notice of today's hearing was posted on
14 the State of Delaware Secretary of State's Public
15 Meeting Calendar and at the Richardson Robbins
16 Building at 89 Kings Highway, Dover, which is the
17 location of this hearing.

18 In addition, public notice of this
19 hearing was published in the News Journal and State
20 News. Delaware Environmental Appeals Board is a
21 quasi-judicial body created by the General Assembly
22 to hear appeals on the decisions of the Secretary.
23 The way the Board fulfills its duties and
24 responsibilities, including conducting hearings is
25 established and governed by Delaware by the Delaware

1 Code Board Regulations and case law.

2 I will now introduce the Board
3 Members and Board Staff. My name is Dean Holden,
4 Chairperson of the Board. Other Board Members
5 participating in this hearing --- constitute a quorum
6 pursuant to 7 Del. Code C6007. Mr. Robert Mulrooney,
7 Michael Horsey, Deborah Wicks. I would also like to
8 introduce the Board's Assistant Deputy Attorney
9 General Zach Naylor and the Board's Administrative
10 Assistant, Tanesha Perry.

11 The Appellants and Appellees are
12 represented by counsel at today's proceedings. I ask
13 that Counsel take this opportunity to introduce
14 themselves to the Board and for the record.

15 At this time if we can just run through
16 --- it's almost asking for a kind of a roll call for
17 the record to get everybody that's here and who is
18 present.

19 ATTORNEY WEAVER:

20 Happy to do so, Chairperson Holden,
21 ladies and gentlemen of the Environmental Appeals
22 Board. Good morning. My name is Thaddeus Weaver. I
23 am the Delaware Counsel for Appellants, Greenwich
24 Terminals, LLC, Gloucester Terminals, LLC and GMT
25 Realty, LLC, and I'm with the Firm of Dilworth

1 Paxson. I'm pleased to introduce my Co-Counsel from
2 the Firm of Manko, Gold, Katcher and Fox, Jill
3 Kaplan, Shoshana Schiller and Steve Daly. Ms. Kaplan
4 and Ms. Schiller are admitted Pro Hac Vice. Mr. Daly
5 is a Member of our Delaware Bar, and he will be
6 presenting on behalf of the port operator Appellants.
7 Thank you.

8 ATTORNEY RUSHDAN:

9 Good morning Chairman Holden, Members
10 of the Board Wali Rushdan and on behalf of Diamond
11 State Port Corporation with the Firm Barnes and
12 Thornburg, LLP. With me this morning is my Co-
13 Counsel, Mr. William Burton. We look forward to
14 presenting to you this morning.

15 ATTORNEY POLESKY:

16 Good morning, Board. Joelle Polesky,
17 Stradley Ronon on behalf of Philadelphia Regional
18 Port Authority. I have with me, my colleague, Andrew
19 Levine, who will be addressing the Board today. He
20 is admitted Pro Hac Vice.

21 ATTORNEY SKJOLDAL:

22 Good morning, my name is Michelle
23 Skjoldal. I'm a Member of the Delaware Bar with the
24 Firm Eckert Seamans, here representing Mr. Walter
25 Curran. With me today is my colleague, David

1 Rockman, he's admitted Pro Hac and we are ---. Thank
2 you.

3 ATTORNEY SCOTT:

4 Good morning, Chair Holden, Members of
5 the Board. My name is Deborah Scott. I'm the Deputy
6 Attorney General with the Department of Justice and I
7 represent Department of Natural Resources and
8 Environmental Control, DNREC. With me here today is
9 my colleague, Jameson Tweedie. Mr. Tweedie and I
10 will be splitting DNREC's argument and also one our
11 newest members of our team, Matthew --- is also here
12 with us today.

13 CHAIR:

14 Thank you. Today, each side will be
15 afforded two hours and 15 minutes to make their
16 presentations. Today will break down as follows.
17 Counsel will make their opening presentation first,
18 but also reserve 25 minutes of your total time for
19 rebuttal.

20 We expect to take a 15 minute break
21 around 10:15. We may take other breaks if necessary.
22 Upon conclusion of the Appellant's opening
23 presentation, we will break for lunch about 12:30.
24 At 12:30, we will resume the Appellee's presentation.
25 We will take a 15-minute break from 2:00 to 2:15.

1 Appellees will conclude their presentation by 3:00.
2 Appellants will have until 3:25 for rebuttal.
3 Thereafter, the Board expects to deliberate in
4 Executive Session pursuant to 7 Del. Code C6008(a),
5 and we expect the day to be concluded around 4:30
6 p.m.

7 Pursuant to 7 Del. Code C6017, the
8 Board may verbally announce the decision to conclude
9 the hearing. A written decisions shall be mailed to
10 the parties by certified mail within 90 days after
11 the conclusion of the hearing. And with that, the
12 Appellants will proceed.

13 ATTORNEY DALY:

14 Thank you. Good morning, Members of
15 the Board. My name is Stephen Daly and I represent
16 the Port Operators on this Appeal, Gloucester
17 Terminals LLC, Greenwich Terminals, LLC and GMT
18 Realty. There's ancient legal doctrine known as the
19 Public Trust Doctrine. It's this idea that there are
20 certain resources that exist for the benefit of the
21 public. Resources like shoreline, water bodies. The
22 lands that meet the waters of its subaqueous lands,
23 and it's the government's responsibility to hold
24 these resources in trust for the public so that the
25 public may engage in things like recreation, commerce

1 and navigation.

2 This is an old but an enduring concept.
3 In the Subaqueous Lands act, the General Assembly
4 placed the responsibility for upholding the Public
5 Trust Doctrine in the hands of the DNREC Secretary.
6 Section 7201 of the Act, the first provision, it
7 empowers the Secretary to deal with public subaqueous
8 lands in order to protect the public interests.

9 I mentioned the Public Trust Doctrine
10 because this is a case about trust. It's about the
11 agency, DNREC, entrusted with protecting the public's
12 interests in subaqueous lands and the public's uses
13 of the state's waters for commerce and navigation.
14 And it's about how that trust was broken when the
15 DNREC Secretary issued the Subaqueous Lands Act
16 Permit to Diamond State Port Corporation.

17 Up against a permitting deadline,
18 DNREC's Secretary placed its blind trust in a
19 conclusion reached by federal agency without getting
20 information about the project's impact to navigation,
21 that both a former staff person identified as
22 missing, as well as a former member of the CASA Coast
23 Guard. The Secretary ultimately failed to consider
24 how the project would impact and impair the uses of
25 state's waters for navigation encounters in three

1 critical ways and I'm going to put them here on the
2 screen.

3 The first, there was no evaluation of
4 emergency planning and procedures. The second, there
5 was no evaluation of the project's turning basin and
6 other shipping traffic in the river. And then
7 finally there was no evaluation of the dredging
8 operations for this project and its impact on
9 navigation specifically.

10 If the Secretary's decision is upheld,
11 it will have long-term ramifications for this section
12 of the river near the project. My clients who
13 operate ports north of the proposed project, they
14 depend on free and unimpeded movement of ships and
15 essential goods across the state's waters, but each
16 of the considerations that the Secretary failed to
17 consider, these three things. They threatened to
18 limit the uses of the state's waters and in the worst
19 case, cut off my client's access.

20 To the people of this state, if the
21 Secretary's decision is upheld, it means that if and
22 when something goes wrong due to this project, and
23 there are a number of emergency scenarios that could
24 unfold, none of which have been evaluated. If and
25 when something goes wrong, DNREC won't have a single

1 answer as to why and how and whether such an
2 emergency could have been prevented.

3 Now I'd like to proceed as follows
4 this morning. First I'd like to go over some
5 information about the projects, particularly focusing
6 on impacts to navigation. Then second, I'm going to
7 talk briefly about the law. Then third, and finally,
8 we're going to dig into the evidence for the Board.

9 Diamond State's proposed project,
10 Diamond State Port Corporation proposes a new
11 container port and turning basin along the Delaware
12 River in Edgemoor in New Castle County. The project
13 is identified here on this map in the red trapezoid,
14 identified as project area in this section of the
15 river. Diamond State proposes to excavate three
16 million cubic yards of sediment from the bottom of a
17 river. After initial construction, Diamond State's
18 own consultants estimate that up to 500,000 cubic
19 yards of sediment will need to be dredged in this
20 area on annual basis, indefinitely for the life of
21 the project. Now that's a massive and historic
22 undertaking. And those aren't my words. That's
23 DNREC's Counsel's words.

24 The project is one of the largest, if
25 not the largest project that has ever been reviewed

1 for impact to subaqueous lands in this State. Now
2 what's the point of all this dredging in the Delaware
3 River? It's to allow really large ships, container
4 vessels, come into the repropoed port. Diamond
5 State's Port, which is along the shoreline there, is
6 designed to accommodate two, 12,000 TVU vessels.
7 Now, TVU is a standard way of measuring ship capacity
8 for these large ships. 12,000 TVUs ship is 1200 feet
9 long, 1200 feet. So that's four football fields, end
10 over end, over end, over end. These ships are
11 massive. Vessel traffic in this section of the river
12 is expected to increase by 55 percent according to
13 Diamond State's own estimates, and most of it
14 consisting of these really large container vessels.

15 Next, I want to direct your attention
16 to the green vertical line in the map. This is the
17 main navigation channel of the Delaware River. These
18 large container ships cannot travel just anywhere
19 they want in the Delaware river, but they need to
20 follow this one road that goes through north and
21 south through the Delaware River. This is the only
22 path for deep draft vessels. It's heavily-traveled
23 by large commercial vessels, according to Diamond
24 State's own consultants.

25 It's also narrow in this section of the

1 river. Also, that's a quote from Diamond State.
2 This part of the river is only 800 feet wide. The
3 main navigation channel is only 800 feet. Elsewhere
4 in the river, it's a thousand feet or more. Also, I
5 want to direct your attention to that yellow area
6 that's identified as Cherry Island Flats. That's a
7 shallow area over which large vessels cannot travel
8 and, in fact, could potentially run aground.

9 Finally, I want to direct your
10 attention to the red circle. The red circle is the
11 proposed turning basin for this project. Really
12 large ships take an incredible amount of coordination
13 to turn in a tight area so they don't run aground.
14 It can --- it involve multiple tugs to assist and it
15 can take up to an hour for one of these ships to
16 turn. You'll see too that this proposed turning
17 basin occupies the entire main navigation channel.
18 While a ship is turning in this turning basin, no
19 other ship will be able to pass.

20 This is an unusual design feature.
21 Industry and regulatory standards caution against
22 placing a turning basin so that it occupies the
23 entire main channel in a heavily-trafficked thoroughfare
24 like this, it's similar to placing a loading zone in
25 the middle of a highway.

1 Now, in March 2020, Diamond State
2 submitted its permit application to DNREC for a
3 Subaqueous Lands Act Permit and federal consistency
4 determination. In support of its application,
5 Diamond State submitted a navigation study. The
6 navigation study was prepared by the Maritime
7 Institute of Technology and Graduate Studies. The
8 study is called the MITAG Study, as I'll refer to it.

9 The study's stated objective was to
10 demonstrate that the terminal will have minimal
11 adverse impact on vessels transiting inbound and
12 outbound on the Delaware, meaning other ship transit,
13 but the study was not designed for this purpose. The
14 study was only a preliminary study. The study used
15 29 preselected simulations, all of which were
16 performed in clear visibility. Twenty-three (23) of
17 the simulations involved a single vessel coming
18 inbound or outbound from the port without any other
19 traffic on the river.

20 Here's an example of one of the runs
21 from the study. This is run 29. You can see here is
22 a single vessel and it shows a pathway of a vessel,
23 but of course, it's simulation. It came from the
24 south inbound and then came up and then the pathway
25 of the vessel went through the turning basin and then

1 attempted to berth along the dock.

2 So the vast majority of runs in the
3 study were a single ship coming into the proposed
4 port. The other handful of simulations involved
5 whether two ships could pass one another near the
6 proposed project, essentially where there are two
7 cars driving in opposite directions on a two-lane
8 highway can pass one another. None of the
9 simulations involved a ship turning in the turning
10 basin with other traffic in the river.

11 Now, let me put this into perspective.
12 Imagine someone was designing a new warehouse
13 facility and needed to perform a traffic study. If
14 it was designed like the MITAG Study, that would
15 involve whether a single tractor trailer could drive
16 in from the road without any traffic, drive through
17 the parking lot without any traffic, and then back up
18 against the dock. That's not a traffic study.
19 That's a parking study.

20 Finally, underscoring the preliminary
21 nature of the study, the MITAG Study referenced
22 future simulations that will be performed to complete
23 the study. Birthing procedures, tug power required
24 and emergency procedures will be developed in future
25 simulation studies. The MITAG Study was included

1 with Diamond State's Permit Application that was made
2 available.

3 As I mentioned at the start, my clients
4 own and operate ports north of the project in New
5 Jersey and Pennsylvania. The main navigation channel
6 is the only road to and from the proposed facilities
7 on the river. Upon reviewing this preliminary
8 navigation study, my clients were concerned about
9 potential impacts of this project on navigation in
10 the river, particularly the proposed turning base in
11 the helicopter, to impede traffic on the river. They
12 therefore retained Captain J.J. Kichner, a subject
13 matter expert in navigation and commercial vessel
14 safety, to perform an independent evaluation of the
15 MITAG Study.

16 Captain Kichner has 50 years of
17 experience in port and commercial vessel safety. He
18 has 30 years that he spent with the Coast Guard,
19 where he was a captain of the Coast Guard and Captain
20 of the port of Sector Mobile Bay. Since retiring
21 from the Coast Guard, Captain Kichner has specialized
22 for two decades in risk management from marine
23 projects. He has extensive experience reviewing and
24 evaluating simulation studies exactly like the MITAG
25 studies for water bodies across the United States and

1 the globe.

2 Captain Kichner's comments on the
3 project were summarized in a nine-page report that
4 was provided to DNREC during the public comment
5 period. Captain Kichner expressed grave concern over
6 the preliminary nature of the MITAG study in light of
7 the critical location of this project and its unique
8 design features, like, the proposed turning basin.

9 If there were a ship casualty in this
10 section of the river, according to Captain Kichner,
11 an emergency, like a ship collision, a ship losing
12 power, or a ship running around Cherry Island Flats,
13 that would put lives, property, and the environment
14 in danger. Worse, a major marine casualty in this
15 section of the river would likely shut down ---
16 preventing the flow of essential goods throughout the
17 Northeastern United States. Such incidents are not
18 merely hypothetical.

19 In 2021, a container vessel was
20 grounded in the Suez Canal and blocked the Suez Canal
21 for six days. It created an international firestorm
22 and prevented the transit of over 300 vessels.
23 Closer to home, in 2022, another container vessel was
24 grounded in the Chesapeake Bay for over a month. In
25 Captain Kichner's view, given the serious

1 consequences of a ship emergency occurring in this
2 part of the river, the MITAG study needed to be
3 completed for the project's impact navigation to be
4 adequately assessed. At a minimum, at an absolute
5 minimum, the future simulations referenced in the
6 MITAG Study, they needed to be performed.

7 Captain Kichner was not alone in
8 thinking this. One of DNREC's key witnesses in this
9 case is former DNREC employee Laura Mensch. Ms.
10 Mensch had been a DNREC employee for just six months
11 when Denmark received Diamond State's Permit
12 Application for this project. Ms. Mensch, at the
13 time, held the title of principal planner in the
14 Division of Climate, Coastal and Energy. She was
15 primarily responsible, along with staff in the
16 Division of Water, for reviewing Diamond State's
17 Permit Application. In her role as principal
18 planner, she needed to consult with others on a range
19 of subjects relevant to DNREC's consideration of this
20 project, including navigational safety.

21 Now, Ms. Mensch is not an expert on
22 navigation. She doesn't purport to be, but she had
23 reviewed Diamond State's Permit Applications and she
24 knew that information was missing about the project's
25 impacts to navigation. She agreed with Captain

1 Kichner that the MITAG Report was incomplete. In her
2 Affidavit submitted in this Appeal, she references
3 the fact that the MITAG study referenced that
4 berthing procedures, tug power required and emergency
5 procedures will be developed in future simulations.

6 She admits, however, in her Affidavit
7 that no follow-up information was submitted by DNREC
8 associates as Diamond State's console regarding the
9 future simulations referenced in the MITAG's Report.
10 That's on page 11 of her Affidavit. In fact, after
11 the public comment period closed, Ms. Mensch sent an
12 email to Duffield, Diamond State's Consultant,
13 specifically requesting this information, but they
14 didn't provide it.

15 While the MITAG study had stated that
16 emergency procedures will be developed in future
17 simulations, Diamond State now backtracked. Instead
18 of providing reference studies, they provided this
19 memorandum, and you see it says, Discussion on
20 Navigation. But instead, this memorandum was merely
21 a list of reasons why Diamond State was not going to
22 do the promised studies.

23 of providing reference studies they provided this
24 memorandum and you see it says discussion on
25 navigation. But instead this memorandum was merely a

1 list of reasons why Diamond State was not going to do
2 promised studies. Chief among this list of reasons
3 was that the port operators who had submitted public
4 comments that they operated competing ports on
5 Delaware River and so their concerns about navigation
6 should be disregarded. I'm sure that the --- we're
7 going to hear later on today, but it's not a valid
8 response to the legitimate concerns phrased in
9 Captain Kichner's Report about the navigational
10 impacts of this project.

11 Now, attached to this list of reasons
12 why Diamond State was not going to provide the
13 information was this letter from the President of the
14 local Delaware River and Bay Pilots Association,
15 David Cuff. Now, Mr. Cuff was himself a participant
16 in the MITAG Study. The letter expressed support for
17 the MITAG Study, but had nothing else.

18 Now, to Ms. Mensch's credit, to her
19 credit, she was not satisfied by this non-response
20 from Diamond State's consul. Nor, was she satisfied
21 by Mr. Cuff's letter and so she continued to look for
22 answers. On April 13, 2021, DNREC's Laura Mensch
23 reached out to the United States Coast Guard via
24 email, and I'm going to bring up this email. This
25 email is critical for these appeals.

1 This email is critical because it gives
2 us an intimate view of what DNREC was thinking and
3 the concerns it had about Diamond State's proposed
4 project, and it highlights the information that Ms.
5 Mensch sought to obtain from the Coast Guard. Ms.
6 Mensch reached out to the Coast Guard for three
7 reasons. First, DNREC had reviewed the MITAG Study
8 and knew that it was missing information and analysis
9 about emergency procedures. Her email said exactly
10 that. We felt the submission and MITAG Study lacked
11 information and analysis addressing emergency
12 procedures.

13 Ms. Mensch also raised other concerns.
14 She referenced the fact that public commenters like
15 the port operators that raised concerns about the
16 project's turning basin, and finally, she wanted to
17 know if that Duffield navigation memo that I brought
18 up on the screen, whether that addressed any of the
19 concerns, or if DNREC needed to obtain more
20 information.

21 Now, months passed after Ms. Mensch
22 sent this email to the Coast Guard and she heard
23 nothing. Five months later, on September 1st, 2021,
24 still having not received any material response from
25 the Coast Guard, Ms. Mensch followed up. Now, she

1 was facing a deadline, and I'm going to quote from
2 her email, the state permitting deadline has now been
3 set for the end of September. So if there is a need
4 for input from the Applicant, I would want to
5 initiate that conversation with them as soon as
6 possible.

7 A week later, September 8th, Ms. Mensch
8 still hasn't received a material from the Coast Guard
9 and she follows up again, stressing again, the
10 pressure she's under to complete her permitting
11 review. I am checking in to see if you happen to
12 hear from your command. I do apologize for reaching
13 out again so soon, but I've been asked to finalize
14 our determination on our project review and this is
15 one final outstanding piece.

16 Well, on September 17th, 2021, the
17 Coast Guard finally provided its response. In a one-
18 sentence email, the Coast Guard responded, Ms.
19 Mensch, after review of the documents you have
20 provided, Sector Delaware Bay does not see this
21 project posing a risk to safe navigation. Two weeks
22 later, on September 30th, 2021, the permit was issued
23 exactly in line with state permit in Denmark that Ms.
24 Mensch had referenced in her emails.

25 Now, before we dig into the Secretary's

1 Decision in this case, I want to talk a bit more
2 about the law. The Subaqueous Lands Act is unique
3 compared to some of the other statutes that DNREC has
4 commenced. It's not strictly about preventing the
5 environmental degradation of subaqueous land. Its
6 purposes are broader. The express purpose of the
7 statute is to protect against uses or changes of
8 subaqueous lands that may impair the public interest
9 and the use of tidal or non-tidal waters. That
10 language is really critical in the provision of the
11 statute, so I'm going to read it again. That may
12 impair the public interest and the use of tidal or
13 non-tidal waters.

14 In other words, it's about protecting
15 all of the various ways in which the state's waters
16 are used, whether it be recreation or aesthetics,
17 navigation or commerce, what have you. DNREC's
18 regulations describe how this is supposed to be done.
19 The Act and Regulation take a precautionary approach
20 before any permit issued, DNREC must consider the
21 potential impact of that proposed activity on the
22 public interest in their various uses of the state's
23 waters.

24 Section 4.6 of DNREC's Regulation, this
25 is the beating heart of this public interest

1 analysis. Section 4.6 states DNREC shall consider
2 the public interest in any proposed activity which
3 might affect use of subaqueous land. And section
4 4.63, that talks about those uses I just mentioned,
5 and DNREC needs to consider the potential effect on
6 the public with respect to commerce, navigation,
7 recreation and so on.

8 Here are all of the different uses of
9 subaqueous lands, and again, it's DNREC's job to
10 account for each of them and to prevent such uses
11 from being impaired. It's important to also
12 underscore that navigation is not some ancillary use
13 of the state's waters. The regulations include
14 additional considerations specifically geared to
15 protecting this important use of the state's waters.

16 One of those is right here. I put up
17 on the screen, Section 4.7.51. The Department shall
18 also consider the degree to which the project
19 represents an encroachment on or otherwise interferes
20 with public lands, waterways, or surrounding private
21 interests. Dredging projects have their own special
22 requirements when it comes to navigability.

23 Activities involving dredging shall be designed to
24 meet the following objectives. Maintain the
25 navigability of channels.

1 When he issued the permit for this
2 project in considering the project's impacts to
3 navigation, the Secretary did not reference any of
4 these regulations I just showed on the screen, nor
5 did the Hearing Officer. This is different than how
6 the Secretary has handled other recent Subaqueous
7 Lands Act approvals that involved navigational
8 safety. Last year, the Secretary issued an order
9 approving a small family marina on Herring Creek in
10 Sussex County.

11 There, public comments were --- raised
12 concerns about navigational safety. I'm going to
13 quote how the Secretary dealt with those concerns.
14 There in that decision and responding to these
15 concerns, the Secretary stated that Section 4.63 has
16 looked at, that section demands consideration ---
17 demands consideration of the potential effect on the
18 public with respect to commerce, navigation and so
19 on.

20 He went on in his order to reference
21 the Public Trust Doctrine that I alluded to at the
22 start. He said, the State of Delaware is charged
23 with upholding the Public Trust Doctrine. This has
24 been used historically to protect the public's rights
25 to fishing, commerce, navigation and so on. Yet for

1 Diamond State's project, no mention of Section 4.63
2 and what it demands, no mention of the Public Trust
3 Doctrine. One would think that a massive historic
4 project like Diamond State's project would receive
5 more scrutiny when it comes to considering the public
6 interest in navigation and commerce than a small
7 marina on Herring Creek, and yet, it received less.

8 Critical considerations related to
9 navigation were simply missing from the Secretary's
10 order and the Hearing Officer's Report. Ms. Mensch's
11 concern about the lack of information and analysis
12 regarding emergency procedures, gone. No mention of
13 that whatsoever. Instead, the Hearing Officer merely
14 dismissed emergency scenarios, calling them non-
15 typical.

16 Emergencies by their very nature are
17 non-typical. Let's say you were building a large
18 office complex. A non-typical situation for an
19 office complex is a fire, but that doesn't obviate
20 the need for smoke alarms, sprinklers, fire
21 evacuation planning and the practicing of fire
22 drills. Further, the Hearing Officer made no mention
23 of other concerns raised by Captain Kichner in his
24 Report, primarily relating to the everyday operation
25 of the proposed turning basin.

1 Similar to airline schedules, port
2 operations on the Delaware River are highly sequenced
3 and scheduled, often planned months in advance, and
4 these large vessels that use --- channel can only
5 travel at certain times of day during high tides.
6 That's language that comes from Diamond State's
7 brief. That's unrefuted. In this carefully-
8 calibrated system, any slowdown can have a cascading
9 effect on the entire system.

10 The turning basin threatens all of
11 that. It takes a large container vessel like this,
12 moving in the main channel, miles --- stop, and no
13 ship, as I mentioned before, can use the main channel
14 while the turning basin is turning ship.

15 The Secretary's Order also makes no
16 mention of the extensive dredging operations and its
17 impacts to navigation. Recall that this project
18 requires an extraordinary amount of dredging, both to
19 construct the port, as well as to maintain it.
20 Dredging is like a floating construction zone out in
21 the river, according to a safety alert issued by the
22 Army Corps of Engineers. Captain Kichner's Affidavit
23 agrees. Similar to highway construction projects,
24 dredging operations cause slowdowns. They increase
25 the risk of serious accidents or collisions, and they

1 also potentially limit the available width of the
2 main channel where the dredging is occurring. But
3 none of this is addressed by either Secretary or the
4 Hearing Officer.

5 In fact, DNREC admits that it did not
6 consider any potential effects from the project's
7 anticipated maintenance dredging for this project,
8 navigation or otherwise. Rather than consider these
9 three areas, emergencies, the turning basin and
10 dredging, the Secretary and Hearing Officer
11 ultimately relied on three pieces of evidence; the
12 MITAG Study, which we looked at. The Letter from
13 David Cuff of the Pilot's Association and the United
14 States Coast Guard email.

15 Before we look closer at those three
16 pieces of evidence, I want to discuss the Board's
17 task in this case. The issue before this Board is
18 whether the Secretary's decision was supported by the
19 evidence. What does that standard mean? Supported
20 by the evidence? In past decisions, the Board has
21 said that Secretary's decision is not supported by
22 the evidence when decision was arbitrary or
23 capricious, that means unreasonable or in disregard
24 to facts and circumstances in the case.

25 Under this standard, how the Secretary

1 reached his decision is as important as the decision
2 itself. Critical to this inquiry is, did the
3 Secretary show his work? It's like checking a
4 student's math homework. If the Secretary said the
5 number is ten, can the Board see how the Secretary
6 added two plus four plus four? Does it all add up?
7 In their briefs, DNREC and Diamond State a different
8 standard, one that's actually more deferential than
9 the Secretary, but the one that they cite is the one
10 that courts apply when they're reviewing agency
11 decisions.

12 The Board is itself an agency, operates
13 under a different standard, and the Board need only
14 look at its prior decisions to see what standard they
15 cite as the incorrect one. But here's the single-
16 most important thing about the standard of review.
17 No matter whether the Board applies the standard that
18 we cite or the one that DNREC and Diamond State cite
19 in their briefs, it shouldn't matter. The
20 Secretary's decision cannot be upheld under either
21 standard. No reasonable person would have reached
22 the same conclusion as the Secretary on this factual
23 record.

