

1 UNITED STATES OF AMERICA
 2 NUCLEAR REGULATORY COMMISSION
 3 BEFORE THE ATOMIC SAFETY AND LICENSING BOARD
 4 - - - - -x
 5 In the Matter of :
 6 PHILADELPHIA ELECTRIC COMPANY : Docket No. 50-352 OL
 7 (Limerick Generating Station : 50-353 OL
 8 Units 1 and 2) :
 9 - - - - -x

10 Norristown Borough Hall
 11 235 East Mry
 12 Norristown, Pa.
 13 Thursday, October 7, 1982

14 The hearing in the above-entitled matter
 15 reconvened, pursuant to recess, at 9:04 a.m.

16 BEFORE:
 17 LAWRENCE BRENNER, Chairman
 18 Administrative Judge
 19 RICHARD F. COLE, Member
 20 Administrative Judge
 21 PETER A. MORRIS, Member
 Administrative Judge

22 FOR THE BOARD:
 23 LUCINDY MINTON, Esq.
 24 Atomic Safety & Licensing Board
 25

1 APPEARANCES:

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17 On behalf of Intervenor,

18 Del-Aware Unlimited, Inc.:
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1 C O N T E N T S

2 WITNESSES: DIRECT CROSS REDIRECT RECROSS BOARD

3 Vincent S. Boyer,
 4 W. Haines Dickenson,
 5 E. H. Bourquard
 6 Paul L. Harmon and
 7 John E. Edinger (Recalled)
 8 By Mr. Sugarman 1610

9 (Afternoon Session...1628)

10 Vincent S. Boyer,
 11 W. Haines Dickenson
 12 Paul L. Harmon and
 13 E. H. Bourquard (Resumed)
 14 By Mr. Sugarman 1637

15 Michael Kaufmann and
 16 Charles Emery
 17 By Mr. Sugarman 1700
 18 By Mr. Conner 1704

19

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21 E X H I B I T S

22 <u>NUMBER</u>	23 <u>IDENTIFIED</u>	24 <u>RECEIVED</u>	25 <u>BOUND IN TRANSCRIPT</u>
18 Del-Aware 7	1639		1727
19 Del-Aware 8	1660		

20

21 RECESSES:

22 Morning - 1586

23 Noon - 1627

24 Afternoon - 1694

25

1 interrupting the Applicant's case for the convenience of
2 subpoenaed witnesses who were more locked into
3 scheduling this week. We now have it, through the
4 courtesy of Mr. Wetterhahn, that Mr. Brundage is not a
5 problem and so we need not work him in this week. As
6 provided under the subpoena authority, his travel
7 expenses are going to be paid.

8 MR. SUGARMAN: Which they will be.

9 JUDGE BRENNER: And I hope that doesn't become
10 a reason as to why we cannot go to Washington if that
11 becomes the consensus.

12 MR. SUGARMAN: No, not at all.

13 JUDGE BRENNER: Mr. Phillippe, as I recall, is
14 from the Washington area; correct?

15 MR. SUGARMAN: Oh, yes, and Washington the
16 week after next would be equally convenient for him.
17 Let me say about Mr. Brundage -- this is hardly worth
18 talking about, but he has already been paid travel
19 expenses and it is just a question of paying him
20 whatever difference there may be between Washington
21 versus Norristown.

22 JUDGE BRENNER: The sole purpose of my inquiry
23 here is to make sure that we do work in Del-Aware
24 witnesses this week if we can who could not come to the
25 Washington area in the event the hearing is moved to

1 Washington the week of the 18th, so I would like those
2 witnesses to be heard this week unless it is already
3 established that we definitely would be in this area
4 rather than Washington.

5 MR. SUGARMAN: It has not been so
6 established. Ms. Coe indicate that Messrs. Kaufmann and
7 Emery and Plevyak could be here tomorrow. She told me
8 something this morning about whether they could come to
9 Washington that week of the 18th if necessary, and she
10 will be back in a moment and I can ask her. I think she
11 told me something but I don't want to say because I'm
12 not sure.

13 JUDGE BRENNER: That would be the
14 consideration that they could come to Washington in the
15 event we were there. Then I would rather not further
16 interrupt the Applicant's case with their testimony.

17 What about Messrs. McCoy and Miller in the
18 event we hear some of their testimony?

19 MR. SUGARMAN: They can come to Washington. I
20 have ascertained that.

21 JUDGE BRENNER: There is no problem?

22 MR. SUGARMAN: That is correct.

23 JUDGE BRENNER: What about Professor Lewis?

24 MR. SUGARMAN: Well, I don't anticipate any
25 problem, let me put it that way. I was not able to

1 reach him last night. He was in transit from State
2 College to Point Pleasant. His wife didn't know where
3 he was staying.

4 [Laughter.]

5 JUDGE BRENNER: All right. As I understand
6 it, then, when you have a chance to talk to Ms. Coe, you
7 will find out that Messrs. Kaufmann, Emery and Plevyak
8 can come to the Washington area, and I am not requiring
9 that you have to make so much of a showing. If it is
10 inconvenient to them, we will adjust.

11 MR. SUGARMAN: We are coming to the end of
12 that. What I was going to say is that as far as I am
13 concerned, Washington is okay, subject to that one
14 caveat, and I don't believe it is a problem, but if it
15 is a problem, we can get them on tomorrow.

16 JUDGE BRENNER: All right, I agree, and that
17 is the exact way we will work.

18 MR. SUGARMAN: So my assumption is we are
19 going to be in Washington the week of the 18th.

20 JUDGE BRENNER: That is fine with us if it is
21 fine with you.

22 MR. SUGARMAN: I thought it might be.

23 JUDGE BRENNER: Let's go off the record for a
24 moment.

25 [Discussion off the record.]

1 JUDGE BRENNER: Let's go back on the record.
2 The next order of business that we had in mind
3 was to obtain the parties' views on the portions of the
4 Miller and McCoy testimony as to which there is
5 disagreement. Perhaps it would be best to start with
6 you, Mr. Sugarman, and you could start with either the
7 Miller or McCoy testimony, as you prefer.

8 MR. SUGARMAN: The area of disagreement
9 between ourselves and the Applicant is broader than the
10 area of disagreement between ourselves and the Staff, so
11 I need to address all of the testimony to which the
12 Applicant objects. We have on our copies numbered the
13 questions. I hope that the Board has been able to do
14 that.

15 JUDGE BRENNER: Yes, we have also numbered the
16 pages.

17 MR. SUGARMAN: We found that we were applying
18 inconsistent numbering systems for the pages, depending
19 upon whether we numbered the cover. Did you number the
20 cover?

21 JUDGE BRENNER: Why don't we stay with the
22 question numbers, then.

23 MR. SUGARMAN: The first question -- well, let
24 me say first of all I would like for the record to
25 informally offer the entire testimony, but I recognize,

1 as I stated before, that the Board has ruled on other
2 material that dictates the resolution on these
3 questions, and therefore I do not press the point at
4 this point. I understand the Board would similarly rule
5 on this testimony as it has other similar testimony.

6 Is there any problem in my so stating that?

7 JUDGE BRENNER: No, except -- I want to be
8 very candid with you -- we did not look at the portions
9 which you agreed to strike to see if in view of our
10 prior rulings they would be excluded within those prior
11 rulings.

12 MR. SUGARMAN: Well, maybe I could stipulate
13 what they relate to and that way solve the problem.
14 Question 4 relates to, with the exception of the first
15 sentence of the last paragraph, relates to --

16 JUDGE BRENNER: Of McCoy?

17 MR. SUGARMAN: Question 4, of McCoy, yes.
18 Relates to the impact of the diversion and the Fish and
19 Wildlife's concern about the diversion with relation to
20 consumptive withdrawals. It is my understanding the
21 Board has ruled that that issue is foreclosed by DRBC
22 action.

23 [Pause.]

24 You stated it very broadly, and let here is
25 the problem, Mr. Sugarman. Remember that one area we

1 have permitted you to inquire into would be the
2 environment that the aquatic biota of interest would
3 find themselves in in the vicinity of the Point Pleasant
4 intake to the extent that total environment would be
5 pertinent to an analysis of any impacts of the intake on
6 such biota.

7 MR. SUGARMAN: Yes. Looking at the answer
8 again, I look at that and I realize that, and in our
9 discussions among counsel we said that this is
10 consumptive so it is out. I look at it now and I see
11 that, limited to the statistics in there as to the
12 anticipated future flows in the river, I do wish to
13 offer that without any testimony as to the adverse
14 effect of those withdrawals on the river system as a
15 whole.

16 JUDGE BRENNER: You have exactly appreciated
17 my distinction. Here is the problem, though. In this
18 answer the two things are interwoven, and the rule is
19 that if you can't separate things out to strike that
20 which is immaterial, the whole portion is out because
21 otherwise non-relevant matters which we would not want
22 parties to cross-examine on would remain in.

23 MR. SUGARMAN: Then I will separate them at
24 this moment, if I may, and that is --

25 JUDGE BRENNER: May I make one suggestion?

1 MR. SUGARMAN: Yes, sir.

2 JUDGE BRENNER: I think you have got testimony
3 of other witnesses, more than one other witness, that
4 discusses the same subject.

5 MR. SUGARMAN: Not the future depletive
6 withdrawals, and not in the same detail. I have not seen
7 any testimony that goes to that.

8 JUDGE BRENNER: All right. Remember it is
9 only pertinent to be tied into the flow by Point
10 Pleasant.

11 MR. SUGARMAN: Absolutely. I will remember
12 that very clearly and I will respect that distinction.
13 I would want to include in the testimony the material
14 starting on line 9 of the second page of that answer,
15 starting with the language "In the 1980 Level B study,
16 current consumptive water use," and indicating the past
17 and future water use, and then the levels in January
18 1981.

19 JUDGE BRENNER: So you would be talking about
20 the rest of that paragraph?

21 MR. SUGARMAN: The rest of that paragraph, and
22 the first sentence only of the next paragraph.

23 JUDGE BRENNER: Okay, I understand.

24 MR. SUGARMAN: And the reason I am not going
25 for the second sentence of that paragraph is because Mr.

1 Miller will cover that. That is, I think, within the
2 limits of what the Board -- that is precisely within the
3 limits of what the Board has agreed that I may adduce.
4 But Mr. Miller will cover that as part of the same
5 sentence, so I would just strike the whole sentence.

6 JUDGE BRENNER: All right. I understand which
7 portions you want in and why.

8 MR. SUGARMAN: And the reason that those are
9 offered is that they are relevant to the question of the
10 determination of what will be the flow past Point
11 Pleasant, and that is all they are offered for. And just
12 for the reason for the flow past Point Pleasant, that is
13 all that those materials are offered for.

14 And the foundation is that the witness, as
15 part of his official position as testified in the first
16 three answers to the first three questions, is to be
17 aware of this documentation from an official position
18 point of view, to compile it and to interpret it.

19 JUDGE BRENNER: Do I understand correctly that
20 you also want to include the first sentence to the
21 answer to Question 4 in evidence? And I am taking that
22 from the cross-reference chart we were provided.

23 MR. SUGARMAN: The sentence, "The services
24 concerned" et cetera?

25 JUDGE BRENNER: Yes. According to the chart I

1 have, it says that you would agree to strike Question
2 and Answer 4 as now modified by the discussion we just
3 had, except first paragraph 4, and according to this
4 chart, the Staff would not object to that, and I don't
5 understand what purpose you would offer that sentence
6 for.

7 MR. SUGARMAN: Right, that is the sentence,
8 "In January 1981."

9 JUDGE BRENNER: No.

10 MR. SUGARMAN: The first sentence of Paragraph
11 4.

12 JUDGE BRENNER: I'm sorry, the first sentence
13 of Response 4, the first paragraph of the response, "The
14 services concerned."

15 MR. SUGARMAN: No, sir, the first sentence of
16 Paragraph 4 of Response 4. The word "paragraph" is
17 misleading.

18 JUDGE BRENNER: No, it is not, it is perfectly
19 clear. I just read it wrong. Thank you.

20 MR. SUGARMAN: So I have already covered that
21 sentence in my explanation of the foundation, relevance
22 and materiality. As to probative value, I think the
23 witness through his studies and inquiries and
24 compilations of data has adequately demonstrated,
25 subject to cross-examination, that he is capable and a

1 good witness for providing this complicated data from
2 official records.

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1 JUDGE BRENNER: I will tell you, it has been
2 some time trying to figure out why that first sentence
3 of the answer is different from the rest of the answer,
4 and why the staff was agreeing with you, but go ahead.

5 MR. SUGARMAN: I am sorry, sir. Probably it
6 would have been better had we physically marked up the
7 testimony. The Question 5, we don't offer that, or we
8 offer it, but we understand that that will be
9 eliminated. It goes to the impact of consumptive uses
10 on the basin.

11 Question 6 is precisely responsive to the
12 second subject that the board has indicated, namely, the
13 environment and likely environment around Point
14 Pleasant, and deals with the dissolved oxygen, the
15 history of dissolved oxygen levels in the river, and the
16 impact on the fish and why they can't come up. And
17 there again, Mr. McCoy in his official capacity as a
18 witness is a witness for that.

19 I would say that I think Mr. Miller is the
20 expert on the subject, and if there is a problem of
21 accumulation or repetitiveness, what I would propose to
22 do is to put Mr. McCoy and Mr. Miller as a panel, and
23 not to strike this testimony, but that either of them
24 can respond to questions.

25 JUDGE BRENNER: Do you see a distinction

1 between the last paragraph of that Answer 6 and the
2 first two paragraphs?

3 MR. SUGARMAN: There is a distinction. The
4 reason I recognize that the board would probably strike
5 that is because it indicates that what I was urging a
6 couple of days ago would be relevant within the terms of
7 the board's prior discussion as to location of the
8 intake. I believe it is relevant to the subject, but I
9 thought the board -- I believe it is very relevant, and
10 I believe that it shows that if an alternative
11 downstream were selected, even though the water would be
12 taken out of the Delaware River, it would be far less
13 harmful on the fish, but I was trying to recognize what
14 the board had already done.

15 I think it is relevant not only because it
16 leads to the selection of alternatives, but also because
17 it shows the comparative disadvantage of this location.
18 But the reason I agreed to strike it was, I thought the
19 board would probably do that. If the board would hear
20 it, I do offer it.

21 JUDGE BRENNER: It wasn't clear to me, at
22 least -- I didn't discuss this particular point with the
23 other board members -- that in that third paragraph you
24 were advocating another intake in a different location
25 in the Delaware for the same purpose as the Point

1 Pleasant intake. Rather, it appeared to me that you
2 were talking about purchasing water from an existing
3 water supply instead of the intake at Point Pleasant.

