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September 3, 1982

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Mr. Harold R. Denton  
Director, Office of  
Nuclear Reactor Regulation  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555

In the Matter of  
Philadelphia Electric Company  
(Limerick Generating Station, Units 1 and 2)  
Docket Nos. 50-352 and 50-353

Dear Mr. Denton:

In response to the notice published in the Federal Register on August 12, 1982 (47 Fed. Reg. 35054) relating to the captioned proceeding, I am hereby submitting "Comments of Philadelphia Electric Company on Del-Aware Unlimited's Request for Suspension or Revocation of Construction Permits Pursuant to 10 C.F.R. §2.202 and §2.206(a)." These comments also respond to the letter dated August 13, 1982 from Del-Aware's counsel. For the reasons stated therein, no suspension, revocation or amendment of the permits for Limerick Units 1 and 2 is warranted.

Answers and related documents responding to the Staff's questions in the context of its review of supplementary cooling water supply issues will be filed under separate cover by the Company.

Sincerely,

*Troy B. Conner / RMR*

Troy B. Conner, Jr.  
Counsel for Philadelphia  
Electric Company

Enclosure

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COMMENTS OF PHILADELPHIA ELECTRIC COMPANY ON  
DEL-AWARE UNLIMITED'S REQUEST FOR SUSPENSION  
OR REVOCATION OF CONSTRUCTION PERMITS  
PURSUANT TO 10 C.F.R. §2.202 AND §2.206(a)

Preliminary Statement

By letter dated July 2, 1982, Del-Aware Unlimited ("Del-Aware"), by its attorney Robert J. Sugarman, Esq., submitted a request to the Director, Office of Nuclear Reactor Regulation, Nuclear Regulatory Commission ("NRC") seeking the suspension or revocation of construction permits issued in Docket Nos. 50-352 CP and 50-353 CP for the Limerick Generating Station, Units 1 and 2. The request was made pursuant to 10 C.F.R. §§2.202 and 2.206(a). On August 12, 1982, the Director published notice in the Federal Register (47 Fed. Reg. 35054), stating that he had received the request.

By letter dated August 4, 1982 to Mr. Sugarman, the Director stated that the petition is being considered pursuant to 10 C.F.R. §2.206. The Director stated that the granting of the immediate relief requested by the petition "would be an extraordinary action that would be warranted only if immediate action were required to abate some imminent and substantial hazard that threatened public health and safety or the environment." Noting that no such threat to the environment existed and that construction of the Point Pleasant intake and pumping station would not commence until about December 15, 1982, the Director stated

that no immediate relief would be granted pending a final determination of the petition. By another letter dated August 13, 1982, Mr. Sugarman responded to the Director's letter, expressing disagreement with this action.

Philadelphia Electric Company ("Licensee") is the holder of Construction Permit Nos. CPPR-106 and CPPR-107 for the Limerick Generating Station, Units 1 and 2, respectively. Licensee opposes the relief sought on the grounds that the request contains no "new information [which identifies] a major change in facts material to the resolution of major environmental issues." <sup>1/</sup> Nor has Del-Aware shown any grounds for the extraordinary relief of license suspension or revocation. Shorn of its rhetoric, the request is merely an attempt to relitigate legal issues already decided by the Appeal Board in ALAB-262 at the construction permit stage, <sup>2/</sup> or made contentions or rejected as legitimate issues by the Licensing Board in the pending operating license proceeding. <sup>3/</sup>

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- 1/ Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), DD-79-17, 10 NRC 613, 622 (1979).
  - 2/ Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-262, 1 NRC 163, 182-83 (1975).
  - 3/ Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352 OL and 50-353 OL, "Special Prehearing Conference Order" at 50-101 (June 1, 1982) ("Limerick, 'Special Prehearing Conference Order'").

Other portions of the request seek to litigate before the NRC matters properly decided by or pending resolution before the Delaware River Basin Commission ("DRBC") or the United States Army Corps of Engineers. Where specific items involve alleged changes in operating impacts, they have been made the subject of contentions to be heard by the Licensing Board. Under settled standards, the Director should not exercise his Section 2.202 authority to reopen legal issues decided by the Commission at an earlier stage, nor should he prejudge factual issues pending before a licensing board by way of admitted contentions.

#### Factual Analysis

The request by Del-Aware does not reflect the factual background necessary to understand what was accomplished by the NRC and DRBC and what was decided by the Appeal Board at the construction permit stage. When analyzed from the historical perspective, it is clear that the matters alleged by Del-Aware at this time were properly considered and treated by the respective agencies in conjunction with the construction permit proceeding and that no changes with respect to such matters have occurred since the issuance of the construction permits for Limerick.