24 So why do I say that? Let's turn to
25 the three pieces of evidence that the Secretary

1 relied on. The MITAG Study, the Letter from David
2 Cuff of the Pilot's Association and the United States
3 Coast Guard Email Let's start with the MITAG Study.
4 I said before that the MITAG study was a preliminary
5 study. You don't need to take my word for it because
6 that's a word that was expressly used in the study
7 itself. The study said this was a preliminary study,
8 but we knew that already. Berthing procedures,
9 emergency procedures were promised in future
10 simulation studies.

11 Further, all the tests, all these
12 simulations were performed in clear visibility. Also
13 recall that this port is designed to accommodate two
14 12,000 TVU vessels, or four football field-sized
15 ship. While the MITAG Study, it focused most of the
16 study simulations on a smaller vessel, just 9300
17 TVUs. That's a three football-sized (sic) ship.
18 You're missing an entire football field. The study
19 only provided preliminary feedback regarding the
20 feasibility of the largest ships planned for this
21 facility, even though the port was specifically
22 designed to accommodate these varied vessels.

23 One second. Bear with me. We'll get
24 to this in a moment. All right.

25 Okay.

1 Here we go. The MITAG Study was
2 limited in its scope. That's, again not my phrase.
3 That comes directly from page 36 of Diamond State's
4 brief where Diamond State admits that the MITAG Study
5 was limited in its scope. This was a parking study.
6 This was not a traffic study. It only looked at
7 whether an inbound ship or an outbound ship can
8 transit in and out of the proposed port area. There
9 were no runs simulating the impact of the proposed
10 turning basin on other shipping traffic in the river.

11 Next. We haven't talked about this one
12 yet. The MITAG Study included recommendations from
13 the pilots who participated in the study. The pilots
14 recommended certain environmental limitation should
15 apply to ports that come to this port for safer
16 transit. Specifically, that no transit should occur
17 when winds are greater than 20 knots. The Coast
18 Guard has said that 20-knot winds are not uncommon in
19 this area. The study also said that for all inbound
20 transits, they need to be limited to high tide when
21 the waters are highest. For these really large
22 container ships.

23 Now, in relying on the report's
24 conclusions, neither the Secretary nor the Hearing
25 Officer referenced this limitation on the study's

1 conclusions. At this point, it's not clear whether
2 or how these conditions are going to be implemented,
3 if at all. And if they are implemented, we don't
4 know how these limitations might impact other traffic
5 on the river. While this is catching up, I will ---.

6 So after each of the 29 runs, the
7 pilots who participated in the study would evaluate
8 each of those runs on a scale of one to ten, with one
9 being the least safe and ten being the most safe.

10 You might think that for a preliminary study
11 involving only preselected runs, the average scores
12 across all runs would probably be relatively high;
13 nine or eight? No. The average score, 5.4 out of
14 ten. 5.4 out of ten, with ten being the most safe.
15 Imagine that newspaper headline. 5.4 out of ten is a
16 failing grade in grade school. This is not a social
17 studies quiz. This is the design of a major
18 infrastructure project along the Delaware River, but
19 it actually gets worse.

20 Recall that the MITAG Study wanted to
21 provide preliminary feedback on those largest
22 vessels, the four football field-size ships. Well,
23 for these runs, the safety score was actually worse.
24 It was just 4.0 out of 10. 4.0 out of 10. That is
25 less safe than not. And again, these were not

1 complicated scenarios. It was, can I park my ship at
2 the dock? Again, you see here, including the number
3 of runs involving that four football-size ship, the
4 average score, safety score, by these pilots who
5 participated in the actual study; 4.0 out of ten.

6 Now, let's turn to the Letter from
7 David Cuff of the Pilot's Association. You'll recall
8 that this Letter was attached to that Duffield
9 Memorandum on navigation, and it listed --- and in
10 his Letter, Mr. Cuff expressed his support for the
11 conclusion reached by the MITAG Study, which,
12 interestingly, he participated in the MITAG Study.
13 His letter should have been afforded no weight.

14 First of all, we know what the pilots
15 who participated in the study thought about the
16 safeness of this facility. Mr. Cuff, after the fact,
17 post hoc representations after the fact do not change
18 that. How far after the fact? Well, that raises an
19 interesting question, because we have no idea. This
20 letter is undated. The record doesn't have any
21 information about when this letter was written. Now,
22 why does that matter? We have no information as to
23 when --- what information was made available to Mr.
24 Cuff. Did he have access to the public comments?
25 Did he have access to the port operator's comments

1 and Captain Kichner's Report? We don't know. All we
2 know is that his letter was prepared sometime after
3 the MITAG Study in 2018 and when it was provided to
4 DNREC in 2021.

5 Next, Mr. Cuff's Letter merely parrots
6 the MITAG Study's conclusion that the project would
7 have minimal impact on ships as they transit the
8 existing navigation channel. But again, the MITAG
9 Study is not really designed for this purpose and Mr.
10 Cuff has nothing new reciting the Study's
11 conclusions. The one new thing that this letter does
12 add, the one new thing, it's wrong about. The letter
13 states that the ship simulation, the MITAG Study
14 represented the typical ship traffic on the river.
15 That is demonstrably wrong. The MITAG Study itself
16 stated that the navigation channel handles a variety
17 of different classes of vessels and different sizes
18 of ships, including oil tankers. This is from the
19 MITAG Study. Oil tankers, container ships up to
20 14,000 TVUs. That's even bigger than the four
21 football field --- field-sized ships I mentioned
22 before, and barges, tugs, et cetera. The simulation
23 itself only looked at two container ships, two sizes
24 at that. DNREC cannot rely on Mr. Cuff for
25 conclusion that we know is incorrect.

1 Let's turn to the United States Coast
2 Guard Email. There we go. Recall that Ms. Mensch
3 was not satisfied by those two pieces of evidence we
4 just looked at, the MITAG Study and the Pilot's
5 Letter. She knew she needed more information, so she
6 reached out from the United States Coast Guard, and
7 unfortunately, the Coast Guard did not provide the
8 answers to her questions.

9 First of all, this Email is a single
10 sentence. There are actually no attachments to this
11 email. There's no report. There's nothing. This is
12 it; a single sentence in an email. It also includes
13 no explanation or analysis. Now, I pulled up on the
14 screen Ms. Mensch's critical Email from April 2021,
15 when she reached out to the Coast Guard because this
16 email, as I said before, indicates what she was
17 interested in hearing from the Coast Guard. She
18 wanted to know about the MITAG's lack of information
19 and lack of information on emergencies. She had
20 concerns about the public commenters who raised
21 issues with turning basin. And then finally, she
22 wanted to know whether more information was needed
23 from the Applicant that signed the Duffield
24 Navigation Memo.

25 The Coast Guard did not provide answers

1 to any of these particular inquiries. They merely
2 provided the blanket signoff. DNREC could have
3 sought clarification on these points, but they
4 didn't.

5 There's another problem with this Coast
6 Guard Email. I mentioned before that Ms. Mensch
7 sought input from the Coast Guard on the Duffield
8 navigation memo. We looked at that earlier today.
9 There's one problem. Ms. Mensch attached the wrong
10 document to her email that she sent to the Coast
11 Guard. She sent the wrong document to the Coast
12 Guard. You'll see the document that she attached to
13 her Email was about mitigation. She sent the wrong
14 Duffield Memorandum. This Memo that she sent to them
15 was about the environmental impacts of the project.
16 It has nothing to do whatsoever with navigation.

17 Now, you might think that Ms. mensch
18 caught this error, and a few days later, fixed it.
19 No. In fact, several months later, in August, Ms.
20 Mensch sent the same attachments, again, attaching
21 the wrong document. And here's the kicker. The
22 Coast Guard never said anything about it. Even
23 though Ms. Mensch sent the wrong attachment, sent
24 twice, if you want a second opinion from a doctor
25 about an x-ray, and instead of sending the x-ray, you

1 send a copy of your tax return, you would expect,
2 hope that your doctor would catch that and say, whoa,
3 I think you sent me the wrong document. What am I
4 even supposed to be looking at? If not, what is your
5 doctor even giving you a second opinion on?

6 Now, what do all three of these pieces
7 of evidence have in common? Well, none of them
8 include any evaluation of emergency procedures, and
9 we knew that. The MITAG Study didn't that
10 information and Ms. Mensch knew that. She --- the
11 Pilot's Letter didn't include anything about
12 emergency procedures. And the Coast Guard, in a one-
13 sentence email, provided no other information about
14 that either. They also include no evaluation of the
15 turning basin on other shipping traffic. The MITAG
16 Study didn't look for the turning basin's impact on
17 other ships in the river and the Pilot's and their
18 one-page letter from the Coast Guard didn't add
19 anything to that as well.

20 And finally, there was no evaluation in
21 any of the documents of the dredging operations
22 impact to navigation. This is the primary activity
23 authorized by this Permit. The Secretary did not
24 consider in his decision, this obvious impact of the
25 proposed project.

1 So let's return where we started, and
2 that's trust. DNREC and Diamond State are also only
3 asking this Board to blindly reach the conclusions
4 reached by the Pilot's Association and the Coast
5 Guard, same as the Secretary had. There's no
6 analysis of theirs to follow. There's no report to
7 see how they arrived at their conclusions. They
8 didn't show their work, and so neither did the
9 Secretary.

10 And so we're asked to accept the
11 conclusions of the Pilot's Association, Mr. Cuff, and
12 the United States Coast Guard, simply because those
13 conclusions came from their letterhead. Such trust
14 is simply not justified, not on this record, not
15 where there is credible, detailed expert testimony
16 from Captain Kichner, himself a former member of the
17 Coast Guard, stating that more evaluation is needed
18 for a project this size and scope and in this
19 location.

20 Such trust is not just a ---. Second,
21 where DNREC's own staff, Laura Mensch, knew that
22 information analysis was missing about the project's
23 impacts to navigation. Information that was once
24 promise, but never delivered, and such trust is not
25 justified. Three, for the magnitude of potential

1 harm from a ship --- occurring in this part of the
2 river is potentially catastrophic, and the likelihood
3 of such an event occurring has not been evaluated.

4 Against all of this, for the Secretary
5 to simply trust or hope that the Pilot's, and the
6 Coast Guard probably have this under control, that's
7 not reasonable decision making, not for an agency
8 entrusted with upholding and protecting the public's
9 interest in subaqueous lands and the uses of the
10 state's waters. But now, in this Appeal, that trust
11 falls with its independent Board.

12 There's still time to get this right.
13 Let's complete the navigational analysis for this
14 port. Let's really understand how the project would
15 impact this section of a river. And based on that,
16 let's decide what, if anything, needs to be done to
17 protect safe and unintended use of the state's water.

18 I'd be pleased to answer any questions
19 the Board may have.

20 BOARD MEMBER:

21 I'm a little confused. Which
22 regulatory agency has responsibility for the traffic
23 on the Delaware River?

24 ATTORNEY DALY:

25 so the actual movement of ships, the

1 Coast Guard regulates the movement of those ships.
2 It's important to keep in perspective what the role
3 is of the Subaqueous Land Act. As I mentioned
4 before, it's about protecting against uses that
5 impair the state's waters. Right? And so DNREC, in
6 controlling subaqueous lands, from all the way in
7 this section of the river, from the Delaware line to
8 the New Jersey side, all that's subaqueous lands.
9 Delaware essentially owns that part of the Delaware
10 River. And so Delaware has a really critical
11 interest in making sure that these waters are safe
12 and used ---. This is the sovereign interest of the
13 state. And so the Subaqueous Lands Act gives DNREC
14 essentially a way to weigh-in on these projects
15 before they're authorized in case there are any
16 impacts to navigation.

17 BOARD MEMBER:

18 Because you have the imports upstream,
19 obviously, located in several different states. So
20 that channel serving basically multiple state's
21 interests on through there. So --- from on a day-to-
22 day basis, is it the Coast Guard that is determining
23 how that traffic is managed on that river?

24 ATTORNEY DALY:

25 So the actual day-to-day management of

1 the traffic is the responsibility of the Pilots, in
2 coordination with the Coast Guard. And it's not just
3 the Local Pilot's Association. There are actually
4 Federal Pilots, but the point being that neither of
5 those entities, though, kind of do this precautionary
6 look like DNREC does at the outset with the
7 Subaqueous Lands Act. Like, should we move forward
8 with this? Are we comfortable with this? Coast
9 Guard doesn't actually have an approval that needed
10 to be obtained for this project. Like, the Coast
11 Guard is regulating this activity as it's unfolding,
12 but DNREC has this opportunity at the outset to say,
13 is everything kosher for the State of Delaware from
14 the uses of the state's water?

15 BOARD MEMBER:

16 So the Coast Guard's not involved with
17 the approval of the construction activities along the
18 river that impact the channel?

19 ATTORNEY DALY:

20 That's correct. There's no indication
21 that the Coast Guard has subsequent approval that
22 needs to be obtained for this project to move
23 forward.

24 BOARD MEMBER:

25 So you mentioned the one-sentence

1 response they've provided. What information, I
2 guess, would you be looking for the Coast Guard
3 respond in this situation?

4 ATTORNEY DALY:

5 I think that's a really good question
6 and I think, frankly, I'm going to give you the most
7 lawyerly answer you've ever heard and saying, it
8 depends. So DNREC specifically asks about three
9 different things, emergency procedures, about impacts
10 of the turning basin, as well as input on that
11 Duffield navigation number. We didn't get that from
12 the Coast Guard.

13 So at a bare minimum, I would want to
14 see the Coast Guard respond to those particular
15 concerns that DNREC had. And we also have no idea,
16 we have no idea how the Coast Guard concluded that
17 this project was safe. What were they considering?
18 And looking at some of the email traffic between
19 DNREC and the Coast Guard, DNREC sent some documents
20 showing, like, how far the project was from the
21 navigation channel.

22 So it seemed like --- I'm really just
23 speculating with that because we don't know, that the
24 Coast Guard was looking a lot at setback criteria.
25 We don't know ---. There's no mention in those

1 emails about emergency procedures for the turning
2 basin. So I don't even know if the Coast Guard even
3 looked at that.

4 BOARD MEMBER:

5 But I guess would they typically
6 provide some sort of study that they would do
7 internally in these situations or --- or what more
8 that they would be questioning the information that
9 was provided?

10 ATTORNEY DALY:

11 Frankly, I'm not sure the answer. I
12 mean, I think if the Coast Guard performed a full
13 analysis, that would absolutely be something everyone
14 would want to see. And if not, if it was kind of
15 more of an ad hoc review, I think that's really
16 critical to understanding how much of it you're to be
17 relying on that conclusion.

18 BOARD MEMBER:

19 Okay.

20 Thank you.

21 BOARD MEMBER:

22 I think to me, the point that your
23 argument sits upon is did the Secretary consider,
24 right, when --- get back to well, what's a good ---
25 the Secretary to consider ---? The record includes

1 correspondence with the Coast Guard, discussion of
2 the MITAG Study, correspondence from the Pilot's
3 Association, how do you link a statement that the
4 Secretary didn't consider when the record seems to
5 indicate that there was a fair amount of interaction
6 with those agencies around this topic?

7 ATTORNEY DALY:

8 That's a good question. And to me it's
9 that considering impacts to navigation needed to
10 include consideration of these three things. Like,
11 these were three critical aspects of a project, one
12 of which DNREC itself had identified as a concern
13 about impact to navigation. So when the Secretary
14 says he considered impact to navigation, we have to
15 look at what he means by that, and we have to look at
16 what we expect him to mean by that. And so he needed
17 to consider, in considering the effects of
18 navigation, these three aspects to understand at all
19 how this process would impact navigation on the
20 Delaware River.

21 BOARD MEMBER:

22 Thank you.

23 ATTORNEY LEVINE:

24 Members of the Panel and of the
25 audience, my name is Andrew Levine, and along with

1 Joelle Polesky from Stradley Ronon, we are
2 representing Philaport, the Philadelphia Regional
3 Port Authority.

4 I really want to start off with a
5 general comment about depiction of Philaport to this
6 entire proceeding as some sort of evil empire trying
7 to guard its proprietary interests upstream and
8 allowing no downstream development. I just want to
9 state at the outset, we have worked with the Port of
10 Wilmington for generations. We're on the same
11 maritime exchange. We share the same pilots. All
12 Philaport wanted were some basic answers to some
13 basic questions. Mr. Daly really spelled it out, and
14 I'm extremely dedicated to not repeating his
15 presentation, nut I will touch on some of the issues
16 here, because I believe, in part, Philaport's
17 position is no different than your neighbor's
18 position.

19 If you were putting up a fence, if you
20 were modifying your driveway, I'd just want to make
21 sure it's not going to screw up my property. That's
22 all Philaport wants. You can do anything you want to
23 the Port. You can have Hello Kitty-style port; we
24 don't care. All we care is that our ships gets to go
25 past so we can honor our contracts, our schedules,

1 our safety protocols and we can keep revenue flowing
2 into Philadelphia.

3 One of the points here is, and I'm
4 sorry, it does have to be mentioned, Philadelphia
5 paid for this. Philaport paid the non-federal share
6 of this main navigation channel. Forgive us for
7 having a little bit of an ownership interest-attitude
8 about it, but again, it's a willingness to share. We
9 know we don't control traffic on the Delaware from
10 its inception all the way up to the end of the
11 Delaware River in Northeastern Pennsylvania. It's
12 our goal to make sure that ships get to our facility
13 in an unimpeded manner and that this port not
14 interfere with our business. That's it. That's the
15 premise.

16 We aren't interested in your
17 methodologies and sampling. We run a port too. We
18 have some interest in your dredging. We want to know
19 how it, in fact, affects port traffic. But not in as
20 much detail as others. Because again, we run a port
21 too. We know the challenges, the technical issues.
22 We know how tough it is to deal with all of the
23 different variables that come into designing a new
24 port. We're in the process of doing south port
25 ourselves. So we're very well aware of all of the

1 challenges.

2 What bothers Philaport here is we don't
3 feel that there's equal treatment among the parties.
4 We feel we are held to a much stricter standard. And
5 that what Mr. Daly's presentation presents it, yes,
6 some checklists were superficially checked, but the
7 moment you peel down a layer, you find it's just
8 vacuous. And I think --- let me make sure this
9 works.

10 One of the heroes of our story, and I
11 really do feel she got short shrined in this whole
12 process is Laura Mensch. And I believe in this
13 process she was, used the term, a mensch. She was a
14 person that was really on a quest, really trying to
15 find the right information. And there's only so much
16 you can expect of Laura Mensch in a critical analysis
17 of the information.

18 At a certain point, and honestly, in
19 response to some of the questions that were just
20 posed, the Secretary has an independent obligation to
21 take a look and not just see that check marks were
22 checked, but actually asked why. That's the
23 repeating light motif in this. Nobody's asking the
24 questions why or because. All we need are simple
25 explanations.

1 So this is Philaport's big concern. We
2 don't want the turning basin to interfere with our
3 business. Operate your port. Do as you wish with
4 your port. Don't screw us up. And your regs (sic)
5 say structures cannot interfere with navigation,
6 public or otherwise. That's a very, very strict
7 standard. It's a shall.

8 Shall is not an evaluative process.
9 Shall is, yes or no? Do you interfere? Do you not
10 interfere? Do you have an impact? Do you not have
11 an impact? Not maximal or minimal. It's is there
12 any and I know it's a strict standard and people
13 don't really like it, but I'm sorry, the Delaware
14 Supreme Court's been pretty damn strict on this point
15 and has said that when it says shall, we, shall, even
16 if you believe you have a better idea, and Lord knows
17 when it comes to a legislature, we all have better
18 ideas, but you need to get the legislature to change
19 the law, or change - or the DNREC to change the regs,
20 but the language stays as it is.

21 You know, and just touching base on the
22 Hearing Officer's Report, again, touching base with
23 what Mr. Daly discussed, and not wishing to go into
24 greater detail, it's a census. And so the question
25 came up, did we expect to see a report? Yes. Yes we

1 expected to see a report. The Coast Guard has
2 something called the NAVCEN, the Navigational Center
3 that analyzes port requests for ship traffic
4 analysis. There is a full-fledged U.S. Coast Guard
5 process that could have been invoked here.

6 We would have had detailed analysis and
7 you know what it probably would have done? Shut me
8 up. That's the whole thing. All you had to do was
9 perform some simple tests and you know what Philaport
10 would have done? Shut up. Because we have the same
11 operations that you do. We have the same mode of
12 business. We know your business. You know our
13 business. You have our chief engineer. You have our
14 general counsel. We share personnel. We don't want
15 to get in the way of your business. We just don't
16 want you getting in the way of ours, and so we had
17 some very simple, basic questions that could have
18 been answered years ago, if not months ago. And
19 that's why civil court is here today taking this
20 position.

21 It doesn't have a stance against
22 Delaware. It doesn't have a stance against the Port
23 of Wilmington. It's just concerned for a lot of the
24 reasons Mr. Daly just said there could be critical
25 delays in that ship traffic that dramatically impair

1 our ability to do business at our ports. I mean,
2 several of them. So this is the turning basin and
3 again, it's the same picture, but what's critical is
4 just understanding it's the entire main navigation
5 channel. We're putting vessels that are about 1,200
6 to 1,400 feet long into a 1,700-foot turning basin.
7 So there's not much wiggle room, folks. And that is,
8 as Mr. Daly points out, that is our sole role.

9 Now, over the course of the last eight
10 years, it has been meticulously dredged from the
11 mouth of Delaware all the way up to Philaport. It's
12 been done with the Army Corps and Philaport paid the
13 non-federal shares, New Jersey and Delaware didn't.
14 It doesn't mean they're forbidden to use it. It's
15 just a statement that you can understand why we have
16 a particular interest in making sure that we get
17 upriver. We paid \$144,000,000. We want to make our
18 money back.

19 So the Hearing Officer, when she took a
20 look at this, Ms. Vest, and I've dealt with Ms. Vest
21 many times. We dealt with the entire Bloom Energy
22 Air re-permitting and all of that. She refers to the
23 port as a proposed structure. This proposed
24 structure has certain attributes. We have comments
25 in favor of the proposed structure and comments

1 against the proposed structure.

2 The idea is that the port, in its
3 entirety is a structure. We can hyper parse words if
4 we want. Is this square inch a structure? Is that
5 square into structure? I think the Hearing Officer
6 has it right. The whole darn thing is one big
7 structure. And there is a definition of structure.
8 It's incredibly meandering and far wheeling, but the
9 one thing it is doesn't define is a port. It defines
10 a marina, which is sort of a mini-mini port, but it
11 doesn't take the time to develop a port, it's
12 definition.

13 So I've taken the port facility
14 definitions from the transportation regs. You'll see
15 the port facility really includes everything. And
16 then I've taken the definition of the Port of
17 Wilmington from the DSPC's formation regulation. And
18 you can see it includes structure facilities. That
19 includes everything. No one tries to hyper-parse
20 these facilities when you're trying to evaluate
21 safety and when you're trying to figure out how we
22 can make sure that vessels can go upriver without
23 being --- without interference. And the term
24 structure itself is a flexible term. It means
25 construction. I mean, that comes right out of DNREC

1 regs. And it's correct. And that's what we have
2 here. That is exactly how the Court describes the
3 development of a channel, such as the turning basin.

4 It is construction of a new navigation
5 channel. It is an ascertainable stationary location
6 on land and water. We know where this turning basin
7 is? We know the dimensions of the turning basin. We
8 know how it will be dredged out. We know how it will
9 be maintained. It is an object. It is a structure.
10 It is something that can impair traffic going
11 upriver. And that's one of the concerns we had about
12 the MITAG study from the start.

13 It was never designed to rule out
14 interference. From the start, it accepted the
15 premise that minimal impact is okay. That's all
16 we're looking at. I'm looking at a standard, shall
17 not interfere. MITAG is saying, well, let's be
18 creative and not interfere much. So that from the
19 start was a misalignment. But again, as Mr. Daly
20 pointed out, and as others will, this was a
21 preliminary study. It was meant as a first stab.

22 It's actually very good for what it
23 does, which is set the stage for what really needs to
24 be studied so that we could have a safely-operated
25 port. And then it was supposed to look for best at

1 9300 TVUs. We'll note that's 9,300 shipping
2 containers. And then take a look, maybe 12,000
3 container ships can enter here as well.

4 So I do apologize for the typo, but one
5 is demonstrate minimal impact. Second is, shall not
6 interfere. Two very different standards. And then,
7 you know, Mr. Daly went into some of the MITAG. You
8 know, when you look at all of the runs in total,
9 here's your 12,000 TVU runs. It barely tested in the
10 context of so many runs with the 9,300 over and over
11 again and then they stick in a few here. And we're
12 supposed to feel deeply comforted that now it has
13 been ruled out that there are safety concerns
14 associated with 12,000 TVU vessels, and this does not
15 stand for that proposition at all.

16 Mr. Daly went into safety ratings.
17 That should be a bit shocking. And again, the
18 concept was that the MITAG Study would have future
19 simulations. This was meant to be step one. My
20 understanding is that, in fact, some subsequent MITAG
21 studies may have occurred that involved Captain Cuff
22 and the like. That could have been done upfront.
23 That's all we needed was the information upfront so
24 we knew what the impact would be so that you wouldn't
25 have this concern 25 miles up the river. But the

1 Port of Wilmington, in its various reports will state
2 the fact that we exist. We have a port 12 miles
3 upriver. We have a port 25 miles upriver, but never
4 really takes into account the impact that they could
5 have on either of those nearby ports.

6 And then the technical response memo,
7 and I do want to be sort of tough on this memo. This
8 was a hatchet job memo. This was not a substantive
9 technical response to legitimate technical issues
10 raised by experts from very reputable institutions.
11 This was; don't listen to these people. They're in
12 competition against you. So they're all liars. But
13 I'm sorry, that's not how it is. We have a right to
14 know what's happening downriver from us when, one, we
15 pay for it, and two, it could materially impact our
16 business.

17 If a ship can't make it up, if a ship
18 is delayed because of Wilmington's failure to
19 properly analyze safety protocols, that's going to
20 have a ripple effect on us. Then we're going to
21 start getting calls. Why should we use your port if
22 we're going to encounter problems downriver? We can
23 just go to New York or Baltimore. Thanks.

24 And that's the concern that Philaport
25 has, is that something could happen at Wilmington

1 that impacts our business. And so over and over
2 again, we simply asked, do a few more studies. Tell
3 us what's going to happen if there's an emergency.
4 Tell us what's going to happen if the ship loses
5 steam in the speed in the middle of a turn? It has
6 happened and it has had impacts on river traffic. So
7 we just wanted the answer.

8 Go back to MITAGS. You had months,
9 month and months, if not years to do it. And you
10 know, this kind of comment --- commentators make
11 false claims of interference. That's just nefarious
12 in terms of how a consultant is supposed to respond
13 to legitimate criticisms. What they could have said
14 is we do have to take into account we're in
15 competitive position. I don't mind that, but to
16 claim false claims and that's a document that is to
17 be reviewed by the Secretary? That is outrageous
18 that a technical consultant would actually take that
19 form of accusation in a document that is an official
20 record. We may have a disagreement, but don't tell
21 me my claims are false. You may disagree. You may
22 have a different point of view, but we are not liars.

23 So I believe that our concerns are
24 perfectly legitimate. These are various statements
25 that are taken out of this report. The one that I

1 considered the most important is the sudden rejection
2 of the MITAG recommendations. Here you had MITAG,
3 which is, we'll all agree, an official organization
4 that does these model studies and they had specific
5 recommendations. Where does Duffield get off
6 dismissing them without an explanation? There may
7 have been an excellent explanation. There may have
8 been very good reasons to do this. We'll never know
9 them, not based on the written record, and that's all
10 the Secretary had in front of them.