4 MR. SUGARMAN: That is correct. And that is
5 an alternative for NWRA. And that would improve the
6 situation at Point Pleasant in terms of the migratory
7 fish being able to get up. It also would improve the
8 situation in terms of the low flow withdrawals. I would
9 offer it. Now, you have opened my thinking to the fact
10 that this relates to NWRA and not to PECO, and therefore
11 is not an alternative, and within the same discussions
12 we previously had, and so I would offer it.

13 JUDGE BRENNER: Okay, we understand your
14 argument.

15 MR. SUGARMAN: Thank you. I don't think there
16 is a necessity for a foundation problem on that, or for
17 a foundation justification. Mr. Bourquard is here. He
18 can testify if he disagrees with Mr. McCoy's testimony
19 that he made that statement.

20 Number 7 does relate to the salinity concerns,
21 and it, I think, goes to the necessity or goes to the
22 witnesses' concern about the adverse effect of a
23 diversion per se, and therefore I agree that that would
24 probably be within the board's prior rulings.

25 Question 8, as I indicated to the board and

1 parties this morning, on reviewing that testimony, I
2 would urge the inclusion of the first paragraph and the
3 first sentence of the second paragraph, because it
4 relates to the likely flow occurrences at Point
5 Pleasant, and that is all I offer it for. The rest of
6 it deals with salinity, and while obviously, as I said,
7 I would like to include that issue, I recognize the
8 board's rulings on it.

9 Question 9 relates to two things. It relates
10 to the skimming, the adverse impact of skimming
11 reservoirs on low flows at Point Pleasant, and Merriel
12 Creek being the case in point, and I offer it for that
13 as indicative of the concern or of the likelihood of
14 adverse effects from low flows at Point Pleasant in the
15 operations of the intake.

16 The second subject that it deals with, and it
17 deals with it in two places, is the Red Creek Reservoir
18 alternative on the Schuylkill River, which was identified
19 in the Merriel Creek Draft EIS as a less damaging
20 alternative environmentally than Merriel Creek, and if
21 the board were willing or were to admit the contention
22 on one unit, I would submit that it would be appropriate
23 to consider new storage alternatives on the Schuylkill as
24 an alternative.

25 But inasmuch as the board the other day

1 indicated that if it were to admit that contention, it
2 would not admit, and I frankly didn't understand what
3 the board's reasoning was on that, but we didn't have
4 time to go into it, the reason for only looking at
5 alternatives that would involve purchase of water from
6 existing storage on the Schuykill and River Run of the
7 Schuykill for one unit, and not including the possible
8 construction of a new storage facility to store the
9 nature flow of the Schuykill and make it available at
10 low flow times.

11 So, I would ask the board to further consider
12 that question, and if that becomes a relevant part, if
13 our contention is admitted on that point, and if the
14 board decides that it has the scope to consider a
15 storage alternative on the Schuykill, then the Red Creek
16 discussion in Mr. McCoy's testimony, I think, is
17 extremely important and material, and I would offer it
18 as being very important evidence on that point, and I
19 would call the board's attention to Exhibit D-1 in my
20 pile of exhibits, which is a letter from U.S. Fish and
21 Wildlife Service urging the Corps of Engineers to
22 consider Red Creek, because of the change in Limerick
23 from two units to one unit.

24 And I would just like on the question of the
25 change -- this isn't the time to argue the contention,

1 but I would point out that the Pennsylvania Public
2 Utility Commission order has equal or more status than
3 the permits issued by DER, since it was based on an
4 extensive adjudication, and by an adjudicatory body, and
5 not an administrative action by an administrator, and
6 that that order is a final order of the PUC.

7 So, that is my basis. If the board excludes
8 the testimony on the Red Creek Reservoir alternative for
9 the reason that I have indicated, then I would recognize
10 that that would take out everything from -- that would
11 take out the first full paragraph -- well, in my
12 numbering system, Question 9 answer begins on Page 7, so
13 I will move to Page 8, and I would take out everything
14 from the top of that, the first full paragraph. I would
15 take out everything starting with the last sentence of
16 that first full paragraph, which reads, "The Draft
17 Environmental Impact Statement for Merriell Creek."

18 I would take that out, and I would take out
19 the following paragraph, because that relates to the Red
20 Creek Reservoir alternative. The next alternative --
21 the next paragraph would also come out, the one
22 starting, "If the Red Creek Reservoir site were used."

23 I would then offer the following paragraph,
24 because it indicates the adverse effects of skimming at,
25 among other things, Point Pleasant. It doesn't refer

1 specifically to Point Pleasant, it says, but it does
2 refer to stream habitat, wildlife habitat, wetlands and
3 stream habitat are destroyed and replace by large
4 reservoirs with extreme water level.

5 Well, strike that. If I may strike that, I
6 would take out that paragraph, too. The paragraph
7 starting, "The Service has pointed out."

8 The next paragraph, starting, "The September
9 14, 1982, letter," again, the last part of that
10 paragraph or the last part of the page, "The use of 30
11 CFS from the Philadelphia Treatment Plant discharge
12 could reduce adverse environmental effects from the
13 Point Pleasant diversion and the need for construction
14 of a skimming reservoir," I would urge the inclusion of
15 that and the following sentence, and the following
16 sentence, and the following paragraph, and all that
17 would be based on the inclusion of the Unit 1
18 contention. It is related to the Unit 1 contention.

19 In other words, if there is one unit, then
20 there is adequate storage existing or potential in the
21 Schuylkill River, and what the benefits of that would be,
22 but that is if that contention is admitted.

23 Now, Question -- and again, I am not --

24 JUDGE BRENNER: Let me stay with that
25 contention for a moment. Earlier this week we indicated

1 that we would try to get back and hear discussion on
2 those proposed contentions this week. Since we are
3 going to be back in any event, we are going to defer
4 it. In addition, we do not have a copy of the PUC
5 order, and we would like to be supplied one before the
6 end of the week.

7 MR. SUGARMAN: It is Exhibit D-5, not
8 complete, excerpts. It has the findings and conclusions
9 of the PUC. I also supplied a copy of the full order to
10 the staff.

11 JUDGE BRENNER: All right. Just before the
12 end of the week, we would like to get it from somebody.
13 A subject which I do not want to go into at length now,
14 but I will give you a coming attraction, we are going to
15 inquire. To the best of our knowledge, we have never
16 been apprised in this docket of any of the actions of
17 the Pennsylvania Public Utility Commission regarding the
18 status of that Unit 2, and it appears now that that has
19 been a subject of deliberations before that Utilities
20 Commission going back some many months now, recognizing
21 that the parent final order did not come out until
22 August 27th, as I recall, and I want to discuss the
23 obligations of the parties, including the applicant and
24 staff, for filing formal documentation before us in a
25 proceeding.

1 I am not talking about what background letters
2 may or may not have been exchanged among the parties.
3 Those are not filings before us, and I don't even know
4 if anything exists in those letters, so we will get back
5 to that, and that also affects possibly the timeliness
6 argument.

7 MR. SUGARMAN: May I say on that --

8 JUDGE BRENNER: No, we will hear it when we
9 get back to the subject. I just wanted to warn
10 basically people other than yourselves to be thinking
11 about it.

12 MR. SUGARMAN: Well, I just wanted to say that
13 I raised the subject over and over again. I was told
14 both by staff and by applicant that it was premature
15 because the Commission hadn't taken final action.

16 JUDGE BRENNER: Well, you are getting ahead of
17 it. We will hear it next time. My immediate questions
18 are going to deal with the obligation of the parties to
19 keep this board apprised of information pertinent to the
20 proceeding. Go ahead.

21 MR. SUGARMAN: So, to summarize on Question 9,
22 I offer the first paragraph of the answer and the second
23 paragraph of the answer down to the last sentence of
24 that paragraph regarding the impact of Merriell Creek on
25 flows in the Delaware, and I offer -- I do not offer the

1 next -- the last sentence of that paragraph, the
2 following paragraph, the one after that, and the one
3 after that, unless we get into Contention 1. I mean, we
4 get into the contention on one unit, and the last
5 paragraph of that page, and the following paragraph, I
6 guess, are subject to the same statement. In other
7 words, the rest of the answer is subject to the one unit
8 contention.

9 Would it be appropriate for me to not make
10 argument on why that should be admitted with the Unit 1
11 contention until you have disposed of the Unit 1
12 contention? Or would you like to hear the argument
13 now?

14 JUDGE BRENNER: Let me put it this way. We
15 are in the process of considering whether there is a
16 sufficient basis for admitting the contention. There is
17 some overlap between the basis and factual information,
18 and that is why I asked Mr. Hansler the questions I
19 asked him when he was here. I think we have got enough
20 now to understand the argument on it, and I would
21 therefore rather defer it. We are giving it careful
22 consideration, as you can imagine, by the fact that we
23 have not been quick with an answer, and when we sit down
24 and scope it out a little better in terms of our own
25 preparation, it may become apparent that we need more

1 information. I don't know, but I would rather defer it
2 until that point.

3 MR. SUGARMAN: Fine. That seems to make sense
4 to me, too.

5 JUDGE BRENNER: But it may also be that we may
6 decide we have enough information to rule on the
7 admissibility of the contention, and of course whatever
8 we do, we will give you our reasons to the best of our
9 ability.

10 MR. SUGARMAN: And this information is all by
11 virtue of it being in your hands, so to speak, is before
12 you on the question of basis for the contention, and if
13 not, may I tender it as further basis for the
14 contention? I think you indicated to me yesterday that
15 even if material is not admitted, it is available to you
16 as a basis for the contention.

17 JUDGE BRENNER: We will look at it in that
18 light, but I don't want to mislead you. It is possibly
19 too general here in this form, and in order to be as
20 focused with respect to what we are considering, let's
21 get back to you when we give you our reasons on the
22 contention.

23 MR. SUGARMAN: May I suggest that if the board
24 would need more focused basis on the contention, given
25 that we have a week, perhaps, I could provide further

1 focus. As you know, there is such a mass of material
2 regarding this case, it is hard to know what to give the
3 board without giving the board too much, and if there is
4 a need for more on basis, or more focused material on
5 basis, it might be helpful for everybody if the board
6 were to indicate what material it needs. I don't mean
7 now, but whenever.

8 (Whereupon, the board conferred.)

9 JUDGE BRENNER: Mr. Sugarman, we won't go into
10 it now. We will look at it for basis, in recognition of
11 your point that there may be a lot out there that you
12 could better focus on for us once you understand better
13 what is on our minds. We will attempt to accommodate
14 that in this fashion. If we are prepared to have what
15 we consider to be preparation for a meaningful
16 discussion on the arguments for and against admitting
17 the contention, we will do that on the record with you,
18 and in that sense, through the course of that
19 discussion, you can assist us.

20 There will be some mini-argument, if you will,
21 and we will say, what about this, and you can say, here
22 is this about this, and recognizing that you might not
23 know exactly how it's going to go, you might want to
24 check a document, and we might be able to allow for that
25 also. If, on the other hand, we do it in writing, we

1 would give you an opportunity to come back and ask us to
2 reconsider, not because you disagree with our reasons,
3 but because there is a material effect that we did not
4 know of or that we misunderstood, and that way I think
5 we could have a more focused discussion of the situation
6 as opposed to getting ahead of ourselves now.

7 So, we will defer it, but we will accommodate
8 your point, which recognizes a valid one.

9 MR. SUGARMAN: Thank you, sir. I think from
10 the board's questions of Mr. Hansler, I do get the
11 feeling that one of your concerns is to know what is
12 feasible on the Schuykill.

13 JUDGE BRENNER: Well, I don't want to go too
14 far. You see, you have always had two arguments, and I
15 have to distinguish between the two causes. You have
16 always argued that there has been enough water through
17 storage or whatever on the Schuykill for two units.
18 That argument, pursuant to the law of this case, we may
19 no longer hear in our view, so we have to see whether
20 the possible change from two units to one unit if we
21 even get to that point, and we may even decide for one
22 reason or another that the posture is such that we
23 should still consider those two units, I am not
24 precluding that, but assuming we are willing to look at
25 a what if situation for the purposes of the

1 admissibility of the contention, I have to distinguish
2 your other argument from the position that this is a
3 material change in the 30 CFS difference such that the
4 things that were not available before are now available,
5 and it was that point I had in mind when I said somewhat
6 vaguely on purpose that part of the response to Question
7 9 in the McCoy testimony may be too general to focus on
8 that, and I will leave it at that for now.

9 MR. SUGARMAN: I understand. I would just
10 point out that it is 35 CFS. It is 35 CFS difference.
11 It is a 22 MGD difference. The total CFS at Point
12 Pleasant is 150, of which 75 is allocated to PECO. If
13 you cut the 75 in half, that is down to 37 and a half
14 CFS, which converts to about 22, 23 million gallons a
15 day.

16 JUDGE BRENNER: The difference I was referring
17 to before is the difference in flows on the Schuykill,
18 which in turn, do you understand that when I said 30 CFS
19 before, I was referring to the difference between the
20 530 and 560, but I understand the point you just made
21 also.

22 MR. SUGARMAN: Question 10, I recognize, is
23 outside the scope of the admitted contentions. It is
24 one of the contentions that we proffered but was
25 rejected. Question 11 is outside the scope, and as far

1 as I know, there is no Question 12 unless we are talking
2 about the table, and I think the table is adequately
3 connected and has obvious materiality and relevance.

4 JUDGE BRENNER: I am sorry. I didn't hear
5 what you said, as far as you know on Question 12.

6 MR. SUGARMAN: If there is a Question 12, it
7 is -- I don't have a Question 12 in my numbering.

8 JUDGE COLE: Page 10.

9 MR. SUGARMAN: I am sorry. Question 12 is
10 admissible. Right, Question 12 in our view is clearly
11 admissible. Thank you very much, Judge Cole. Is
12 clearly admissible as relating to the impact of the
13 intake operation on the shad at Point Pleasant. The
14 witness is in a position to have relevant information on
15 that subject, and I think the testimony clearly provides
16 adequate basis. That was missing from my copy of the
17 McCoy testimony. I don't know. There is a gremlin
18 involved here somewhere.

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1 JUDGE BRENNER: I don't want to be too
2 predictive, but of all the questions and answers to have
3 been missing from your copy, that was probably not the
4 best one for you to be missing.

5 MR. SUGARMAN: I appreciate that, yes. I
6 don't know if there is an objection to any part of the
7 question, but I think it --

8 JUDGE BRENNER: Applicant apparently objects.

9 MR. SUGARMAN: I know applicant does, and they
10 did not provide a reason to us why they objected. So I
11 can't respond to the objection, because I haven't heard
12 it. I would like to respond when I hear it.

13 JUDGE BRENNER: Okay, you did state why you
14 think it is relevant.

15 MR. SUGARMAN: Yes, sir, and material. Would
16 you want me to address Miller now or should we all
17 address McCoy first?