The subject of Del-Aware's instant request and its contentions before the Licensing Board is a project known as the Point Pleasant Diversion Plan, whose purpose is to provide water to Montgomery and Bucks Counties, Pennsylvania

and to supply supplemental cooling water for Limerick. <sup>4/</sup>  
Review of the actions taken by DRBC which led to final approval of the project requires an appreciation of its unique nature and function in providing for the management, conservation and allocation of water resources in the Delaware River Basin. <sup>5/</sup> Accordingly, DRBC acts under a Compact approved by Congress in 1961 to coordinate the efforts and programs sponsored by federal, State and local governments, as well as private enterprises, affecting water resources of the Delaware River Basin. All projects approved by DRBC under its rules and procedures are added to a Comprehensive Plan, which is an evolving blueprint of various projects which DRBC periodically evaluates and adds to the Plan in order to meet developing needs. To

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<sup>4/</sup> Throughout its petition, Del-Aware refers to the latter aspect of the Point Pleasant project as a "Supplemental Cooling Water Supply (SCWS) plan." This particular designation as used by Del-Aware is of its own creation, and has not been used by Licensee or any of the concerned agencies. Apparently, Del-Aware is attempting to create the impression that the plan for supplying supplemental cooling water for Limerick is not an integral part of the diversion plan. As the DRBC docket decisions make clear, the Point Pleasant diversion plan does include supplemental cooling water for Limerick.

<sup>5/</sup> See generally Delaware Water Emergency Group v. Hansler, 536 F. Supp. 26 (E.D. Pa. 1981), aff'd mem., No. 81-2622 (3d Cir. 1982); DRBC v. Bucks County Water and Sewer Authority, 474 F. Supp. 1249 (E.D. Pa. 1979), appeal dismissed, 615 F.2d 1353 (3d Cir. 1980); Dublin Water Co. v. DRBC, 443 F. Supp. 310 (E.D. Pa. 1977); Bucks County Board of Commissioners v. Interstate Energy Co., 403 F. Supp. 805 (E.D. Pa. 1975); Borough of Morrisville v. DRBC, 399 F. Supp. 469 (E.D. Pa. 1975), aff'd mem., 532 F.2d 745 (3d Cir. 1976).

effectuate its control over Basin water resources, the DRBC Compacts requires that any project having a substantial effect on water resources must be approved under Section 3.8 of the Compact. The basic standard for approval under Section 3.8 is that the proposed project "would not substantially impair or conflict with the Comprehensive Plan."

Essentially, DRBC utilized a two-step approach in reviewing the Point Pleasant project relative to Limerick and rendering Section 3.8 approval. In the first stage up to November 1975, it added the project to the Comprehensive Plan and granted Section 3.8 approval to various aspects of the project. At that time, the environmental impacts were fully evaluated in a Final Environmental Impact Statement ("DRBC FEIS") that considered all components of the project except the North Branch Water Treatment Plant, which would be utilized solely by the Neshaminy Water Resources Authority ("NWRA"). In the second stage up to February 1981, it gave Section 3.8 approval to components it had only conditionally approved before. At that time, it also prepared a Final Environmental Assessment (August 1980) ("DRBC FEA") to update its previous review to evaluate environmental impacts associated with the single component of the project, i.e., the North Branch Water Treatment Plant, which had not previously undergone environmental review.

Thus, all of the components of the Point Pleasant project relative to Limerick, some of which will be utilized

jointly by Licensee and NWRA, received prior environmental review and conditional Section 3.8 approval years ago. These components include (1) the Point Pleasant Pumping Station and Delaware River Intake Facilities, (2) Combined Transmission Main From Point Pleasant to Bradshaw Reservoir, (3) Bradshaw Reservoir, and (4) Bradshaw Reservoir to East Branch Perkiomen Transmission Main and Release Facilities.

Each of these project components underwent a full environmental review as required by NEPA and related environmental statutes. In addition to environmental data furnished by technical consultants, numerous federal, State and local agencies commented upon the DRBC FEIS. DRBC critically examined each of the five elements required for consideration under Section 102(2)(C) of NEPA, 42 U.S.C. §4332(2)(C), and appended the major substantive documents or extracts thereof upon which it had relied in its findings, including the views of public and private commentators. DRBC concluded at that time that the withdrawal of water from the Delaware River under the proposed Point Pleasant project was the best alternative for meeting the supplemental cooling water needs of the Limerick facility and the water supply needs for Bucks and Montgomery Counties. <sup>6/</sup> DRBC also concluded that the diversion of water from the Delaware River for this purpose would not have significant adverse effects on the environment under the specific conditions

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6/ See DRBC FEIS at 40-42.

imposed. <sup>7/</sup> Except for the decision to reduce the diversion at Point Pleasant from a maximum of 150 mgd to a maximum of 95 mgd, there have been no significant changes in the Point Pleasant project since its consideration in the 1973 FEIS. <sup>8/</sup> Only final design and operational details have been added. <sup>9/</sup> No challenge to the adequacy of the 1973 DRBC FEIS was made.

The review by DRBC was coordinated with the AEC's review for Limerick pursuant to recommendations by the Council on Environmental Quality as a result of earlier correspondence. Representatives of the DRBC, NRC and CEQ met on March 17, 1973 to discuss and decide the scope of the subsequent NEPA review for Limerick, including the respective responsibilities of NRC and DRBC in conducting this review. The results of that meeting were documented in two letters from CEQ to NRC and to DRBC, dated March 22 and 23, 1973, in which CEQ concluded that DRBC would have primary responsibility for evaluating environmental impacts associated with the water allocation for Limerick and that DRBC would assist the AEC "in developing an overall cost-benefit balance" for Limerick.

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<sup>7/</sup> Id. at 3. Specific conditions are discussed in the DRBC FEIS at pp. 29-31.