11 You know, and then to categorize it.
12 To characterize the entire effort by Philaport, the
13 port operators and Walter Curran, it's just people
14 that are competing port facilities who don't give
15 this any weight or any deference, but highly insulted
16 in an administrative process. What we deserved were
17 simple answers to straightforward questions and we
18 didn't get them. What we got instead was a steadily
19 building wall of defense. We're right, we're right.
20 Leave us alone. We've met the minimum standards that
21 should squeeze us by.

22 And so in a sense, we just do not
23 believe that it is legitimate for them, for DNREC to
24 have decided not to move forward with the subsequent
25 tests that were specifically recommended by MITAG.

1 That these tests were so critical, and they really
2 are the critical ---.

3 We know that Mr. Cuff will do an
4 excellent job no matter what challenge he's given.
5 He sits on our Board. We know how good he is. It
6 isn't a question of will they be able to figure out a
7 way to get vessels into this port? It's whether or
8 not there's been an official --- an adequate
9 examination of the factors that people like Mr. Cuff
10 would have to take into account in determining how
11 best to maneuver. So using his statement that we
12 think we can get ships in safely, that's just a
13 statement of his job that we all know he can probably
14 do. Is it optimum? Is it demonstrably safe? No.

15 All we have is the one sentence from
16 the Coast Guard that is really the only statement in
17 the entire record from a federal agency that says
18 they don't see a safety issue. And you would expect
19 to see an entire administrative record underlying
20 that conclusion.

21 The Coast Guard performs detailed
22 studies of navigational safety. This was a one-off
23 comment. It's hard to determine the context. Was it
24 meant by Cook (sic) to simply start a dialogue? What
25 really comes across, and it's unfortunate because I

1 can only imagine the horror of the moment when Ms.
2 Mensch realized she had twice sent the wrong
3 attachment and suddenly was under a time crunch. And
4 then miraculously, that email comes back that says,
5 we don't see a problem. No analysis.

6 All Philaport is asking for here is a
7 because; we don't see a problem, because; we don't
8 see a diffuse, because. and the record is just
9 devoid of all of that. So this isn't us trying to
10 shut down the Port of Wilmington. This isn't us bill
11 of court trying to say there should be no Edgemoor
12 and that you have no rights to this channel. It's
13 just we have to share the channel. You have an
14 obligation to demonstrate to us you're not going to
15 interfere. Your own regs say it and it didn't do it.

16 That's our presentation. We're happy
17 to take any comments that you may have or any
18 questions.

19 BOARD MEMBER:

20 When there's activities, you know,
21 leadership activities that cause issue, who steps in?
22 Who's the traffic cop? Who says, you're doing
23 something wrong, or you can't do that?

24 ATTORNEY LEVINE:

25 So just to sort of elaborate a little

1 on a point made. So the Coast Guard will study and
2 Set the general protocols for a harbor or a port, but
3 it is in conjunction with the pilots who then have to
4 administer it, and they are an expert at that. So,
5 yes, that's who administers it. So if you're asking,
6 gee, should you ask a pilot if this is a safe boat?
7 Impart the dialogue? Absolutely. We just don't
8 have a fully developed record. That's my concern.

9 Can I answer any other questions?

10 Well, then I thank you very much.

11 BOARD MEMBER:

12 Thank you. So it's 10:40 now. We'll
13 take a quick break and reconvene at 10:50.

14 ---

15 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

16 ---

17 ATTORNEY ROCKMAN:

18 Good morning to the Board. I'm David
19 Rockman on behalf of Appellant, Walter Curran. I'm
20 here to ---. Unlike the other two Appeals, Mr.
21 Curran has a primary focus beyond the navigational
22 problems created by the port, although those are
23 important here, too, but in that respect, I'm going
24 to rely on the preceding presentations and not
25 attempt to repeat any of the material that's already

1 been covered.

2 The issue that really concerns Mr.
3 Curran is the broad impacts of the fourth project on
4 the protected interests of recreation, fishing, and
5 enjoyment of natural resources. Mr. Curran's Appeal
6 also raises the question of whether adequate
7 mitigation was considered and imposed. As the Board
8 is likely aware, it is Mr. Curran's position that
9 DNREC did not follow or comply with the subaqueous
10 lands regulations.

11 UNKNOWN SPEAKER:

12 I'm sorry. There's this thing back
13 here. Can you speak up a little bit?

14 ATTORNEY ROCKMAN:

15 Sure.

16 UNKNOWN SPEAKER:

17 Thank you.

18 ATTORNEY ROCKMAN:

19 As the Board is likely aware, it's Mr.
20 Curran's position that DNREC did not follow or comply
21 with its subaqueous lands regulations. I'll refer to
22 those as the SAL Regulations because subaqueous is a
23 bit of a tongue twister when you got to say it a lot.

24 Recreation, fishing, and enjoyment of
25 natural resources are all protected by the SAL

1 regulations. My argument here today will identify
2 the specific DNREC regulations for SAL permits that
3 require consideration of recreation, fishing, and
4 employment protection of natural resources, as well
5 as those that require mitigation of harms and impacts
6 to be addressed.

7 I will review the Affidavit testimony
8 provided to the Board, including information
9 regarding the methodologies used by and on behalf of
10 many government agencies to evaluate recreational
11 impacts. It will be immediately apparent that DNREC
12 used no such methodology.

13 Overall, as the day continues, you will
14 later hear from Diamond State and DNREC, and I expect
15 that they will talk to you about their view that the
16 port project is an important project, a valuable
17 project, an expensive project, and that they had many
18 meetings, discussions and other efforts and
19 furtherance of the port project.

20 However, while all of that may be true,
21 it's also entirely beside the point. The efforts
22 that Diamond State and DNREC describe in their
23 papers, and presumably here today, are the expected
24 minimum starting point for a massive, complicated
25 project like the port. None of it excuses the

1 failure to follow the regulations.

2 Who is Walter Curran? Walter Curran is
3 a Delaware resident with a deep and abiding interest
4 in the Delaware River and the recreational
5 opportunities that it provides. He has used the
6 affected sections of the river for recreation for
7 decades. Mr. Curran is also someone with a lifetime
8 of experience in the port and shipping industry in
9 both the public and private sector, including as
10 Deputy Director of the Maryland Port Administration.
11 His set of experiences gives him a unique perspective
12 and awareness of the expected impacts from the port
13 project and motivated him to take action to both
14 submit comments on the project and then later to file
15 this Appeal.

16 At this point in the morning, the Board
17 is certainly familiar with the port project and some
18 of the details. I would like, however, to put up for
19 you, this is an excerpt from the front page of the
20 Permit issued by the Secretary, and to highlight two
21 items here. First, said bullets covers what is
22 authorized by the permit. In this third bullet here,
23 it talks about the loss of 5.5 acres of subaqueous
24 land, and that's the portion of the subaqueous lands
25 that are going to be filled in during the port

1 project. And as we go through and we'll talk about
2 the information that Diamond State has submitted. You
3 might think that was the full entirety of the port
4 project and its effect on subaqueous lands, but
5 that's not true, because here, when you get to the
6 next bullet, it talks about the dredging that's going
7 to be conducted for port construction and the removal
8 of about 33 -- sorry, 3.3 million cubic yards of
9 material elsewhere in the application. It's clear
10 that the footprint of that dredging operation for
11 port construction is going to cover about 87 acres.

12 So before we really get going, let's
13 take a step back and look at the SAL regulations and
14 how they apply to recreation, fishing, and protection
15 of natural resources. It's easy perhaps to initially
16 think, wow, we've got this massive economic project
17 and we've got this guy up here complaining about
18 recreation. Fine. Recreation is fun, sort of
19 inherent in the name, but isn't that a little bit
20 frivolous or superficial? And my answer to you is,
21 even while I acknowledge that might be the initial
22 reaction, when you look at the Delaware regulations,
23 you'll see that it is actually elevated and given an
24 important status, co-equal with that of commerce and
25 navigation.

1 So within the 7 Delaware Code Section
2 7504, which are the SAL regulations, we have several
3 subsections that guide us in this Appeal. Subsection
4 4.6 says mandatory language; the Department shall
5 consider the public interest in any proposed activity
6 which might affect the use of subaqueous lands.
7 Those considerations include commerce and navigation.
8 We looked at this regulation earlier, talking about
9 commerce and navigation, but also on co-equal status
10 recreation, aesthetic enjoyment, natural resources
11 and other uses of the subaqueous land.

12 Continuing on, the next section, 4.7
13 also said the department shall consider the impact on
14 the environment, including but not limited to, and
15 then we have a whole number of subsections, the
16 relevant ones are on this slide, but that's any
17 effect on shellfishing, finfishing or other
18 recreational activities. Also any harm to aquatic or
19 tidal vegetation, benthic organisms, or other flora
20 and fauna in their habitats. And then as well, any
21 impairment of air quality, either temporary or
22 permanent, including noise, odors and hazardous
23 chemicals. Additionally, the Code goes on and it
24 comes back to the topic of fishing. So the
25 department has to consider the effect of the project

1 or any adverse effect on shellfish beds or finfish
2 activity.

3 So collectively, this set of
4 regulations shows that recreation is predetermined by
5 the state to be a valuable resource that needs
6 protection. It is not a frivolous concern. It is
7 enshrined in the regulatory code. It's something
8 that the Department has to take account of. The code
9 doesn't tell them with specificity how and when. But
10 as we'll see, and as I'll try to articulate for you,
11 they so completely missed this point that the
12 Secretary's decision is insufficient and should be
13 overturned.

14 At counterpoint in the regulations is
15 question of mitigation. So several additional
16 provisions that deal with mitigation. The Code says
17 an application may be denied if the activity could
18 cause harm to the environment, which cannot be
19 mitigated sufficiently. Similarly, subsection 4.2.
20 --- okay, the slides are lagging a little.

21 There's section 4.6.7 which states,
22 given the inability for avoidance or alternatives to
23 the loss of subaqueous lands, the extent to which any
24 applicant can employ mitigation measures to offset
25 any losses incurred by the public, another mitigation

1 requirement. So collectively, the regulations spell
2 out both a clear interest in protecting regulation
3 and in requiring mitigation, or at least considering
4 the ability and potential for there to be mitigation
5 where possible.

6 Well, with that regulatory backdrop and
7 now that our slides are working again, I'd like to
8 next turn to the question of what information is
9 before the Board to consider the claims put forward
10 by Mr. Curran and the defenses offered by Diamond
11 State and DNREC. Let's talk first of all about some
12 of the key administrative documents that you have
13 before you.

14 First, we have the project drawings.
15 This is just the cover slide of the approved project
16 drawings. And then we have from within those
17 approved drawings, what was labeled as the conceptual
18 site plan. I know we've seen similar drawings
19 already, but we've got here, you know, this is where
20 the port is going to be constructed. This is the
21 river. That's the land up there. This heavy black
22 outlined area, that's the 87 acres of dredging.

23 It's darn hard to read because this is
24 blown up, but right here, that says subaqueous fill.

25 And if you look at the set of drawings, you'll see

1 that the fill area is sort of here (indicating). You
2 know, sort of in what Diamond State elsewhere calls
3 an intertidal beach area. So right on the edge of
4 the land in the water, that's where the 5.5 acres of
5 fill are going to be relative then to the 87 acres of
6 dredging, which extend from the land all the way up
7 to the main navigation channel talked about earlier
8 here today.

9 So we've got that to sort of set the
10 stage and the setting. We also have, importantly,
11 the environmental assessment technical document,
12 which was a Diamond State submission that covered a
13 lot of ground about technical aspects of the port
14 project. This gives us a better picture. Just the
15 dredging area, the 87 acres, as it relates to the
16 main navigation channel and the land.

17 Now, the environmental assessment
18 technical document also addressed very, very briefly
19 the question of recreational facilities affected by
20 the project. And it says recreational facilities
21 within the port project are associated with pleasure,
22 boating and fishing. And it also notes that use,
23 recreational use of the project site has been limited
24 to transient passage of recreational boaters.

25 We don't disagree with this. That is

1 exactly how Mr. Curran uses this area as he boats
2 with his friends, you know, going fishing or going
3 boating up and down the river in this section, he
4 will pass by the port. The problem is this really
5 hard to do during port construction and during port
6 operation.

7 We also have potentially in the record,
8 although it wasn't in the chronology submitted by
9 DNREC. So a little question about whether this is
10 truly part of the record., but there's this March
11 1st, 2021 Duffield Associates Memo attached as
12 Exhibit G to Diamond State's brief, and that talks
13 about --- it finds one of the regulations that I
14 walked you through before about the effect on
15 recreation and it says the following, in the
16 highlighted area here. As an intertidal beach with
17 limited access, the areas being filled do not support
18 recreational or commercial fishing activities or
19 recreational activities.

20 Interesting thing here is the focus on
21 the intertidal beach area. This is the commentary
22 restricted to those 5.5 acres that are going to be
23 filled. not that 87 acres of dredging that fills the
24 land to the main navigation channel where
25 recreational boaters on the Delaware side would need

1 to transit.

2 And then next, among our key
3 administrative documents, we have the Hearing
4 Officer's Report of course. Now, the Hearing
5 Officer's Report, as with the Secretary's Order
6 itself, is essentially silent on recreation. It just
7 doesn't come up. The closest the Hearing Officer
8 gets is the response to public comments, and there
9 were public comments about protection of recreational
10 fishing. And so what the Hearing Officer' Report
11 says okay for recreational fishing.

12 Here's our response. Well, to protect
13 endangered sturgeon, we're going to prohibit working
14 in the water, no, in water work, from March 15
15 through June 30th. So it talks a little bit about
16 protecting the endangered fish. It talks nothing
17 about recreation. There's no attention here to the
18 fishermen or how they go about their activity of
19 fishing. There's merely this offhand comment about
20 protecting the sturgeon. So it is not really a
21 responsive comment. It doesn't really address the
22 issue of recreation or recreational fishing. It goes
23 sort of sideways on that issue. An important point,
24 nonetheless, for the protection of the endangered
25 sturgeon, but it misses our concern entirely of the

1 recreational aspect.

2 Interesting. And I'll introduce this
3 now because we're talking about the Hearing Officer's
4 Report, and then come back to it later. The next
5 paragraph, actually, the Hearing Officer's Report
6 talks about mitigation, and it says DNREC has
7 required the Applicant to mitigate for the loss of
8 5.5 acres of subaqueous land associated with the
9 proposed project.

10 Now, as you've already figured out,
11 those 5.5 acres, that's the land that's going to be
12 filled. This makes clear that the mitigation is for
13 those 5.5 acres and not for anything else, including
14 not for the much larger 87 acres that are going to be
15 dredged. Among our key administrative documents, we
16 also have the Mitigation Plan. I'm going to come
17 back to that later. We'll talk about recreation,
18 then we'll talk about mitigation as I move forward.

19 Next, we have some evidence that was
20 submitted by Affidavit. We submitted four of those
21 on behalf of Mr. Curran. The first is from Walter
22 Curran himself, and that details his relationship
23 with and use of the river, including the portion
24 affected by the port project. We've also put into
25 evidence three expert witness Affidavits. As we

1 noted in our brief, all three Affidavits are for the
2 purpose of helping the Board have an understanding of
3 scientific and technical issues that are not within
4 the normal purview of anyone not trained and
5 experienced in those particular fields.

6 We introduced them consistent with Rule
7 of Evidence 702, which covers expert witness
8 testimony, and says if you can have expert witness
9 testimony, scientific, technical, or other
10 specialized knowledge, that they're an expert in
11 something. One, it will help the trier of fact,
12 understand the evidence or to determine a fact
13 initiative.

14 Now, of the three expert witness
15 Affidavits that you have, the first one's from Damian
16 Preziosi (phonetic). He's a consultant with the
17 integral group, and he addresses the effects of
18 construction and maintenance dredging on the
19 environment in the absence of appropriate mitigation
20 here.

21 Second, we have one from Dr. Craig
22 Jones, and that provides information about the
23 logistics of dredging and what impact it has on
24 boating on the river in terms of safety hazards and
25 exclusion zones. As well as addressing the massive

1 amount of dredging. That will be required on an
2 ongoing basis for maintenance. Dr. Jones' testimony
3 illustrates the large amount of equipment necessary
4 to support a dredging operation. The safety areas
5 that need to be imposed around the dredging
6 equipment. And the need for a pipeline to be
7 installed in the river from the dredging area down to
8 the disposal site, wherever that may be, somewhere
9 upriver or downriver.

10 Now, we attached to the Dr. Jones's
11 Affidavit, a couple of pictures that are taken from
12 government documents. We included the whole
13 government document. I've just got the pictures here
14 just to help get us aligned a little bit. This is an
15 example of a typical dredging barge. You can see
16 here the dredged barge. Several support vessels
17 around it. And then winding up into the distance.
18 The dredge pipeline floating there on the surface of
19 the river that'll carry the dredge materials away to
20 the dredge disposal area.

21 Now, this is an image of a dredging
22 operation. It's not intended to be specifically
23 representative of this one. This is just sort of a
24 convenient one put out there by the Army Corps. For
25 those who aren't familiar in their day-to-day lives

1 with dredging operations.

2 What's interesting here, same dredging
3 operation you can see, is the Army Corps document
4 depicts the exclusion zone. That area in sort of
5 shaded here around the dredge bars and the pipeline
6 as it goes up. And it shows where people have to
7 stay out of other traffic needs to avoid that area.
8 To avoid interfering with, becoming entangled with,
9 crashing into, what have you, either the dredging
10 operations themselves, the other support vessels for
11 the dredging operations or, very importantly, that
12 disposal line as it goes up the river to the disposal
13 site.

14 With Dr. Jones' Affidavit, we also have
15 a U.S. Coast Guard Marine Safety Alert that talks
16 about this very subject. It says hazard example;
17 nearly indistinguishable floating dredge-type
18 sediment. You can kind of see it right there
19 (indicating), but if you saw that picture and you
20 didn't know that was a dredge disposal line, I don't
21 think, unless you're a real expert, you would pick
22 out what that is or be aware of that before
23 potentially you drove your boat right over it.

24 And as the Coast Guard says, there have
25 been too many instances where outboard motor-

1 propelled vessels have alighted with the dredge pipe,
2 causing the motor to recoil into the boat and strike
3 the occupants or eject them from the vessel. That
4 just puts a really fine point on, there is a safety
5 hazard associated with dredging operations. You need
6 to stay away, for both your own safety and safety of
7 the dredge operation and the personnel there. This
8 just highlights the importance of, everybody's got to
9 stay away when these dredging operations are going
10 on.

11 Next, we have also an Affidavit from.

12 --- oh, I'm sorry. I got stuck on a slide. Going
13 back to the dredge disposal pipeline. This is taken
14 from the environmental assessment technical document.

15 Submitted by Diamond State. And you can see here
16 we've got the Edgemoor site. So that's the port up
17 there in orange. And it contains several potential
18 strategy material disposal areas. The closest is the
19 Wilmington Harbor north area right there, but then
20 there are also the two Reedy Point ones well down
21 there. The environmental assessment technical
22 document itself says that Reedy Point North is the
23 preferred disposal area. hat reedy point north. Is
24 the preferred disposal area.

25 In any case, remember that disposal

1 dredge pipeline, it's got to float in the river?
2 That'll go from the location of the port to whatever
3 disposal area is selected. It'll have to float there
4 in the river. Sort of in that passageway. On the
5 Delaware side between the shore and the main
6 navigation area, i.e., where any boater coming from
7 Delaware is going to want to be unless you want to
8 put yourself in the main navigation channel.

9 Interestingly, if we're going down to
10 Reedy Point, you're going to have to traverse this
11 whole length of river. Including right across the
12 mouth of the Christina River there, preventing any
13 boats from coming in or out of the Christina River
14 while that dredge pipeline is active and floating in
15 the water.

16 Okay.

17 I'd like to next move on to our final
18 Affidavit that's before the Board, and that's an
19 Affidavit from Dr. Theodore Tomasi. His Affidavit
20 addresses, among other issues, impacts to
21 recreational activities can be, and routinely are,
22 evaluated. I encourage the Board to give particular
23 consideration. To Dr. Tomasi's Affidavit. He has
24 extensive experience in evaluating impacts on
25 recreation from projects and occurrences such as oil

1 skills, including in the Delaware River. This
2 includes work on both behalf of the federal and state
3 governments, including the State of Delaware.

4 He describes the methodology and
5 established approach to making this kind of
6 assessment of recreational impacts. This involves
7 the combination of economics, psychology, and
8 resource management. The goal is to identify how
9 people will react to change in recreational resource
10 availability. Dr. Tomasi explains that a typical
11 approach includes defining an effective area,
12 measuring the number of recreational trips that would
13 be affected by the project.

14 Here, for example, this would include
15 accounting for marinas and boat launches within the
16 affected zone and measuring the number of trips. And
17 when he talks about the affected zone, it's not the
18 port project, that little orange circle up there.
19 It's how far up and down the river are people likely
20 to enter the river and during their boating
21 expedition, fishing expedition, go up or down such
22 that they would pass by the port. Overall, Dr.
23 Tomasi shows that there is an established scientific
24 approach to assessing recreational impacts that has
25 been used in hundreds of such evaluations. The

1 record here shows that no such approach was used by
2 DNREC.

3 The Board also has, before an
4 Affidavit, evidence submitted by DNREC and Diamond
5 State. DNREC submitted three Affidavits, but they
6 don't discuss recreation or recreational impacts at
7 all. One could almost just look at DNREC's briefs
8 and Affidavit and easily reach the conclusion that
9 DNREC failed to consider impacts to recreation just
10 on the basis of those documents alone. If this were
11 a movie, I could perhaps wave those around and say, I
12 rest my case. Unfortunately, this is not a movie,
13 this is real life. So I will continue to talk about
14 Diamond State's Affidavits.

15 They submitted two, both of which are
16 somewhat odd submissions. We have one from David
17 Small, the former DNREC Secretary. He did not have
18 personal involvement with the port project, and his
19 Affidavit opines on how DNREC functions. Unlike the
20 scientific and technical opinions in the Affidavits
21 submitted by Mr. Curran, it's unclear that the
22 functioning DNREC would be a subject on which this
23 Board would need expert input. As such, it doesn't
24 appear that Mr. Small's Affidavit meets the standards
25 of Rule 702, which we saw earlier, I would say also

1 offers an Affidavit from Brad Devine, a consultant.
2 Mr. Devine appears to be neither an appropriate
3 factual witness or an expert witness.

4 Mr. Devine offers factual information
5 on the circumstances and history of the Diamond State
6 permit application. He states that he has personal
7 knowledge of the information in his Affidavit,
8 although he doesn't describe any personal involvement
9 in the application or otherwise provide any basis for
10 his knowledge. As such, it's not clear what that
11 basis is. He appears to be serving as a fact
12 witness. But then his Affidavit risks introducing
13 facts who are not before the Secretary, which is
14 inappropriate.

15 Indeed, even though Diamond State
16 claims the administrative record supports DNREC's
17 decision, Diamond State's brief, in opposition to Mr.
18 Curran, is rife with citations to Mr. Devine's
19 Affidavit and has relatively few citations to the
20 actual administrative record itself. This speaks
21 volumes to the lack of actual support for DNREC
22 decision in the context of the administrative record.

23 Now I'll take a step back from those
24 challenges and know, and as I'll discuss more in a
25 minute, it's our position that the Board can consider

1 any competent evidence put before it. Diamond
2 Statement in this case has articulated a much
3 narrower review of what the Board can consider, which
4 makes it particularly odd that they submitted these
5 two particular Affidavits. Should the Board take a
6 narrow view of the evidence, which we don't support
7 and which we think goes contrary to relevant case law
8 here in Delaware, but should the Board take a narrow
9 view of evidence, then Diamond State's Affidavits
10 clearly should not be considered.

11 However, returning to the core issues
12 here, Mr. Devine offers only a few short paragraphs
13 on the topic of recreational impacts. That's in
14 paragraphs 105 to 107 of his Affidavit. It's clear
15 that the statements that Mr. Devine makes set up some
16 of the arguments made by Diamond State in its brief.

17 Here are the two key paragraphs in the
18 Devine Affidavit. Section 105, he reaches the
19 relative --- he makes the relatively conclusory
20 statements that the proposed project actually has no
21 cognizable negative impact on recreational
22 activities, but what does he support that with? He
23 says the potential loss of subaqueous lands and
24 appears intertidal beach. And whether that's
25 subaqueous lands or not is an issue of dispute

1 between Diamond State and DNREC. But per Mr. Devine,
2 that potential loss of land is 5.5 acres of land that
3 really no one can get to anyway. It's hard to get to
4 from the shore. Voters aren't going to be there
5 either. That loss, that filling in of that 5.5
6 acres, is immaterial from a recreational standpoint.

7 So then we get --- holding that in
8 mind, let's recall, and we've seen this slide
9 earlier, what it says in the environmental assessment
10 technical document submitted with the applications by
11 Diamond State, that says that recreational facilities
12 within the project area are associated with pleasure
13 boating and fishing. As I mentioned, we agree with
14 that statement. We think Mr. Devine has a really
15 narrow focus, but the environmental assessment
16 technical document appears to get it right.

17 And again, that's the area, the larger
18 area that the environmental assessment technical
19 document should say. The dredging and the people
20 trying to get from up here, down here,
21 recreationally, outside of the main navigation
22 channel. But all of this sets up Diamond State's
23 brief, and they say, you know, Mr. Curran claims to
24 be an avid boater and fisher on the river, but his
25 arguments rest on a fundamental misunderstanding of

1 this part of the river.

2 Simple fact is, there's limited to no
3 recreational boating or fishing at the project site,
4 and therefore little to no recreational value on this
5 part of the river. And they go on to talk about,
6 this is an intertidal beach with limited access. So
7 what we've done is completely changed the subject of
8 the evaluation here. We've moved from the overall
9 port project and the 87 acres of dredging in the
10 river, and now we're just talking about this 5.5
11 acres of fill on the intertidal beach.

12 Well, Mr. Curran fully acknowledges he
13 is not boating on the beach. He's boating in the
14 river where small recreational vehicles will
15 obviously be affected by the massive 87 acre dredging
16 project needed for the port, covering the full width
17 between the shore and the main navigation channel.

18 So, with all of that, it's probably
19 fair. Step sideways for a minute on an
20 administrative issue. What information can the Board
21 consider? Well, we look to the Delaware Solid Waste
22 Authority versus DNREC. It's a case from 2021 as
23 really setting the rule here, and that says, the
24 record before the Board consists of the entire record
25 that was before the Secretary, as well as any other

1 competent evidence the party has been produced during
2 this appeal.

3 So we've talked about the Affidavits we
4 submitted, the Affidavits the Diamond State
5 submitted. We think it's perfectly fair for the
6 Board to consider all of that as competent evidence.
7 And we disagree with Diamond State that the record
8 should be limited --- that the Board can only
9 consider the record before the Secretary, and we
10 disregard any other competent evidence that it's
11 presented with, and we think that this case really
12 controls the scope of the Board's material.

13 Now, in terms of what's the Board's
14 challenge here? The question really is whether the
15 evidence supports the Secretary's decision. And we
16 admit that appellants, such as Mr. Curran, have the
17 burden of proof in this regard, and we need to show
18 that the evidence does not support the Secretary's
19 decision. Now, as quoted in Diamond State's brief,
20 substantial evidence means such relevant evidence as
21 a reasonable mind might accept adequately support a
22 conclusion, citing the Smolco versus DiamlerChrysler
23 (phonetic) case. We agree with that assertion of the
24 legal standard here. We just submit that the
25 evidence --- the evidence here shows the Secretary's

1 decision was not supported by such relevant evidence
2 as a reasonable mind would accept as adequate.