18 JUDGE BRENNER: Let's stay with McCoy, I
19 think. Applicant staying with the ones that Mr.
20 Sugarman did not offer to withdraw for the reasons he
21 stated.

22 MR. CONNER: I may have gotten a little mixed
23 up in one of them, but I think we have it all. The
24 first three, of course, are only background information,
25 so it wouldn't matter because otherwise he testifies in

1 Four. We do not believe the first sentence of the
2 answer is relevant or pertinent because, one, it
3 expresses only concern which has very little to do with
4 what the Delaware River Basin Commission ultimately did,
5 and it also has to do with the cumulative effects, which
6 would seem clearly to be within that agency's
7 jurisdiction, as distinguished from the NRC.

8 JUDGE BRENNER: I think you had my same
9 problem, Mr. Conner. I think Mr. Sugarman has agreed
10 that Four would not be admitted into evidence except for
11 a portion further in the answer. That reference to the
12 first sentence is to the first sentence of the first --
13 fourth paragraph of Answer Four. That was the same
14 question I had before.

15 MR. CONNER: Do I understand, then --
16 (Whereupon, counsel conferred.)

17 MR. CONNER: Mr. Sugarman has just shown me
18 the copy of the testimony he has marked, so that he has
19 withdrawn the first sentence in the first paragraph of
20 the answer. The only parts remaining are between Line 9
21 and Line 19 on the second page of that answer, which
22 appear in the third paragraph. Now, we object to this
23 as irrelevant, not the best evidence, speculative,
24 bringing matters wholly beyond the scope of this
25 proceeding, and as not having an adequate foundation as

1 to the CFS alleged to be at Trenton during the draught
2 of January.

3 On Number 6, we object on the grounds that it
4 is not proper foundation. It is general. It is not
5 connected to Point Pleasant as such. It discusses
6 matters other than shad and shortnose sturgeon, which
7 would be the limit of the contention. It is
8 speculative, and it is in our view inadmissible hearsay
9 in the sentence which makes the general statement that
10 low DO had been blamed for shad kills in the Delaware
11 estuary. That sentence would also be irrelevant insofar
12 as it would apply to Point Pleasant.

13 It is also, in our view -- well, there is
14 certainly no foundation for the conclusion that low
15 river flows would bar repeat spawning as referred to in
16 that last sentence of the first paragraph. Where I lost
17 out again is, I do not understand whether this next
18 paragraph was withdrawn, or is not offered, or what.

19 MR. SUGARMAN: The second paragraph of 6?

20 MR. CONNER: No, if DO barrier becomes --

21 MR. SUGARMAN: That is offered.

22 MR. CONNER: That is offered. All right.
23 This is also bad as speculative and not providing an
24 adequate foundation for the conclusion. It also has no
25 connection with the Point Pleasant intake as such. Did

1 you offer the next paragraph?

2 MR. SUGARMAN: Yes.

3 MR. CONNER: If the sentence on Mr. Bourquard
4 is offered, it is in any event irrelevant. This is the
5 type of alternative which was considered by the Delaware
6 River Basin Commission in determining the 3.8 approval
7 of Point Pleasant. It relates only to the Neshaminy
8 aspects of the use of the Point Pleasant intake as
9 distinguished from Limerick, and it is pure speculation
10 as to the use of Torreysdale water, which in any event
11 is not what was authorized by the Delaware River Basin
12 Commission, which in fact considered such alternatives.

13 We would be glad to offer what we have
14 identified as Item 5 in applicant's Exhibit 3 for
15 identification as this being the pertinent document, and
16 we would offer this if the board wishes to show the
17 consideration of alternatives that was given by DRBC at
18 that time. While I have this open, if I may jump ahead,
19 on Page IV-93, the DRBC specifically found "that a new
20 reservoir in the Schuylkill River Basin would have a
21 greater environmental impact, larger land use, and
22 higher cost than the proposed pipeline system," so it
23 did in fact speak expressly on the use of the Schuylkill
24 Reservoir.

25 JUDGE COLE: Mr. Conner, when you said Item 5,

1 are you referring to the Item 5 in the list that is in
2 fact Applicant's Exhibit 3? Is that correct?

3 MR. CONNER: Yes.

4 JUDGE COLE: Which is an environmental
5 assessment for the Meshaminy Water Supply System,
6 Delaware River Basin Commission, August, 1980?

7 MR. CONNER: That is correct.

8 Continuing on, let's see, 7 is out. On
9 Question and Answer 8, which starts with salinity, and I
10 understand is offered only as to matters of flow, we
11 object to this as not the best evidence, as totally
12 irrelevant to this proceeding in terms of the historical
13 information as to old New York City reservoirs, and the
14 other potential storage that is referred to there.

15 This includes Table 1, and we submit that
16 while we have not yet had time to check these numbers
17 because we didn't have testimony earlier, they probably
18 reflect the historical lows for those months which may
19 or may not be correct, but are really irrelevant in the
20 fact that they simply take worst case readings and seem
21 to be nothing more than that. There is evidence in the
22 record as to the general flows, the average flows, and
23 so forth, and as such, in our view, the table is a scare
24 document with the lowest numbers but nothing more than
25 that.

1 The last sentence in the offer as to
2 consumptive uses in 1980 and so forth, and would be such
3 and such by the year 2000, is in our view wholly
4 irrelevant to this proceeding, and a matter solely for
5 the consideration of the DRBC, and moreover, Mr. Hansler
6 has already provided testimony in this general area.

7 On Number 9 --

8 JUDGE BRENNER: Mr. Conner, I am sorry, I lost
9 you. Your last remark, which portion was that addressed
10 to?

11 MR. CONNER: The last sentence offered for 8.

12 JUDGE BRENNER: The sentence beginning,
13 "Consumptive water uses?"

14 MR. CONNER: Yes.

15 JUDGE BRENNER: Thank you.

16 MR. CONNER: Going over to 9, here again we
17 submit that, and I will characterize this historical
18 data, is irrelevant to this proceeding, and a matter
19 fully considered and reviewed and completed by the
20 Delaware River Basin Commission. We will stipulate that
21 the 1977 DRBC decision required the creation of a
22 reservoir, but we submit that is also irrelevant to any
23 issue in this proceeding.

24 The last paragraph as to Merriell Creek in our
25 view is a matter totally beyond the jurisdiction of this

1 agency, and is totally a matter that is now under
2 consideration by the DRBC, and is also a matter which
3 under the agreement established by the Council on
4 Environmental Quality in 1973, as I remember it, said
5 that this would be a matter solely to be reviewed by
6 DRBC.

7 The last two paragraphs of Question 9 again
8 are matters beyond this agency's jurisdiction, and are
9 matters which have in fact been considered or would be
10 considered by DRBC. In the event some change were
11 necessary by some reduction in flow or some new
12 alternative, it would be a matter that would have to be
13 raised new with DRBC, and for it to act upon. This
14 contains only speculation that some other source might
15 provide water. It is not in our view for this agency to
16 take over the function of DRBC and base a decision on
17 the fact that perhaps something different should be
18 done.

19 I alluded earlier to, I think it was Page
20 IV-94 of the DRBC environmental assessment, which
21 specifically stated that a reservoir on the Schuykill
22 would have greater environmental impact than the
23 proposal that it adopted, and I believe those comments
24 apply equally to the last paragraph which are also
25 basically irrelevant. It also applies to matters beyond

1 any contention in this case, particularly as it applies
2 to the Perkioman.

3 Addressing Question 12, there are various
4 different points here, so it is hard to make any general
5 objection. The first paragraph dealing with DRBC
6 actions is again not a matter for this agency to
7 consider as stated in this testimony, proposed
8 testimony. There is a serious question as to what is
9 meant in the third sentence as to the Riegelsville
10 gauge, which I understand has been out of commission for
11 some years.

12 The next paragraph is already established in
13 the record, so I think it should be stricken if only for
14 being cumulative, although that is essentially what our
15 testimony said, although not stated, as here.

16 The third paragraph, again, is a matter for
17 the DRBC.

18 JUDGE BRENNER: Mr. Conner, I am sorry to
19 interrupt. I just want to make sure I didn't miss your
20 point. If I wait until the end, you might not be able
21 to recall it. In the second paragraph, you are stating
22 that that paragraph essentially reflects the applicant's
23 testimony, and therefore should be excluded?

24 MR. CONNER: Well, it is correct. The
25 inference from the paragraph is that there must be flows

1 greater than 3,000 CFS, but that is not what the words
2 say. The words say a fact which is true, that at flows
3 greater than 3,000 CFS, the velocities would be one
4 FPS. They might be more than that, but it is hardly
5 worth quibbling about, and no measurements were taken at
6 flows less than 3,000 CFS, of course, as was discussed
7 yesterday.

8 JUDGE BRENNER: That's right, and I guess that
9 is what I had in mind when I asked you the question I
10 just did.

11 MR. CONNER: We take measurements to mean
12 physical measurements, as distinguished from what Mr.
13 Boyer testified to yesterday.

14 JUDGE BRENNER: Okay. I see your point now.
15 But I am not sure Mr. Boyer's answers to the questions,
16 which of course is what would guide us rather than this
17 discussion, were phrased that way. Well, it is in the
18 record.

19 MR. CONNER: So this is not a comprehensive
20 statement here, but it is not wrong if you read it
21 literally and carefully.

22 The next paragraph is again a matter that is
23 before or that was before and has been considered by
24 DRBC and is being considered by the Corps of Engineers.
25 It is speculative in stating, if the intake is in the

1 back eddy, which is contrary to fact, so being
2 speculative on this point it is not of probative value,
3 and is really irrelevant.

4 The sentence as to what Mr. Bourquard
5 estimated is a positive pull is a characterization of
6 something else. I am not sure what. And as such, would
7 not be appropriate in any event. Whatever Mr. Sugarman
8 might have in mind as a positive pull could be asked of
9 Mr. Bourquard, who could explain it right now, so the
10 characterization in our view is incompetent evidence,
11 and is not the best evidence available.

12 There is no foundation for this assumption of
13 approximately 0.1 acre of the back eddy and river as
14 being subject to apparently the positive pull of the
15 intake structure. There is no foundation or basis for
16 this continually exposed idea which as stated is
17 contrary to fact which this board can notice. It seems
18 to say that eggs and larval fishes would be continually
19 exposed, and I think there is enough evidence now to
20 indicate that there are spawning periods and growing
21 periods as well as other periods.

22 The two-to-one ratio that is discussed in this
23 next sentence is not irrelevant, but certainly there are
24 many better ways of establishing what is meant there.
25 It seems to be a recommendation that it would be nice if

1 the velocities always exceed one foot per second, but it
2 does not relate that to impingement and entrainment
3 losses being greatly reduced. There is no foundation as
4 to why this is so. If it is the two-to-one ratio, it is
5 not expressed.

6 The next paragraph again is speculative,
7 without any showing as a basis for the clogging becoming
8 a problem. There is no basis for it saying that the
9 velocities at the screen would exceed 0.5 FPS, and it is
10 speculative in saying that this might possibly impinge
11 larval fishes. The matter on American eels is
12 irrelevant, since the contentions are limited to shad
13 and shortnose sturgeon, although I understand that eels
14 like to eat shad.

15 In the last paragraph is again an opinion that
16 is stated, that would be stated to the agency when it
17 comments, i.e., the Corps of Engineers, or the DRBC, and
18 is speculating again on some alternate source in the
19 Schuykill.

20 The last sentence is merely the opposition.
21 There is no basis for its inferred conclusion that this
22 is a damaging activity, meaning, I gather, the use of
23 the intake in the river.

24 I think that covers all of our points, as I
25 understand it. Oh, I am sorry. On the assumptions, on

1 the activity of the intake, shall we say, such as the
2 speculation on clogging and so forth, there is no
3 showing in his qualifications that the gentleman offered
4 has any expertise in the use of this type of screen or
5 as to potential problems that he speculates about.

6 JUDGE BRENNER: Mr. Conner, just before I go
7 to the staff, a few times you have made the point that
8 it was not the best evidence, and I guess I don't
9 understand that argument, given my recollection of the
10 limitations of the applicability of the best evidence
11 rule to the use of documents.

12 MR. CONNER: I thought I said not the pure
13 rule at one point. Obviously, I am not talking about
14 the use of documents. I am talking about the fact that
15 there are other ways to establish this more directly
16 than, for example, what I gather Mr. McCoy used reading
17 U.S.G.S. water flow charts, for example, but that is
18 what I had in mind. I had no intention of arguing the
19 strict best evidence rule as to documents.

20 JUDGE BRENNER: So you mean in the sense that
21 it would be unnecessarily cumulative?

22 MR. CONNER: Yes, sir.

23 JUDGE BRENNER: Staff?

24 MS. CHAN: Staff would like to begin by
25 addressing -- let's see, Question Number 6, and I

1 believe Del-Aware wishes to admit all three paragraphs,
2 and as previously stated on the staff position in the
3 status report given to the board, the staff only would
4 allow the admission or only approves of the admission of
5 the first two paragraphs as far as they concern the
6 occurrence of fish at Point Pleasant.

7 As to the last two sentences in the first
8 paragraph, which seem to be conclusions not relating to
9 Point Pleasant, the staff does not approve of them, and
10 would object to their admission.

11 The third paragraph, we believe, is a question
12 of DRBC allocation, and a discussion of alternatives for
13 NWRA which are not relevant to the PECO withdrawals at
14 issue in the contentions before the board.

15 As to Question 8, originally, I believe
16 Del-Aware had agreed to strike all of Question 8, and
17 now in the oral argument it appears that they wish to
18 include parts of it. The staff believes that although
19 all of Question 8, the answer to Question 8 is not
20 relevant to the contentions before the board, the last
21 two sentences of the first paragraph which begins on
22 Page 5, which stated, "With the storage capacity
23 available at the time, it was still impossible to
24 prevent this low flow event from occurring in the middle
25 of the out migration period for American shad. Extreme

1 low flows have occurred in the Delaware River every
2 month since completion of the three New York City
3 reservoirs." Although we don't see the relevance of
4 this, we do not find it objectionable.

5 However, Table 1, there is no basis provided,
6 nor a foundation for the admission of that table. The
7 remainder of the answer deals with downstream salinity,
8 which the staff does not see as relevant to the Point
9 Pleasant effects on fish.

10 As to Question 9, Del-Aware wishes to admit it
11 and the staff objects because it discusses alternatives,
12 and we believe that this is within the jurisdiction of
13 the DRBC in its allocation capacity, and furthermore
14 that it deals with Schuylkill River issues which at the
15 time have not been admitted by the board.