<sup>8/</sup> See Delaware Water Emergency Group v. Hansler, supra at 49. See generally DRBC FEA at Part III, 2-35; IV-11.

<sup>9/</sup> Delaware Water Emergency Group v. Hansler, supra at 43.



With this assistance from DRBC and other sources, the NRC published the FES for Limerick in November 1973. DRBC representatives also appeared before the Licensing Board to give testimony in the construction permit proceeding on December 5, 1973. Based upon the complete record, the Licensing Board issued an Initial Decision authorizing the issuance of construction permits for Limerick on June 14, 1974. <sup>10/</sup> In affirming the Licensing Board's decision with minor modifications, the Appeal Board expressly approved the Staff's reliance upon the DRBC Environmental Review in preparing the AEC's FES for Limerick:

Indeed, the staff went far beyond a mere uncritical factoring of the DRBC findings into its cost/benefit analysis. Specifically, in preparing its FES on the Limerick project, the staff reviewed DRBC's final environmental impact statement on the entire Point Pleasant Diversion project. On the basis of that review, it concurred in DRBC's ultimate findings that the entire Diversion project would have a minimal adverse environmental impact - findings which had followed as comprehensive a NEPA evaluation as would have been performed by this agency. In addition, the staff looked at, and appended to the Limerick FES, the DRBC's decision on the Diversion project, which contained an even more detailed description of the environmental and economic costs of the entire project (see FES at pp.I-1 through I-5).

. . . . .  
In sum, we hold that the DRBC had authority to prepare an environmental impact statement on the Point Pleasant Diversion project in compliance with the requirements of NEPA. It was therefore

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<sup>10/</sup> Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-74-44, 7 AEC 1098 (1974).

entirely appropriate for this Commission's staff to use that statement as a basis for its own assessment of the impact of the Point Pleasant Diversion insofar as Limerick is concerned. 11/

The Commission's action as regards its approval of the "river follower" mode of operation was sustained by the United States Court of Appeals for the Third Circuit. 12/

As noted, final Section 3.8 approval was granted by DRBC for the Point Pleasant project in Docket No. D-65-76 CP(8) and Docket No. D-79-52 CP, issued February 18, 1981. Preceding this issuance, DRBC had issued a Negative Declaration, dated August 25, 1980, in which DRBC found "that circumstances have not changed concerning [NWRA's] water supply system and the overall Point Pleasant project to such an extent as would require the preparation of another Environmental Impact Statement." The Negative Declaration was based upon a comprehensive Final Environmental Assessment (August 1980), which reviewed 14 categories of environmental concerns raised by commentators on matters such as water quality, impact on aquatic biota, conservation, impact on growth and development, esthetics, archeological and historic sites, and consideration of project alternatives.

On appeal, the United States District Court for the Eastern District of Pennsylvania held that the more recent

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11/ Limerick, ALAB-262, supra, 1 NRC at 186, 189.

12/ Coalition of Nuclear Power v. Nuclear Regulatory Commission, No. 75-1421 (3d Cir., Nov. 12, 1975).

updating confirmed the validity of the earlier analysis and conclusions DRBC had reached in its 1973 FEIS. As noted, the Court stated that the more recent analysis by DRBC pertained merely to design and operational details and did not affect the underlying environmental analysis reflected in the 1973 FEIS. The Court said:

Where, as here, the §3.8 application merely supplies added details to a portion of the already approved Comprehensive Plan and where, as here, the DRBC reasonably concludes on the basis of all its prior studies and an up-to-date comprehensive environmental assessment that the application, if granted, will cause no significant additional adverse environmental impacts over those arising from the then existing and approved Comprehensive Plan, there is no need or justification for requiring a new FEIS. 13/

The judgment of the district court was affirmed by the Third Circuit Court of Appeals on the basis of the opinion below on March 19, 1982.

#### Discussion

- I. No Action By The Director Is Appropriate Since The Staff Will Complete Its Environmental Review Related To The Point Pleasant Project Prior To Commencement Of Construction.

Before discussing the individual allegations raised by the petition, Applicant notes that the Director has already taken the position that no interim relief under 10 C.F.R. §2.206 is appropriate pending the completion of the Staff's environmental review of the Point Pleasant project as it

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13/ Delaware Water Emergency Group v. Hansler, supra at 43.

relates to Limerick. As the Director observed in his letter dated August 4, 1982 to Mr. Sugarman, Applicant has advised the Licensing Board that the construction of the Point Pleasant intake and pumping station will not commence until about December 15, 1982. Additionally, the Licensing Board has required Applicant to give 45 days notice of its intent to commence construction if an earlier date is contemplated. Under the circumstances, there is clearly no need for any immediate, interim action by the Director pending completion of the Staff's environmental review of these particular components.

As the Director stated, "the granting of immediate relief would be an extraordinary action that would be warranted only if immediate action were required to abate some imminent and substantial hazard that threatened public health and safety for the environment. Such a threat does not appear to be imminent here." Moreover, it would be unnecessary for the Director to take action under 10 C.F.R. §2.206 even following the completion of the Staff's review. As discussed below, many of the items discussed in the petition relate to matters previously decided at the construction permit stage or which are presently before the Licensing Board in the operating license proceeding. A request for action under Section 2.206 is not a proper means for collaterally challenging the correctness of legal findings by the Commission's adjudicatory boards in such proceedings.