3 So ultimately, the question presented
4 to the Board is not whether the port is a good idea
5 or whether the port will provide some benefit to the
6 state. Instead, the question is whether the evidence
7 before the Board supports the conclusion that the
8 Secretary acted in accordance with the SAL
9 regulations when approving the permit for the port
10 project. Mr. Curran submits that the relevant
11 evidence is not adequate to support DNREC's decision.

12 So sort of sum up, will there be
13 impacts to recreation from the port project? Yes,
14 clearly there will be impacts to recreation, fishing,
15 and aesthetic enjoyment of natural resources. As
16 argued in our briefing and based on the evidence from
17 the record and the Affidavits, the construction
18 process will exclude recreational vehicles from the
19 affected areas. There will be a significant impact
20 on the ability of recreational users to safely use
21 and/or transit the area during construction.

22 Construction also means that a lot of
23 sediment will be stirred up and that will make the
24 area unattractive for fish. There will also be a
25 total loss of the benefit community in the area of

1 the port due to the dredging, again, affecting the
2 viability of fish in that area.

3 The construction process; it's a
4 construction process. It's intrusive, and noisy and
5 will make boating and fishing on the river a lot less
6 pleasant and will likely serve to drive recreational
7 users to go elsewhere to or to stay home. The noise
8 evaluation in the environmental assessment technical
9 document makes clear that Diamond State did not
10 consider noise impacts to recreational users or any
11 users of the river.

12 Further, and to expand on what Counsel
13 for the other appellants talked about this morning,
14 port operations will result in increased traffic that
15 will block the river while port vessels are entering
16 and exiting the port, and that's true even if there
17 aren't any emergencies. You got one of those huge
18 vessels turning in or out, you're a little
19 recreational boater trying to get by, you've got an
20 extended wait period such that you're probably not
21 going to use this part of the river anymore because
22 it's just too hard to get by. You know, imagine
23 you're trying to come back to your marina because the
24 weather's turned in a little bad and now you've got a
25 very lengthy wait while you're letting some boat come

1 in or out of a port, you could get stranded out there
2 in some pretty bad weather. Best advice, stay home.
3 That's the unfortunate effect that this will have
4 recreational users.

5 Additionally, we've got the subject of
6 maintenance dredging. It's clear that there will be
7 maintenance dredging needed on annual basis on to the
8 indefinite future. To allow the continued operation
9 of the port. Initially, Diamond State takes the
10 position that maintenance dredging should not be
11 considered and implies that without the threat of
12 maintenance dredging, all of Mr. Curran's concerns go
13 away. That's false, as I've just recounted all of
14 the harms that will result just from the port
15 construction.

16 Diamond State also attempts to evade
17 the impacts of maintenance dredging by claiming it
18 speculative. It is nothing of the sort. Diamond
19 State's permit application makes clear that
20 maintenance dredging will be required. Uncertainty
21 over the exact amount of dredging does not make the
22 need for maintenance dredging speculative. Diamond
23 State also argues that maintenance dredging is a
24 future issue and should not be considered now.
25 However, Diamond State relied on the positive aspects

1 of future port operations to justify and support the
2 project. You can't now argue that the Board should
3 ignore the corresponding negative impacts of port
4 operations.

5 Indeed, the SAL regulations on their
6 face require consideration of all impacts. And do
7 not draw the line at activities that are current
8 versus future. DNREC, indeed, obviously thought that
9 maintenance dredging was a ripe issue for concern,
10 giving its pushback on the shoaling fans, which were
11 part of the original application that Diamond State
12 then removed after that DNREC pressure.

13 So did DNREC evaluate the recreational
14 impacts? The permit application in the environmental
15 technical document noted that recreational activities
16 of transient boaters, but it didn't really consider
17 what that meant or how such recreational activities
18 would be affected by the port project. So an
19 evaluation of recreational impacts was not included
20 in the application. The Hearing Officer's report is
21 essentially silent on recreational impacts, even when
22 responding to the concern over the concern on
23 recreational fishing.

24 Can we assume that DNREC thought
25 carefully about impacts to recreation and just

1 neglected to mention it anywhere in the Hearing
2 Officer's Report or the Secretary's order? No,
3 there's no evidence that they did so. In fact, given
4 the absence of any testimony or mention the
5 remediation issue in DNREC's three Affidavits here,
6 it remains crystal clear that DNREC just missed this
7 issue.

8 Is there something that DNREC could
9 have done? Yes, absolutely. As Dr. Tomasi's
10 Affidavit demonstrates, there are established
11 scientific tools to evaluate recreational impacts.
12 DNREC did not utilize any such tool. There's no
13 estimate of the number of impacted trips or any
14 identification of the impact zone from the project.

15 As such, was the information before the
16 Secretary substantial evidence such that a reasonable
17 mind might accept it as adequate to support the
18 decision and the conclusion issued a permit in the
19 context of the SAL regulations to protect regulation?
20 No. There was not sufficient information there to
21 support the issuance of the permit.

22 I'll close on the question of
23 mitigation. Did DNREC consider an imposed mitigation
24 for recreational impacts as required by the rules?
25 No. There was no assessment of the recreational

1 impacts. Therefore, there was no basis for
2 determining what the scope of any appropriate
3 mitigation might be. The Hearing Officer's report
4 that we looked at makes clear that the mitigation
5 that was approved was just for the 5.5 acre, that
6 part being fill, and they didn't really consider any
7 mitigation for anything else, such as the 87 acres
8 that are going to be dredged, much less, the
9 corresponding and resulting harms to recreation.

10 Overall, there's no indication or
11 evidence in Hearing Officer report or anywhere in the
12 record that DNREC attempted to comprehensively
13 evaluate what recreational fishing impacts would
14 occur, what needed mitigation, whether mitigation was
15 possible or what mitigation should be required.

16 Now, Diamond State does have its
17 mitigation plan, and that does include a couple of
18 improvements at Fox Point State Park. It's worth
19 noting there, though, within the text of that plan,
20 it says, depending on overall projects and costs,
21 after the completion of the priority one and priority
22 two elements, those are other mitigation things, more
23 intertidal wetlands, responding to the fill, you
24 know, DNREC may implement or construct these or other
25 enhancements at Fox Point State Park.

1 So the improvements at Fox Point State
2 Park are entirely contingent on what DNREC feels like
3 doing in the future. But even if we assume that
4 they're going to do them, you know, some trail
5 improvements, removing vegetation, better lighting,
6 quality improvements in the park, those aren't
7 correlated with the impacts, like going into the
8 doctor and saying, I might have COVID, and he says,
9 okay, let me put a brace on your wrist. It's not
10 really responsive to the concern that you're
11 expressing, even if maybe it's helpful in some
12 manner. And it's clear that any improvements at the
13 park are not at all helpful to recreational fishermen
14 or boaters or any user of the river who's affected by
15 the project.

16 Finally, did DNREC consider and impose
17 mitigation for the environmental impacts of question
18 Bermuda's obligations under the regulations? And the
19 answer here again is no. DNREC looked at the
20 mitigation plan and said, we're going to match this
21 up with 5.5 acres of fill. They did not match it up
22 with the 87 acres of dredging that has to occur; 5.5
23 acres to 87 acres, so they're making up for what does
24 that work out to, seven or eight percent of the total
25 project. They just missed the ball. They're

1 focused. They got too focused on the fill and they
2 missed the impact of the dredging on the environment,
3 and therefore, don't have adequate mitigation there
4 either.

5 Thank you for your attention. That
6 completes my argument. Are there any questions?

7 BOARD MEMBER:

8 Yeah, I have a question. So what's on
9 the Edgemoor site now?

10 ATTORNEY ROCKMAN:

11 It's a former industrial facility
12 that's inactive and has been for years. And I think
13 the remaining pieces of it get demolished to put in
14 the port.

15 BOARD MEMBER:

16 Have you been there?

17 ATTORNEY ROCKMAN:

18 I have not been there, no. I don't
19 think I could get on, frankly. Although, it would be
20 interesting to see.

21 BOARD MEMBER:

22 And you probably don't know the answer
23 to this, but when the --- port --- is really a large
24 dredging that took place, what happened to the
25 boaters --- that was up and down the river?

1 ATTORNEY ROCKMAN:

2 Would have been in that main navigation
3 channel, as opposed to on the sides where the
4 recreational boaters go.

5 BOARD MEMBER:

6 I'm just thinking it would have been
7 all over the place.

8 ATTORNEY ROCKMAN:

9 I think --- yeah, we could potentially
10 ask Philaport's Counsel on that, and I think you
11 know, that was ---.

12 BOARD MEMBER:

13 Just a question.

14 ATTORNEY ROCKMAN:

15 Yeah.

16 CHAIR:

17 Mr. Horsey?

18 MR. HORSEY:

19 Yes. A simple question. Your client,
20 and this is real important for your client, is your
21 client here today?

22 ATTORNEY ROCKMAN:

23 No, he's not. Unfortunately, I don't
24 know how much of the party you were to all of the
25 scheduling discussions, but coming up with a date

1 that worked for all of the counsel was a nearly
2 impossible task, and unfortunately, we had to choose
3 a date that worked for counsel. Diamond State said
4 they could not go beyond today as the date for the
5 hearing. So were not able to find a date when Mr.
6 Curran was available, but also met with all counsel.
7 Disappointed he couldn't be here, and we are too, but
8 he's not.

9 MR. HORSEY:

10 Second question.

11 ATTORNEY ROCKMAN:

12 Yeah.

13 MR. HORSEY:

14 And I appreciate that Mr. Curran is
15 worrying about the environment of our state, and
16 everybody has talked about need for maintenance,
17 dredging, plus everybody's talking about the amount
18 of dredging that's going to take place to build it.
19 Is it possible, and I get it, that DNREC didn't
20 bring this up, but has your client ever thought that
21 it might be possible that maintenance dredging will
22 act like a four bay in a stormwater --- and catch all
23 the sediment that's coming down the river and help
24 protect the rest of the bay ---? Has he ever
25 considered that?

1 ATTORNEY ROCKMAN:

2 I'm not sure that that's --- I don't
3 --- that hasn't been an issue that's been germane to
4 the issues he's raised in the appeal.

5 MR. HORSEY:

6 I just wanted to know if he ever
7 thought about that because I appreciate the concerns
8 to protect the environment and I don't know if that
9 might be a good thing to protect the environment.

10 ATTORNEY ROCKMAN:

11 The way you're framing it, it might be.
12 I'm not sure I've seen the maintenance dredging
13 report in any of the records that we have, as having
14 that beneficial side aspect.

15 MR. HORSEY:

16 Well, just the fact of silt comes down
17 river, it don't go up river.

18 ATTORNEY ROCKMAN:

19 This is true, but it gets washed in.
20 And I'm at the edge of my scientific knowledge here.
21 And I'm speculating, you know, your top layer of
22 sediment in the river, it's going to be washed in
23 from all of the contributing streams. And some of
24 that will just be local erosion and soil that's not
25 of concern, except now it's in the way of the port

1 operation.

2 MR. HORSEY:

3 Thank you.

4 ATTORNEY ROCKMAN:

5 Thank you.

6 BOARD MEMBER:

7 You expressed a concern about the
8 mitigation plan only addresses the 5.5 acres
9 subaqueous lands. So did the mitigation plan address
10 the 87 acres. I don't know if you can answer this,
11 but what would the scope of the mitigation plan look
12 like for that work?

13 ATTORNEY ROCKMAN:

14 The harm to the 87 acres? We're taking
15 out the entire benthic community there and then with
16 the maintenance dredging, keeping --- you know,
17 pulling it out. We've covered this a little bit in
18 some of our Affidavits. You know, once you do that
19 kind of dredging, some parts of that underwater
20 benthic community will recover over a period of time.
21 The problem is that there are certain parts that
22 aren't going to recover quickly enough before they're
23 then wiped back away when you do the maintenance
24 dredging.

25 So what could you do for mitigation?

1 How do you manage that? There's probably a world of
2 options, and if we've got panel mitigation experts
3 here, I bet you they could fill the screen with
4 potential options of what could be done to help
5 balance out the harms that could be caused. So,
6 short answer. I'm sure there are a lot of things
7 that could be done. Unfortunately, there's nothing
8 in the current plan that addresses that.

9 BOARD MEMBER:

10 I'm just trying to get my arms around
11 what the scope of that looks like and does it ---
12 compared to what has been proposed for mitigation for
13 the 5.5 acres. That's all.

14 ATTORNEY ROCKMAN:

15 Yeah. Thank you.

16 BOARD MEMBER:

17 Mr. Curran in his Affidavit or
18 testimony, indicated that he recreated in those 5.5
19 acres of impact for the --- has been discussed ---?

20 ATTORNEY ROCKMAN:

21 No. We completely agree. He is not
22 boating on that beach, he's merely in the river
23 itself, not being a title beach going by. His
24 concern is the larger the full scope of the project,
25 not the sort of narrow slice of it.

1 BOARD MEMBER:

2 Thank you.

3 ATTORNEY ROCKMAN:

4 Thank you.

5 CHAIR:

6 Thank you very much. With that, we're
7 going to take a break for lunch.

8 ---

9 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

10 ---

11 CHAIR:

12 DNREC, discussion? All right, thank
13 you.

14 ATTORNEY SCOTT:

15 My colleagues, it's fine. I hear that,
16 I think they said it all. Okay.

17 Good afternoon, Chair Holden, members
18 of the Board, Mr. Mallor (phonetic). My name is
19 Devera Scott. Again, I'm the Deputy Attorney
20 General. I work for the Department of Justice, and I
21 represent DNREC. I'm here with my colleague Jameson
22 Tweedie and Matthew Denn (phonetic) and Mr. Tweedie
23 and I are going to split the arguments. He is going
24 to address the mitigation portion and address the
25 navigation and some other issues.

1 From the outset, I --- I just wanted to
2 clarify some points. But first, I just wanted to ---
3 to make a statement that I'm very proud to represent
4 this agency. I've represented them now for going on
5 17 years, and I find the DNREC folks, staff to be
6 some of the most hardworking, dedicated people that
7 I've ever worked with. And I say that because I'm
8 not here to present any kind of hyperbole in my
9 argument. But some of the statements made about my
10 client were upsetting. That calling, for example,
11 the Hearing Officers report a hatchet job. I assure
12 you that DNREC intends to demonstrate what a
13 wholesome and thorough permitting process this was.

14 DNREC --- the Secretary has repeatedly
15 said that these are his decisions, and you know,
16 please don't beat up our staff or make any derogatory
17 statements about those folks who are so hardworking
18 and underpaid. But, that would be my speech for the
19 legislature.

20 So I will get started from the
21 beginning. I --- I do intend to move for a directed
22 verdict at this point. So, I ask the Board whether
23 or not you just want me to incorporate that into my
24 presentation or have that as a separate argument.
25 But at this point, I will move for a directed verdict

1 because as the Board is well aware, the standard
2 under Title 7 Section 6008(b) of the Delaware Code
3 provides that the burden of proof is on the
4 Appellants to show that the Secretary's decision is
5 not supported by the evidence on the record before
6 the Board.

7 And to clarify, the Appellants have
8 submitted affidavits from purported experts that were
9 not in the record before the Secretary. And
10 Regulation 5.3 is clear that Applicants, permit
11 Applicants may introduce evidence that was not before
12 the Secretary, additional evidence. But all of the
13 Appellants in this case are not the Applicant. So,
14 it says Appellants other than permit Applicants or an
15 alleged violator may only introduce evidence which
16 was before the Secretary.

17 And in this case, the Appellants have
18 submitted affidavits from --- Philadelphia Court has
19 submitted an affidavit from Charles Harman. Mr.
20 Harman does not have any comments in the record
21 before the Secretary and his affidavit should be
22 stricken. Board operators have identified Mr.
23 Inskip, Mister --- I'm sorry, I'm going to hatch
24 this name, Whene.

25 ATTORNEY 3:

1 Whene (pronunciation),

2 ATTORNEY SCOTT:

3 Whene?

4 ATTORNEY 3:

5 Whene, it's pronounced Whene.

6 ATTORNEY SCOTT:

7 Okay.

8 Mr. Jones and Captain Kichner. And of
9 those four experts, only Mr. Jones and Captain
10 Kichner commented in the record before the Secretary.

11 And there --- any evidence from those experts should
12 be limited to seven and nine page, respectively,
13 reports that were submitted in the public comment in
14 --- in the public record. Mr. Curran, he submitted
15 three expert affidavits from Mr. Tomasi, from Mr.
16 Preziosi, and also from Mr. Jones. And likewise, Mr.
17 Tomasi did not provide any comments on the record for
18 the Secretary, and his affidavit should be stricken.

19 Mr. Preziosi, he presented --- he
20 submitted a six page report which is in the public
21 record, so any consideration of his opinions should
22 be limited to those public comments.

23 I also note --- note that I agree with
24 Mr. Curran's counsel. He objected that Diamond
25 State's affidavit contained information not in the

1 record before the Secretary. They are the permittee,
2 and I'm not going to, you know, discuss Diamond
3 State's affidavit. But I think Mr. Curran's counsel
4 made my point that non-Applicants cannot present
5 information that was not in the record before the
6 Secretary.

7 As --- as the Board knows and as all
8 the Applicants have stated, this was a massive
9 undertaking, the --- the permit process for the
10 Board. It's not a usual boat dock on Herring Creek.
11 It involves federal and state permits. It was a
12 comprehensive joint permitting process. Once the
13 application, certainly the federal and the state
14 agencies participated in weekly meetings for two
15 years to discuss this project, and those participants
16 included the National Oceanic Atmospheric
17 Administration, the Army Corps of Engineers, United
18 States Fish and Wildlife, EPA, the Delaware River
19 Basin Commission, the --- and Environment for Public
20 Works. Of course, the State, and I mentioned the
21 Delaware River Basin Commission and Congressional
22 staff from members of the United States Senate
23 Committee on Environment and Public Works.

24 And this, today is --- is DNREC's
25 decision to issue a subaqueous lands permit to

1 construct the wharfing for that port expansion. And
2 DNREC intends to show in its case on the merits, if
3 --- if it proceeds, that the permit decision is
4 supported by the evidence in the record before the
5 Secretary.

6 As I stated, this was a very involved
7 process. Those --- those federal and state partners
8 met weekly for two years, and PhilaPort, who ---
9 whose attorney mentioned the main channel dredging,
10 which took ten years, and the port itself is in Reach
11 C of that main channel project. And that dredging
12 alone in the Reach C where the port is located,
13 started in the spring of 2010 and was completed in
14 September of 2010. So, it --- and from what I
15 understand, the port's construction dredging will
16 only take 90 days. So to the extent that they're
17 arguing impacts to navigation, for ten years they've
18 been dredging the main channel from Philadelphia ---
19 well, it's open now, but which included blasting of
20 rock, and it was a very involved process.

21 As I --- as I stated earlier, I am
22 moving for a directed verdict because Appellants have
23 not satisfied their burden of proof. I am addressing
24 the navigation piece. The Coast Guard has authority
25 and responsibility to consider navigation. It's

1 their statutory duty under 33 and 33 CFR Subpart B
2 talks about the control of vessels and facility
3 operations. And that's in Laura Mensch's affidavit
4 at page ten.

5 I also wanted --- I pulled this up as
6 well because Mr. Daly's presentation and in the
7 PhilaPort's presentation, they said that Laura Mensch
8 did not provide any navigation information to the
9 Coast Guard, and they highlighted this mitigation.
10 But at the last line is a zip file of navigation
11 reports, comments from the public that DNREC received
12 regarding navigation, including Mr. Curran's
13 comments. All of that information was provided to
14 the Coast Guard, the agency that has statutory
15 authority to regulate safety and navigation on the
16 Delaware River and others.

17 And it makes sense because as I believe
18 one of the Board members noted that there are other
19 states impacted. Mr. Horsey, I believe it was you,
20 impacted by this project. I would also --- so, there
21 --- there are issues bigger than DNREC. DNREC
22 Delaware. There are national security concerns which
23 are within the scope of the Coast Guard's authority.
24 And it makes sense, you know, under the supremacy
25 clause, you have --- having two separate agencies, a

1 federal agency and a state agency, making findings on
2 the same issue and potentially having conflicting
3 final decisions when you have two different, even
4 judicial --- forms of judicial review, it would just
5 make the process unworkable.

6 That is why they met for two years once
7 a week, so that they could discuss these issues ahead
8 of time. And I do agree that Ms. Mensch isn't at
9 issue. She is one of those hard working folks at
10 DNREC, and she did do her due diligence. Ms. Mensch
11 actually worked in the coastal program and her
12 responsibility was for the federal consistency
13 determination, which has been removed from this ---
14 this hearing by the Board. But she did work
15 collaboratively with subaqueous lands program and
16 others on --- on this project, so. So, I don't think
17 it was unreasonable when she went above and beyond.

18 She did not reach out to the Coast
19 Guard because she --- she's certainly thorough, but
20 her --- she reached out to the Coast Guard based on
21 public comments about navigation. So to the extent,
22 and which also proves that DNREC takes these public
23 comments, and they don't just --- it's not a check
24 the box. They considered the comments here, and they
25 made changes. They went back to the Applicant, they

1 inquired to the Coast Guard about navigation. And
2 when the Coast Guard determined that this project and
3 the safety, you know, was not a concern from them,
4 then that ended her consideration, the consideration.

5 The parties also --- the Appellants
6 also cite to DNREC's regulations and the statute that
7 talks about the shall word, they shall consider. And
8 I submit to the Board that DNREC did consider
9 navigation with this project. They were not required
10 to do their own navigational impact analysis. It was
11 --- it was reasonable and satisfactory that they
12 reached out to the appropriate agencies as they did
13 as well. All the federal agencies weighed in on
14 their areas of expertise, such as the US Fish and
15 Wildlife on impacts to the habitat. I'm sure when
16 --- when my colleague presents.

17 And PhilaPort also makes an interesting
18 argument about the turning basin that, of course,
19 that DNREC didn't consider the impacts, again, to the
20 navigation which were addressed by the Coast Guard.
21 But they --- they want to sort of shoehorn in a
22 definition that they claim that there's no definition
23 of structure in the law, but there is, as I believe
24 another party noted under Section 7504-1, a structure
25 includes, but it's not limited to, any boat ramps,

1 slip, building, breakwaters, bridge, bulkhead,
2 culvert, dam, derrick, dock, gabion, groin, jetty,
3 residents, launching facility, marina, mooring
4 facility, pier, seawall, walkway or wharf.

5 That includes a lot of information, and
6 I think the common denominator there that --- is that
7 those are structures as we know them. Something that
8 is built. They --- PhilaPort included a definition
9 from the dictionary about structure being something
10 such as a building that is construction ---
11 constructed. I would also note that there's a
12 definition for turning basin in the Merriam-Webster
13 Dictionary that says the turning basin is an enlarged
14 space at the end of a canal or narrow channel to boat
15 --- to permit boats to turn around. The, like, the
16 odd --- the odd thing out in that list, in the
17 regulatory definition of structure.

18 And the Port Operators cite Laura's ---
19 Laura Mensch's affidavit as DNREC's alleged conflict
20 in interpreting the regulations regarding navigation,
21 and that's false. It's completely in line with the
22 --- by giving deference to the Coast Guard that,
23 again, not to beat a dead horse, an agency that has
24 the authority and to control safety and navigation on
25 the Delaware River.

1 The last thing I want to say about
2 navigation is that not only did Ms. Mensch provide
3 all this information, I wish this was a hyperlink
4 that I could open because you would also see that the
5 client, the MITAGS report and the report from
6 Duffield submitted to the Coast Guard, contrary to
7 what the Appellants argued.

8 Each part --- each party here played a
9 part of a comprehensive process, and to that point,
10 Appellants have not satisfied their burden. Have
11 demonstrated that the Secretary granted a subaqueous
12 lands permit to Diamond State Corporation. It was
13 supported by the evidence on the record before the
14 Board, and therefore at this juncture, DNREC would
15 ask the Board to consider its motion.

16 Otherwise, I will turn my argument over
17 to my colleague, Mr. Tweedie.

18 ATTORNEY ROCKMAN:

19 Mr. Chairperson.

20 ATTORNEY SCOTT:

21 Unless you have any questions for me.

22 ATTORNEY ROCKMAN:

23 At this point, should the Appellant
24 respond to the motion or how can we ---?

25 CHAIR:

1 Right, but my expectation is during
2 rebuttals, after DNREC's argument. They have to
3 complete that.

4 ATTORNEY ROCKMAN:

5 Yeah, thank you.

6 ATTORNEY TWEEDIE:

7 Good afternoon, Chair Holden and
8 members of the Board. I'm James Tweedie, Attorney
9 for DNREC. As Devera said, I'll be presenting
10 DNREC's argument on mitigation, largely responding to
11 Mr. Curran's argument. And I have a couple slides
12 that went with DNREC's presentation on the burden of
13 proof, which Devera --- and has been discussed. Rule
14 5.3, which is very important to this case given the
15 voluminous evidence being offered by Appellants who
16 are not permit applicants or alleged violators and
17 attempting to contribute here. And to deference,
18 DNREC is entitled to.

19 Mr. Curran's appeal focuses on DNREC's
20 consideration of environmental, recreational, and
21 fishing considerations in its review of Diamond
22 State's application. And on the sufficiency of the
23 mitigation DNREC required as a part of the permit
24 approval. As Devera discussed, Appellants bear the
25 burden of proof. And the standard before the Board

1 is whether or not the Secretary's decision is
2 supported by evidence in the record before the
3 Secretary --- before the Board, which includes the
4 record before the Secretary.

5 Mr. Curran's appeal fails for three
6 fundamental reasons. First, Mr. Curran's appeal
7 relies extensively on information that was not in the
8 record before the Secretary and based on the plain
9 application of Rule 5.3, cannot be --- cannot be
10 introduced by these Appellants and should not be
11 considered by the Board. This should not be in
12 dispute, as the Board has applied that rule in the
13 past and indeed reiterated its application when ---
14 when resolving motions in limine in this case.

15 Mr. Curran relies extensively, and in
16 many cases, exclusively on purported evidence that
17 was not part of the record before the Secretary, and
18 his appeal should fail on that basis. Second, Mr.
19 Curran tries to twist procedural requirements of the
20 subaqueous lands regulations into substantive
21 requirements that did not exist in Delaware law.
22 Delaware law requires DNREC to consider various items
23 in the process of considering a permit application,
24 and that is exactly what DNREC did.

25 These statutory and regulatory

1 provisions, however, do not mandate any substantive
2 outcome nor mandate any exact method of considering
3 those factors, just that DNREC must do so. The same
4 is true of mitigation. A permit may be denied if ---
5 if there is not --- if it can't be mitigated to
6 DNREC's satisfaction, but that does not mean it must
7 be denied. That does not mean mitigation must be
8 imposed, as Mr. Curran would ask that you believe
9 that it should, regarding, for example, the 87 acres.
10 These are --- these are obligations --- these are
11 procedural obligations to DNREC, but it must consider
12 not things it has to do or reach any particular
13 outcome. And DNREC did indeed comply with these
14 procedural requirements, considering the very issues
15 about which Mr. Curran complains and his appeal must
16 fail for that reason.