16 Lastly, on Question 12, although staff
17 initially agreed to the admission of this question and
18 answer in its entirety subsequent to the staff's
19 submission of the position to the board, we have
20 received some testimony by PECO with information that we
21 did not have at the time, and also a new staff analysis
22 of records at Trenton and the Trenton gauge, and we
23 assume that in the first paragraph of Question 12 answer
24 beginning, "During July, August, September, and October
25 flows decreased below 3,000 CFS more than 20 percent of

1 the time, and at the Riegelsville gauge," et cetera, we
2 assume that this does not take into account the present
3 storage on the Delaware River, and according to staff
4 analysis based on records in the last ten years, only 1
5 to 2 percent of the entire year did flows go below 3,000
6 CFS.

7 So, our objection is now based on new staff
8 analysis that the 20 percent does not represent present
9 storage on the Delaware River, which we believe is more
10 accurate data by which to gauge future flows on the
11 Delaware River.

12 Moving to Paragraph 3 of Question 12, based on
13 testimony given subsequent to the NRC's position on this
14 question, the positive pull statements interpreting the
15 conclusions about positive pull and eddy formation and
16 subsequent or consequent effects of this pull on larvae
17 within ten feet of the intake is a mischaracterization
18 of our understanding of the technical capacity of the
19 screens, and the question of the eddy's effect and
20 continual exposure of fish to the intake has changed
21 because of the discussion about the eddy formation, and
22 changes in the position of the eddy as discussed by the
23 PECO panel yesterday in the entire discussion of the
24 panhandle, as the board may recall.

25 JUDGE BRENNER: Well, Ms. Chan, how can you

1 ask us to strike that on the basis of the information
2 that you are supplying through counsel? Wouldn't that
3 be a subject for cross examination on the merits, and
4 perhaps questions of your witnesses, focusing your
5 witness on the testimony that we may have just recently
6 admitted of Mr. McCoy?

7 MS. CHAN: As the board wishes. However,
8 regarding the first section or the first part of my
9 objection about the 20 percent of the time, the staff
10 calculation has it closer to 1 to 2 percent of the time
11 for the last ten years, and that was done subsequent to
12 our position, so if the board wishes to take it at this
13 time, the staff will --

14 JUDGE BRENNER: Well, it doesn't sound like a
15 legal basis to strike in terms of relevancy or
16 competence of the witness or foundation and so on. So I
17 am trying to make sure I am not missing a point if you
18 have one beyond the fact that he is wrong.

19 MS. CHAN: Only that we are not given the
20 basis here of that 20 percent, and until we know what
21 the basis is, we can't really agree as to whether the 20
22 percent is accurate.

23 JUDGE BRENNER: Did you have anything else on
24 the McCoy testimony?

25 MS. CHAN: That is all. Thank you.

1 MR. SUGARMAN: May I briefly respond to one or
2 two of the points that Mr. Conner made and the staff?

3 JUDGE BRENNER: Yes, but be reasonably brief.
4 I think we understand the arguments.

5 MR. SUGARMAN: I will be very brief. In
6 general, the argument on speculation is -- seems to say
7 that whatever opinions the witnesses developed as to
8 future effects of a future event are speculation and
9 therefore should not be admitted, and I presume that the
10 only way of avoiding speculation would be to testify
11 after the fact. Otherwise, any prediction of future
12 events has an element of what in the license is
13 speculation.

14 What distinguishes admissible evidence from
15 pure speculation is the expertise of the witness and the
16 study that he has given to the subject, and just as Mr.
17 Boyer was permitted to testify on how he computed, not
18 in writing, that is, he orally could determine the
19 likely velocities, if there is anything that was pure
20 speculation in the sense that Mr. Conner used the term,
21 that is it. And yet that is what we have before us.
22 So, to say that Mr. McCoy, after the years that he has
23 been working in this area of dealing with flows in the
24 Delaware River and using the U.S.G.S. data on a daily or
25 monthly or weekly basis for ten years, that he can't

1 form opinions -- eight years and four months, I am sorry
2 -- that he can't form opinions as to what is likely to
3 happen in any given project when it is his official
4 responsibility, it seems to me is indicative of the
5 reach to which there is an effort to just keep this
6 testimony out.

7 The statement about DRBC comments on the
8 Schuykill alternatives that Mr. Conner read from the
9 DRBC environmental assessment of 1980, that the
10 Schuykill alternatives would be more damaging, I only
11 want to address that because it might remain in the
12 board's minds relative to the unadmitted contention.
13 That, of course, was addressed to the two units at
14 Limerick, and it may very well be, and we are not trying
15 to retry that, whether the DRBC was right in saying that
16 if there were two units at Limerick, the necessity for a
17 reservoir on the Schuykill would create greater
18 environmental damage, but we are talking about one unit
19 at Limerick, and that is what the testimony is addressed
20 to, and that is what our argument for admission is
21 addressed to.

22 So, the statement in the DREC EIS -- it is not
23 the EIS, it is a final assessment that was not an EIS --
24 is completely irrelevant to the question of what the
25 alternatives would be on the Schuykill for half the

1 need.

2 Mr. Conner suggests that the DRBC evaluated
3 the alternatives for NWRA and decided not to authorize
4 it. The way he put it is, it is not the authorized
5 alternative. I don't -- It is hard for me to respond to
6 that as a serious statement, except to say that there
7 would be no need for DRBC authorization to use
8 Torreysdale. Torreysdale is the existing facility. It
9 has plenty of water. I don't know if Mr. Conner knows,
10 but the PECO witnesses certainly know that the city of
11 Philadelphia is contemplating selling 100 MGD from
12 Torreysdale to the city of Camden to make up for the
13 aquifer that they are losing because of the salinity
14 intrusion, and to say that that water needs DRBC
15 authorization to be sold to Bucks County is -- I don't
16 know. It is -- The testimony could also bring out that
17 Torreysdale water is already being used by Bucks County
18 right downstream from where the NWRA wants to service,
19 and the pipe is already there, and the water is going up
20 there.

21 So, on cross examination Mr. McCoy could, I am
22 sure, further elaborate on that, so there is no
23 necessity for DRBC authorization. That is not in
24 issue.

25 And Question, again -- well, I won't repeat

1 what I said before. I think the board has my thoughts.
2 I am only responding to new material that I didn't
3 anticipate being raised.

4 The argument that the witness's proposed
5 testimony with respect to Question 8, low flows, is a
6 worst case may or may not be true. That is for cross
7 examination. But the fish live in the worst case. That
8 is to say, they have to breath or take oxygen out of the
9 water when the water is in its worst case. By the same
10 token, the entrainment and impingement losses will occur
11 at the worst case.

12 The argument further with regard to Question 8
13 that that is for the DRBC, it is not for the DRBC to
14 determine the local effects of the intake on the fish.
15 It is for the DRBC, this board has held, to determine
16 finally whether the water can be removed from the river,
17 but that does not -- obviously, this board has
18 repeatedly ruled that that does not preclude this board
19 from considering the effects of that withdrawal in the
20 local area.

21 Mr. Conner's argument would preclude this
22 board from having information to make that conclusion.
23 You need to know what the flows are in order to
24 determine the effect. I think that is clear from the
25 testimony already. That is, the applicant's testimony,

1 much less our testimony. The lower the flow, the lower
2 the velocity. The lower the velocity, the higher the
3 fish losses.

4 JUDGE BRENNER: You are talking about the
5 first portion of the response to Question 8?

6 MR. SUGARMAN: Yes, sir, and that is the only
7 part I am offering. Ms. Chan referred to the fact that
8 it deals with salinity, and I have acknowledged that the
9 board would exclude the part on salinity, and therefore
10 have stipulated to that.

11 JUDGE BRENNER: I think either explicit or
12 implicit in the arguments of Mr. Conner, at least, and I
13 am giving you my impression to give you a chance to
14 respond, is that this reference to flow is so general as
15 to be in the bailiwick of the entire river and DRBC as
16 distinguished from anything that would help us look at
17 potential flows in the vicinity of Point Pleasant.

18 MR. SUGARMAN: It may be said to be general,
19 sir, but everything about the Delaware River Basin comes
20 down. It can't be always provided in complete detail,
21 and one has to depend on people who work with that system
22 to be able to characterize some things about it, and
23 based on their knowledge and experience and expertise.

24 Again, we are not trying to adjudicate what
25 the DRBC should do, but only to understand the impacts

1 of it, and the witness, Mr. Hansler, did give us
2 testimony that they built all of this new storage. I
3 think it is extremely relevant to know what the flows
4 have been since that storage was completed.

5 JUDGE BRENNER: You mean the flows in the
6 vicinity of Point Pleasant?

7 MR. SUGARMAN: Oh, yes, sir, that is all we
8 are talking about, is the flows in the vicinity of Point
9 Pleasant, but since the river is a regulated river, the
10 upstream reservoirs control what the flow is at Point
11 Pleasant. I think everybody would agree to that. Not
12 totally controlled, but controlled to a very
13 considerable extent. I think that 50 percent of -- I
14 think 50 percent of the watershed above Point Pleasant
15 is controlled. I am not sure of that, but it is a
16 substantial number, and it does have a significant
17 effect on the flow in the river. That is what Mr.
18 Hansler's testimony was.

19 The indication is that Merriell Creek will be
20 considered by -- Mr. Conner argues that Merriell Creek
21 will be considered by the DRBC and therefore this
22 Commission can't look at the effects of Merriell Creek.
23 Again, I would make the same response. It is for the
24 DRBC, this board has held, to make the sole
25 determination as to whether Merriell Creek should be

1 authorized, should be permitted.

2 I agree with that. I think it is very much
3 for this board to consider what the effects of that are
4 with respect to the river. However, the board has held
5 that with respect to depletive effects, that is, with
6 regard to whether it is appropriate to have that
7 depletion of the river, that is, within the exclusive
8 purview of DRBC, so I don't offer it for that. I only
9 offer it to indicate what the flows by the intake are
10 likely to be, and that would not go to the question of
11 whether Point Pleasant should be authorized as a
12 concept, in other words, the depletive use and the
13 allocation, which is what this board has precluded on,
14 but only on the question of whether this intake at this
15 location will be adversely affected by skimming flow off
16 of the river at Merriell Creek.

17 And as I indicated to the board, the draft EIS
18 for Merriell Creek is very clear. Merriell Creek water,
19 water will be withdrawn out of the Delaware River from
20 Merriell Creek whenever the flow in the river exceeds
21 3,145 CFS, and water is needed for Merriell Creek. We
22 will provide testimony that there is considerable damage
23 to the fish, that the velocities at the intake are less
24 than one foot per second, less than double the maximum
25 withdrawal rate, even at 3,000 CFS.

1 Therefore, is it relevant to have the
2 information as to what the frequency of occurrence of
3 the 3,000 CFS will be. Judge Cole?

4 JUDGE COLE: You said less than double the
5 withdrawal rate, and you meant less than double the
6 withdrawal velocity.

7 MR. SUGARMAN: Yes, sir.

8 JUDGE COLE: That was my concern.

9 MR. SUGARMAN: I appreciate that. Yes. I
10 appreciate that correction. In other words, the
11 applicant has testified that they have just the minimum
12 velocity that they think they need to minimize the
13 impact on fish. We will have an exhibit. We have an
14 exhibit that is the applicant's document, that shows
15 that the mortality loss is like this down to one, and
16 then from one it is straight on out.

17 JUDGE COLE: That is not going to come across
18 very well in the transcript.

19 MR. SUGARMAN: It is not a curve. The
20 applicant argued that it should be -- to the Corps of
21 Engineers that it should be a curve, but it is two
22 straight lines, and as you drop the velocity below one
23 foot per second, you get dramatic increases in fish
24 loss, and according to the table that the applicant used
25 with the Corps of Engineers, which we will show in cross

1 examination today. So, Merriell Creek will have an
2 adverse effect on flows that are significant to
3 impingemen, and the fact that what the skimming plan is
4 for Merriell Creek, and the fact that it is going to
5 skim, and the effect of that is relevant to the intake
6 at Point Pleasant, and that is the only purpose for
7 which we offer it.

8 Ten and 11 we have stipulated. Twelve, to say
9 that this witness has no expertise on this subject and
10 that -- now I am responding to the staff, too -- and
11 that other evidence that they have they think detracts
12 from the strength of this opinion, it seems to me is a
13 classic example of what they can do with cross
14 examination if they are right and there is no basis for
15 those arguments.

16 As to there being inconsistent evidence as a
17 basis for rejecting the testimony, there is a claim that
18 some of the material here is not related to Point
19 Pleasant, specifically Question 6 with respect to the
20 staff, and I think I have made clear and the board has
21 made clear the basis of admitting testimony relating to
22 dissolved oxygen levels in the Delaware River, and so I
23 won't repeat that.

24 That is all I have. Thank you.

25 (Whereupon, the board conferred.)

1 JUDGE BRENNER: Well, we appreciate all the
2 assistance of counsel. We are going to take a break
3 now, while it is still reasonably fresh in our minds, as
4 distinguished to going right to the Miller arguments.
5 You have also seen an example of why we like to have
6 written motions to strike, and why the testimony should
7 be filed in advance. If we had gone through all of this
8 on all of the motions to strike, as I have seen at some
9 proceedings, you could imagine what would have happened
10 this week.

11 We will take a 15-minute break, until 10:55.

12 (Whereupon, a brief recess was taken.)

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1 JUDGE BRENNER: We are ready to proceed. Does
2 anybody know if Mr. Sugarman is going to be here?

3 [Pause.]

4 MR. SUGARMAN: I am sorry, sir.

5 JUDGE BRENNER: Okay, we are ready to give our
6 rulings on the motion to strike portions of the
7 testimony of Richard W. McCoy offered by Del-Aware. As
8 will be seen, we are going to strike some portions but
9 some portions will remain, so Mr. McCoy will be a
10 witness.

11 The following detailed rulings which I am
12 about to give are keyed to materiality of the contents
13 given Mr. McCoy's written professional qualifications.
14 I will address in general some of the other bases for
15 the motions to strike after making these particular
16 rulings.

17 When I give a number, that includes the
18 question and answer unless otherwise indicated. Numbers
19 1 through 3 are in. That is background and there were
20 no objections.

21 With respect to 4, we would leave the question
22 in and strike all of the answer with the exception of
23 lines which we discussed, that are actually lines 10
24 through 21, not the numbers previously alluded to but
25 more particularly on the second page of the answer,

1 beginning in the first, I guess the second full
2 paragraph of that page, the fourth line of that
3 paragraph, "In the 1980 Level B study" through the rest
4 of that paragraph, and then the next sentence of the
5 next paragraph would remain in. We believe they are
6 material to consideration of the flow conditions which
7 may exist, and in turn that might be material to the
8 effect on fish of the Point Pleasant intake.