In a subsequent letter dated August 13, 1982 from Mr. Sugarman to the Director, Del-Aware challenges the decision not to take any immediate, interim action pending completion of the Staff's review. The points discussed by Del-Aware in its letter also failed to provide any basis for action under Section 2.206. Del-Aware again indicates considerable misunderstanding as to the role of the NRC in reviewing the Point Pleasant project for environmental impacts. Specifically, Del-Aware is under the misimpression that the NRC "licensed" the project by the issuance of construction permits for Limerick. In point of fact, approval of the Point Pleasant project lay within the jurisdiction of the DRBC, which granted final Section 3.8 approval to the project in February 1981. The NRC, as indicated by the Appeal Board in ALAB-262 and again by the Licensing Board in the current proceeding, merely has responsibility for evaluating environmental impacts of the project associated with the Limerick facility in the context of the overall cost-benefit analysis. Accordingly, there is no need to "amend" the application for Point Pleasant or obtain permission from the NRC to construct the components approved by DRBC and, in certain instances, currently undergoing review by the Corps of Engineers.

Thus, Applicant sees nothing to be gained by the institution of a separate proceeding under Section 2.206 coincident with the current Staff review on an expedited basis as requested by the Licensing Board. Also,

Del-Aware's suggestion that the matters in its petition be referred to the Licensing Board to be decided with other issues in contention may not be granted. The Licensing Board has expressly determined that construction impacts are beyond its delegated jurisdiction. The Director does not have authority to enlarge the Board's jurisdiction, nor does the Board have authority to grant such relief even if it were requested.

II. General Challenges To Licensing  
And Appeal Board Decisions May  
Not Be Heard Under Section 2.206.

Presumably, the instant petition has been filed pursuant to the suggestion by the Licensing Board in the operating license proceeding that contentions by Del-Aware alleging "changes in construction impacts due to either changes in proposed construction or the changes in the recognition of the historical value of areas which may be impacted by construction should be directed as a request for action to the Director of Nuclear Reactor Regulation pursuant to 10 CFR §2.206(a)." <sup>14/</sup> However, for the most part Del-Aware discusses the relationship between Licensee and NWRA and the interagency relationship between the NRC and DRBC in performing their respective EPA reviews. These subjects are altogether irrelevant to construction impacts. The request merely seeks to relitigate the scope of review issues already decided by the Appeal Board in ALAB-262 and

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<sup>14/</sup> Limerick, "Special Prehearing Conference Order" at 86.

by the Licensing Board in its recent Special Prehearing Conference Order.

Thus, a great deal of the petition does not even purport to address environmental concerns as such, but rather the relationship between Licensee and NWRA in the construction and operation of the Point Pleasant pumping station and transmission main. Del-Aware erroneously assumes that the cost-benefit analysis at the construction permit stage proceeded on the premise that the Point Pleasant pumping station would be built regardless of Limerick. In fact, the Appeal Board held that the cost-benefit ratio favored construction of Limerick under the Point Pleasant Diversion Plan "so long as the record demonstrated that the net benefit of Limerick operating under that alternative would be as great as that of either a non-nuclear plant at the same or a different site or a nuclear plant located elsewhere." <sup>15/</sup> The Appeal Board then found that such a demonstration had been made. There is no support for the assertion by Del-Aware <sup>16/</sup> that the Point Pleasant Diversion was not "fully explored" at the construction permit stage. Del-Aware points to no limitation by the Licensing Board which precluded the consideration of Point Pleasant contentions during the hearing at that time.

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<sup>15/</sup> Limerick, ALAB-262, supra, 1 NRC at 182-83.

<sup>16/</sup> Petition at 13.

In any event, the record in the operating license proceeding has been clarified by the affidavit of Robert A. Flowers, Executive Director, NWRA, who has stated that "NWRA is committed to construct the Neshaminy Water Supply System authorized by [DRBC] Docket No. D-65-76 CP(8) with or without Philadelphia Electric Company." <sup>17/</sup> The Licensing Board accepted this statement in reaffirming its prior determination that environmental impacts attributable solely to NWRA's use of the project would not be considered by the NRC. <sup>18/</sup> Accordingly, Del-Aware's factual analysis is simply incorrect. Moreover, the Licensing Board has rejected as erroneous Del-Aware's legal theory that NWRA impacts should be considered because, according to Del-Aware, the project would not be built "but for" Limerick. <sup>19/</sup>

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<sup>17/</sup> A copy of Mr. Flowers' affidavit is attached.

<sup>18/</sup> See Memorandum and Order at 9 n.2 (July 14, 1982).