17 And third, Mr. Curran's appeal seeks to
18 second guess DNREC's process and DNREC's conclusions
19 that is neither appropriate nor sufficient to succeed
20 in an appeal. The standard before the Board is
21 whether there's evidence to support the Secretary's
22 decision, and to succeed, Mr. Curran must show that
23 there is not. Whether or not Mr. Curran thinks there
24 could have been a better process or Mr. Curran would
25 have reached a different outcome is simply not

1 relevant, or his purported experts. The only issue
2 is whether Secretary Garvin's decision, who has been
3 appointed and confirmed by the Senate, whether he ---
4 whether his decision is supported by the evidence in
5 the record, and it is. And for each of these reasons
6 independently, Mr. Curran's appeal should be failed.

7 First, evidence not in the record. Mr.
8 Curran bases his argument on voluminous evidence that
9 was not part of the record before the Secretary. It
10 is undisputed that Mr. Curran is not a permit
11 applicant, nor is he an alleged violator. As such,
12 Mr. Curran is limited by Rule 5.3, and he may only
13 introduce evidence which was before the Secretary.
14 And this rule makes sense. The system we have
15 contemplates that a record will be prepared that
16 includes not only evidence developed by the permit
17 Applicant and DNREC, but also input from the public,
18 such as Mr. Curran, through public comment. DNREC
19 technical staff must evaluate and respond to that
20 input, which is addressed in the technical response
21 memo, or in some cases, it may result in a change in
22 the project by the permit applicant.

23 The Hearing Officer then prepares all
24 of this into a complete record, and on the basis of
25 that complete record, the technical response memo,

1 the Hearing Officer's report, the Secretary makes his
2 decision. This process requires that if party's in
3 opposition to a project, such as Mr. Curran here have
4 evidence to consider in that permit application, they
5 must put it into the record so it can be considered
6 by the Secretary. Trying to insert new issues, new
7 purported evidence, new purported experts, after this
8 permit has already been issued and after the order
9 has already been signed, undoes this --- completely
10 undermines this process.

11 So, it is abundantly clear that this is
12 what Mr. Curran is doing, and it's --- it's said so
13 explicitly in his brief. In footnote one, on page
14 two, information in this brief is taken from the
15 affidavits being submitted with this brief from
16 Appellant and his three experts. This is not a side
17 issue, but rather the very substance of Mr. Curran's
18 appeal is based predominantly, and in many cases
19 exclusively, on this evidence that was not before the
20 Secretary. At which was not, therefore, part of the
21 record to be evaluated in --- in --- in issuing the
22 decision.

23 Mr. Curran's briefing to the Board is
24 replete with this. His --- the section of his
25 opening brief on construction title is construction

1 and operation of the port will have significant and
2 negative impacts on recreation, fishing, and
3 enjoyment of the river. Cites almost exclusively
4 from evidence that was not in the record before the
5 Secretary. These supported experts that ---
6 affidavits and Mr. Curran's affidavit, which was also
7 not part of the record, as Devera described earlier.

8 The section on the mechanics of
9 dredging, pages 13 to 15, cite exclusively to the
10 affidavit of Mr. Jones. The same is true of the
11 section on the impacts of dredging on recreation,
12 pages 15 to 16, cites exclusively to the affidavits
13 that were not part of the record. Same is true on
14 the alleged impacts of dredging for aquatic life,
15 which relies exclusively on these affidavits. Did it
16 with the section on navigation and river traffic
17 impacts from Port Operations, pages 18 to 19. Again,
18 exclusively on affidavits that were not part of the
19 record before the Secretary.

20 Thus, the entirety of Section 5 of the
21 opening brief, namely, the entirety of his argument
22 that construction and operation of the port will have
23 significant and negative impacts on recreation,
24 fishing, and enjoyment of the river, is based on not
25 --- is based on information not in the record before

1 the Secretary and cannot be introduced by Appellant
2 Curran. Without this purported factual basis for his
3 appeal, his appeal fails.

4 The next section, that DNREC had
5 properly failed to consider impacts to recreation
6 fishing, is the same. Mr. Curran argues that there
7 are alternative approaches to evaluating these
8 impacts that DNREC could have used, which, of course,
9 is not the standard before the Board. The standard
10 is whether the Secretary's decision is supported by
11 the evidence in the record, but regardless, it relies
12 exclusively upon Mr. Tomasi's affidavit.

13 The next section, what DNREC could have
14 done here is --- is almost absurd. That is not the
15 issue before the Board. He does not get to inject
16 what he thinks should have been done. Rather, is the
17 Secretary's decision supported. But regardless, it
18 cites exclusively to the Tomasi affidavit. And this
19 goes on and on.

20 In --- in substance, all of Sections 5,
21 6, and 7 which is the bulk of their argument, the
22 meat of their argument, the factual underpinning, and
23 the legal analysis, all relies almost entirely or
24 exclusively on these affidavits that were not part of
25 the record. So, I know we have limited time, so I

1 won't belabor it further, but this applies
2 essentially to all of Section 5, all of Section 6,
3 which is pages 23 to 30 --- 30, and Section 7, which
4 is pages 30 to 37. All these portions that rely on
5 the affidavit submitted with Mr. Curran's opening
6 brief, relying on evidence not before the Secretary
7 should be disregarded. The Board must follow the
8 standard established in the rules and the statute and
9 rule on the order on that basis.

10 Second, DNREC has complied with the
11 procedural requirements set forth in Delaware law,
12 and Mr. Curran's attempt to twist procedural
13 requirements into substantive requirements is simply
14 inconsistent with Delaware law and not relevant to
15 the issue before the Board. As I said, Mr. Curran's
16 appeal focuses on DNREC's consideration of
17 environmental, recreational, and fishing
18 considerations in its review of Diamond State's
19 permit application and the sufficiency of the
20 mitigation that was required as a conditional.

21 Mr. Curran seeks to challenge whether
22 it could have been done better, but that's not a
23 relevant standard. Mr. Curran cannot meet his burden
24 because there is extensive evidence in the record, in
25 the technical response memo, in the Hearing Officer's

1 report, and --- and the supporting documents in the
2 record, that DNREC engaged in a lengthy and rigorous
3 process and that there is extensive evidence to
4 support the Secretary's decision. Instead, Mr.
5 Curran tries to create purportedly substantive
6 requirements in Delaware law, i.e. the Delaware law
7 mandated some outcome or mandated that --- that these
8 issues be considered in exactly the way Mr. Curran
9 wants them to have been considered. But that's not
10 consistent with Delaware law.

11 So repeatedly, Mr. Curran points you to
12 regulations that require --- that say DNREC shall,
13 DNREC shall. But they all are DNREC shall consider,
14 DNREC shall consider. So what is required is not
15 that DNREC do some specific thing, but that it
16 considered that subject. And that is exactly what
17 DNREC did. And that includes both the consideration
18 of recreational, environmental, and fishing
19 interests, and it also includes the determination as
20 to what mitigation --- what mitigation, if any, would
21 be included in the approval of the permit.

22 And in a couple places, Mr. Curran's
23 own briefing gives away the fact that DNREC did
24 indeed carefully consider these issues in discussing
25 sedimentation, an issue with both environmental and

1 fisheries implications. Mr. Curran's brief states
2 that, quote, this was not only reviewed by DNREC, but
3 done so with sufficient scrutiny, end quote, that the
4 project changed as a result. That's on page ten of
5 the brief. It can't be true that DNREC both failed
6 to evaluate something and evaluated it so fully that
7 the project changed as a result of that.

8 So, the subaqueous land regulations
9 require DNREC to consider recreational patents, and
10 that DNREC did consider those factors is abundantly
11 clear from the Hearing Officer's report, technical
12 response memo, and elsewhere. Counsel at one point
13 focused on the fact that recreation didn't appear in
14 the declarations of Mr. Cargill (phonetic), Mr.
15 Snaler (phonetic), and Mrs. Mensch. But it's
16 abundantly clear from the substance of those
17 documents, the Hearing Officer's report, and the
18 technical response memo, that they were considered.

19 At --- at another point, Counsel said
20 that the technical response memo and the Hearing
21 Officer's report didn't address recreation at all,
22 which is simply inaccurate. Both the technical
23 response memo and the Hearing Officer's report
24 addressed recreation. The technical response memo in
25 --- in addressing comments five and nine, the Hearing

1 Officer's report at pages 12, 13, 16, 20, and 21.
2 And not only did DNREC consider recreation, but the
3 mitigation DNREC required as a part of this project
4 specifically --- was specifically tailored to
5 recreational interests. It included improvements at
6 Fox Point State Park that are designed to facilitate
7 recreational access to the Delaware River, and that
8 is detailed in the technical response memo, the
9 Hearing Officer's report, it's in the Secretary's
10 order itself, and in the supplemental memo from Mr.
11 Cargill that was attached to the Hearing Officer's
12 report in detail that mitigation was required.

13 The same is true for fishing interests.
14 The Hearing Officer's report and the technical
15 response memo both address impacts on fishing. The
16 technical response memo at comments five and nine,
17 the Hearing Officer's report at pages 16, 20, and 21.
18 Indeed, Mr. Curran's opening brief acknowledges that
19 the hearing --- that the Hearing Officer's report
20 identifies some protections for fish. That's at page
21 29. And as a recreation, the mitigation that DNREC
22 required includes components specifically tailored to
23 fisheries and improving the fisheries and the
24 fisheries ecosystems in the Delaware River. So these
25 include the environmental DNA program that is going

1 to be funded as a result of the mitigation that's
2 required here. To improve the data and management of
3 fisheries in conjunction with other improvements.
4 This was addressed in the Cargill memo on the
5 mitigation and the Hearing Officer's report at pages
6 20 and 21.

7 And importantly, the technical response
8 memo and Mr. Cargill's declaration detailed that the
9 port expansion project itself, through the dredging,
10 is likely to significantly improve water quality in
11 the Delaware River with attendant benefits to
12 fisheries, the ecosystem, and fish species. And why
13 would that be? It's because there's a significant
14 quantity of contaminated soil that is what is being
15 dredged --- contaminated --- so contaminated that the
16 US Army Corps of Engineers was concerned with how to
17 dispose of it.

18 And so, removing all of that
19 contaminated soil from the bottom of the Delaware
20 River will improve those ecosystems. It will improve
21 the ecosystems, it will improve the health of the
22 fish, and it will improve as a result, the health of
23 the fisheries, the recreational fisheries impact that
24 Mr. Curran assertively is so concerned about. And at
25 this point, it is, you know, eating fish out of the

1 Delaware River is a questionable, restricted thing.
2 So getting those contaminants out of this river is
3 not a de minimis impact. It is a significant impact
4 that in DNREC's due made this project a net benefit
5 because of the removal of all that contamination.

6 And indeed, the --- the permit itself
7 contains special conditions that were required as ---
8 as part of the permit approval that --- to protect
9 fish species. Completely belying any assertion that
10 DNREC did not consider those interests. And any
11 assertion that DNREC didn't consider environmental
12 interests as part of this permanent application is
13 nonsensical and completely belied by all of the
14 evidence in the record.

15 DNREC required Diamond State multiple
16 times to provide additional or improved data or
17 analysis. It --- DNREC's consideration of
18 environmental concerns shows up in the Hearing
19 Officer's report, in the technical response memo, and
20 in the special conditions imposed on the permit. So
21 DNREC has complied with all of these procedural
22 requirements, and there --- the idea that there are
23 substantive requirements built into these provisions
24 is inconsistent with the law. It's not what the
25 regulations say, and it's not what was required.

1 So third, Mr. Curran attempts to
2 replace DNREC's judgment with Mr. Curran's judgment.
3 And that's flatly at odds with the process we have
4 with the role of DNREC, role of the Secretary, and
5 whether or not Mr. Curran would prefer a different
6 process or a different outcome is not relevant. And
7 his approach here is not subtle. Indeed, the brief
8 explicitly states what DNREC could have done here,
9 it's on page 25. Has an entire section dedicated to
10 that.

11 Elsewhere, he attempts to substitute
12 the judgment of Mr. Curran's alleged experts for
13 DNREC's judgment. Again, not how this process works.
14 These are quotes. In Tomasi's opinion, that's at
15 page 26; according Tomasi, also at page 26; Tomasi
16 made an evaluation, at page 29; Tomasi estimates,
17 same; Tomasi concludes also on page 29. In claiming
18 there's another method of evaluating recreation on
19 the river, Mr. Curran relies exclusively upon Mr.
20 Tomasi's conclusion that another way is better.
21 That's on page 30.

22 The same with mitigation. Mr. Curran
23 again tries to replace his judgment with DNREC's
24 judgment, relying on the Tomasi affidavit to support
25 the assertion of what DNREC could have and should

1 have considered, that's on page 33. And that section
2 of the brief cites exclusively to the Tomasi ---
3 Tomasi affidavit, which should be excluded under Rule
4 5.3.

5 The same is true for the mitigation of
6 harm section on pages 33 to 37. So Delaware law does
7 not allow Mr. Curran to substitute his judgment or
8 that of his purported experts for DNREC's judgment,
9 and Mr. Curran cannot succeed in his appeal by doing
10 so. DNREC is the agency charged with responsibility
11 for these matters. Secretary Garvin is Cabinet
12 Secretary charged with decision making authority on
13 these matters, and Mr. Curran cannot displace those
14 roles just because he thinks it could have been done
15 differently or he would have done it.

16 As detailed in Mr. Snaler and Mr.
17 Cargill's declarations, DNREC engaged extensively on
18 mitigation, and the mitigation in the order was ---
19 was crafted to address the harms from the project.
20 That's in the Snaler declaration of paragraph 33 and
21 the Cargill declaration at paragraphs 49 to 57.
22 Mitigation included separate components to address
23 the impacts on --- of dredging, the impacts to fish
24 species, fisheries, that's an eDNA program,
25 recreational interests through the walking trail, the

1 access to Fox Point State Park, viewing access to
2 water, and other improvements.

3 And so, what did DNREC actually do? In
4 thinking about all three of these reasons why Mr.
5 Arguments --- why Mr. Curran's arguments should fail,
6 it's important to refer back to what actual --- what
7 DNREC actually did. It was not a hatchet job as was
8 asserted by counsel earlier. In fact, DNREC engaged
9 in an extremely lengthy and robust evaluation of the
10 impacts of Diamond State's proposed action, and the
11 record more than demonstrates evidence to support the
12 Secretary's decision. DNREC's evaluation lasted five
13 years before the Secretary reached its decision.
14 Five years. That's the process that Appellants
15 assert is insufficient.

16 During that time, DNREC reviewed
17 numerous submissions from Diamond State, reviewed
18 voluminous data submitted by Diamond State, reviewed
19 independent data from DNREC and other sources,
20 including federal agencies, sent Diamond State back
21 for more data repeatedly where DNREC determined it
22 was insufficient to support DNREC's --- Diamond
23 State's position, sent Diamond State back repeatedly
24 to revise and redraft submissions that were
25 insufficient, and coordinated extensively with

1 federal agencies that were either responsible for or
2 had expertise on certain issues, like the navigation
3 issue that --- that has been discussed earlier.

4 If --- if Appellant's assertion that
5 this is insufficient is correct, it's hard to imagine
6 what process could be sufficient. Boiled down, I'll
7 take one point from Mr. Curran's brief. He asserts
8 that what DNREC must do is engage in careful and
9 thorough consideration before issuing a permit. That
10 is what DNREC did, and the Secretary's order should
11 be upheld.

12 So, let's --- and I'll try and be
13 brief, walk through what DNREC did to evaluate
14 environmental recreational fisheries concerns as set
15 forth in the technical response memo, the Hearing
16 Officer's report, supporting documents, and the
17 declarations of Mr. Snaler, Mr. Cargill, and Ms.
18 Mensch. This was a robust and lengthy process. Work
19 began in 2016 with sampling. Multiple iterations of
20 seeking additional or improved data from Diamond
21 State. DNREC sought to ensure that proper data had
22 been collected, and that adequate evaluation of that
23 data had occurred.

24 The first sediment and surface water
25 assessment report that Diamond State submitted, in

1 2018, DNREC found insufficient sampling and
2 recommended that Diamond State do additional
3 sampling. DNREC also incorporated technical staff
4 from the Delaware River Basin Commission with
5 expertise on the Delaware River. And in 2019,
6 Diamond State provided new sampling, and a new
7 sampling and analysis plan. DNREC received that and
8 asked that it be rewritten because it --- it wanted
9 specific comments to address.

10 Diamond State submitted that new
11 sampling and analysis plan, and DNREC provided yet
12 more comments and --- and concerns. These concerns
13 addressed PCBs, VOCs, the confined disposal facility,
14 and a host of other topics, and required considerably
15 more sampling from Diamond State.

16 In 2019, Diamond State submitted a
17 sediment and surface water quality report to DNREC,
18 and DNREC requested yet more details and raw data so
19 that DNREC could fully evaluate that data. And this
20 was all before Diamond State even submitted its
21 application, which came in March of 2020. So for
22 almost four years, DNREC had been requiring
23 additional data, additional studies, additional
24 analysis.

25 And even when Diamond State submit that

1 --- submitted that permit, first permit application,
2 DNREC rejected it as administratively incomplete and
3 asked Diamond State to do it again. So it was only
4 in the summer of 2020 that DNREC received an
5 administratively complete affidavit --- application.

6 And everything I've just walked through
7 is all detailed in Mr. Cargill's declaration that's
8 submitted with the briefing in this matter. And even
9 after the application had been received, DNREC
10 continued to evaluate and --- and continued to ask
11 for improvements and changes. All of this was done
12 with an eye towards a robust public comment, public
13 input process. So that included that DNREC, in an
14 effort to ensure that there was robust public
15 engagement, held a joint --- a joint public hearing
16 on this and the federal consistency determination.

17 Public comment occurs contemporaneously
18 with the staff review, so that comments are available
19 to DNREC staff and that that can be used by DNREC
20 staff to improve the project and be included. So
21 DNREC often engages in an iterative project to get
22 the Applicant to answer questions and provide
23 additional information to flesh out the project. And
24 that this is, of course, in contrast to what Mr.
25 Curran is doing now, submitting all of this evidence

1 only after the fact, only after the decision.

2 So what --- how did that public comment
3 process work? Well, the statute requires 20 days of
4 public comment. DNREC first had 70 days of a public
5 comment period. It then extended that another 31
6 days. There's over 100 days of public comment
7 period, drastically longer than normal.

8 DNREC received all those public
9 comments and digested them into different categories.
10 Those are the ones that were addressed in the
11 technical response memo and the Hearing Officer's
12 report. DNREC coordinated with other agencies and
13 subject matter experts. So this includes a --- a
14 joint permitting process that was done with the
15 federal agencies, and that included a host of
16 agencies that have already been referenced before,
17 but include the Army Corps of Engineered, NOAA, EPA,
18 Fish and Wildlife Service, et cetera.

19 DNREC evaluated in detail not only the
20 data provided by Diamond State, but also independent
21 sediment and fish statistic data collected by the
22 state. Data collected by the Army Corps of Engineers
23 and other data. DNREC worked carefully with the Army
24 Corps of Engineers to address concern about the
25 contamination of the dredging materials that I

1 referenced earlier and where those would go, but also
2 the benefit to the river that would come from their
3 removal.

4 DNREC coordinated or relied on or
5 received information from the experts who had
6 knowledge of how navigation worked in the Delaware
7 River, namely the Coast Guard, Pilots Association,
8 and the tug operators. DNREC reasonably relied on
9 those experts and their determination. And as Devera
10 pointed out, what was communicated to the Coast Guard
11 was a lengthy process that went on months, providing
12 copious data that the Coast Guard then considered in
13 its determination that there was not a concern to
14 navigation.

15 And the idea that this removal of what
16 they refer to as contaminant mass, the soils that are
17 being dredged out of the river. The idea that this
18 is --- is of a benefit to the ecosystem is not
19 DNREC's alone. This was agreed to --- agreed with by
20 the US Army Corps of Engineers, and that's in the
21 cardinal declaration at third --- at paragraph three.

22 So --- so this is from Mr. Cargill's
23 declaration. Data shows that concentrations of site
24 related contaminants in fish continue to improve due
25 to concerted regional efforts to identify and

1 minimize sources of PCBs and other risk driving
2 contaminants into waterways, and to clean up
3 sediments that have already been impacted by historic
4 contaminant releases. So again, this is not only a
5 benefit to the ecosystem, but this is a benefit to
6 the fisheries' interests that Mr. Curran is --- is
7 concerned about.

8 This --- that was at Carville at
9 paragraph 37. Also in paragraph 37, concentrations
10 of PCBs and dioxin purines in the sediment exceeded
11 ecological screening levels established by DNREC,
12 which supports the presence of contaminants in fish
13 tissue and resulting fish consumption advisories in
14 the area. As such, removal of contaminant mass that
15 is bound to the sediments, i.e. dredging, represents
16 a huge benefit to the local aquatic ecosystem and
17 will likely result in more rapid reductions of PCBs
18 and dioxide purines in the Delaware River fish
19 tissue. So, the idea that DNREC didn't consider
20 fisheries' interests is completely at odds with what
21 DNREC staff were working so hard to do.

22 On the mitigation that was used to
23 address environmental, recreational, and fisheries'
24 concerns, DNREC was equally rigorous. And DNREC
25 worked to develop a plan that would address not only

1 DNREC's requirements, but also federal requirements.
2 So that included the environmental interests, the
3 creation of a wetland, the recreational interests,
4 the access at Fox Point State Park, the fisheries'
5 interests, the environmental DNA program. All of
6 these issues were considered and addressed. That's
7 fine --- unless --- unless you care.

8 DNREC initially rejected Diamond
9 State's mitigation proposal and engaged with Diamond
10 State to ensure that adequate mitigation occurred
11 with the project. That's in the Snaler declaration,
12 52 to 55. And all of this is detailed in a technical
13 response memo and the Hearing Officer's report. That
14 technical response memo that is a hatchet job,
15 according to opposing counsel. That technical
16 response memo addresses the impacts of recreation and
17 the efforts to minimize those impacts.

18 I went back and looked, and this is
19 from the Hearing Officer's report. Special
20 consideration was taken to appropriate mitigation
21 requirements that would result in improvements to the
22 local environment and increase recreational
23 opportunities for the residents of neighboring
24 communities. The idea that DNREC didn't consider it
25 belied right on the face of it. It gave special

1 consideration to that and worked hard to have its
2 mitigation addressed. Recreation is addressed
3 throughout the technical response memo. I --- I gave
4 page cites earlier.

5 And so, whatever the record that Mr.
6 Curran would like to be, that's not the record that's
7 before you. This is a record that was developed over
8 a long period of time with hard work by DNREC and
9 undoubtedly the hard work of Diamond State to put
10 this all together.

11 A supplemental memo to the Hearing
12 Officer's report details the mitigation efforts and
13 how they all address habitat loss, ecosystem health,
14 fish species and public access, exactly the concerns
15 that are supposedly at issue. And the --- and the
16 permit itself included conditions to protect fish
17 species, to protect water quality, to limit impacts
18 on navigation, and to protect nearby subaqueous
19 lands.

20 So, in summary as to Mr. Curran's
21 appeal, it must fail. Mr. Curran relies extensively
22 and on many issues, exclusively on the evidence not
23 before --- not in the record before the Secretary and
24 prohibited by Rule 5.3. Mr. Currant seeks to twist
25 procedural requirements into substantive requirements

1 that are not in the statute or the regulations. Mr.
2 Curran tries to substitute his judgment for that of
3 DNREC, but that is inconsistent with the law and the
4 regulations, and it is inconsistent with the record
5 that shows DNREC engaged in a lengthy and thorough
6 review of this project. It considered the factors
7 required to be considered by the subaqueous lands
8 regulations, and required mitigation tailored to
9 environmental interests, recreational interests, and
10 fishing interests as part of its approval.

11 In closing, Devera and I have detailed
12 and has set forth in further detail in the briefing
13 by both DNREC and Diamond State in advance of this
14 hearing that each of the Appellants' appeals must
15 fail. The Appellants cannot twist the standard to be
16 applied in court into something it's not. The
17 standard is simple. It is the Secretary's decision
18 supported by evidence in the record, and here it
19 plainly is. The Appellants cannot change the record
20 after the fact. They're not permitted by the Board's
21 plain rules from expanding the record beyond what was
22 before the Secretary.

23 The Appellants also cannot impose
24 responsibility on DNREC beyond its authority. DNREC,
25 where it was reasonable and appropriate, relied on

1 the experts and the agencies who had expertise on
2 different topics. Navigation is one of the most
3 clear, but it worked closely with all of the other
4 agencies responsible both for federal permitting and
5 the Delaware River Basin Commission. And it's
6 notable that the Delaware River Basin Commission also
7 approved this permit.

8 Fundamentally, Appellants cannot
9 substitute their judgment for that of the
10 Secretary's. DNREC and Secretary Garvin have
11 specific roles and responsibilities under Delaware
12 law, and Appellants cannot just impose what they
13 think would be better, a process or outcome on the
14 decision of the Secretary. So the question is
15 whether the Secretary's order is supported by
16 evidence on the record, and here it clearly is.

17 I wanted to follow up on something Mr.
18 Levine, I think, said, which was something to the
19 effect that Laura Mensch is a hero of the story. And
20 I agree. Laura is no longer with the state, but she
21 was a hero and a dedicated state employee doing her
22 job. But the thing is, she's not the only one.
23 She's one of many dedicated state employees working
24 extremely hard to rigorously evaluate this project
25 and everything else that DNREC does, digging into the

1 details, pushing back on Diamond State, reaching out
2 to external experts, working with federal agencies,
3 all with the goal of rigorously evaluating the
4 application and ensuring that the state's interests
5 are protected. And the attacks on state employees
6 doing their job and asserting that that is a hatchet
7 job is unfounded and totally inappropriate.

8 DNREC, as Devera noted, urges a
9 directed verdict. DNREC thanks you very much for
10 your time and consideration.

11 Do you have any questions?

12 CHAIR:

13 Thank you. Any questions from the
14 Board? Thank you.

15 ATTORNEY TWEEDIE:

16 Thank you.

17 CHAIR:

18 And Diamond State.

19 ATTORNEY RUSHDAN:

20 Good afternoon, Chairman Holden,
21 members of the Board, it's been a long day, and I
22 thank you for the time and attention that you've
23 already committed to the presentations that you heard
24 so far. Mr. Burton and I, who've already been
25 introduced on behalf of Diamond State Port

1 Corporation, intend to be good stewards of the time
2 that we've been allotted and intentionally not
3 repetitive of information that has already been
4 covered. But we do intend to be thorough.

5 With respect to a preview of how we are
6 going to spend our allotted time, I'm first going to
7 briefly address the Board on issues of standard of
8 review in a very summary fashion, because a lot of
9 that ground has been covered by other parties. Then
10 Mr. Burton is going to come and address you on some
11 background information about the parties and the
12 underlying project. I'm going to return, and address
13 the Board on Diamond State's position on the
14 navigation issues that are before you. And then
15 lastly, Mr. Burton is going to return again to
16 address the Board on environmental impacts and
17 recreation activities. So, let's begin.

18 As has already been stated, there is a
19 Supreme Court case that's instructed on the standard
20 of review in this matter. It was established in
21 Delaware, Solid Waste Authority versus Delaware
22 Department of Natural Resources and Environmental
23 Control, in which it's been established and again
24 stated that the burden is the appellants to carry.
25 And the burden is to show that the Secretary's

1 decision is not supported by the evidence on the
2 record before the Board.