9 Item 5, there is no dispute that it is out.
10 When we say there is no dispute, we understand that Mr.
11 Sugarman to preserve his other arguments offered them,
12 but we also agree with his characterization as to why
13 they would fall within those other arguments which
14 previously we have ruled upon.

15 Item 6, we would leave the question and the
16 first two paragraphs of the answer in. Here again we
17 believe it is material to the conditions in the river
18 which would affect the existence of fish in the vicinity
19 of the intake or the condition of the fish that exist in
20 the vicinity of the intake. All this in turn might
21 affect the impact on the fish of the intake.

22 The third paragraph, we would strike gills
23 with another alternative other than the Point Pleasant
24 diversion. As we have stated, we would not consider
25 even whether we should consider such further

1 alternatives unless and until we have determined that
2 impacts here are significantly more important than
3 previously considered at the construction permit stage.

4 Item 7, there is agreement that it is out. On
5 8, we would leave the question in and we would leave the
6 first paragraph in, and thereby also Table 1 would
7 remain in. And we would leave in evidence or allow to
8 be offered into evidence the first sentence of the
9 second paragraph, "Consumptive water uses in 1980" and
10 so on through the end of that sentence only. We would
11 leave that in also for the effect on flows.

12 I should have emphasized at the beginning, and
13 I will take this opportunity to do it, as we have stated
14 before, when we decline to grant a motion to strike on
15 the basis of materiality, it merely means that at this
16 point we have not determined that it is immaterial. Due
17 to the way the issues become focused by the end of the
18 evidentiary hearing or failure to tie things up or other
19 possible reasons, we may in our findings state that any
20 of this turns out to be not material. So when I say it
21 is material, that is solely in the limited context of
22 the preliminary ruling on the motion to strike.

23 Using this last one as an example, if this
24 general reference to flow is not tied up to conditions
25 at Point Pleasant, it is not going to have any meaning.

1 All right, I believe I stated the rest of 8 is
2 out by agreement. We would strike all of 9, and we do
3 so because we find that part of it deals with the
4 question of one unit versus two units, as we have
5 discussed. We will look at it for bases in that
6 context. The other part of it deals with the impacts of
7 Merriell Creek on the direct impacts as distinguished
8 from impacts on the flow. Although Mr. Sugarman alluded
9 to impacts on the flow, we see nothing in this answer
10 that is material or probative on the effect of Merriell
11 Creek on the flow in the vicinity of Point Pleasant.

12 It is true there is a general reference in the
13 use of the word "flow," but that is all there is, and it
14 is no help. In addition, one of the three contentions
15 that we are considering deals with the impacts of the
16 Merriell Creek Reservoir, and we are considering the
17 admissibility of that contention, although a not
18 surprising piece of information is that we are
19 considering the words of the Appeal Board in terms of
20 who would look at the impacts of any proposed new
21 reservoir, but we will get into that more in the
22 contention context.

23 Items 10 and 11 are out by agreement. Item
24 12, we will leave the entire question and answer in in
25 terms of materiality. We believe it is material to a

1 discussion of the impacts in the vicinity of Point
2 Pleasant. Quite clearly, two portions which gave us
3 pause with respect to materiality but which we will not
4 strike do exist, and I would like to note them. The
5 sentence on eels we are leaving in not because we are
6 going to permit an inquiry into the adverse effect on
7 eels given the contention but because it might become
8 pertinent to operating conditions of the intake, such as
9 a need for backflushing or velocities.

10 The last paragraph states Mr. McCoy's view as
11 to when alternatives should be considered. As phrased,
12 it goes beyond the situation in which we stated we would
13 look to alternatives, which I just repeated a few
14 moments ago. So our failure to strike those should not
15 be taken as some change in our position. However, it is
16 the logical follow-up to his thoughts and we would
17 interpret it that if there is a significant adverse
18 impact greater than that previously considered at the CP
19 stage of the Point Pleasant diversion, then other
20 alternatives should be looked at.

21 So we will leave it in in the sense of no harm
22 done, but it shouldn't be taken to be a change in our
23 position on the legal scope of when alternatives would
24 be looked at.

25 There were other arguments in support of

1 motions to strike, which we did not ignore. Some of the
2 arguments were that some of this information was not
3 tied up and therefore it did not appear to be
4 specifically material and that some of the information
5 had inadequate foundation. As to certain aspects of the
6 testimony which we have left in, those objections were
7 arguably valid ones, but on objections like that it is a
8 matter of degree, and we felt that the information was
9 not so insufficiently tied up or lacking in foundation
10 as to take the step of striking it.

11 But here again, at the finding stage it may be
12 another matter. The parties are free to argue that
13 after the cross-examination, the material has no
14 probative value given the lack of foundation or lack of
15 it being tied up.

16 The argument as to speculation is a matter we
17 will leave for cross-examination. We do not disagree
18 with Mr. Sugarman that a lot of things are speculation
19 unless they have actually occurred, and we will leave it
20 for the cross-examination and the information supplied
21 by these witnesses as to whether it is probative or
22 non-probative given the bases for their statements here.

23 In the sense that some of it might be a little
24 cumulative, we did not strike anything for that reason.
25 In the first instance, if it is cumulative to another's

1 party witness, we would not strike it where the point is
2 still in controversy and we don't want to rely on a
3 reading of the bare written document to assume that they
4 are saying the same thing that is not perfectly clear in
5 some cases, and we suspect differences will arise in
6 some of these areas and we don't know the full extent.

7 To the extent that it is cumulative with other
8 witnesses by you, Mr. Sugarman, we agree with your
9 suggestion that that can be cured by the use of the
10 panels, and while that won't totally eliminate
11 redundancy, it will do that sufficiently such that
12 striking it is not appropriate in this instance as an
13 efficiency measure.

14 We think Mr. McCoy and Mr. Miller should be
15 presented as a panel together. We are not absolutely
16 requiring it in case you come back and tell us it is not
17 possible for some reason, but we hope it will be
18 possible.

19 MR. SUGARMAN: We would be happy to do it if
20 it is possible and we have discussed that with them and
21 they are agreeable as long as the logistics are worked
22 out, and we see no reason why it won't be possible.

23 JUDGE BRENNER: I think that completes the
24 rulings on the McCoy testimony. If we have left
25 anything out, the parties can tell me now.

1 I guess we should move to the Miller
2 testimony. I want to change the sequence on this and
3 ask the parties opposing the admission of all or
4 portions of the Miller testimony to tell us why.

5 Mr. Conner.

6 MR. CONNER: I will try to speed this up.
7 Essentially, our objections to 1 through 8 as the
8 questions are numbered is the fact that while it is
9 generally a correct statement of historical information,
10 it is not relevant to any of the three issues, or,
11 indeed to the possible fourth issue the Board might
12 consider. It really has nothing to do, it does not
13 relate to any matter in controversy. It is not reliable
14 evidence in that sense in the terms of the three issues
15 and under the Rule 2.743(c).

16 With respect to Number 9, we don't understand
17 that this thing is relevant to any issue. The Chairman
18 has just ruled on the McCoy that it might be connected
19 up somehow, but the answer is not really responsive to
20 the question. If there is a question of do sports
21 fishermen use the Tohicken Creek bar, we will stipulate
22 that, but the question seems to go way beyond the
23 question that is asked.

24 And if it is offered only for the purpose that
25 fishermen stand on it, we have no objection to that. But

1 we will stipulate that, so there is no need for a
2 witness on it. And as always, as we see it, that is all
3 there is. Certainly it has nothing to do with the
4 location of the intake, as such. Well, I think the
5 relocation argument has been ruled out.

6 On Number 10 --

7 JUDGE BRENNER: Mr. Conner, I didn't
8 understand your last statement about the relocation.

9 MR. CONNER: I suggested and made the point
10 that on the contention as to the relocation of the
11 intake, I think the Board has effectively ruled the
12 aspect of relocation out as a practical matter in the
13 proceeding. You are looking only at the impact on the
14 situation where the intake is now located. If I am
15 wrong on that, we also object on the grounds that this
16 has nothing to do with the point of relocating the
17 intake.

18 JUDGE BRENNER: I think you have overstated
19 anything that we have said in the case if you are
20 stating it as a general proposition that permeates all
21 issues in the case, and I will leave it at that.

22 MR. CONNER: Well, I understood you to say
23 yesterday that you were not looking at relocation; that
24 you were now only considering the environment in the
25 vicinity of the intake unless somebody had some

1 comparison to make. That was the context.

2 JUDGE BRENNER: Yes. I think what I said
3 yesterday was said in a particular context and should
4 not be generalized necessarily to everything in the case.

5 MR. CONNER: Then we object to all of this
6 testimony as having nothing to do with the relocation of
7 the intake.

8 The final, Number 10, again has no foundation
9 for the assumptions that are made in it and no
10 background information is presented on the gentleman to
11 indicate whether he has any knowledge of the physical
12 facts that exist concerning the intake that supports his
13 conclusions.

14 JUDGE BRENNER: Do you mean it is too
15 conclusionary?

16 MR. CONNER: Well, on the lack of foundation
17 he states, for example, if the intake velocities exceed
18 0.5 fps, et cetera, which is not a fact, so we think
19 this testimony is not competent on the grounds that
20 there is no foundation shown for why he picks his
21 numbers or what it is. We really don't think it is
22 reliable evidence in the sense of the contentions given,
23 the nature of the statements made and the conclusions
24 reached. And it is generally true as a statement that
25 we have no quarrel that if the assumptions were correct,

1 this might be correct or might be a correct conclusion
2 to make, but it is also vague as to, for example, what
3 does the first few weeks of growth mean for larval
4 shad.

5 It is just not clear. It is not understood
6 what he means. We concede that he means fish, but we
7 are not clear what his testimony means; so on that basis
8 we say it is not reliable or probative and for that
9 matter need not be received. The facts on that latter
10 point could easily be ascertained from our panel. I am
11 not suggesting the Intervenors don't have a right to
12 present their own witness on it; I am just saying for
13 what is offered here it could almost be stipulated if it
14 were made concise.

15 JUDGE BRENNER: Staff?

16 MS. CHAN: As stated in its submission to the
17 Board, the Staff objects to the admission of the first
18 nine questions and answers because they are unrelated to
19 the relocation contention, and our earlier objection
20 before our last admonition of the Board concerning the
21 admission of cumulative evidence is now no longer
22 valid. So our only objection is that it is not related
23 to the relocation contention.

24 JUDGE BRENNER: Mr. Sugarman, you may respond
25 if you wish.

1 MR. SUGARMAN: The evidence is offered because
2 one cannot evaluate the extent of the loss and therefore
3 the significance of the impact without understanding
4 what the resource is and what it is likely to be absent
5 the project. This establishes the factual predicate of
6 or the base case against which the impact of the intake
7 operation has to be measured.

8 If there is no shad in the Delaware River or
9 no likelihood of shad in the Delaware River, then there
10 is no impact on shad, regardless of what entrainment and
11 impingement theoretical losses might be. If the shad is
12 not an important resource, then there is no significant
13 effect from losing it. If the shad in the river is not
14 and if the shad in the river in the future is not likely
15 to be much more important than it has in the recent
16 past, then there would be no reason to assume that the
17 data in the recent past showing that the shad is not an
18 important species in the last 20 or 30 years until about
19 five years ago would be relevant to the question of
20 whether there is an environmental impact.

21 Perhaps I am being thick, but I don't
22 understand how the importance of the shad in the river
23 and what effects the ability of the shad to be an
24 important species in the river absent the project, I
25 don't see how that is not essential to evaluating the

1 effects on the project.

2 So the Question 5, for example, in detail
3 explains why the shad are likely to be more important --
4 well, 5, 6 and 7 taken together, why the shad spawning
5 is likely to be important in the lower river, why it has
6 been in the past and why it is likely to be in the
7 future.

8 Question 8, again, indicates what the recent
9 trend and success of the shad has been. It all goes to
10 the predicate for the concern about the effects of the
11 intake.

12 Question 9 establishes, to the extent -- well,
13 when you are dealing with fish, we have to be -- well,
14 we are talking qualitative evidence, essentially, and
15 not quantitative, and therefore it is important for this
16 witness who spends a considerable amount of time in his
17 office located in Rosemont, New Jersey -- which I think
18 we can take judicial notice is within a few miles of
19 Point Pleasant -- in fact, it is almost right across the
20 river but you have to go downriver to get to a bridge --
21 is extremely relevant to the question of what the
22 importance of that fishery is.

23 And Question 10, the witness is indicating his
24 expert opinion as to the effect that different flow
25 velocities will have on the seriousness of the impact

1 from the operation of the intake. Clearly relevant,
2 clearly material, clearly qualified. If the argument
3 is, well, it is too vague, I submit that it is very
4 specific as to what it says, and if there is a need for
5 cross-examination, the witness will be here to be
6 cross-examined.

7 I could go and compare the Applicant's
8 proposed testimony and show that similar statements have
9 been made that I have felt obviously cry out for
10 cross-examination, and I assume the Applicant doesn't
11 want to hold us to any higher standard than the
12 Applicant employs.

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1 JUDGE BRENNER: Any other comments?

2 Ms. Chan, you look like you wanted to say
3 something.

4 MS. CHAN: Yes, the staff has one comment,
5 that Mr. Sugarman characterized his support of the
6 admission of these questions and answers based on an
7 analysis that absent the project, such effects would not
8 occur. The issue, as I understand it, is not absent the
9 project, but whether the impact of the changed location
10 is greater than that approved in the CP.

11 MR. SUGARMAN: May I respond to that?

12 JUDGE BRENNER: Yes.

13 MR. SUGARMAN: Mr. Masnik stated in his
14 deposition it was impossible to know what the impact of
15 the project would have been at the shoreline, and
16 therefore he was considering a project versus no
17 project. Mr. Masnik is the staff's witness on this
18 subject.

19 JUDGE BRENNER: Anything further?

20 (No response.)

21 JUDGE BRENNER: All right. Give us a moment,
22 please.

23 (Whereupon, the board conferred.)

24 JUDGE BRENNER: We are going to permit the
25 testimony in its entirety.

1 MR. CONNER: Mr. Chairman, given the board's
2 ruling, and given the fact of what I have already said
3 on the record about the testimony, in order to try to
4 move it along, we would just simply, if it is agreeable
5 to everybody, we will simply stipulate that if the
6 witness were here, this is what he would testify to, and
7 let it go at that.

8 JUDGE BRENNER: Well, do you want to hear my
9 reasons?

10 MR. CONNER: Well, I was trying to say, if we
11 do that, that should eliminate any need for any further
12 ruling.

13 JUDGE BRENNER: Well, let me just tell you why
14 we are not striking it. Because the matter has been
15 raised several times about the relocation aspect. First
16 of all, we think the historical background, while not
17 directly tied up explicitly in this written testimony,
18 can become relevant to the fish resource in a river
19 that is either there now or reasonably might be expected
20 in the whatever future period is deemed to be material.