<sup>19/</sup> In presenting its arguments, Del-Aware also states that Licensee, NWRA and DRBC failed to disclose the interrelationship between Licensee and NWRA in the project, and that Licensee "withheld information" on the project and "attempted to separate it from the Limerick plant in the permit and review process." Petition at 11. These accusations, which are rather cavalierly made by Del-Aware, are again premised on its erroneous, self-created legal theory that the NRC had to approve construction of the Point Pleasant project rather than simply evaluate its environmental impact as related to the construction and operation of the Limerick facility in the NRC's overall cost-benefit

(Footnote <sup>19/</sup> continued on next page)



Further, Del-Aware errs in asserting that the Staff did not consider impacts of the entire project at the construction permit stage. To the contrary, not only the Staff but also the Licensing Board and the Appeal Board fully considered the entire Point Pleasant Project at the construction permit stage. The record contained the entire DRBC environmental analysis and also supplemental testimony as to the environmental effects of the Point Pleasant Diversion Project (properly with the emphasis upon the Limerick portion). <sup>20/</sup> Reviewing this record, the Appeal Board found "that the entire Diversion Project would have a minimal adverse environmental impact." <sup>21/</sup> As the Appeal Board stated:

Indeed, the staff went far beyond a mere uncritical factoring of the DRBC findings into its cost/benefit analysis. Specifically, in preparing its FES on the Limerick project, the Staff reviewed DRBC's final environmental impact statement on the entire Point Pleasant Diversion project. On the basis of that review, it concurred in DRBC's ultimate

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19/ (Continued)

analysis. An analysis of the Environmental Report and the NRC's Final Environmental Statement would demonstrate, in any event, that Licensee fully provided the NRC with all information it requested for its environmental review.

20/ There are portions of the record which Del-Aware has obviously misconstrued. For example, it cites portions of the Appeal Board decision discussing DRBC findings regarding alternatives for a supplemental reservoir. Del-Aware has misinterpreted this discussion to apply to the Bradshaw Reservoir. See Petition at 32.

21/ Limerick, ALAB-262, supra, 1 NRC at 186 (emphasis added).

findings that the entire Diversion project would have a minimal adverse environmental impact - findings which had followed as comprehensive a NEPA evaluation as would have been performed by this agency. In addition, the staff looked at, and appended to the Limerick FES, the DRBC's decision on the Diversion project, which contained an even more detailed description of the environmental and economic cost of the entire project . . . . 22/

Accordingly, there is no basis for the statement that the Appeal Board (or the Licensing Board below) "did not include the Point Pleasant pump station, or the transmission lines in its decision [for] the construction permit." 23/ As discussed supra, Del-Aware is simply mistaken in its belief that the components of the Point Pleasant project should have been included in the construction permit. The Appeal Board determined that the components of the Point Pleasant Diversion project described by DRBC in its FEIS and the additional Limerick components which were the subject of testimony before the Licensing Board would, in construction and operation, result in less environmental cost than a non-nuclear facility at the same site or a nuclear facility at a different site. 24/ Del-Aware cannot now take issue

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22/ Id. at 186 (emphasis added).

23/ See Del-Aware Petition at 6.

24/ As discussed at pages 13-15, supra, Del-Aware also wishes to challenge the decision by the Licensing Board in the operating license proceeding limiting the scope of its review to exclude components of the Point Pleasant Diversion project which will be utilized solely by NWRA.

with these findings made at the construction permit stage under the auspices of Section 2.206. Further, as previously discussed, Del-Aware is simply wrong in its belief that there was some obligation on the part of the NRC to include the physical components of the Point Pleasant Diversion Plan in the Limerick construction permits, such that the NRC would have "approved" the Point Pleasant project. <sup>25/</sup>

Even more fundamentally, Del-Aware ignores the fact that NWRA is a totally separate legal entity which was not a party to the construction permit proceeding nor a party to the current operating license proceeding, or otherwise subject to the jurisdiction of the NRC. It is NWRA, not Licensee, which has received authorization by DRBC to construct and operate the Point Pleasant pumping station in Docket No. D-65-76 CP(8). <sup>26/</sup> In any event, the Appeal

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<sup>25/</sup> See Del-Aware Petition at 7.

<sup>26/</sup> While the financial relationship between Licensee and NWRA is truly irrelevant, the fact is that Licensee will pay a charge to NWRA based upon water usage. The Licensing Board laid this matter to rest in determining that environmental impacts from portions of the Point Pleasant project which will be used only by NWRA will not be considered by the NRC. The Board stated:

Del-Aware argues that this part of the system would not be built by the NWRA or would be vastly reduced in size if it were not for the need to build the Point Pleasant intake and Bradshaw Reservoir for use by Limerick. (Tr. 448). However, the test for determining whether a project has been illegally segmented for NEPA purposes is not

(Footnote <sup>26/</sup> continued on next page)

Board has ruled in ALAB-262 that the Staff properly relied upon the FEIS prepared by DRBC for the entire Point Pleasant Diversion Project, which concluded that all environmental impacts, however they might have been apportioned, were minimal compared to anticipated benefits.

In this respect, Del-Aware's discussion of the record before the NRC at the construction permit stage gives little or no weight at all to the exhaustive environmental review conducted by DRBC in its separate proceedings. The Appeal Board well understood and approved the degree to which the NRC relied upon DRBC's findings, and the Appeal Board's decision in ALAB-262 as to the "river follower" mode of

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26/ (continued)

whether one segment would be not built but for the other.

Limerick, Special Prehearing Conference Order at 76. The Licensing Board reaffirmed this holding in its subsequent Memorandum and Order, dated July 14, 1982, where it stated at pages 8-9 as follows:

Del-Aware argues that the NWRA is financially dependent on the Applicant for completion of the entire system and that the NWRA portion, thus, lacks independent financial utility. This is simply another way of restating the argument that but for the Applicant's participation in building part of the system, the part utilized only by NWRA would not be built. As we explained previously, the "but for" test is not the correct test in this situation. (SPCO at 76-77). Nor do we find financial dependence to be the equivalent of lack of physical independent utility, and we have found no case equating the two.

operation was affirmed by the United States Court of Appeals for the Third Circuit in Coalition of Nuclear Power v. Nuclear Regulatory Commission, No. 75-1421 (3d Cir., Nov. 12, 1975).