3 That case goes on to say that the
4 entire record that was before the Board --- that was
5 before the Secretary, excuse me, and any other
6 competent evidence that the parties produced during
7 the appeal is part of that consideration. And if the
8 Appellant fails to carry this burden, then the
9 Secretary's decision must stand.

10 Now, we cannot review that language in
11 a vacuum because we have the Board's own Rule 5.3,
12 which states Appellants other than permit applicants
13 or an alleged violator may only introduce evidence
14 which was before the Secretary. Mr. Tweedie already
15 addressed how important the consideration of this
16 Rule 5.3 is in the context of how the Board views the
17 evidence here. And we submit again in a confirmatory
18 fashion, that because the Appellants are neither
19 permanent Applicants or alleged violators, then the
20 record that is before you for consideration is the
21 record that was before the Secretary.

22 And that makes a lot of sense, because
23 in the case that we talked about previously, the DSWA
24 case, in that instance, the Appellants that were
25 involved there were the permit Applicant, which is a

1 distinct --- a distinction with a difference in the
2 posture of this matter before you. So, just want to
3 set the table in that fashion to be clear about what
4 the DSP's --- Diamond State's position is on the
5 standard review and what it is not.

6 And with that said, I'd like to turn
7 over the rostrum to my colleague, Mr. Burton. He's
8 going to take the Board through some background
9 information about the parties and the initiative.

10 ATTORNEY BURTON:

11 Thank you, Mr. Rushdan. Good
12 afternoon, Chairman Holden, members of the Board. My
13 name is William Burton, Barnes & Thornburg, here on
14 behalf of Diamond State Port Corporation.

15 Before I jump into Appellant's
16 arguments, I think we should all take a step back and
17 know a little bit about who Diamond State Port
18 Corporation is. In 1995, the State of Delaware
19 purchased the Port of Wilmington from the City of
20 Wilmington and created Diamond State Port Corporation
21 to manage the port. Diamond State is not a private
22 company out to make a profit for its shareholders.
23 It's a public entity within the Delaware Department
24 of State, created to support the public interest and
25 to serve Delaware citizens.

1 It's governed by a Board of Directors,
2 which includes members of the government ---
3 Governor's cabinet, legislatures, and others
4 nominated by the Governor and confirmed by the
5 Delaware State Senate. Its mission is to contribute
6 to Delaware's economic vitality, which in reality
7 means that thousands of people go to work for port
8 every day to earn a good wage and benefits to support
9 themselves and their families. They rely on these
10 jobs, which many do not require a college degree, yet
11 pay well, which is a rarity in today's economy. The
12 workforce is highly diverse, as is leadership that
13 represents them, and Diamond State fully expects that
14 same posture will continue at the Edgemoor location.

15 So in support of this appeal, and in
16 accordance with Board Rule 5.3, Diamond State has
17 presented two witnesses by affidavit. Diamond
18 State's first witness is Mr. David Small, who has
19 nearly three decades of experience at DNREC. He is a
20 consultant at Verdantas, which is a consulting firm
21 created in 2020 through a merger of several smaller
22 firms, including Duffield Associates who you've seen
23 throughout these papers. Mr. Small's nearly three
24 decades of experience at DNREC includes in 2001 to
25 2014 as DNREC Deputy Secretary, and from 2014 to 2017

1 as DNREC Secretary. He has an extensive experience
2 and practical understanding of the subaqueous land
3 permitting application process, the public comment
4 period, and the issuance of subaqueous land permits
5 here in Delaware.

6 Diamond State's second witness is Brian
7 Devine, who is a Geotechnical Principal Engineer and
8 Senior Consultant at Verdantas, with extensive
9 experience in technical direction and management of
10 geotechnical engineering and design and
11 implementation of geotechnical programs. Mr. Devine
12 has unique experience in environmental permitting
13 associated with dredging and subaqueous construction
14 here in Delaware. He served as Diamond State's
15 project manager, the Edgemoor Expansion Project, and
16 therefore has an extensive working knowledge of all
17 aspects of the federal, state, and local permitting
18 application process that went into this project.

19 So now that we know a little bit about
20 Diamond State and who our witnesses are, let's take a
21 look at who the Appellants are in these consolidated
22 appeals. The first Appellant is PhilaPort, who's
23 more formally known as the Philadelphia Regional Port
24 Authority. PhilaPort is an agent --- agency of the
25 state of Pennsylvania and owner of the Port of

1 Philadelphia properties, ports which are upstream
2 from the Port of Wilmington and the Edgemoor
3 location, who are direct competitors at Diamond
4 State, and others who have operations on the Delaware
5 River.

6 And importantly, simultaneously with
7 this appeal pending, PhilaPort is currently working
8 on a major port expansion of its own. It seeks to
9 invest approximately \$3.5 billion to increase its
10 operations upstream and to compete directly with
11 Diamond State and others. PhilaPort's expansion
12 project provides important and meaningful context
13 behind why it's bringing this appeal in the first
14 instance.

15 The second Appellant here is the Port
16 Operators, which is an arm of Holt Logistics Company
17 owned by the Holt family, who are operators of the
18 Port of Philadelphia --- the PhilaPort properties.
19 So the Port Operators operate the ports that are
20 owned by PhilaPort. The Port Operators at PhilaPort
21 have teamed up in these consolidated appeals to
22 achieve one goal, to gain a competitive advantage on
23 the Delaware River. They've also teamed up with the
24 third Appellant, Mr. Curran, who is a longtime
25 employee of the Holt family.

1 Now, although Mr. Curran would have
2 this Board believe he's merely a concerned citizen
3 out to safeguard recreational fishing and boating on
4 the Delaware River, the record paints an entirely
5 different picture. Mr. Curran admits he lives
6 approximately 110 miles away from the proposed
7 project site, down at the Delaware beaches. He also
8 admits that he doesn't own a boat and that when he
9 wants to enjoy this fishing and recreational
10 activity, he has to coordinate with his friends who
11 do own boats and travel two hours up Delaware to fish
12 and boat in front of a historic industrial site. Mr.
13 Curran has also hired large law firms to further this
14 occasional recreational activity and to preserve
15 these occasional recreational activities.

16 All this to say, Appellants are not the
17 everyday Delawareans raising concerns. They are
18 direct competitors of Diamond State who have hired
19 large firms and consultants to use this appeal
20 process to gain a competitive advantage. With that
21 reality, does that mean the Secretary's decision
22 should automatically be affirmed? No. But it's an
23 important context and can't simply be cast aside, as
24 Appellants would like to do in these proceedings.

25 So now that we've taken a look at who

1 Diamond State Port Corporation is, who its witnesses
2 are, and who the Appellants are, let's take a look at
3 everything that went into this proposed project.

4 Diamond State's proposed project has been the result
5 of tireless efforts from federal and state officials,
6 alongside union leadership and represented by
7 thousands of Delawareans who work at the port. The
8 proposed project is also the product of significant
9 and extensive consideration, expert analysis,
10 discussions, meetings, public comments, and
11 administrative critique and review that spanned over
12 half a decade. So much has gone into this project
13 that the amount of review, public input, and analysis
14 is almost unmatched in Delaware's history.

15 Unfortunately, I don't have enough time
16 today to go through every single thing that led us
17 here today, but I do want to highlight a few things
18 for the Board. The project started back with the
19 deepening of the Delaware River, which PhilaPort
20 claims it paid for and should have unfettered access
21 to the Delaware River. But that deepening of the
22 river started with the announcement of the Panama
23 Canal Expansion project, which would allow larger
24 ships to pass through the Panama Canal and access the
25 United States Eastern seaboard. Those new Panamax

1 ships are one and a half times larger than the normal
2 ships and would allow twice as much cargo to be
3 delivered to ports who --- who can accept them.

4 The issue is that Delaware did not and
5 currently does not have a port capable of accepting
6 those Panamax ships. And so that's what this project
7 aimed to fix. So back in January 19th, 2016, Diamond
8 State held a public --- an open public forum where it
9 solicited comments from over 100 individuals about
10 the site location. In March 2020, after picking the
11 Edgemoor facility --- Edgemoor location as the
12 proposed project site, Diamond State had another
13 opening public comment period at Mount Pleasant
14 Elementary School, where again over 100 individuals
15 attended and were able to meet with subject matter
16 experts and provide public consultations.

17 Now, all of the work depicted on this
18 slide that occurred before Diamond State submitted
19 its applications could all be considered extra
20 credit. It wasn't required to do any of that before
21 submitting its application. However, after it
22 submitted its application, DNREC issued a joint
23 public notice in August of 2020 and advising the
24 public that Diamond State's application was submitted
25 and setting a virtual public hearing. After that

1 public hearing, DNREC then extended the notice and
2 comment period to allow for additional comments.

3 That provided a total of 101 day
4 comment period for public review and engagement,
5 which is one of the largest periods in DNREC's
6 history. During that extended public comment period,
7 the public submitted 194 comments, 191 of which were
8 received after the public hearing. And as this slide
9 depicts, even after DNREC's public hearing, the
10 public continued to have opportunities to weigh in
11 and engage in the proposed project.

12 So after all of these key events, all
13 this public input, all this public outreach,
14 Appellants asked, why is any of this important? Why
15 is any of this relevant to why we're here today?
16 Well, it's important and relevant because this appeal
17 is all about what was seemingly not done, what was
18 apparently not considered, and in the eyes of these
19 upstream competitors, what should have been done.
20 Appellants want to paint a picture that DNREC's
21 review and approval was rushed, rubber stamped,
22 subject to some internal deadline, and now lacks
23 evidence such as the Secretary's decision should be
24 overturned.

25 But the record surrounding this project

1 and the extensive amount of analysis and review that
2 went into it paints an entirely different picture.
3 DNREC should be applauded for its tireless efforts,
4 long hours and sleepless nights that went into
5 evaluating and analyzing this important application.
6 We should be honoring the work of these fine civil
7 servants rather than questioning their integrity and
8 candor. To say this project was not fully vetted,
9 scrutinized and subject to extensive analysis, public
10 input, and review is simply a farce.

11 So, turning directly to Appellant's
12 arguments, my colleague Mr. Rushdan will address the
13 first argument, which we have as navigation.

14 ATTORNEY RUSHDAN:

15 Thank you, Mr. Burton. I'm now going
16 to take the Board through a very important topic and
17 the issues before the Board, which is navigation.
18 But before I touch on the specific issues of
19 navigation, I need to do some background work first
20 about what are we talking about with respect to the
21 navigation activities itself.

22 We're talking about the Delaware River
23 navigation channel. There's already been some
24 testimony, well some discussion today rather, in the
25 presentations about what this is, but I want to

1 highlight a few things that weren't expressly stated.
2 The Delaware River navigation channel is about 102
3 miles long, starting from the Delaware Bay where it's
4 widest, which is about 1,000 feet, and it --- up to
5 --- it's 102 miles from the Delaware Bay to
6 Philadelphia in the Camden, New Jersey area, where
7 many of the Appellants operate.

8 The --- it's approximately 400 feet
9 wide in the area where the Philadelphia port
10 operates. But in the section of the navigation
11 channel where the Edgemoor port is, it's
12 approximately 800 to 900 feet long, it can vary ---
13 it can vary vastly, but it's approximately double the
14 size of the area that's available to navigate in the
15 Philadelphia area.

16 That's also relevant when you consider
17 the ship beam, which is essentially the reference to
18 how wide these ships are. They're approximately 161
19 feet wide. So if you do some quick math, 161 feet
20 wide, it's approximately four ships side by side,
21 with a little bit more to give, and that'll become a
22 more relevant point as we make our way through the
23 presentation.

24 Now, the Edgemoor site is situated in
25 the navigation channel, where you see this star

1 towards the top of the graphic. And the star in the
2 lower part of the graphic is the existing port of
3 Wilmington. Now, it's already been explained the
4 reason --- the critical reason why this Edgemoor port
5 is important is because of that expansion of the
6 Panamax vessels. Right? The ability of these
7 vessels to --- to transmit cargo is expansive, but
8 they also require a deeper dredge channel in order
9 for them to be able to --- to be able to --- to
10 navigate the navigation channel.

11 The existing port infrastructure could
12 not accommodate these ships. So we were essentially,
13 Diamond State, that is, and in the State of Delaware
14 in particular, was at a disadvantage because it could
15 not participate in some of the economic opportunities
16 that were available through these Panamax vessels.

17 This next slide, which has been
18 incorporated into a number of the presentations
19 already, again just orients you to the specific
20 footprint of the proposed Edgemoor port. It's
21 already been identified that the yellow --- the two
22 yellow lines, that's essentially that navigation
23 channel, and again, I represent to you, it's
24 approximately about 800 feet wide in this section of
25 the channel where the port would operate. And then

1 that section that you see dark green and hatched,
2 that's essentially the footprint of where the actual
3 Edgemoor port operations will occur.

4 So now that we've reoriented ourselves
5 to actually what we're talking about with respect to
6 where navigation activity will occur, let's talk a
7 little bit about the important players that make sure
8 that navigation is safe in this navigation channel.
9 And these folks have already been discussed to some
10 degree, but it's critical that I reiterate some of
11 these points.

12 So first, we start off with the United
13 States Army Corps of Engineers. The Army Corps of
14 Engineers is responsible for overseeing civil works
15 projects involving navigation and federal waterways.
16 Now, they're primarily responsible for maintaining
17 commercially navigable water channels throughout the
18 entire United States that provide access to deep
19 water ports, such as the one that's being proposed
20 here. Importantly, the work that has to be done in
21 order to allow access to these deep draft vessels
22 that want to get to these ports is the dredging
23 component, which the United States Army Corps of
24 Engineers conducts and oversees.

25 Now, dredging must be done in the

1 navigation channel to make it clear and safe for
2 navigation. So, the United States Army Corps of
3 Engineers play a critical role in making sure that
4 they are not only doing the work of dredging, but
5 they also ensure that it's done in a way that makes
6 navigation safe.

7 The next major player in the navigation
8 channel is the United States Coast Guard Sector,
9 Delaware Bay. As an arm of the United States Coast
10 Guard, they are responsible for port and waterway
11 security generally over shipping and American waters.
12 They assist with providing navigational markers that
13 assist with navigation of the pilots and captains
14 that usher the vessels through the waters. In
15 particular, Delaware Sector Bay is responsible for
16 the entire Tri-state area, New Jersey, Pennsylvania,
17 and Delaware. And forgive me, New Yorkers, I know
18 you have a different constitution of the Tri-state
19 area.

20 But in all seriousness, the Delaware
21 Sector Bay acknowledges that they have a special role
22 in busy commercial ports that are at issue here. The
23 ones in Wilmington --- the proposed one in
24 Wilmington, and in the Philadelphia area. And they
25 are well familiar with the unique needs of these

1 ports and --- and the particular vessels that they
2 serve.

3 The next major player is the Pilots
4 Association Bay and River Delaware. These folks
5 actually board commercial vessels when they enter
6 into the navigation channel and ensure that the
7 navigation activity is conducted in a safe manner.
8 These pilots act in the public interest, and
9 independent of any direction that does not comport
10 with the needs of maritime safety. That's critical.
11 These folks coordinate with each other. There's a
12 pilot on every single vessel, and they coordinate as
13 maritime activity is --- is taking place upstream and
14 downstream. And they ensure that the activities of
15 navigation are done in a way not to create problems
16 within the navigation channel.

17 So sometimes that may require a vessel
18 to stop, that may require a vessel to slow down. It
19 may require a vessel to make some other type of
20 maneuver within the navigation channel. These are
21 not unusual or indicative of problems. These are
22 acts of navigation which are carefully coordinated by
23 the pilots who, again, operate in the public interest
24 and with respect to maritime safety.

25 And again, if an activity cannot be

1 done safely, a captain may be --- a captain who
2 pilots a vessel may be interested primarily in
3 getting that cargo to its intended destination in the
4 most efficient manner. And the Pilots will align
5 with that, so long as it can be done safely. And if
6 it cannot, then appropriate activities will take
7 place to make sure that safety is prioritized.

8 And last but not least, we have the
9 Wilmington Tug, Inc. Tugboat operators serve a
10 critical role in this section of the navigation
11 channel. Wilmington Tug is --- is the actual tug
12 operator in --- in the area where Edgemoor port,
13 proposed Edgemoor port will be. They assist vessels
14 in navigating to safe places. Specifically, they're
15 critical in the berthing process, which is the
16 process that allows for a vessel to actually be
17 docked at its intended destination so that cargo can
18 be loaded and offloaded. And in the event of a
19 maritime event, they're essentially boots on the
20 ground to help deal with those issues as they arise.

21 So, these major players are not just
22 important because of what they do, they're important
23 because of who they are, which are the collective
24 experts on the issues of safety, maritime safety in
25 the navigation channel.

1 So now that I've addressed these key
2 players, I'd like to now turn to what actually the
3 Secretary was required to consider when it comes to
4 navigation issues. So, we start off with this
5 overall subaqueous land regulation, which is lengthy
6 and has many subparts to it, some of which have
7 already been expressly referenced in earlier
8 presentations.

9 But the regulation starts with the
10 purpose, and that's where I want to start the
11 discussion here as well. The discussion of purpose
12 states that subaqueous lands within the boundaries of
13 Delaware constitute an important resource of the
14 state and require protection against uses or changes
15 which may impair the public interest. The purpose
16 goes on to say expressly that this regulation is to
17 empower the Secretary. First line it has, it's
18 empower the Secretary to deal with the dispose of the
19 subaqueous lands in order, again, to protect the
20 public interest.

21 So this idea of the public interest is
22 woven into the very purpose of how the rest of the
23 regulation needs to be interpreted. And we don't
24 have to speculate about what the public interest is
25 because it's defined expressly in the regulation as

1 well. Public interest means the demonstrable,
2 environmental, social, and economic benefits which
3 would accrue to the public at large as a result of
4 the proposed action, and which would exceed all
5 demonstrable environmental, social, and economic
6 costs of the proposed action.

7 So the public interest definition
8 itself doesn't suggest that there's going to be no
9 potential costs. It suggests a weighing
10 determination of costs, not the absence of any
11 impact. But it expressly acknowledges that there may
12 be impacts, and you have to weigh that with the
13 benefits to the public at large. And in doing so,
14 the Secretary appropriately considers the ultimate
15 project and purpose to be served. Here, the purpose
16 to be served is to allow Delaware to be competitive
17 in a way that will be historically impactful on the
18 Delaware economy and the Delaware workforce.

19 So, we now transition to some specific
20 regulations that deal with the issues of navigation.
21 First, we have the public use impact regulation, and
22 this says that the Department shall consider in any
23 proposed activity, within we see this public interest
24 term again, which might affect the use of subaqueous
25 lands. These considerations include, but are not

1 limited to, the potential effect on the public with
2 respect to commerce, navigation but one of many
3 factors, recreation, aesthetic enjoyment, natural
4 resources, and other uses of the subaqueous lands.

5 Why did I highlight that last part of
6 the regulation? I highlighted it because that
7 modifier is the key to understanding that entire
8 regulation. It's navigation with respect to the
9 subaqueous lands, not navigation generally. It's
10 recreation with respect to the subaqueous lands,
11 aesthetic enjoyment with respect to the subaqueous
12 lands, natural resources with respect to the
13 subaqueous lands, and of course, commerce with
14 respect to the subaqueous lands.

15 And again, it's not any one factor.
16 These are all part of an overall calculation of the
17 Secretary. So even if the Secretary had a concern
18 with one particular area, that doesn't conclude the
19 analysis, that doesn't make it dispositive. The
20 Secretary is allowed to, and did in fact, consider
21 all of these areas, which will be illustrated as we
22 go further into the presentation, in fact, which has
23 already been stated by our colleagues at DNREC.
24 Counsel for DNREC, pardon me.

25 Now, the next regulation I want to

1 discuss is Section 4.7.51. And this is a regulation
2 that deals with the degree to which the project
3 represents an encroachment or otherwise interferes
4 with public lands, waterways, or surrounding public
5 interests. The degree to which. So it also again
6 implies that there may be some, but the degree to
7 which it impacts. And as I will acknowledge later in
8 the presentation, the Secretary did in fact include a
9 special condition in the permit which talked about
10 acknowledging how waterways would not --- could not
11 be impacted through the execution of this permit.
12 Dredging is also a key factor that is evaluated by
13 the United States Army Corps of Engineers. And the
14 --- and that was a special condition of the
15 Secretary's permit, which I'll again address a little
16 bit later.

17 But this regulation was in fact
18 considered, and it's demonstrable in the record that
19 it was considered. 4.11.1, projects shall be
20 designed to meet the following objectives, maintain
21 the navigability of channels. The project was
22 designed to maintain the navigability of channels.
23 And it's a specific condition, again, in the permit
24 that demonstrates this, which I will acknowledge when
25 we talk about the actual permit that was issued by

1 the Secretary.

2 And last but not least, we're going to
3 talk about this Section 4.8.4, which has already been
4 the topic of a lot of attention today, which
5 essentially says that structures shall not interfere
6 with navigation, public or other interests.
7 Importantly, in the preceding paragraph so we can
8 understand what structures are, it says structures
9 shall utilize the best available materials and
10 technologies. So we already have some idea that a
11 structure should include materials and technologies
12 as part of what we're not interfering with or what
13 the word structure is.

14 And as already been indicated through
15 prior presentations, structure is defined in the
16 actual subaqueous land regulations. And this is a
17 non-exhaustive list of potential definitions of what
18 a structure could be, but this is a list of things in
19 like kind that consists of materials, okay? And I'll
20 further note for the Board's consideration that this
21 is not a mere accident or coincidence that turning
22 basin was not included. Turning basin --- the ---
23 the regulations actually have reference to the term
24 turning basin in the regulations. It's a completely
25 different part of the regulation that has nothing to

1 do with these navigation issues.

2 But I share that to say there was
3 acknowledgment of what a turning basin is, and it was
4 not included in this definition. So we're going to
5 talk about what is a turning basin now. There's been
6 a lot of speculation about a turning basin being a
7 structure and not being a structure. As I represent
8 to you, it is not. But let's talk about what it
9 actually is and what it is not. So, this image has
10 already been shared in some prior presentations as
11 well.

12 But as I mentioned before, the
13 navigation channel here, the turning basin comprises
14 the entire navigation channel, no doubt about it.
15 And this is approximately about 800 feet or so that's
16 within the navigation channel. It's a total width of
17 1,700 feet, and the remainder of the navigation, the
18 remainder of the turning basin, rather, is
19 incorporated into the footprint of where the port
20 operations will be.

21 Now, the actual length of the turning
22 basin is also one that is guided by regulations for
23 how turning basins need to be designed. And these
24 aren't regulations that are designated by DNREC.
25 These are regulations from the United States Army

1 Corps of Engineers. The basin needs to be
2 approximately 1.5 times the length of the anticipated
3 ships to --- to use this turning basin. In here, we
4 use a regular ship length of 1,200 feet. So, you
5 take 1.5 times of that and you have that 1,700 feet
6 length for the turning maneuver to occur.

7 Now, as we further define what a
8 turning basin is and what it is not, the actual
9 people who regulate this are the United States Army
10 Corps of Engineers. And again, we don't have to
11 speculate about it because it's already been
12 determined. United States Army Corps of Engineers
13 hydraulic design of deep draft navigation projects is
14 essentially the Bible for United States Army Corps of
15 Engineers. And in that document, they define a
16 turning basin as an area that provides for the
17 turning of a ship. Simple as that. Turning basins
18 are usually located at or near the upper end of the
19 interior channel, and possibly at one or more
20 intermediate points along the channel, such as the
21 case here.

22 A turning basin is an integral
23 navigation project feature as defined by the same
24 documents, but it is not a structure. And lastly,
25 pulled from the same manual, when traffic conditions

1 permit, the turning basin should use the navigation
2 channel as part of the basin area. So I want to stop
3 and just really reflect on that for a moment, because
4 a huge part of the discussion about navigation is
5 criticizing the design of the turning basin being
6 inside of the navigation channel. But when in fact
7 we have authority that says this is actually
8 appropriate in the Army Corps of Engineers documents
9 itself, it's hard to reconcile the two. One, based
10 on the actual people who are involved in designing
11 the standards for this and speculation on the other
12 side.

13 Next, I'd like to turn the Board's
14 attention to the MITAGS study, which again, has been
15 another point of criticism here. And I want to talk
16 about what the MITAGS study is and what it is not.
17 The MITAGS study was a limited report. The MITAGS
18 study was not required by any part of the permitting
19 process that DNREC reviews as part of this permit.
20 This study was commissioned as part of the parallel
21 process with the federal regulatory authorities for
22 the permits that were required on that parallel
23 track.

24 So again, this is not something that is
25 required nor submitted for that purpose, but it was

1 helpful. It was helpful because the MITAGS study, at
2 its core, is a feasibility study. The MITAGS study
3 was used to determine the core issue of whether or
4 not berthing can occur safely into and out of the
5 port. It was not intended to be an end all, be all
6 discussion of the entire length of the navigation
7 channel. What it was designed to do was to say what
8 you're proposing to build, can you safely accomplish
9 the functions of what is the day-to-day operations?
10 Can you get ships in and can you get them out back
11 into the navigation channel, and can you do so with
12 minimal impact?

13 And the MITAGS study ultimately
14 concluded that you could. And just to back up for a
15 second, the MITAGS organization is essentially the
16 Harvard of maritime. If you want to find out if a
17 project is going to be safe or if you can actually do
18 something that it requires, you know, granular sort
19 of analysis of navigation, this is the organization
20 that you go to, okay?

21 And these --- the amount of
22 intellectual horsepower that's there, they bring on,
23 you know, folks from the federal authorities, the
24 Army Corps of Engineers at the table. They also
25 bring in individuals who have direct experience with

1 this particular navigation channel, as they did here.
2 On the very first --- second page, rather, of the
3 report, the MITAGS report makes it clear to highlight
4 that the recommendations here are purely for guidance
5 and that the final decision on what is safe to
6 transit rests with the master of the vessel and the
7 local pilot.

8 So again, even in this report that's
9 crafted by subject matter experts across the country,
10 they ultimately, or not ultimately, in the very
11 beginning, show deference on the issue of safety to
12 the local pilots.

13 There's also been involvement,
14 specifically from Captain Bailey, who was a retired
15 Delaware pilot. And again, this is important because
16 we don't have folks who are impressive in their own
17 right as intellectuals in navigation. We have
18 someone who actually understands the nuances of
19 what's taking place in the Delaware River navigation
20 channel be informative on how the simulations are ran
21 so that they can be true to the conditions that you
22 see. And I represent to you that that type of direct
23 experience is more important than speculative
24 conclusions about this particular navigation channel.
25 We'll touch on that in a moment.

1 The MITAGS report also made some
2 recommendations, okay? And one of the
3 recommendations that was actually material that was
4 fundamental to the process that we are in now, which
5 was how is the actual design of how turning is going
6 to occur, how is that design, and is that design
7 affected? And its recommendation said that the
8 design area --- that the design should consider
9 deepening a red hatched area to provide additional
10 maneuvering space. That specific recommendation that
11 is specific to considerations that have to be
12 factored now was incorporated.

13 I think there might have been some
14 confusion based on my review of the papers about when
15 --- when this MITAGS study happened and when the
16 permit application was submitted. This preceded the
17 permit application. This recommendation came in, the
18 designers took it into consideration, and in fact
19 made those changes to improve the maneuverability
20 before the permit application was submitted.