21 The wording of the contention has not
22 changed. The subject is that the intake will be
23 relocated so that it will have significant adverse
24 impact on American shad and shortnose sturgeon, et
25 cetera. However, we don't know if the impacts can be

1 separated out such that the comparison can be made. If
2 it cannot, we will have to look at the impacts here.

3 Beyond that, even if they can be separated
4 out, we still have to know what the effect is on the
5 location here in order to compare back, so even in that
6 event, the information is material. In other words, as
7 Judge Cole is prompting me here, we need knowledge of
8 the resource at the proposed intake structure, either
9 present resource or resource that may be reasonably
10 expected for reasons other than pure speculation, which
11 we would determine after hearing all of the evidence.

12 In terms of how conclusory the information is,
13 again, it is a matter of degree, and we think it is
14 enough to get to cross examination. I think a
15 comparison with other testimony filed by other parties
16 would show that at least some statements that are as
17 conclusory as some statements in here. Of course, we
18 are not applying Mr. Sugarman's trial lawyer standard
19 that statements cry out for cross examination, because
20 that would apply to all statements in testimony of
21 opposing parties.

22 MR. SUGARMAN: I learned that from Mr. Conner
23 over the last couple of days.

24 (General laughter.)

25 JUDGE CONNER: I did want to go into those

1 reasons briefly, Mr. Conner, because of the relocation
2 discussion. With respect to stipulating it in, I have
3 not forgotten Mr. Sugarman's comment that these are not
4 his witnesses in the sense that he was able to prepare
5 direct testimony that had in what he wanted in. He has
6 been able to have their cooperation, and therefore we
7 have had the benefit of a better presentation than just
8 the bare bones outline, and we appreciate that.
9 However, because he has done somewhat better, we are not
10 in turn going to hold it against him and say therefore
11 he cannot ask any further questions.

12 The better job he was able to accomplish due
13 to the difference in circumstances of these witnesses
14 were still not the full working with the witness that
15 would be fully within the sphere of influence, shall we
16 say, of Mr. Sugarman and his client. However, as we
17 indicated the other day, the additional questions have
18 to be within the scope of the information covered of
19 which you apprised the parties in your trial brief, and
20 the exhibits.

21 MR. SUGARMAN: Exactly.

22 JUDGE BRENNER: And in turn also in the scope
23 of the contentions in issue. Now, you may want to talk
24 to the parties and tell them what it is you want to ask
25 the witnesses, and for all I know a stipulation can be

1 worked out.

2 MR. SUGARMAN: I will try. I doubt it, but I
3 will try. I will certainly try.

4 JUDGE BRENNER: Mr. Conner?

5 MR. CONNER: Mr. Chairman, the net effect of
6 your ruling is that Mr. Sugarman will be allowed to
7 develop these people based upon the essentially
8 concluso statement, Number 10, and this puts the
9 applican exactly where it was last summer, of not
10 knowing what is really going to be adduced from these
11 witnesses. Yesterday, in order to assist us somewhat so
12 we could at least follow the questions, Mr. Sugarman
13 wants to develop apparently, though we now know he wants
14 to develop from these witnesses. I think you should at
15 least let us have a copy of his cross examination
16 outline, or rather his development of evidence in chief
17 outline, so that we will have some knowledge of what we
18 are to meet here.

19 JUDGE BRENNER: Unless I am forgetting
20 something, and that is entirely possible, we don't have
21 any further information on McCoy and Miller than what
22 you have at this point, but we are going to be --

23 MR. SUGARMAN: You had already asked me to
24 provide that one day before Miller and McCoy, and since
25 they won't be on until the week of the 18th, I will

1 provide it much more in advance than that.

2 JUDGE BRENNER: Would you be willing to supply
3 that to the other parties?

4 MR. SUGARMAN: Yes, certainly. As I did with
5 Mr. Pence.

6 JUDGE BRENNER: Do you think you can do it in
7 the next few days?

8 MR. SUGARMAN: Yes, sir. Yes, sir, as soon as
9 I get a chance to take a breath.

10 JUDGE BRENNER: Let's pick a date, so we will
11 all know when we are going to need to get it. How about
12 receiving it next Tuesday?

13 MR. SUGARMAN: If I can mail it express mail
14 on Monday.

15 JUDGE BRENNER: All right. Let's leave it
16 that way. Put it in the express mail on Monday, and
17 hopefully that will arrive by Tuesday.

18 JUDGE COLE: Monday is a holiday.

19 MR. SUGARMAN: Then I will put it in the
20 express mail on Tuesday, if that is all right.

21 JUDGE BRENNER: That is all right as a last
22 resort. Why don't you try to do better? Perhaps get it
23 in their hands --

24 MR. SUGARMAN: In their hands on Tuesday? If
25 express mail operates, I will do that. If express mail

1 operates on Monday, I will mail it on Monday.

2 JUDGE BRENNER: Maybe you could get it in
3 express mail Saturday, is what I am suggesting.

4 MR. SUGARMAN: Aren't we going to be up at
5 Point Pleasant on Saturday?

6 JUDGE BRENNER: I didn't know you were going
7 to be, but I will be.

8 (General laughter.)

9 JUDGE BRENNER: Okay, put it in express mail
10 Monday, or whenever you can put it in express mail
11 thereafter, not later than first thing Tuesday.

12 MR. SUGARMAN: I will.

13 JUDGE BRENNER: Mr. Conner?

14 MR. CONNER: May we request the same be done
15 for any of the subpoenaed witnesses, or indeed for any
16 witness that Mr. Sugarman wants to amplify their
17 evidence?

18 JUDGE BRENNER: Well, the only one left is Mr.
19 Brundage.

20 MR. CONNER: I was thinking of McCoy.

21 JUDGE BRENNER: These comments apply to Miller
22 and McCoy. Miller and McCoy are a duet, as far as I am
23 concerned, until I am apprised differently.

24 MR. SUGARMAN: Yes, Miller and McCoy go
25 together. As far as Brundage is concerned, didn't I

1 already provide a revised -- what would constitute the
2 direct testimony of Brundage?

3 JUDGE BRENNER: That is what I was going to
4 say.

5 MR. SUGARMAN: I have one matter to report.
6 Mr. Kaufmann and Emory and Plevyak would find it
7 extremely difficult to get to Washington the week of the
8 18th. They have two days that they would find it
9 difficult to be in Philadelphia or in this area on the
10 week of the 18th. They are available tomorrow, and so I
11 would propose that we take them tomorrow, and if we take
12 them tomorrow, then I have no problem with being in
13 Washington the week of the 18th.

14 JUDGE BRENNER: All right. We will definitely
15 take them not later than tomorrow. I wouldn't mind
16 starting them today if they are available. I don't want
17 to end up in the situation where we can't finish a
18 witness, as we did twice now.

19 MR. SUGARMAN: I understand what you are
20 saying, yes. I don't know if we can get them here
21 today. We will see what we can do. They are in three
22 different locations geographically, but I don't know how
23 far away Mr. Kaufmann is. I don't know where he is.

24 JUDGE BRENNER: Why don't you talk to the
25 other parties over lunch, after you talk to the

1 witnesses. Now, recognizing, if you can get them here
2 today, they may not finish today.

3 MR. SUGARMAN: Yes, I understand that fully.

4 JUDGE BRENNER: But I don't mind that.

5 MR. SUGARMAN: I understand. I think they
6 will be agreeable if they could do it.

7 JUDGE BRENNER: See what you can do. And we
8 would want to put the three of them on together. Now,
9 it is possible that if one of them -- See what the
10 availability is. It is possible you could go with two
11 out of the three for a while.

12 MR. SUGARMAN: They can be here at 9:00
13 o'clock tomorrow morning.

14 JUDGE BRENNER: I understand. That is the
15 latest. We are requiring that they be here by then at
16 the latest. But my time assumptions have been off in
17 this proceeding so far.

18 All right. Incidentally, while we were
19 talking about these other people, somebody should advise
20 Mr. Brundage that he need not be here tomorrow, based
21 upon the discussion we had this morning, but I did not
22 expressly state it that way. Do you think you could do
23 that, Mr. Conner?

24 MR. WETTERHAHN: Yes, we will take care of
25 that, of informing him.

1 JUDGE BRENNER: In coordination with the other
2 parties, schedule a day for Mr. Brundage in Washington
3 the week of the 18th.

4 MR. WETTERHAHN: Yes, sir.

5 JUDGE BRENNER: Thank you very much.

6 Let's get going.

7 (Pause.)

8 Whereupon,

9 VINCENT S. BOYER,
10 W. HAINES DICKENSON,
11 E. H. BOURQUARD,
12 PAUL L. HARMON, and
13 JOHN E. EDINGER,

14 the witnesses on the stand at the time of recess, were
15 recalled, and having been previously duly sworn, resumed
16 the stand, and were examined and testified further as
17 follows:

18 CONTINUED CROSS EXAMINATION ON BEHALF OF THE INTERVENOR

19 BY MR. SUGARMAN:

20 Q Mr. Boyer, you testified yesterday that you
21 participated in various discussions which led to your
22 calculations of the velocity. When did you form your
23 opinions about the nature and extent of the eddy under
24 different flow conditions?

25 A (WITNESS BOYER) Over the last few months,

1 when these questions came up about the effect of the
2 eddy and the detailed questions as to whether it was
3 going to be drawn into the intake. Before that, general
4 observations of the river, without making a detailed
5 study, and from the velocity plots, I had concluded that
6 there wasn't a concern at 2,500 cubic foot per second
7 flow.

8 Q Could you repeat the last part of that,
9 please?

10 A (WITNESS BOYER) I said, from a general
11 observation, not a general, but from a detailed
12 observation and analysis of the velocity plots, I had
13 concluded that there would not be a problem, and even
14 down to 2,500 or lower flows, but certainly at 2,500
15 cubic foot per second river flow.

16 Q Is there some reason that when I asked the
17 panel that question in the deposition, you were not able
18 to provide that information at that time?

19 MR. CONNER: We object to that question. If
20 there is a question relating to something said at the
21 deposition, he should produce that and ask him why isn't
22 it consistent or whatever, but just to call on a memory
23 exercise here is something else which in my memory is
24 mischaracterized as unfair cross examination.

25 JUDGE BRENNER: Yes, that objection is

1 granted. If you are going to use the deposition, point
2 to a particular portion. Whether you read it or not
3 before showing it to the witness depends upon how you
4 are going to use it, as you know.

5 MR. SUGARMAN: Are you saying that I should
6 identify a deposition page?

7 JUDGE BRENNER: Yes, so the witness can take a
8 look at what statement you are now inquiring about. And
9 then he could explain, that is, give his answer to your
10 question.

11 BY MR. SUGARMAN: (Resuming)

12 Q At Page 150 on August 5th I asked the
13 question, "Would flows below 3,000 CFS with a velocity
14 past the west screen of the intake in front of the
15 intake be less than a foot per second." Mr. Bourquard
16 answered, "I don't know. I don't have any measurements
17 covering that." Mr. Boyer said nothing.

18 A (WITNESS BOYER) Well, that answer is
19 correct. We do not have any velocity studies conducted
20 at lower flows. We had velocity traverses conducted at
21 4,500 cubic feet per second and at 3,000 cubic feet per
22 second.

23 Q But you just testified a moment ago that some
24 time ago you had made a calculation that the minimum
25 velocity past the intake would be a foot per second.

1 A (WITNESS BOYER) You are in error.

2 Q What did you say a few moments ago?

3 A (WITNESS BOYER) The transcript will show it,
4 or you will have to read it back.

5 JUDGE BRENNER: Why don't you just ask the
6 question in the form of, did you make the calculations
7 or not, not in terms of what did he say, but what would
8 his answer now be?

9 BY MR. SUGARMAN: (Resuming)

10 Q When did you first make a calculation or
11 estimation of what the velocities past the intake would
12 be when the flows were less than 3,000 CFS?

13 A (WITNESS BOYER) It has been this year, during
14 the time period that concerns or questions were raised
15 about flows down in those values.

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1 Q Was it subsequent to the deposition?

2 A (WITNESS BOYER) No.

3 Q Then why didn't you testify to it at the
4 deposition?

5 A (WITNESS BOYER) I wasn't asked that question.

6 MR. CONNER: We object to this, and if Mr.
7 Sugarman wants to pursue it, I want to bring the whole
8 transcript page in. The reference referred to by Mr.
9 Sugarman relates to, in the context of measurements and
10 modeling --

11 JUDGE BRENNER: Hold it, Mr. Conner, because I
12 don't want the witness to be prompted in that sense. I
13 think I know where you are going as to your legal point,
14 and I don't want the technical information read.

15 Mr. Sugarman, the question, I'm going to
16 permit the exploration. He is entitled to explore what
17 he views as an apparent inconsistency. But it will be
18 more meaningful, instead of talking about the entire
19 deposition, this relates to the reason as to why it is
20 the better practice to point to a particular portion,
21 and then you kind of fell back into wording your
22 question so that it encompassed the entire deposition.

23 Why don't you stay focused on the statement or
24 statements that you believe are apparently inconsistent.

25 BY MR. SUGARMAN: (Resuming)

1 Q Mr. Boyer, do you have a copy of the
2 deposition in front of you that you are looking at now?

3 A (WITNESS BOYER) Yes.

4 Q Do you see at the bottom of page 150 and the
5 top of -- I asked the question to the panel. At flows
6 below 3,000 CSF would the velocity pass the west screen
7 of the intake, in front of the intake be less than a
8 foot a second?

9 Mr. Bourquard volunteered to answer and stated
10 I don't know; I don't have any measurements covering
11 that.

12 A (WITNESS BOYER) Well, that is true. We don't
13 have any absolute measurements.

14 Q I'm not asking whether Mr. Bourquard's
15 statement is true. My question wasn't limited to
16 measurements. My question what at flows -- and I will
17 repeat it again -- at flows below 3,000 CSF would the
18 velocity pass the west screen of the intake, in front of
19 the intake be less than a foot a second.

20 Yesterday you volunteered a lot of opinions
21 about that based on some calculations on that subject.
22 My question, whether what Mr. Bourquard says is true or
23 not, you apparently did know or did have an idea. Why
24 didn't you say so?

25 A (WITNESS BOYER) Now, look. You asked a

1 tremendous number of questions at the deposition. You
2 were roaming around from one thing to another and asking
3 long, complicated questions. The velocity at the
4 intake, if you want to say that you have got to be
5 specific. Are you talking about the top of the intake,
6 are you talking about the bottom of the intake, are you
7 talking about the average velocity?

8 We didn't have any absolute measurements, and
9 that is what we referred to.

10 JUDGE BRENNER: Could I borrow a copy of the
11 deposition, please? I don't want to take yours because
12 you are actively using it.