Del-Aware also fails to acknowledge the additional review conducted by DRBC in conjunction with its grant of final approval to the project pursuant to Section 3.8 of the DRBC Compact. This supplemental analysis preceded issuance of Docket No. D-65-76 CP(8) and Docket No. D-79-52 CP on February 18, 1981, which constituted Section 3.8 approval. Significantly, a broad range of challenges to the sufficiency of this review was categorically rejected by the federal courts in Delaware Water Emergency Group v. Hansler, supra. Under the ground rules laid down by the Appeal Board in ALAB-262, this additional input from DRBC will be reviewed by the NRC Staff in preparing its Environmental Statement, but not, as Del-Aware suggests, by conducting a de novo review on the entire subject. The fact that Del-Aware now asserts that yet another, duplicative analysis should replot the same ground is certainly not a basis for suspending the construction permits. <sup>27/</sup>

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<sup>27/</sup> The cases cited by Del-Aware at page 35 of its petition do not support the proposition that overlapping agency responsibilities under NEPA may not be synchronized. To the contrary, cooperation between agencies is encouraged under NEPA in order to avoid duplication of efforts. Sierra Club v. Alexander, 484 F. Supp. 455, 467 (N.D.N.Y.), aff'd mem., 633 F.2d 206 (2d Cir.

(Footnote <sup>27/</sup> continued on next page)

Two allegations by Del-Aware in particular show that it simply does not understand the licensing schemes of DRBC and the NRC and the relationship between those agencies, as designated by the Council on Environmental Quality years ago, with regard to Limerick.

The division of responsibility between DRBC and the NRC as reflected in DRBC Docket No. 79-52 and correspondence from the NRC to DRBC, contrary to Del-Aware's mischaracterizations, is consistent with the preceding analysis. Thus, Del-Aware erroneously states that the decision of the DRBC in Docket No. D-69-210 CP (November 5, 1975) conditioned its allocation approval upon preparation of an FES by the AEC. In fact, DRBC merely noted that the AEC had prepared an FES and that the NRC's actions in granting the construction permit had become final. Likewise, in Docket No. D-79-52 CP, DRBC did not, as Del-Aware also misstates, condition its approval on "approval by the NRC." <sup>28/</sup> DRBC merely stated:

The Commission reserves the right to reopen this docket at any time, and to reconsider this decision and any and all conditions imposed hereunder in light of

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27/ (Continued)

1980). Del-Aware's reliance upon Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), ALAB-506 8 NRC 533 (1978), is misplaced because TVA, which is, of course, a federal agency, was itself the applicant for construction permits. There is no doubt but that the NRC must and has independently determined compliance with NEPA in such cases.

28/ Del-Aware Petition at 38.

further information developed by, or decisions rendered in, pending or future proceedings conducted by other State and Federal agencies concerning the development and operating of the Limerick Nuclear Generating Station and related facilities. [Docket No. D-79-52 CP at 8.]

Thus, the fact that DRBC conditioned its approval of the project upon subsequent NRC licensing is by no means an admission that its own review was inadequate or incomplete, but rather an expression of comity among federal agencies which recognizes the obvious, i.e., operation of components related to the Limerick Generating Station depends, as a practical matter, upon NRC licensing of the Station itself.

Accordingly, the Staff merely states the obvious in the letter from Mr. Tedesco to DRBC, dated December 16, 1980, which simply notes that the customary environmental review as required by 10 C.F.R. Part 51 at the operating license stage will be conducted. There is no intimation that information and data reviewed by DRBC in its FEIS will be reviewed by the NRC de novo.

The Commission has previously rejected similar efforts to circumvent the hearing process, stating that "parties must be prevented from using 10 CFR 2.206 procedures as a vehicle for reconsideration of issues previously decided."<sup>29/</sup> As the Commission stated in the Bailly

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<sup>29/</sup> Consolidated Edison Company of New York, Inc. (Indian Point, Unit nos. 1, 2 and 3), CLI-75-8, 2 NRC 173, 177 (1975).

proceeding, the Director's procedures are inapposite where the allegedly changed circumstances "do not include any actual or demonstrated impacts of construction activities on the environment, but rather petitioners' grounds for believing the Final Environmental Statement to be in error, out of date, or incomplete, and the Licensing Board decision authorizing issuance of the construction permit therefore to be void." <sup>30/</sup> Del-Aware's legal theories as to what should have been the scope of review at the construction permit stage clearly do not amount to "new information regarding the issue under consideration" which identifies "a significant unresolved safety issue or a major change in facts material to the resolution of major environmental issues." <sup>31/</sup>

III. Particular Items Under Review By  
The Corps Of Engineers And Within  
Admitted Contentions Are Not A  
Basis For Section 2.206 Review.