21 And in the conclusion summary, again,
22 it reminds us of where I started my discussion about
23 the MITAGS study. The purpose was to validate the
24 design of the Edgemoor terminal and turning basin.
25 There's been a lot of discussions about what the

1 MITAGS study is not, but most importantly is what ---
2 was it --- what is it? What was it designed to do?
3 And this is what it was designed to do to validate
4 the design of the Edgemoor terminal basin. And the
5 runs that were completed showed that this was
6 feasible, that it was accomplished, that it was
7 something that could be accomplished.

8 And I'll take this opportunity to talk
9 about some of the criticisms that the MITAGS study
10 was set up in sort of the most favorable conditions
11 possible. So one of the criticisms was that, again,
12 you simulated best case scenarios. You didn't have
13 any factors that suggested any type of challenge.
14 And that's belied by some specific references that
15 are in the MITAGS report itself. Specifically,
16 around the wind. All winds tested simulated worst
17 case scenarios, okay? Especially in the document.

18 There's also this issue of vessel runs
19 wherein you show in the MITAGS report that there's
20 sufficient space for vessels to pass each other in
21 the navigation channel, which I mentioned,
22 approximately 800 feet or so. But when they tested
23 these runs, they showed that you could actually pass
24 one another in the navigation channel. And again,
25 the end result, and the end inclusion was that you

1 would have minimal impact on ships, not that there
2 would be no impact.

3 And again, impacts on ships is not a
4 problem. Impacts on ships is how the navigation
5 channel functions. Ships have to slow down,
6 sometimes they have to stop. This isn't a new
7 novelty that's created by virtue of this project.
8 This is how regular and normal operations in the
9 navigation channel happen. And this report is
10 basically saying that our berthing activity does not
11 disrupt that in a more than a minimal way.

12 Now, the MITAGS report was incorporated
13 into the public comment in this --- in this matter,
14 so there was an opportunity for the public to review
15 it, to offer comments on it, and that in fact
16 happened. And I highlight here specifically a
17 section of the public comments that were provided by
18 Greenwich Terminals and Gloucester Terminals LLC
19 counsel, Ms. Kaplan, who put public comment into the
20 record. And in that public comment there was also
21 the report that was provided.

22 We talked about earlier Captain Jersey
23 Kichner, who is relied upon by the Appellants. That
24 information did not just come before the Board in
25 this appeal. That information was in the record

1 before the Secretary for consideration. And I'll
2 represent to the Board that in the extensive briefing
3 that was done --- has been done in this consolidated
4 appeal, essentially all of the core arguments
5 relating to navigation criticisms were part of the
6 public record and incorporated for consideration. I
7 just highlight a few anecdotally for you to focus on,
8 which is the placement of the turning basin.
9 Occupies the entire main navigation channel, as if
10 that's a design flaw. We've already addressed that
11 in the Army Corps of Engineers manual as not being
12 issued.

13 The proposed Edgemoor project and
14 turning basin is also located at a critical turn in
15 the main channel, and so it's likely to affect visual
16 navigation aids. We have heard from the United
17 States Coast Guard, who's responsible for visual
18 aids, basically saying in their email that they did
19 not consider this a project that would interfere with
20 safe navigation.

21 We --- there are specific regulations
22 that were highlighted as being relevant so that the
23 Secretary could expressly consider those regulations
24 to see if --- see if he agreed are noted here. And
25 then ultimately, a final parting shot on the actual

1 MITAGS study itself as being flawed and incomplete.

2 All of that information, all those
3 criticisms are documented in the record as well as
4 Captain Kichner's report itself, which again, I'll
5 highlight some of the key parts of it. MITAGS study
6 is incomplete. The MITAGS study simulations were
7 only conducted in clear visibility, and basically
8 given the criticality you've seen this precise phrase
9 pulled in earlier presentations to federal channels,
10 upstream and end stream ports. If it was blocked for
11 any reason, that would be a problem. And blaming the
12 MITAGS studies as being incomplete and additional
13 simulations analysis are recommended. So again,
14 these criticisms are not new. The Secretary had the
15 opportunity to consider and did, in fact, consider
16 all of these criticisms.

17 The Secretary also considered the
18 counterpoints to those criticisms, which were
19 introduced through the technical memorandum, which
20 was --- been discussed today as well. And the
21 technical memorandum was robust. It addressed a
22 number of different particular issues. But the one
23 that I want to focus on in particular is this
24 speculation about the impact on other vessels when
25 the turning basin is being used. And when the

1 turning basin is being used, just to be clear, no
2 vessels can pass. When I talked about the passing of
3 --- the passing distances, that assumes that they're
4 --- the turning basin is not being used. When the
5 turning basin is being used, passing is not
6 occurring.

7 But rather than speculate about
8 significant periods of delay, we actually have data
9 that informs our analysis of how long that will
10 typically be based on usage of this area of the
11 navigation channel.

12 Now, the Defasa (phonetic) workshop,
13 this is the Defasa workshop summary, this document
14 here, which this was pulled from, and in fact,
15 Captain Kichner references in his report as being
16 instructive and informative of why he is correct with
17 his conclusions. But in his --- based on this
18 report, data was pulled to basically demonstrate that
19 the turning could occur over a 10 to 15 minutes
20 period. And in the time that I've been presenting,
21 there probably could have been about maybe two turns
22 that have occurred. And I represent to the Board
23 that that is not a significant period of time. And
24 again, the speculation upon which this significant
25 period is based, I don't know the data that is being

1 relied upon for that, but we have data here.

2 Additionally, I've already touched on
3 this point that there's significant distancing.
4 There isn't expansive and aggressive use of all of
5 the space that the proposed Edgemoor port has to
6 operate in. The actual regulations have a minimum
7 ten foot setback from the navigation channel from
8 where you can operate. And when you account for the
9 beam of a ship, which is approximately 161 feet, the
10 distance is 575 total, counting for the beam you have
11 414 feet off of the navigation channel. So that's a
12 significant distance that you have to otherwise
13 engage in navigation when ships are berthed at the
14 site.

15 So all of these issues are addressed in
16 the technical memorandum, which is further supported
17 if we go back to these major players in the
18 navigation channel, who came in to give confidence to
19 the Secretary that the issues concerning navigation
20 were not well founded. There's already been
21 discussion about the Pilots Association Bay and River
22 Delaware letter. Essentially, the letter in totality
23 expresses support for the project. And again, these
24 are the folks who have a responsibility for boarding
25 the vessels and determining whether or not safe

1 navigation can occur. They're on board.

2 We also have a letter from Wilmington
3 Tug, the tug operators who are responsible for
4 actually doing the berthing activity in the
5 navigation channel. These folks are also on Board.
6 And there's been much discussion today about the
7 United States Coast Guard email that perhaps one or
8 two lines that basically identified that the Coast
9 Guard, who is responsible for safety of federally
10 regulated waterways, did not see this project as an
11 impediment to safe navigation.

12 Mrs. Mensch's intentional efforts to
13 contact the United States Coast Guard I don't think
14 are indicative of a problem. That's indicative of a
15 process working. She was doing her job to find out
16 what she could find out about the Coast Guard's
17 opinion on this issue. As already been indicated by
18 counsel for DNREC, the navigation issues came up in
19 public comment. Ms. Mensch was doing her due
20 diligence, and she followed up. She followed up and
21 she followed up until she got a response.

22 And there's criticism about, well,
23 should it have come in the form of a report? There's
24 no requirement for that in the regulation. There's
25 no indication that there needs to be an expansive

1 report. Again, the conclusion is informative, not
2 because of what it was, but because of who they are.
3 These are the subject matter experts on the issues of
4 safety in the navigation channel.

5 So ultimately, after considering public
6 comment, the technical memorandum that was provided
7 in response to certain issues on navigation, Hearing
8 Officer issued a report. And importantly, there's
9 been a lot of discussion about Secretary, what the
10 Secretary didn't consider. Well, what's in the
11 record is the safest place to look to for what the
12 Secretary considered. And part of the record is the
13 Hearing Officer's report, which states that the
14 Department received a public comment that alleged
15 that the proposed turning basin would negatively
16 impact navigation of vessels on the main channel and
17 that there would be impact to shipping that may occur
18 in non-typical emergency scenarios. Expressly
19 references that these were passed on to the Applicant
20 and addressed.

21 And as part of that, the Hearing
22 Officer ultimately concluded that the Applicant has
23 adequately demonstrated compliance with all
24 requirements of the statutes and regulations. The
25 Hearing Officer's report was ultimately accepted and

1 adopted by the Secretary. And the Secretary didn't
2 just adopt the Hearing Officer's report and leave it
3 at that. In the actual permit itself, there are
4 special conditions that highlight that the Secretary
5 did consider these express regulations on navigation
6 and dredging issues.

7 Specifically, in special condition
8 number five. Secretary states that disposal areas
9 shall be inspected prior to dredging and effectively
10 maintained in a way that prevents the entrance of the
11 dredge material in empty surface water or wetland.
12 Again, safe navigability of channels expressly in ---
13 in this permit. All dredging and construction
14 activities shall be performed in a manner that
15 minimizes impacts to navigation. That is not the
16 absence of consideration. That is expressly
17 acknowledged in consideration.

18 And then lastly, and very importantly,
19 and in special condition 17, states that the work
20 authorized by this permit is subject to the terms and
21 conditions of all appropriate United States Army
22 Corps of Engineers organization. This is very
23 important because while there's already been sharing
24 with the Board that, and we agree with the fact that
25 the --- DNREC's area of responsibility includes the

1 subaqueous lands which go from certain areas in
2 Delaware all the way to certain areas pretty close to
3 New Jersey. And those are all, and that traverses
4 the navigation channel.

5 However, the Army Corps of Engineers
6 are the actual folks who do the dredging in the
7 navigation channel. They're the folks who control
8 safety in the navigation channel. They maintain it.
9 So DNREC does not have expertise in this area. This
10 is not what DNREC does. Even though DNREC owns it,
11 I'm a little sad that the 249ers lost, but football's
12 fresh in my mind. It's kind of like the owner of a
13 football team. The owner has --- owns the team, but
14 the general manager and the coach, they actually are
15 boots on the ground controlling what actually happens
16 on the field.

17 That's essentially here. So as a
18 manager, well you know, know, Jerry Jones would
19 disagree, but if you are the owner, you're not going
20 to impose your will on areas that you don't have
21 subject matter expertise in. Proper is to say, well,
22 what do the experts have to say about that? And use
23 their conclusions to help inform your final
24 decisions.

25 Very close to --- to being wrapped up

1 in navigation. Just have a few more points I want to
2 address. So, Captain Kichner's report is the focal
3 point for reliance for the Appellants on the issues
4 of navigation. And I've taken a subset of some of
5 the key issues that are raised in Captain Kichner's
6 report and highlighted where the counterpoints are in
7 the record. So we go through this first sort of
8 major issue of the significant period language,
9 right? Not supported by data, just a significant
10 period of time. We actually have data that talks
11 about the navigation study demonstrating the actual
12 period of time that it would take to complete a
13 turning maneuver and berthing into the harbor.

14 We have this reference to PEMF
15 (phonetic), where there's a recommendation that no
16 turning basin intrude on a deep draft channel. PEMF
17 is essentially a trade organization that gave this
18 --- this apparent recommendation. However, the
19 actual authority for dredging and how these turning
20 basins are to be designed says the opposite. Says
21 you should use the navigation channel as part of the
22 basin area. There's a representation in Captain
23 Kichner's report that if a vessel using the main
24 channel were to have to slow for a vessel obstructing
25 the channel in the turning basin, it could impact the

1 transiting vessel and cause it to ground.

2 For sure it could, but that's not
3 unique to this port. That is an issue that
4 transcends any port you talk about. It's an act of
5 navigation to slow, to stop, to potentially have to
6 turn. These don't indicate problems in design.
7 These are acts of navigation. And that has been
8 testified to an affidavit from Mr. McMurry
9 (phonetic).

10 And last but not least, I refer back to
11 the United States Coast Guard Port and Waterway
12 Safety Assessment, which was highlighted as
13 emphasizing the criticality of the Delaware River
14 federal channel and the need to ensure that it is
15 never obstructed. To suggest that because of this
16 turning basin being in the navigation channel, that
17 that somehow implicates the United States Coast
18 Guard's concerns. But the very entity that prepared
19 this report also gave us support for the project and
20 said that it does not see the Edgemoor project posing
21 a risk to safe navigation.

22 So we have a general reference to
23 what's an accepted fact. This is a critical
24 waterway. However, the folks who actually have to
25 deal with the issues related to this to be able to

1 say, we don't see it posing a risk to safe
2 navigation.

3 And I'd like to conclude here, and I
4 thank you all very much for your attention today on
5 an issue of what I think is really a good hypocrisy.
6 So, as my colleague Mr. Burton has already pointed
7 out, there is a parallel process going on where ---
8 in which the PhilaPort is seeking to expand their
9 port operations. And here, you have an e-GGRT
10 (phonetic) of a public notice that demonstrates what
11 they intend to do.

12 Now, I represent to you that the blue
13 area is essentially the navigation channel that you
14 see here. And this yellow area here, this is a
15 turning basin. That's a proposed design for a
16 turning basin directly in the navigation channel.
17 The precise issue that has been highlighted as the
18 fundamental flaw for the design here for the Edgemoor
19 port. And I find it curious that it is somehow the
20 catalyst for concerns about safety and maritime
21 casualties here. But that same logic does not apply
22 to the design in an area where the width of the
23 channel is nearly half the width of the channel in
24 the area where the Edgemoor port is located.

25 So, I return, in conclusion, to the

1 public interest. This is the ultimate framework
2 through which all of this has to be considered. And
3 the Secretary did, in fact, consider it. Public
4 interest as to the environmental, recreational and
5 economic factors. In its existing condition, it's a
6 vacant, dilapidated site. There's no recreation
7 occurring on this site, which has already been
8 conceded. And economically, Delaware is at a
9 competitive disadvantage with the limitations of the
10 existing quarter.

11 On the other side, environmentally,
12 this site, a historically industrial site, is being
13 put to maximally productive use in light of its
14 existing limiting conditions. Recreationally,
15 there's a mitigation plan which my colleague Mr.
16 Burton is going to address when he takes back the
17 presentation, which will produce a walking trail for
18 sightseeing. And last but not least, the economic
19 piece. The Edgemoor port is going to provide a
20 historic opportunity to produce good paying jobs and
21 to allow for Delaware to be competitive in the
22 maritime industry in a material way. And this
23 ultimate purpose, this ultimate purpose was
24 considered properly by the Secretary in determining
25 the conclusion to grant the permit.

1 So I thank you for the opportunity to
2 present, and I'll defer to the Board's wishes if you
3 would prefer to --- if you have any questions on
4 navigation, I'm happy to take them now. If you
5 prefer Mr. Burton to present and ask questions
6 jointly, you can proceed.

7 CHAIR:

8 And does Mr. Burton have more to
9 present or --- or ---?

10 ATTORNEY BURTON:

11 That's correct, on ---.

12 ATTORNEY RUSHDAN:

13 On navigation, we've --- I've covered
14 all the grounds, so there will be no more specific
15 points on navigation. Mr. Burton is going to address
16 recreational and environmental impacts.

17 CHAIR:

18 Okay.

19 And I will --- I would point out, you
20 guys used about two hours of your two hours and 15
21 minutes granted. So, save some time also for
22 rebuttal.

23 ATTORNEY BURTON:

24 They don't have to worry about
25 rebuttal.

1 CHAIR:

2 All right. Okay.

3 Questions from the Board here at this
4 point? Thank you.

5 ATTORNEY RUSHDAN:

6 Mr. Burton, I have you at about 20
7 minutes remaining on the end.

8 ATTORNEY BURTON:

9 Okay.

10 Thank you so much. Thank you, Mr.

11 Rushdan. I want to turn to the next argument that
12 Appellants raised in its consolidated appeals, which
13 is that DNREC failed to consider the recreational use
14 of the proposed project study.

15 But before I turn to that argument, I
16 think you should take a step back, take a look at
17 what the regulations require DNREC do. Section 4.6
18 says the Department shall consider, and then in 4.6.3
19 says the potential effects on the public with respect
20 to, and then it says recreation right there. The
21 Secretary is supposed to consider recreation. And as
22 I'll show in a minute, the Secretary certainly
23 considered the recreation when it approved Diamond
24 State's application.

25 As depicted --- sorry. The

1 environmental technical assessment document that
2 Diamond State submitted with its application
3 consisted of 187 pages and was created to analyze and
4 document the potential impacts the proposed project
5 would have. That explains in great detail the lack
6 of recreational use of this area of the Delaware
7 River. As depicted on the slide, the technical
8 document specifically states the proposed project
9 site is limited and the current water quality of this
10 portion of the Delaware River does not support fish
11 and water congestion. In fact, DNREC and the
12 Department of Health and Social Services advised that
13 individuals should eat no more than three eight ounce
14 fish in this area of the river, and women of
15 childbearing age or children should eat no fish in
16 this area of the river.

17 The technical document continues
18 stating that the recreational boating traffic in the
19 vicinity of this project is limited to the main
20 channel of the Delaware River. The technical
21 document then states the proposed project is not
22 going to have a significant direct or indirect impact
23 on commercial or recreational species. It also
24 states that there is not expected to be direct or
25 indirect adverse impacts for recreational resources.

1 So as we noted in our papers, when you
2 consider Diamond State's mitigation plan, which
3 actually adds recreational opportunities to this area
4 of the river, and also establishes a DNREC fishery
5 monitoring program and consumption dredging, which
6 I'll get to in a minute, which will remove known
7 contaminants from this area of the river and enhance
8 the ecosystem, then that effect is there is little to
9 no cognizable impact on recreation. And that's
10 exactly what Mr. Devine testified to paragraph 105 of
11 his affidavit. There was no cognizable negative
12 impact on recreational activities.

13 So, how do apparent --- Appellants get
14 around this mountain of evidence? Well, they turn to
15 an old lawyer trend. It's called a straw man
16 argument. Essentially, what they do is they
17 recharacterize the arguments that we're making in our
18 papers in a way that avoids the real issues and puts
19 the arguments into --- recharacterizes the arguments
20 in a way that they can easily be blown down like a
21 straw man. The straw man argument that they put
22 forward with regard to navigation --- recreation,
23 sorry, is that DNREC only considered and Diamond
24 State only discussed the recreational use of the 5.5
25 areas of fill --- fill area associated with the

1 proposed project.

2 But as we just walked through, the
3 technical document discusses much more than just that
4 5.5 acres of fill area. It discusses the local area,
5 the local community, the whole project site. And so
6 one is left wondering, what are Appellants citing to
7 when they make these arguments? Well, the answer is
8 they're looking at the memorandum that Diamond State
9 submitted to DNREC explaining why no subaqueous lands
10 were affected and why no mitigation plan was needed.

11 That memorandum properly analyzed and
12 discussed the potential fill area. Because that was
13 the subject of what was being discussed and debated
14 between Diamond State and DNREC at the time. But as
15 we just looked at, the technical document does
16 analyze much more than just that. It discusses the
17 project site, the vicinity, and the local community.
18 The end result is that the Secretary clearly
19 considered recreational use of the proposed project
20 site, not just this fill area as the regulations
21 required.

22 DNREC's next argument --- sorry.
23 Appellant's next argument is that DNREC failed to
24 consider noise pollution. Again, before we address
25 this head on, let's take a step back and look at what

1 the regulations require. It says the Department
2 shall consider the impacts on the environment,
3 including but not limited to, and then at 4.7.1.5 it
4 includes noise. So that's what the regulations
5 require the Department to consider, the impact on the
6 environment and the air --- the air quality and
7 noise. And as I'll show in a minute, Secretary
8 certainly considered noise pollution when it
9 considered the construction permit application.

10 The technical document actually
11 contained eight single space pages that walked
12 through an extensive analysis that was conducted on
13 the potential noise pollution. After walking through
14 that analysis, the technical document then concluded
15 that the noise pollution would be consistent with
16 noise levels in the area resulting from traffic on
17 local roadways. Technical document then concluded
18 that no impact would --- that the construction would
19 not impact adversely the local nearby population and
20 would comply with Newcastle County noise regulations.

21 And this is really of no great surprise
22 because this area is buffered from the community
23 through Interstate 495. Again, all of this to say
24 DNREC certainly considered noise pollution and
25 granted the permit application. It's littered

1 throughout the environmental technical assessment
2 documents.

3 Appellant's next argument is that DNREC
4 failed to consider the effects of cloudy water when
5 it granted the permit application. The record again
6 addresses this issue. The evidence before the
7 Secretary showed that there was no --- there would be
8 no likely effect on color, taste, odor, chemical
9 content, and suspended particle concentrations due to
10 this project. And at the bottom of this slide here,
11 you can see, you know, circled in red, that's the
12 water clarity --- water currently at this project
13 site, and we'll get to in a minute. This proposed
14 project was actually going to make the water quality
15 better in this area of the Delaware River. Again,
16 Secretary had this information and considered it.

17 Appellant's next argument is that DNREC
18 failed to consider the sturgeon population when
19 granting the permit application. Again, the
20 technical document which incorporates a biological
21 assessment, which biological assessment is itself a
22 very important document. That's a 96 page single
23 space document that was designed to evaluate the
24 potential effects destruction would have on the
25 surgeon and other endangered species in this area of

1 the river. It was a significant study that was
2 undertaken and relied on in the technical document.

3 And based on that biological
4 assessment, Diamond State informed DNREC the proposed
5 project may only slightly increase the risk of
6 sturgeon striking --- vessels striking surgeon, but
7 it also notes that that risk may be lowered due to
8 the larger Panamax ships we discussed earlier that
9 would decrease the amount of traffic going through
10 this --- going through the navigation channel. So
11 there was a possibility that there would be less
12 surgeon strikes.

13 And based on DNREC's consideration of
14 these issues, the Hearing Officer's report, which was
15 incorporated and adopted by the Secretary, contains a
16 limitation limiting in water work during the sturgeon
17 spawning season. I represent that alone as clear
18 evidence. The sturgeon population was considered
19 when the Secretary granted the application.

20 Now, turning to Appellant's next
21 argument, that DNREC failed to consider the impacts
22 of dredging. Appellants again make a straw man
23 argument here. In this straw man argument,
24 Appellants claim that Diamond State is arguing that
25 the Board cannot consider anything that the Secretary

1 did not consider. And I think in their papers, they
2 say if the Secretary doesn't consider anything, the
3 Board can't consider anything. But that's not what
4 we're arguing at all.

5 What we're actually arguing is this
6 Board can only consider what the Secretary was asked
7 to consider in the permit application. In other
8 words, the Secretary was only required to consider,
9 and this Board can only analyze what the permit
10 application actually sought, what the Secretary's
11 order granted. And here, since the application did
12 not ask for a maintenance dredging permit, which is
13 what Appellants are raising issues with, the
14 Secretary did not go through the analysis that would
15 be required to grant the maintenance dredging permit
16 because that was never asked for. That was not
17 before the Secretary.

18 In fact, Delaware law prohibits courts
19 and administrative bodies from issuing advisory
20 opinions on hypothetical questions that are not
21 before them. Thus, had the Secretary done the
22 analysis to consider whether a maintenance dredging
23 permit was required and gone through that analysis
24 and granted a maintenance dredging permit, I'm sure
25 all my friends on the other side would be up here

1 saying that that constitutes reversible error, and
2 the Secretary's decision should be reversed.

3 With that said, DNREC did what it was
4 required to do and considered the effects of
5 construction dredging on the association ---
6 associated with the proposed project. The technical
7 document notes that dredging is expected to bring
8 better water quality to this area of the river,
9 supporting recreational fishing by removing large
10 quantities of substance of the concerns of the
11 ecosystem. Again, better water quality and increased
12 recreational opportunities.

13 The technical document further states
14 that dredging is likely to have a beneficial impact
15 to the commercial and recreational fishery
16 populations, allowing for a healthier ecosystem. The
17 document states --- technical response memorandum
18 also represents that dredging will have a net benefit
19 to the aquatic ecosystem. Thus, Appellant's argument
20 that DNREC did not consider the effects dredging
21 would have on the river is simply not the case. Just
22 because Appellants do not agree with the ultimate
23 conclusions does not change the fact that the
24 Secretary analyzed and considered construction
25 dredging when granting the permit application.

1 Turning to Appellant's last argument,
2 which is that Diamond State Port Corporation's
3 application did not remain updated throughout the
4 permitting process. Again, let's take a look back at
5 what the regulations require. To state that
6 application shall maintain the application in a
7 current state and notify the Department immediately
8 of any changes in the information provided. Diamond
9 State complied with this regulation. Its application
10 was always kept updated and current, and Diamond
11 State informed DNREC immediately upon making any
12 changes.

13 As I'll show in a minute, DNREC
14 interprets the word application in this regulation to
15 mean the formal application documents that are on
16 DNREC's website. And we have appendixes that are
17 asked to be submitted with that application, as well
18 as, and this is important, any of the additional
19 information that is submitted by the Applicant during
20 the application process. In that manner, the
21 application remains current so long as nothing
22 disturbs the underlying data and information upon
23 which the application rests.

24 What Appellants are arguing, however,
25 is that any change to an application, regardless how

1 it's minor, immaterial, or insignificant, all
2 requires that the application be resubmitted, subject
3 to a new notice and comment period, and the process
4 essentially start all over again. That reading is
5 not only inconsistent with DNREC's interpretation of
6 this regulation, but it's also contrary to public
7 policy.

8 Mr. Small testified that DNREC reads
9 this regulation to mean that an application does not
10 need to be amended and subject to a new process if
11 changes make the proposed project more
12 environmentally friendly or reduce the size of the
13 project, so long as the application remains
14 technically valid. And as Mr. Small testified, the
15 regulations DNREC --- and DNREC's historical practice
16 serve two important public policy considerations.

17 First, it ensures Applicants do not
18 refuse to make environmentally friendly changes or
19 reduce the size of their project to avoid
20 resubmitting their application and subjecting it to a
21 new process. Essentially, we don't want to dissuade
22 people from making decisions that are helpful.

23 Second, DNREC's interpretation of this regulation
24 fosters administrative efficiencies. If applications
25 were to be resubmitted every time an insignificant or

1 immaterial change was made, or any change for that
2 matter, it would delay the process and completely
3 stifle economic activity.

4 As all the parties agree, this Board
5 must defer to DNREC's reasonable interpretation of
6 this regulation. Which is all that we're asking the
7 Board to do.

8 The other flaw with Appellant's
9 argument, however, is that DNREC's application was
10 never actually inaccurate. The amount of maintenance
11 dredging was and is, and always was 500,000 cubic
12 yards. As Mr. Devine testified, the amount of
13 maintenance dredging that would be required for the
14 proposed project did not taken into account use of
15 shoaling fans, which is the issue that Appellants are
16 raising with regard to the application.

17 As Mr. Devine testified, the
18 calculation that was used to determine the amount of
19 maintenance dredging that would be required did not
20 use shoaling fans and therefore did not include them.
21 So when they removed the application, the number ---
22 the underlying data and information that was used for
23 the application remained accurate. In short,
24 Appellant's reading of this regulation is
25 inconsistent with DNREC's interpretation and

1 historical application.

2 It's also inconsistent with two
3 important public policy considerations. And even if
4 all of that was not the case, Diamond State's
5 application was kept updated and remained accurate.
6 As a result, Appellant's argument should be squarely
7 rejected.