13 MR. SUGARMAN: Do you want the whole
14 deposition or those two pages?

15 JUDGE BRENNER: Give us a moment.
16 (Board conferring.)

17 MR. SUGARMAN: Sir, we have two copies of the
18 deposition. We can certainly give you one so that you
19 can follow.

20 JUDGE BRENNER: Thank you.

21 What was the page in question?

22 MR. SUGARMAN: 150 and 151. It's at the very
23 bottom of 150.

24 (Pause.)

25 JUDGE BRENNER: Proceed.

1 WITNESS BOYER: I might add in clarification,
2 furthermore, that these questions were being directed to
3 Mr. Bourquard at the deposition, and as I recall, people
4 when they got started talking at the deposition they
5 generally continued supplying the answers to the
6 questions without the other panel members interrupting.

7 I would also note that in the next answer he
8 said it would possibly be a little less than that, which
9 is what I pointed out yesterday; and it is completely
10 consistent with my calculations.

11 BY MR. SUGARMAN: (Resuming)

12 Q Well, Mr. Boyer, the question is not whether
13 this is consistent with your calculations. The question
14 is not whether Mr. Bourquard told the truth. The
15 question is why you as a member of the panel who very
16 actively participated in the discussion on the subject
17 for the previous 20 pages or 15 pages at least in
18 volunteering and jumping in on this very subject, why
19 you didn't provide the information that you had. You
20 chose -- let me finish the question, please. You are
21 aware that you chose the concept of having the panel,
22 and I was told that that way every member of the panel
23 would volunteer when they had something to say. And I
24 assume you've been in enough panels so you know how that
25 works. You jumped in yesterday when I asked a question

1 that I thought was directed towards Mr. Bourquard, and
2 your witness was providing about 99.9 percent of the
3 testimony on the subject. If you thought it was
4 appropriate to provide the testimony to the Board
5 yesterday, why didn't you find it appropriate to answer
6 the question that was addressed to the panel?

7 MR. CONNER: Object. I wish to object to what
8 I think the question started out to be and to strike Mr.
9 Sugarman's arguments and characterizations as improper,
10 as a matter for only argument and not for questioning.
11 I object to the question specifically on the grounds
12 that it misstates the record. As Mr. Sugarman indicated
13 in part, this was a colloquy.

14 JUDGE BRENNER: Okay. Wait a minute. I
15 understand your objection. I don't want to put words in
16 the witness' mouth, because I'm going to do what I was
17 about to do before you objected.

18 Mr. Sugarman, that was a heck of a question.

19 MR. SUGARMAN: I apologize for that. I will
20 break it down if you like.

21 JUDGE BRENNER: Just restrict it to the last
22 part of the question which was -- you finally got around
23 to asking the question in the last sentence. Do you
24 recall what it was?

25 MR. SUGARMAN: Yes.

1 BY MR. SUGARMAN: (Resuming)

2 Q Mr. Boyer, you jumped in yesterday and
3 testified 99 percent of the time about this very
4 subject. If you had that information on August 5th, why
5 didn't you as a member of the panel volunteer it then?

6 MR. CONNER: We object to this question as
7 mischaracterizing the deposition. I realize the Board
8 hasn't seen it.

9 JUDGE BRENNER: Overruled. That question can
10 be answered.

11 (Panel of witnesses conferring.)

12 WITNESS BOYER: I'm sorry. I believe that the
13 record sufficiently answers the question. The record
14 shows that the question was adequately answered, and
15 there was no need for any further response on my part.

16 BY MR. SUGARMAN: (Resuming)

17 Q Is it still your testimony that you had made
18 the calculations that you testified to yesterday, that
19 you had made those calculations before August 6th?

20 A (WITNESS BOYER) Yes.

21 Q Well, Mr. Boyer, let me ask you this question
22 then. In paragraph 8 of Applicant's testimony you
23 provided -- the Applicant provided through witnesses the
24 computations of flow velocity in the river. Once again,
25 the velocity that was provided related to minimum river

1 flow at one foot per second in the areas selected for
2 the screens.

3 Assuming that's true at 3,000 CSF, why did you
4 not include your testimony then as to what the flow
5 would be at or what the velocity would be at lower flows?

6 A (WITNESS BOYER) As I discussed yesterday at
7 rather great length, taking into consideration the
8 total, all of the conditions -- that is, the probability
9 of low flows, the time of year of occurrence of low
10 flows, the pumping rates which will be used during
11 various parts of the year, the intake location and the
12 river velocities -- we found that the 3,000 cubic foot
13 per second was an appropriate value to record related
14 information with regard to the screens as an appropriate
15 low flow condition.

16 Q Let me go on to the next point on this in the
17 deposition. At the same page, right down that page, I
18 asked Mr. Bourquard or I asked the panel what would you
19 judge from Exhibit 3 to your January 22nd letter that
20 was addressed to Mr. Bourquard. Answer: It could
21 possibly be a little less than that, as you quoted.
22 Further answer: I might say something in connection
23 with that, too; that at 3,000 CSF, unless there is 3,000
24 CSF we would not be withdrawing at the maximum rate.

25 A (WITNESS BOYER) That is what I just said.

1 Q Is that true, that you would not be
2 withdrawing at the maximum rate when the flow is less
3 than 3,000 CSF?

4 A (WITNESS BOYER) At the time of year -- pardon
5 me if I started. Are you finished?

6 Q Yes, I'm finished with my question.

7 A (WITNESS BOYER) At the time of year at which
8 the 3,000 or lower flows are expected, the maximum rate
9 of pumping up through the year 2010 as calculated, which
10 is about as far as we can reasonably extrapolate with
11 any degree of great confidence, the maximum pumping rate
12 will be two-thirds of the allowed value, two-thirds of
13 the 95 MGD. So that we should not be pumping at the
14 maximum, need to pump at the maximum rates if we are
15 able to average the water pumping system to accommodate
16 the demands.

17 Q Well, that raises -- I won't make a
18 statement. Nevertheless, isn't it true that as of that
19 date Mr. Bourquard apparently was of the impression that
20 you were prohibited by the DRBC from withdrawing water
21 for PECO through that intake unless the flow in the
22 river was 3,000 CSF or more?

23 A (WITNESS BOYER) I would suggest you ask Mr.
24 Bourquard to respond.

25 Q I will.

1 Mr. Bourquard, doesn't that statement reflect
2 what you believed to be true at that time; that PECO
3 could only withdraw water when the flow in the river was
4 more than 3,000 CSF?

5 A (WITNESS BOURQUARD) My response was more in
6 connection with what actual conditions would be. The
7 maximum pumping rate of 95 million gallons a day is
8 predicated on there being with regard to the water
9 supply need, there would be no water available in the
10 North Branch; there would be no water available in Pine
11 Run for the plant to draw from; and the maximum water
12 supply augmentation into the North Branch would be 5.3
13 million gallons a day.

14 Now, that situation only exists, I think, from
15 March 1st to June 15th. After that it drops to 2.73.
16 Also, in the latter part of the year the intention is to
17 utilize the Lake Galena Reservoir to supply water for
18 water supply and during the recreation season which
19 ends at the start of September. After that, NWRA would
20 draw very little, if any, water from the Delaware
21 River. And all of these are preconditioned on a safety
22 factor of 10 percent. In other words, out of that 9.5
23 million gallons a day, 9 1/2 of that approximately is a
24 safety factor; in other words, to occur and take into
25 account possible losses, which we don't anticipate to

1 occur to that extent.

2 So what I'm saying there is I don't believe
3 that this 95 MGD requirement is going to be something
4 that is going to occur at the time when there would be
5 3,000 CSF flow coming down, 3,000 or less CSF flow
6 coming down the river.

7 Q Mr. Bourquard, are you stating that you had
8 never informed or implied to anybody that PECO could not
9 withdraw water from the river when the flow was less
10 than 3,000 CSF?

11 A (WITNESS BOURQUARD) That I have never what?

12 Q Stated or implied to anybody that PECO could
13 not withdraw water, that PECO would be shut off when the
14 flows in the river were less than 3,000 CSF?

15 A (WITNESS BOURQUARD) My understanding was they
16 would be shut off from the natural Delaware River flow.

17 Q All right. Didn't you imply that they could
18 not take water at that intake when the flow in the river
19 was less than 3,000 CSF?

20 A (WITNESS BOURQUARD) Until Merrill Creek is
21 built, yes.

22 Q But didn't you imply that without qualifying
23 it by anything about Merrill Creek?

24 MR. CONNER: Objection. Asked and answered.

25 WITNESS BOURQUARD: I may have.

1 JUDGE BRENNER: Let me explain one thing to
2 the witness. When your counsel makes an objection, you
3 should give us an opportunity to rule on it. I was
4 going to deny it anyway, but we have passed that point.
5 But just so you will know for the future.

6 BY MR. SUGARMAN: (Resuming)

7 Q Didn't you tell the Corps of Engineers that
8 "Another confirming factor is that the maximum
9 withdrawal rate of 95 MGD will only occur when the river
10 flow is 3,000 CSF or greater"?

11 A (WITNESS BOURQUARD) I possibly did. May I
12 see that, what you are referring to?

13 Q Certainly. This is Exhibit D-20-1 which was
14 provided to the Board. On page 3, the first full
15 paragraph. This is one of our marked exhibits.

16 (Discussion off the record.)

17 JUDGE BRENNER: Let's go back on the record.

18 BY MR. SUGARMAN: (Resuming)

19 Q The question is didn't you tell the Corps of
20 Engineers on that occasion at least, at least on that
21 occasion, that Philadelphia Electric Company would not
22 be able to take water out of the river when the flow in
23 the river was less than 3,000 CSF?

24 A (WITNESS BOURQUARD) This does not say that at
25 all, Mr. Sugarman. It says, "Another confirming factor

1 is that the maximum withdrawal rate" -- and it doesn't
2 say Philadelphia Electric, NWRA or anything else --
3 "will only occur when the river flow is 3,000 CSF or
4 greater." Okay. "And such withdrawal will constitute
5 only 5 percent of the river flow."

6 I'm saying here that on the basis of what I
7 just said before, I do not believe that the maximum
8 withdrawal rate will occur when the flow is less than
9 3,000 CSF. And that is still my opinion.

10 Q I will come back to it, Mr. Bourquard. Isn't
11 it true that you --

12 A (WITNESS BOYER) Is it relevant for me to
13 answer?

14 JUDGE BRENNER: No. You can't answer.

15 BY MR. SUGARMAN: (Resuming)

16 Q Isn't it true you stated on numerous occasions
17 that Philadelphia Electric cannot take flow out of that
18 intake when the flow is less than 3,000 CSF?

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1 MR. CONNER: Objection. It should wait. If
2 Mr. Sugarman is going to start referring to numerous
3 occasions, whatever he said, he should show the witness
4 the document or lay some foundation for it, and not just
5 make general statements.

6 JUDGE BRENNER: That is correct, Mr. Sugarman.

7 MR. SUGARMAN: I will defer it.

8 JUDGE BRENNER: Mr. Sugarman, could I make a
9 suggestion? We are going to break for lunch shortly.
10 We could do it now or let you ask a few more questions
11 for which you don't need the documents. Why don't you
12 line up all of your documents during the lunch break in
13 which you think he said something which he is now saying
14 he didn't say, and then we can be ready to roll, and I
15 would like a listing of those documents so that I can go
16 with them, if you are going to be going into a lot of
17 other documents.

18 MR. SUGARMAN: I would rather move on, if that
19 is all right, and I don't know if I will come back to
20 it. I think this statement in the transcript is clear
21 enough as to what the implication is.

22 JUDGE BRENNER: I don't want to argue the
23 findings now.

24 MR. SUGARMAN: I understand.

25 JUDGE BRENNER: I am not precluding you from

1 taking all the documents you want in which you think he
2 said something else. But I don't want to stop every
3 five minutes while you look for the document now. In
4 light of that, you do what you want to do, and we will
5 proceed a little further. When you get to a convenient
6 stopping point in the next five or ten minutes, why
7 don't you let us know? And if you want to stop now, we
8 will.

9 MR. SUGARMAN: This is a good time.

10 JUDGE BRENNER: I was beginning to get that
11 message.

12 We will take an hour and a half so you have
13 time to eat and do some of the other things you have to
14 do, so we will come back at 1:45.

15 (Whereupon, at 12:10 p.m., the board was
16 recessed, to reconvene at 1:45 p.m. of the same day.)

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AFTERNOON_SESSION

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(1:48 p.m.)

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JUDGE BRENNER: Good afternoon. I want to state for the record that this morning we received a letter dated October 6, 1982, addressed to me from Mr. Hansler. Copies have been provided to the parties of the letter and the attachments. And the letter provides the information which either the Board or the parties or both had asked Mr. Hansler to provide. And we appreciate his giving it very much, and particularly in this prompt timeframe.

12

In terms of the findings for the contentions before us now, we do not as a Board propose to do anything with this document. The parties have it for whatever they want to do with it.

16

If the flow information on September 30, 1964 is needed at the Trenton flow information, I think it was a fair inference, but not explicitly stated, that this could be gotten into the record through some stipulation. And I will ask the parties to discuss it among themselves before it is brought up before us again.

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MR. SUGARMAN: It is going to come up in cross-examination this afternoon, sir. It is our position that Mr. Hansler may not have understood the question because of the travel time between Point

1 Pleasant and Trenton. The daily flow would be or might
2 be, especially at low flows where the water is moving
3 slower, the flows that would be relevant would be the
4 flow that would be measured at Trenton on October 1.

5 JUDGE BRENNER: You see, this is exactly what
6 I do not want. I do not want to get into an argument
7 over what this might mean when there is no witness. So
8 if the stipulation cannot be arrived at as to the use of
9 this, we are going to have to work something else out.

10 And I recall your question yesterday and the
11 answer. I do not know if you are going to challenge the
12 answer through some other fashion. But I do not want
13 any criticism on the record of Mr. Hansler when he is
14 not here on what he provided and what he did not
15 provide. I know you did not intend that, but one
16 reading of the record could infer that. He responded, I
17 guess, as he understood the question, and we have just
18 got to take it from here. And if there is some need for
19 further explanation, you are going to have to work out
20 what witness you need for that.

21 MR. SUGARMAN: During the lunch break, sir, if
22 I may make a statement, the Applicant has felt that they
23 might, we might be satisfied or Mr. Phillippi might be
24 satisfied on the issue of the stability of the Bradshaw
25 Reservoir and, therefore, the Contention Number 16B

1 regarding the groundwater contamination.

2 And Mr. Bourquard has provided some data that
3 was generated last week on that subject to Mr.
4 Phillippi, and he has looked it over. And it appears
5 for reasons that they, too, understand justified or
6 satisfied the concern that the 2-to-1 slope is okay in
7 the circumstances.