While the petition does attempt to make some factual allegations of changes in construction impacts, the allegations fall far short of satisfying the Marble Hill legal standard under Section 2.206 requiring specification of "a major change in facts" as to "a major environmental

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<sup>30/</sup> Northern Indian Public Service Company (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 434 (1978).

<sup>31/</sup> Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), DD-79-21, 10 NRC 717, 719 (1979) (footnote omitted).



issue." Moreover, contrary to the holding of the Commission in Indian Point, Del-Aware is attempting to obtain reconsideration of the Licensing Board's ruling that components of the Point Pleasant Diversion Project which will be utilized solely by NWRA will not be reviewed by the NRC as part of its cost-benefit analysis. The Licensing Board has expressly rejected the "but for" test upon which Del-Aware relies in its petition. <sup>32/</sup> The Board reaffirmed this holding on reconsideration and specifically stated:

Del-Aware seeks reconsideration of the portion of our order which excludes from consideration in this hearing environmental impacts of that portion of the Point Pleasant diversion and its associated water supply system which is to be utilized solely by the Neshaminy Water Resources Authority (NWRA). Del-Aware argues that the NWRA is financially dependent on the Applicant for completion of the entire system and that the NWRA portion, thus, lacks independent financial utility. This is simply another way of restating the argument that but for the Applicant's participation in building part of the system, the part utilized only by NWRA would not be built. As we explained previously, the "but for" test is not the correct test in this situation. (SPCO at 76-77). Nor do we find financial dependence to be the equivalent of lack of physical independent utility, and we have found no case equating the two. Hence, we decline to change our ruling that the part of the system attributable only to the NWRA will not be considered in these hearings. <sup>33/</sup>

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<sup>32/</sup> See Limerick, Special Prehearing Conference Order at 76.

<sup>33/</sup> Limerick, *supra*, "Memorandum and Order" (July 14, 1982) (slip op. at 8-9) (footnote omitted).

As such, the Board's holding is the "law of the case" and, especially where the Board has declined to change its view, may not be overridden by the Director. <sup>34/</sup>

The Appeal Board in ALAB-262 fully appreciated the fact that the specific design of the various components comprising the Point Pleasant Diversion had not yet been finalized. Its affirmance of the Initial Decision authorizing issuance of the construction permits was premised on the fact that these components would require further review, including all environmental consequences, by the appropriate agencies. The fact that this evaluation is now taking place as anticipated, therefore, does not constitute any "change" in the factual record upon which the issuance of construction permits was based.

Nor does Del-Aware's disagreement with findings by DRBC or prospective findings by the Corps of Engineers constitute a major environmental issue. As the Commission also stated in Indian Point, a petitioner's "mere dispute over factual issues does not suffice" to show that a substantial health or safety issue has been raised. <sup>35/</sup> The Commission reiterated in the Bailly proceeding that the Director "is not required to accord presumptive validity to every

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<sup>34/</sup> See, e.g., Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), Docket Nos. 50-443 and 50-444, "Memorandum and Order" (February 12, 1981 (slip op. at 6-7)).

<sup>35/</sup> Indian Point, CLI-75-8, supra, 2 NRC at 176 n.2.

assertion of fact, irrespective of its degree of substantiation, or to convene an adjudicatory proceeding in order to determine whether an adjudicatory proceeding is warranted." <sup>36/</sup> The Director may rely upon a variety of sources in making this determination, including "documents issued by other agencies." <sup>37/</sup>

Thus, Del-Aware has provided no factual basis for its assertions, e.g., that the design and location of the Point Pleasant intake structure is environmentally unsuitable, that toxic pollution or intrusion of salinity will occur, or that the water supply needs of NWRA users could be met by other sources. <sup>38/</sup> It has only alleged a need to inquire into these matters. The Director should not give weight to these speculative allegations. Such matters as water flow and quality <sup>39/</sup> and water supply needs <sup>40/</sup> have been thoroughly reviewed by DRBC and the NRC, whose analyses have twice passed muster before the federal courts. Likewise, there has been no showing that any condition in the

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<sup>36/</sup> Bailly, CLI-78-7, supra, 7 NRC at 432.

<sup>37/</sup> Id. at 433.

<sup>38/</sup> Petition at 15-17. Water supply needs of Bucks and Montgomery Counties is not even relevant for the reasons stated by the Licensing Board in its decision, discussed at page 13-15, supra.

<sup>39/</sup> See DRBC FEIS at 14-46; DRBC FEA at 2-31 to 2-55, IV-32 to IV-53; NRC FES §5.2.

<sup>40/</sup> See DRBC FEIS at 41-42; DRBC FEA at 2-1 to 2-3, IV-72 to IV-75.

construction permits has been triggered with regard to the necessity for notifying the Director of Licensing of unanticipated environmental impacts not evaluated in the Final Environmental Statement. In this respect, it should be borne in mind that, under the NRC rules, the Initial Decision by the Licensing Board and the Appeal Board's decision are deemed to amend the Final Environmental Statement in relevant part. <sup>41/</sup> Thus, the findings in these decisions regarding Point Pleasant are also part of the overall consideration given the Point Pleasant project in the Final Environmental Statement.