8 Now, in closing, we want to thank the
9 Board today for all the time that you guys have spent
10 reviewing the --- the mountains of papers in these
11 appeals. This is a very important project, not just
12 to Diamond State, but to Delaware as a whole. There
13 are an estimated 4,000 jobs at stake, which this
14 project is vital to maintaining good paying jobs and
15 attracting new opportunities. This project also
16 addresses legacy environmental issues and allows
17 Delaware to continue to compete in the maritime
18 industry. So, for the entire state of Delaware, I
19 want to thank you for your time today.

20 CHAIR:

21 Okay.

22 Any questions from the Board?

23 ATTORNEY BURTON:

24 I'm sorry, any questions from the
25 Board?

1 CHAIR:

2 Okay.

3 ATTORNEY RUSHDAN:

4 Do I have any time left?

5 TIME KEEPER:

6 Three minutes.

7 ATTORNEY RUSHDAN:

8 I just want to briefly address the
9 Board on one thing, just so the record's complete.
10 Thank you. Very briefly, I wanted to just address
11 the Board on something for the completion of the
12 record.

13 There are three concerns that were
14 raised about the MITAGS report around emergency
15 procedures. And I want to just make clear that the
16 emergency procedures are the items that need to be
17 addressed once the port is constructed. You don't
18 know exactly what emergency procedure you need
19 because you won't know the actual constitution of the
20 port itself. These are things that aren't a flaw
21 because they weren't done now.

22 This port is going to, if all things
23 work out, be created in 2027. So this isn't the last
24 stop in this process. This isn't the last time.
25 This permit is an initial stop in the process. It's

1 not the final step. And there are additional
2 considerations that a number of different bodies have
3 to make in this process. I just want to make that
4 clear. Thank you.

5 CHAIR:

6 Twenty-five (25) minutes reserved by
7 the Appellants. However they want to divide them.
8 Are you ready to move forward with them or affording
9 any time?

10 ---

11 (WHEREUPON, AN OFF-RECORD DISCUSSION TOOK PLACE.)

12 ---

13 CHAIR:

14 All right.

15 We'll reconvene at five of.

16 ---

17 (WHEREUPON, A SHORT BREAK WAS TAKEN DURING THE
18 PROCEEDING.)

19 ---

20 CHAIR:

21 Appellants are doing this in reverse
22 order, so ---.

23 ATTORNEY ROCKMAN:

24 Okay.

25 Sir, I'm again responding on behalf of

1 Mr. Curran. I am not going to have the time here to
2 respond to all of the points that were made by DNREC
3 and Diamond State. I would refer the Board in its
4 deliberations to our reply brief. It was very
5 deliberately set up almost as an FAQ type document.
6 You can look at the index. We've got answers to all
7 of these issues there. I will touch on a few here in
8 about ten minutes that I have.

9 First, let me respond to the attack on
10 Mr. Curran and whether his interest here is genuine.
11 You know, Mr. Curran has used the boats of friends to
12 go fishing and boating in the area of the port for
13 decades, long before the port project was conceived
14 by anyone. I think anyone would look askant at
15 anyone from Wilmington driving 111 miles or whatever
16 it was, to go to the beach for the day. I'm not sure
17 why it's so controversial that someone would make the
18 reverse drive to spend the day with friends on a boat
19 enjoying the river.

20 Let me move on to the directed verdict
21 requested by DNREC. As I said earlier this morning,
22 I could probably, if this were a movie, take the
23 administrative record documents, what we have from
24 DNREC, wave them around, and say, I rest my case.
25 And that's sort of my response to the directed

1 verdict. The record is very clear in its absence of
2 any evaluation of recreational impacts, there really
3 isn't there at all.

4 Now, you know, that may be somewhat the
5 result of Diamond State frequently saying that there
6 are no impacts when they're talking just about the
7 area of fill. And indeed, the very last navigation
8 slide that they had up there trying to summarize
9 everything said, you may remember that side of the
10 slide, it had a column. It said project site, no
11 recreational impacts. Again, we agree in that area
12 where they're building the project that you can't
13 otherwise get that inner tidal beach, and I guess on
14 the land portion itself, we're certainly not boating
15 there. But when it comes to the larger question of
16 what are the overall recreational impacts from the
17 project, there's simply an absence of any evaluation
18 of that in the record.

19 Now, Mr. Tweedie responded to some of
20 that, and he took the tact I would have taken had I
21 --- had I been up here and if our roles were
22 reversed. First, the discussion from DNREC mushed
23 everything together. We were talking about
24 environment and recreation all at the same time,
25 which was why the response to show that there was

1 consideration of recreation talked about PCB sampling
2 and other sampling. That goes to the environmental
3 aspect that doesn't go to the recreational aspect.
4 These are separate and independent in groups.

5 Yeah, there's some overlaps because it
6 all stems from one singular project, but they are a
7 different analyses, and you can't lump them all
8 together and say, well, in the aggregate, we cleared
9 the bar. Our question square to this Board is, did
10 they clear the bar for recreation? And it doesn't
11 appear that they did.

12 Now, Mr. Tweedie also offered a couple
13 of page references, you know, to the Hearing
14 Officer's report and the technical memorandum. As
15 far as I could tell, those are primarily the
16 references to the Fox Point State Park mitigation
17 plan because there are, as we noted earlier this
18 morning, some recreational improvements that are
19 there. Trail's going to get a little bit better,
20 lighting's going to get a little bit better. But
21 those don't really respond to the question I posed
22 earlier this morning. You know, if that's the cure,
23 what's the disease? How can you figure out that
24 that's adequate mitigation if you haven't figured out
25 what the harms and impacts are?

1 You know, what they're --- what they
2 might do at Fox Point State Park because again,
3 remember, it's all contingent. They haven't really
4 agreed to do it. They speculated that they might do
5 it, and that's the way the mitigation plan is
6 written. Even if they implement those and great, I'm
7 sure those are good improvements. They aren't
8 calibrated at all for the recreational harms that are
9 being posed here. And they could have been because
10 they didn't figure out what the recreational harms
11 are going to be.

12 Responding very briefly to some of the
13 points Mr. Burton brought --- brought up. He
14 responded to our issue on noise, and I guess I would
15 point back, and this is in our reply brief, where the
16 technical assessment documents measured the impact of
17 noise were not on people recreating in the river.
18 They looked at other measuring points, but not in the
19 river. They also said there's no ill effects on the
20 environment from the dredging. But they looked at a
21 study that said after you place the fill, the water
22 will still be fit for consumption.

23 That's not dredging. That's the fill.
24 Again, those are two separate activities. One's
25 putting stuff in, one's stirring up all the sediment

1 when you take the dredging out. They're different
2 questions. So it was only a partial answer to a much
3 bigger question.

4 Let's --- I know. About half my time I
5 have left. Let's talk about the role of experts. We
6 talked earlier about the Delaware Solid Waste
7 Authority case. I'll also direct the Board's
8 attention to the Tulou versus Raytheon case. In that
9 case, the Court said the Board has the power to
10 expand upon the record by accepting competent
11 evidence produced by any party to the people. And it
12 also noted, this Court has previously held that it is
13 a denial of an Appellant's due process rights for the
14 Board to limit the evidence before it to that
15 considered by the Secretary. So we do believe, and
16 continue to believe, that case law and the Delaware
17 Code support this Board's ability to consider other
18 competent evidence.

19 Now, why did we bring all of that
20 evidence to you? These several affidavits? Mind
21 you, some of our witnesses had already provided
22 comments during the comment period. We acknowledge
23 Mr. Tomasi here was new. We are not introducing that
24 evidence to ask this Board to step into the shoes of
25 the Secretary, figure out what the recreational

1 impacts are, and then figure out, you know, whether
2 they're significant enough to worry about or whether
3 that matched what the Secretary did.

4 No, this is all background information
5 so that you can assess whether or not the Secretary
6 did a defensible job. And in the absence of, you
7 know, it's --- it's normal for you to ask yourselves,
8 well, if I was a Secretary, what else would I have
9 done? What else could I have done? Folks on the
10 other side said, that's not a question you should
11 ask, but it's the normal thing. If you're trying to
12 figure out whether he was arbitrary, you got to ask,
13 what else could he have done? And that's what that
14 information is there for, to show you that there are
15 scientific methodologies that could have been used to
16 evaluate the recreational impacts but weren't.

17 Here's sort of an example. What ---
18 what if the Secretary had issued the decision that
19 winter is going to end early this year and he had
20 based it on observations of a groundhog? Get a
21 little silly, but to have some fun with me here, that
22 on the ground sounds a little bit arbitrary. Could I
23 come in here, if we were challenging that decision
24 and say, hey, wait a minute, there's the field of
25 meteorology, there's the field of climatology. They

1 use certain data sources, use certain analytic
2 methods, and reach a conclusion, and that conclusion
3 is probably what you'd want to do if you were trying
4 to predict, you know, the next two months' worth of
5 winter weather? Or should we withhold all of that
6 information from you so you are just fully immersed
7 in the Secretary's groundhog-ology?

8 I submit to you that the Board should
9 be able to consider information that informs the
10 Board about what the options were before DNREC to be
11 able to evaluate whether or not they were
12 recreational impacts. And that is the vein in which
13 we submitted that information to you in which I think
14 you fully have the power under Delaware case law to
15 be able to consider that information.

16 I'll wrap up there. Are there any
17 questions for me before I submit?

18 BOARD MEMBER:

19 I got one. What do you want?

20 ATTORNEY ROCKMAN:

21 We would like --- we'd like permit to
22 be vacated and remanded to the Secretary with the
23 direction that they deal with the recreational issue.
24 You know, measure the recreational harms, figure out
25 whether they're harms, measure the impacts, evaluate

1 corresponding mitigation in this multi-year project
2 that's gone on. That is probably just a speed bump.
3 I mean, we expect that that could happen not on a
4 multi-year time frame, but on a lot shorter time
5 frame. It wouldn't necessarily interrupt the court,
6 but it would allow these interests to be recognized.
7 Thank you.

8 ATTORNEY LEVINE:

9 I'll go first. Well, it's a pleasure
10 to address you again. I just wanted to refute a few
11 points. Again, Andy Levine for PhilaPort.

12 I did use the phrase hatchet job, but
13 it never referred to someone from DNREC or in
14 government. It referred to the shoddy job that
15 Duffield did in its technical response memo. It's
16 directed to the consultant, and I stand by that
17 comment. But it was never directed as DNREC or state
18 employees.

19 One of the issues raised has to do with
20 the turning basin, and I was really sort of surprised
21 that someone would have brought up the PhilaPort
22 turning basin that we're in the middle of designing
23 and executing right now. I mean, we're trying to
24 keep a nice closed administrative record and that
25 would just blow it open. But there are some very

1 important distinctions here.

2 In one of the concerns that PhilaPort
3 always had with this turning basin is not that it
4 touches upon the turning basin. It consumes the
5 entire turning basin. Design documents have no
6 problem. How, if you think about it, could you
7 access back and forth out of a harbor without at
8 least touching on the turning basin? It's supposed
9 to be a Venn diagram, not an overlay. So you touch
10 upon it, you don't consume it. So yes, it's very
11 typical that you will have a turning basin that
12 touches on a main navigation channel, but it is
13 almost unprecedented that it consumes the entirety of
14 its width and breadth.

15 When we did do this in PhilaPort, there
16 are some really important distinctions. The first is
17 there's no Cherry Flats by us. That's a huge --- I
18 mean, we don't have the chart up here, but that's a
19 very large constraint that --- that Wilmington just
20 has to face about a shallow area just across from the
21 harbor. So it does reduce your available space. We
22 don't have that.

23 Second, and look, this gets to the
24 special responsibility that I think Wilmington does
25 have in here. If we screwed up, guess what? No

1 upriver traffic is impacted. We're at the end of the
2 line, basically. You're the opening door. That's
3 the difference. Is that a small mistake on our part?
4 Well, we could have liability. We could get fines
5 and penalties. But the river traffic hasn't really
6 stopped.

7 If this makes a mistake in Wilmington,
8 if this is mis-designed, it impacts the entirety of
9 the route. And that's why it's a special
10 consideration and why we don't want to bring in the
11 PhilaPort turning basin into this because they're so
12 fundamentally different in terms of design, dimension
13 and purpose, really.

14 PhilaPort was never advocating
15 unfettered access. We understand the main navigation
16 channel is going to be shared by any number of
17 enterprises, not just ships going to us, but to
18 Jersey ports, to you all, wherever. It's that we
19 don't want an unreasonable interference and your
20 regulations say, shall not interfere. All we asked
21 for were additional studies to show it shall not
22 interfere.

23 One of the last comments made was that,
24 yeah, a lot of that stuff, those supplemental
25 studies, the emergencies, that gets done at the end.

1 I don't know where that comes from. That would have
2 been fabulous to see in any technical document that
3 somebody actually took the time to say, oh, well,
4 MITAGS has recommended these additional studies. We
5 are considering those, and this is how they will be
6 processed. This is how they will be timed and how
7 they will be incorporated into the administrative
8 process. Instead, what you have from Duffield is
9 they represent atypical situations, so we're not
10 looking into it.

11 And that is our whole point, is that
12 they are atypical situations, but they happen. And
13 that is how you design a port, how you design a
14 building, as --- as was indicated. You do it from a
15 worst case scenario in a large part. Do you have the
16 systems in place to handle the emergencies that are
17 clearly foreseeable in the navigation setting? And
18 my answer is no, not in this situation. It certainly
19 could have been. There could have been more runs,
20 more tests. The suggestions were really
21 straightforward, but they were wholly rejected.

22 And really, the way Duffield responded
23 wasn't that there was no technical merit to the
24 point. They simply said, these are competitors of
25 yours, so ignore them. And that's what really upset

1 the Court, is that our points were not to be ignored.
2 We thought we were making serious, straightforward
3 report --- points that could be refuted technically
4 that we have to deal with when we do our own ports.

5 So all were asking is for you to do
6 what we've done in terms of safety studies. But in
7 this situation, I think this process was short
8 circuited and that we did not have adequate
9 consideration of whether or not the structure of the
10 port interferes with upriver navigation.

11 The last point is, is it a structure?
12 Yes, it's a structure. First of all, the Hearing
13 Officer described the whole port as a structure.
14 Second, materials and technology. It's --- it's not
15 made of synthetic materials, but it isn't devoid of
16 material and technology. You really do have to
17 construct these things. You have entire dredging
18 vessels and you've seen a couple of pictures of them.
19 There's no lack of technology, there's no lack of
20 effort, there's no lack of construction technique.
21 It is a construction technique, and that's the
22 hallmark of a structure.

23 So with that, I'm happy to answer any
24 questions you all may still have.

25 BOARD MEMBER:

1 Yeah, what --- what do you want?

2 ATTORNEY LEVINE:

3 I'm sorry?

4 BOARD MEMBER:

5 What do you want? What do you want?

6 ATTORNEY LEVINE:

7 We just want those additional studies.

8 We'd like to see the permit remanded for the
9 additional safety studies under MITAGS, that MITAGS
10 itself recommended that it be done, and that they be
11 considered in this context. I'd also suggest if you
12 were going to be going through that effort. And
13 since we represented, you know, we went to that
14 workshop to take a look at the river traffic. The
15 interesting thing is that's NAVCEN from the U.S.
16 Coast Guard. They were knocking on the door of the
17 agency they want to talk to. But all they did was
18 take a sort of a general report instead of having a
19 study. We just want the study.

20 CHAIR:

21 Any other questions?

22 ATTORNEY LEVINE:

23 Thank you.

24 ATTORNEY DALY:

25 It's been a long day. You've heard

1 that already. Real briefly, before I start my
2 rebuttal, I do want to respond to DNREC's motion for
3 a directed verdict.

4 Specifically, Ms. Scott had raised a
5 concern about witnesses in this case not having been
6 before the Board. But we heard from Diamond State's
7 counsel, Mr. Rushdan. He explained how Captain
8 Kichner's comments, and he showed them up on the
9 screen. And he showed how all of these detailed
10 comments were provided to the Secretary for his
11 consideration. So that issue doesn't apply at all to
12 Captain Kichner.

13 And Ms. Scott also raised concerns
14 about David Whene and PJ Inskeep, who also submitted
15 affidavits. Those are both port managers for the
16 Port Operators. And they didn't submit affidavits as
17 experts, but as fact witnesses to establish the
18 impact this would have on their facilities. So, the
19 motion for directed verdict that for Port Operators
20 is completely baseless.

21 I want to return to where I started
22 this morning. And that was talking about how the
23 Secretary is empowered by the Subaqueous Lands Act to
24 issue permits in order to protect the public
25 interests. And we heard that phrase, public

1 interest, from Diamond State's Counsel, Mr. Rushdan.
2 He spent some time on it, and Diamond State's Counsel
3 agreed. The purpose of the Subaqueous Lands Act is
4 to ensure that uses of the state's water are not
5 impaired and to protect public interest. There's
6 that phrase again.

7 And then Mr. Rushdan showed you the
8 meaning of the phrase public interest. And it's
9 really broad. It's a really broad concept that is
10 about weighing the environmental, social, and
11 economic benefits of the project and weighing those
12 against the social, economic and environmental cost
13 of a project. Now, how do you weigh the
14 environmental, social, and economic costs of a
15 project if you don't know what those costs are?

16 This brings me to the question that
17 Chairperson Holden had raised this morning when I was
18 standing on the stage. And he had asked, you know,
19 what's required --- and I'm paraphrasing, I
20 apologize, Mr. Holden. But what is required of DNREC
21 when it considers the public's interest on impacts of
22 navigation? What is that supposed to look like?
23 Well, at the very least, as I mentioned before, the
24 Secretary needs to understand the cost. How will
25 navigation be impacted?

1 He can't do the weighing for the public
2 interest to figure out is this good or bad if he
3 doesn't know how the public interest is not --- is
4 going to be harmed or not. And there's more. In
5 Hagman (phonetic) Board of POK, as we cited, it's
6 from 20-10. We cited this opinion extensively in our
7 papers. But the Board explained some more about how
8 the permitting process for DNREC is generally
9 supposed to be conducted. And there, the Board said
10 that effective review by the management chain at
11 DNREC is considered --- is a really critical part and
12 it relates to this idea of considering impact in
13 navigation.

14 And this idea of effective review is
15 something that Ms. Scott had alluded to in her
16 comments when she was standing up here on behalf of
17 DNREC. She said that the Secretary of DNREC,
18 Secretary Garvin viewed this as his decision. It's
19 his decision. The buck stops with him when it comes
20 to the Subaqueous Lands Act. This was not, this was
21 Secretary Garvin's decision. This was not Laura
22 Mensch's decision. This was not the Coast Guard's
23 decision. The Subaqueous Lands Act DNREC
24 implemented. This was not the Army Corps of
25 Engineers' decision.

1 Considering the public's interest to
2 impact the navigation, which we heard from Mr.
3 Rushdan, he put it up on the screen. That is the
4 Secretary's job. Here, there was not defective
5 review by the Secretary of this proposed permit.
6 First, very similar to that Hagman case that we cited
7 in our papers. The Secretary and Hearing Officer did
8 not consider the applicability --- applicability of
9 several different regulations applicable to
10 navigation. And Mr. Rushdan, Diamond State's
11 Counsel, put them all on the screen. What's
12 interesting is that Diamond State's Counsel puts them
13 on the screen. The Secretary and Hearing Officer
14 don't even quote them in their decision.

15 Section 4.6.3, the public's interest on
16 navigation be considered. Section 4.7.51, protecting
17 against encroachment and interference of waterways.
18 Section 4.11, maintaining the navigability of
19 channels, three regulations not considered by the
20 DNREC Secretary or the Hearing Officer.

21 The only regulations that the Secretary
22 and Hearing Officer considered with respect to
23 impacts on navigation was just the sighting of
24 structures. That structures cannot impede navigation
25 and that setback criteria needs to be met. But

1 there's more to those regulations. Besides the
2 regulations, the Secretary did not ensure that his
3 staff got their own questions answered or that the
4 public comments had been addressed.

5 Ms. Mensch's critical email, which Ms.
6 Scott had in the background of her presentation when
7 she was arguing on behalf of DNREC, again, that email
8 is critical because it shows us the three things Ms.
9 Mensch had questions about. Emergency procedures,
10 the Port Operator's comments about the turning basin,
11 and finally, that Duffield navigation memo. And we
12 know that Ms. Mensch didn't get the answer to her
13 question about the Duffield navigation memo because
14 she didn't send it to the Coast Guard. But you can
15 look at that exhibit, Exhibit G, to Captain Kichner's
16 affidavit, and you can pull up that exhibit. It was
17 literally provided by DNREC, and you can see what
18 documents she sent them and you can see she sent the
19 wrong document.

20 Now, the Coast Guard didn't weigh on
21 --- in weigh on --- weigh in on any of these items
22 either. As far as we can tell, based on the emails,
23 the Coast Guard was also looking primarily what
24 seemed like setback criteria. How far away is the
25 wharf from the main navigation chain? There's

1 nothing in there saying that they were looking at the
2 turning basin. There's no discussion of emergency
3 procedures.

4 If there had been effective management
5 review, it might have looked like, well, we got this
6 email from the Coast Guard. What about the emergency
7 procedures? What about that? How do we solve that
8 problem? What about the public comments on the
9 turning basin? What'd the Coast Guard say about
10 that? Doesn't seem like that conversation was ever
11 had. If it was ever had, there's no record of it.

12 And we know that the MITAGS, what we
13 heard is the MITAGS is the Harvard of maritime
14 institutes. And they --- MITAGS is the Harvard said,
15 future simulations are going to be performed on
16 emergency procedures? That, they said, no, that's
17 actually not going to happen. That's what they said
18 in the Duffield memorandum. And I'll address in a
19 moment Mr. Rushdan's comments when he came up here
20 and said, maybe you don't need to worry about that.

21 At the end of the day, Secretary's
22 decision as a navigation was just about checking a
23 box. And in considering impact to navigation, and
24 this is the third point, the secretary had to show
25 his work. I said that before. We've heard from Mr.

1 Rushdan, Diamond State's Counsel, that the MITAG
2 Study was limited. This study was not about seeing
3 the impact of the turning basin and the operation of
4 the port on other uses in the river. It was a
5 parking study. As Mr. Rushdan said, it was about
6 seeing if a ship can come in and berth at their dock.
7 It was strictly a parking study. And neither of the
8 other outside experts that we heard from, I guess
9 that we didn't hear from, the Coast Guard, Pilot's
10 Association, none of them showed their work.

11 The only expert in these entire Appeals
12 of the Board of Secretary who showed his work is
13 Captain Jersey Kichner, former Captain of the Coast
14 Guard. He's the only person's report who you can
15 read and see why he reached his conclusions.

16 Diamond State and DNREC could have
17 identified someone on their witness list from the
18 Coast Guard and Pilot's Association to say
19 everything's good here, but they didn't. So we're
20 still left guessing. Captain Kichner is the only
21 expert who's explained anything.

22 We saw Mr. Rushton put up a
23 counterpoint, point-counterpoint. Here's what
24 Captain Kichner said. Here's what Duffield said.
25 Well, there's a problem. Duffield prepared that

1 counterpoint document. That document was written by
2 a geotechnical engineer, Mr. Brian Devine. Mr.
3 Devine might be an excellent geotechnical engineer,
4 but he's not a navigation expert. And it's obvious
5 from the point counterpoints that he was raising.
6 There's this reference to this general ---. We don't
7 have to be concerned about the turning basin because
8 ships won't run into it too frequently. It's
9 basically that every point-two, I think it was like
10 every 15 minutes, like, I don't know exactly, but it
11 came from a general vessel statistic, and the vessel
12 statistic looked like this.

13 In 2018, there were 2400 vessels that
14 traveled along the river, and so what Duffield did
15 was just divide 24,400 by 12 months, by 30 days, and
16 then by 24 hours, and that's how they calculated how
17 often ships are going to be coming down this river.
18 That's not how you do a traffic study. That's not
19 how you figure out how often ships are going to be
20 coming. If I'm trying to figure out how busy I-95
21 going to be in critical parts of the day, I'm not
22 going to necessarily count for every hour from
23 midnight to 9:00 in the morning.

24 I will wrap it up here.

25 Finally, just returning to the last

1 person we heard from on navigation, that was Mr.
2 Rushdan himself. He stepped up here and he told us
3 that emergency procedures would be addressed during
4 construction, but that, Mr. Rushdan was testifying.
5 That is not in the record anywhere. And so I return
6 to Captain Kichner. Captain Kichner explained in the
7 report, and really, really implore you to read the
8 report, that more studying is needed of this proposed
9 project. Let's consider the subject matter expert,
10 the ones whose opinion we can actually read; that's
11 Captain Kichner. Thank you.

12 CHAIR:

13 Questions from the Board?

14 BOARD MEMBER:

15 I just have one. Have you been to the
16 site?

17 ATTORNEY DALY:

18 I've not actually been to the Edgemoor
19 site. And the question being, what do the Port
20 Operators want? Is that your question? I think it's
21 really important for the Board to understand that
22 it's not this choice between what's good for
23 Delaware, what's bad for Delaware, but Diamond puts
24 this question at the Board, that if this moves
25 forward, if the Board reverses, then it's bad for

1 Delaware, but helping these out of state interests.
2 But we can have it both ways.

3 Delaware can have exactly what it
4 wants. And so what we want is more navigational
5 studies. We want to understand how this project is
6 actually going to impact this part of the river in
7 the state right off New Castle County. So to us,
8 yeah, we want more studies. And then based on those
9 studies, to see how, if at all, does the project need
10 to be altered? Do we need more permit conditions?
11 We saw one permit condition indicating that the
12 dredging operation should minimize impacts to
13 navigation. Well, that's virtually inconvenient. We
14 need to see how much more robust we can make this
15 based on those additional studies.

16 BOARD MEMBER:

17 Thank you.

18 ATTORNEY DALY:

19 Thank you.

20 CHAIR:

21 Is there a motion from the Board to go
22 to executive session?

23 BOARD MEMBER:

24 I move we go to executive session.

25 BOARD MEMBER:

1 Second.

2 CHAIR:

3 So we're going to head off to executive
4 session. We'll invite some discussion.

5 ---

6 (WHEREUPON, EXECUTIVE SESSION WAS HELD.)

7 ---

8 CHAIR:

9 All right.

10 Is there a motion from the Board?

11 BOARD MEMBER:

12 I make a motion to deny the Appeal.

13 The Appellants have not carried their burden to show
14 the Secretary's decision is not supported by the
15 evidence in the record.

16 CHAIR:

17 Is there a second?

18 BOARD MEMBER:

19 I second.

20 CHAIR:

21 Any discussion on the motion?

22 I'll do a roll call vote. Mr. Horsey?

23 MR. HORSEY:

24 I vote in favor of the motion.

25 CHAIR:

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Mr. Mulrooney?

MR. MULROONEY:

In favor.

CHAIR:

Ms. Wicks?

MS. WICKS:

In favor.

CHAIR:

And I vote in favor of the motion as well. The motion carries unanimously. The order will get out within 90 days of today's date. We thank you for coming.

* * * * *

HEARING CONCLUDED AT 3:59 P.M.

* * * * *

CERTIFICATE

I hereby certify, as the stenographic reporter, that the foregoing proceedings were taken stenographically by me, and thereafter reduced to typewriting by me or under my direction; and that this transcript is a true and accurate record to the best of my ability.

Dated the 20 day of February, 2024

/s/ Nicole DeHaven
Nicole B. DeHaven,
Court Reporter

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