Further, although the request by Del-Aware apparently arises from the suggestion by the Licensing Board that Del-Aware pursue before the Director allegations relating to construction impacts, most of what it alleges here merely restates legal theories or general factual averments made before the Licensing Board. Some of these theories and averments have been rejected outrightly as a matter of law or as irrelevant or lacking in nonspecificity. Others have been accepted as contentions. Whatever their disposition, these charges have or will be decided by the Licensing Board. The Commission stated in Indian Point that Section 2.206 procedures may not be used "for avoiding an existing

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<sup>41/</sup> See generally 10 C.F.R. §§51.52 and 51.53; Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), LBP-80-18, 11 NRC 906, 909 (1980); Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), Docket No. 50-466 CP, "Order" (March 10, 1980) slip op. at 7 (collecting cases).

forum in which [issues] more logically should be presented."<sup>42/</sup> In particular, contentions relating to environmental impacts of the intake structure as well as toxic pollution have been admitted as contentions in the operating license proceeding <sup>43/</sup> and it would therefore be wholly inappropriate for the Director to decide and thereby prejudice these issues under Section 2.206, <sup>44/</sup> especially where the petitioner alleges no facts to support its allegations, but only asks for a hearing to pursue its charges.

Moreover, the NRC Staff will itself supply input on these very issues in preparing its Draft Environmental Statement. The Director has recognized in numerous instances that Section 2.206 procedures are inappropriate where particular safety or environmental issues will be considered by the Staff and the Licensing Board in an orderly fashion during the license proceeding. <sup>45/</sup> No

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<sup>42/</sup> Indian Point, CLI-75-8, supra, 2 NRC at 177.

<sup>43/</sup> Limerick, Special Prehearing Conference Order at 87.

<sup>44/</sup> Conversely, the Director should not conclude that the necessary showing has been made where the Licensing Board, utilizing a far more liberal pleading standard, has ruled that the allegation does not even constitute a valid contention, i.e., intrusion of salinity, impacts from NWRA components and the existence of other possible sources of supplemental cooling water. See Limerick, Special Prehearing Conference Order at 50, 75 and 95.

<sup>45/</sup> See e.g., Maine Yankee Atomic Power Company (Maine Yankee Atomic Power Station) DD-79-8, 9 NRC 740, 741 (1979); Marble Hill, DD-79-21, supra, 10 NRC at 719; Philadelphia Electric Company (Limerick Nuclear Generating Station, Units 1 and 2), DD-79-16, 10 NRC 609, 610 (1979).

justification exists for short-circuiting Staff preparation of the DES and the litigation of contentions as part of the licensing hearing by giving Del-Aware's allegations presumptive validity here.

The Commission's admonition that Section 2.206 procedures should not be used to avoid other forums in which they would be more logically presented applies equally to the pendency of permit proceedings before the Corps of Engineers under Section 10 of the Harbors and Rivers Appropriation Act of 1899 and Section 404 of the Clean Water Act. The very issues which Del-Aware presents in its Section 2.206 petition are presently being argued by Del-Aware before the Corps of Engineers, whose decision, record and supporting analysis will all be available to the NRC for its review at the appropriate time. There is no need for the Director to prejudge the findings and conclusions to be reached by the Corps of Engineers. Conditions necessary for the protection and enhancement of the environment as determined by the Corps of Engineers, if any, can be adopted and incorporated in the operating licenses for Limerick.

Finally, Del-Aware has failed to make any showing whatsoever that would demonstrate "a material alteration in the NEPA cost-benefit balance which the Board had struck in the Initial Decision" which "would clearly mandate a change

in result." <sup>46/</sup> Absent such a showing, there is no basis for suspension or revocation of the construction permits for environmental reasons. In any event, all of the issues discussed by Del-Aware have been or will be adequately considered by the appropriate agencies. These matters will then be fully scrutinized in the Staff's DES and by the Licensing Board in deciding the contentions it granted to Del-Aware. Separate consideration under Section 2.206 is unwarranted.

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<sup>46/</sup> Georgia Power Company (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), DD-79-4, 9 NRC 582, 584-85 (1979).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of )  
Philadelphia Electric Company ) Docket Nos. 50-352  
(Limerick Generating Station, ) 50-353  
Units 1 and 2) )

AFFIDAVIT OF ROBERT A. FLOWERS

Robert A. Flowers, being duly sworn according to law,  
deposes and says:

1. I am the Executive Director of the Neshaminy Water Resources Authority and have been authorized by NWRA to make this affidavit on its behalf.

2. In Docket No. D-65-76 CP (8), issued February 18, 1981, the Delaware River Basin Commission gave final approval under Section 3.8 of the DRBC Compact to the construction of proposed modifications to the Neshaminy Creek Watershed Plan, which included construction of the Point Pleasant Pumping Station and related transmission lines, which will furnish supplemental water supplies to water-short areas of Central and Bucks Counties.

3. These components constitute a portion of the overall Point Pleasant diversion plan, which was approved in Docket No. D-65-76 CP (8) and Docket No. D-79-52 CP, also




issued on February 13, 1981. The latter decision granted final Section 3.8 approval to the components of the Point Pleasant diversion plan applicable to the Philadelphia Electric Company.

4. NWRA is committed to construct the Neshaminy Water Supply System authorized by Docket No. D-65-76 CP (8) with or without Philadelphia Electric Company.

  
Robert A. Flowers

Sworn to and subscribed before  
me this 10 day of June, 1982.

  
Notary Public

My commission expires 6-12-86.