8 And we, however, want to review that
9 beforemaking a final decision as to whether to agree to
10 strike the contention. We have some other data that we
11 want to check that against. And therefore, we have
12 agreed that if we do not supply anything or provide any,
13 let's call it, a basis, for the moment, or something by
14 the 18th, we will at that time agree to strike that
15 contention.

16 And in the meantime, it is our thought that we
17 will not pursue the question of the seepage or the
18 slumpage of Bradshaw with the panel. And furthermore,
19 and therefore, will not pursue the subsidiary or a
20 subsequent issue of the water quality, which as the
21 Board has ruled is limited to Contention 16B. And if
22 that is agreeable to the Board, that would mean that if
23 we pursue the contention, the panel would be made
24 available on the week of the 18th in Washington to
25 complete cross-examination on that subject.

1 Now, this is -- and I want to make that clear.

2 JUDGE BRENNER: Okay, I understand. You
3 discussed that with the parties?

4 MR. SUGARMAN: I beg your pardon?

5 JUDGE BRENNER: Have you discussed that with
6 the other parties?

7 MR. SUGARMAN: Yes. This is what I am
8 describing to you as an agreement that has come up among
9 us.

10 JUDGE BRENNER: Mr. Wetterhahn, did you want
11 to say something?

12 MR. WETTERHAHN: Yes. I know I agreed to the
13 18th. Perhaps we could have the Friday before, such
14 that the panel members would not have to travel down to
15 Washington.

16 MR. SUGARMAN: The only thing it is dependent
17 on is that there is one document that is not in our
18 control at this time, but we have been promised by the
19 State.

20 JUDGE BRENNER: Okay. Let me interject. It
21 appears you still have another detail or two on which
22 you might have fruitful discussion, talk about it some
23 more, and come back to us -- the approach sounds
24 eminently reasonable --- and work out the logistics and
25 then come back to us.

1 MR. WETTERHAHN: The only immediate effect
2 would be that Dr. Edinger could be excused from the
3 panel at this point in time. The only possible
4 exception -- and let me paraphrase the Board's ruling to
5 explain my exception -- would be with regard to the
6 general information with regard to the D.O. Block
7 downstream. And I am not sure that is a permitted
8 matter for cross-examination even.

9 And I am not sure Dr. Edinger really even
10 addressed that in his testimony.

11 MR. SUGARMAN: Can we bypass that for the
12 moment instead of trying to figure that out?

13 JUDGE BRENNER: You can as far as I am
14 concerned. But if they want to let him go --

15 MR. SUGARMAN: That is a new detail to me.

16 MR. WETTERHAHN: If it interferes with your
17 cross-examination, let's get on, and Dr. Edinger can sit
18 there.

19 MR. CONNER: Mr. Chairman, we would like to
20 get Dr. Edinger excused at least temporarily if there is
21 not going to be any cross-examination applicable to
22 him. And that is really all we are asking. And I guess
23 what I am saying is that if the Board has not ruled on
24 the D.O. Block being permissible or not, that is
25 something else that can be taken up on the 18th.

1 JUDGE BRENNER: Well, we have made several
2 rulings involving that subject, and the subject is an
3 appropriate subject to the extent we indicated in those
4 rulings -- that is, as it might be pertinent to the fish
5 resource in the vicinity of Point Pleasant, not whether
6 the Point Pleasant intake is contributing to the D.O.
7 Block such that the overall conditions in the river are
8 such that the intake should be modified or varied or
9 relocated or something of that nature.

10 But the existing condition of the D.O. Block,
11 if it is material to the fish resource condition in the
12 vicinity of Point Pleasant might be gone into. I do not
13 know if it is material. I do not know if it is going to
14 be material in the end, because I do not know the impact
15 of it on the fish resource or whether there is any
16 dispute as to the impact of it on the fish resource.

17 Here again, it is not the Board's job to try
18 any party's case. But you have got a contention
19 involving the impact of an intake on the fish
20 resources. There are different subjects within that
21 contention that might or might not become relevant, some
22 of which might be the subject of fruitful discussions
23 and possible stipulations.

24 For example, as a hypothetical, if the
25 Applicants were willing to rely on just the fact that in

1 the Applicant's belief there would be no effect, given
2 the intake velocities and the river velocities and
3 condition of the river and so on on fish, fish eggs, or
4 juveniles being taken in even if they were there, then
5 we do not have to spend hours and days litigating what
6 the fish resource is. On the other hand, if that is not
7 the case, the fish resource might still be material.

8 I am not asking for an answer now. But I just
9 point out that it is usually useful for parties to keep
10 talking to each other. Toxics is another example where
11 in that instance the parties have usefully talked to
12 each other. We have spent some time and would have
13 spent additional time on what toxics are in the river,
14 which we cannot rule immaterial now, but all of which
15 might turn out to be immaterial if, in fact, there is no
16 seepage or slumpage.

17 And that is my only point, and I will leave it
18 at that. I cannot promise you that nothing will come up
19 that you do not need Dr. Edinger for. You have to make
20 that decision in light of our rulings.

21 MR. CONNER: I did not make myself clear on
22 that. You said that -- I mean that the Intervenors
23 could try to make their case on cross-examination. If
24 they have no questions of Dr. Edinger involving the D.C.
25 Block, whether it is admissible or not as asked, he

1 could be excused. Anything we might put in on that
2 would be rebuttal testimony because, of course, we have
3 no evidence from the Intervenor in now. I am merely
4 trying to do this for the benefit of the witness.

5 JUDGE BRENNER: I see. I am sorry. I did not
6 understand that point. And your point is a valid one.
7 Do you know now, Mr. Sugarman, that you will have no
8 questions of Dr. Edinger on D.O. Block?

9 MR. SUGARMAN: I do not see anything in his
10 direct testimony relating to D.O. Block, and I have not
11 had time to go back through my cross-examination outline
12 to see if there is anything. That is why I was saying
13 that I did not want to stop and do that. But if Mr.
14 Conner is stating that there is nothing in the
15 Applicant's evidence relating to the D.O. Block, then I
16 will agree that Dr. Edinger does not have to stay. It
17 is that simple. It is really up to Mr. Conner because I
18 am willing to waive trying to build a case on
19 cross-examination on that issue if the panel has not
20 testified on it.

21 JUDGE BRENNER: Okay. Because you have got
22 other evidence on the subject.

23 MR. SUGARMAN: That is right.

24 MR. CONNER: And on that basis, I submit Dr.
25 Edinger could be excused because at best he would be a

1 rebuttal witness on that, on that DO subject.

2 JUDGE BRENNER: To just state it expressly so
3 that we are clear for the protection of Mr. Sugarman, in
4 light of what we are asking him to do, Applicant will
5 not rely on any of the testimony put in so far -- that
6 is, the prefiled written testimony -- for anything
7 material to D.O. Block. That does not preclude you from
8 coming back after with whatever testimony you want later.

9 MR. CONNER: I am sure there is nothing in
10 there, but there is a lot of documents, so there might
11 be some odd exception someplace. But subject to that,
12 we have not offered any testimony on this point yet.

13 JUDGE BRENNER: Okay.

14 MR. SUGARMAN: I will accept that
15 representattion and if it turns out to be a mutual
16 mistake, that we will all correct it. Is that agreeable
17 to the Board?

18 JUDGE BRENNER: That is fine. Do you want to
19 let Dr. Edinger go?

20 MR. CONNER: Yes.

21 JUDGE BRENNER: You had better go while the
22 going is good, Dr. Edinger. Thank you for your time.

23 (Witness excused.)

24 JUDGE BRENNER: We will note now that the
25 remaining four witnesses who have resumed after the

1 lunch break are as indicated. And the reporter will
2 note them; and that is, the witnesses without Dr.
3 Edinger.

4 Whereupon,

5 VINCENT S. BOYER,
6 W. HAINES DICKENSON,
7 PAUL L. HARMON, and
8 E. H. BOURQUARD,

9 the witnesses on the stand at the time of recess,
10 resumed the stand and were further examined and
11 testified as follows:

12 CROSS-EXAMINATION -- Resumed

13 BY MR. SUGARMAN:

14 Q At the lunch, Mr. Bourquard, I was asking you
15 whether you had not represented that -- I will modify
16 the question slightly. Has it not been your statement
17 that below 3,000 feet -- strike that -- that for maximum
18 withdrawal by the Point Pleasant pumping station the
19 minimum flow past intake will be 3,000 c.f.s.?

20 A (WITNESS BOURQUARD) Before I answer that
21 question, I would like to clarify something, if I may.

22 JUDGE BRENNER: No, sir. Please just answer
23 the question. You can clarify things through redirect
24 by talking to your counsel. We have had a bit of a
25 problem here, and I am using this as an opportunity to

1 mention it -- and not to point to you, Mr. Bourquard, in
2 particular -- of not getting concise, direct answers to
3 the question. And the explanation can follow thereafter.

4 So from now on, I would like the witnesses to
5 try to keep the question in mind and answer the question
6 yes or no when possible, and then the explanation after,
7 as opposed to a long explanation that has to be parsed
8 in order to figure out what the answer is. So let's
9 keep it to question-and-answer, and you will have the
10 opportunity for redirect, as I previously indicated.

11 WITNESS BOURQUARD: Would you repeat the
12 question?

13 BY MR. SUGARMAN: (Resuming)

14 Q I will rephrase the question, and I will also
15 show you a document. Well, strike that. Let me start
16 again.

17 Mr. Steacy works for you -- S-t-e-a-c-y?

18 A (WITNESS BOURQUARD) Yes, he does.

19 Q And he prepared a document, part of which has
20 previously been marked as Del-Aware 2, which was
21 referred to yesterday, dated January 4, 1982, entitled
22 "Development of Relationship Between Water Discharge and
23 Water Surface Elevation." Is that correct?

24 A (WITNESS BOURQUARD) Yes.

25 Q And that was submitted by you to the Corps of

1 Engineers under cover of your letter of January 22,
2 which has previously been marked?

3 A (WITNESS BOURQUARD) January 22, 1982. Yes.

4 Q Now, again, this does not include the
5 attachments that Mr. Steacy prepared, but this is now
6 the whole memo, including the page that has previously
7 been marked. I think copies of this are already
8 available.

9 JUDGE BRENNER: What is this? Del-Aware 2 for
10 identification?

11 MR. SUGARMAN: We will mark it as Del-Aware
12 7. It is actually duplicative, to some extent, of
13 Del-Aware 2, because Del-Aware 2 is encompassed within
14 it.

15 JUDGE BRENNER: I see. Why don't we remark it
16 as a completely new exhibit?

17 MR. SUGARMAN: This will be Del-Aware 7.

18 (Discussion off the record.)

19 (The document referred to
20 was marked Del-Aware
21 Exhibit 7 for
22 identification.)

23 BY MR. SUGARMAN: (Resuming)

24 Q At the top of page of Del-Aware 7 i states,
25 "Minimum water level for maximum withdrawal by the point

1 Pleasant pumping station, the minimum flow past intake
2 will be 3,000 c.f.s." Now, did Mr. Steacy get that
3 information from you?

4 A (WITNESS BOURQUARD) Yes.

5 Q Now, when I asked you that question before,
6 you said, well, you might have said that. And then you
7 related it to a whole series of factors that would go
8 into considering what the minimum flow might be expected
9 to be under various probabilities and various
10 circumstances; for example, like Galia, when they are
11 going to fill up and when they are going to dry down, a
12 minimum flow to be maintained in Neshaminy Creek, a
13 whole host of things. .

14 Are you trying to state that the sentence that
15 I just read that Mr. Steacy repeated is intended to
16 reflect a judgment taking all those factors into account
17 and computing what the maximum withdrawal will be and
18 coincidentally it comes out to the same figure, the same
19 value as the condition in the DRBC water allocation?

20 MR. CONNER: Objection to the form of the
21 question. It is compound and mixes assumptions that are
22 not necessarily established, particularly as to whatever
23 the DRBC condition may or may not have been.

24 JUDGE BRENNER: Overruled. Witness can answer
25 what he meant in light of the previous testimony in this

1 exhibit.

2 WITNESS BOURQUARD: The maximum withdrawal
3 referred to in here is the maximum withdrawal in a day,
4 95 million gallons. Now, I would like to clarify that
5 in that there will be four pumps at the station. And
6 anytime the demand on the water system exceeds about 75
7 million gallons a day, the fourth pump will come on, and
8 at that time the withdrawal rate will be 95 million
9 gallons for that particular period of time. But on a
10 daily basis it would not be that, and the period of time
11 that this would occur is considered to be a relatively
12 short part of the day.

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1 BY MR. SUGARMAN: (Resuming)

2 Q Well, I will pursue that in a moment. What
3 does that have to do with the 3,000 CFS minimum flow
4 limitation that is referred to in Mr. Steacy's memo? He
5 doesn't talk about a small part of the day. He doesn't
6 talk about the combined effect of a number of estimates
7 of future changes and conditions. He makes a flat
8 statement here, minimum water level.

9 A (WITNESS BOURQUARD) All of the figures shown
10 in here are mean daily flows. In other words, the basis
11 for his computations of the mean daily flows at Trenton
12 adjusted to Point Pleasant.

13 Q But the statement that I am referring to is
14 not his computation of elevations, but the premise that
15 he was using to arrive at those minimum surface water
16 elevations, and the premise is what I quoted. It says,
17 for maximum withdrawal by the Point Pleasant pumping
18 station, the minimum flow past the intake will be 3,000
19 CFS.

20 A (WITNESS BOURQUARD) Yes.

21 Q That is a flat statement. Are you saying that
22 really reflects a whole series of judgments and was not
23 intended to be read literally?

24 A (WITNESS BOURQUARD) A whole series of
25 judgments? No, that is not related. This is the

1 natural flow of the river, 3,000 CFS going past the
2 gauge.

3 Q Where does it say in there that that refers to
4 the natural flow of the river and does not intend to
5 apply where Merriell Creek is not in operation?

6 A (WITNESS BOURQUARD) I see nothing in here
7 that says it does apply, does or does not apply when
8 Merriell Creek is in operation.

9 Q Wasn't this document intended to establish
10 what the surface water minimum and maximum, what the
11 surface water elevations would be at Point Pleasant with
12 the station in operation?

13 A (WITNESS BOURQUARD) Yes.

14 Q And wouldn't the effect, just as it affects
15 velocity, is irrelevant as to whether the water comes
16 from Merriell Creek or in the natural flow? Wouldn't the
17 minimum surface water elevation be governed by whatever
18 the flow is past the intake, not whether it is natural
19 flow or Merriell Creek flow or a combination?

20 A (WITNESS BOURQUARD) No, it would be the flow
21 that is coming down the river naturally.

22 Q Exactly, so doesn't it make no difference to
23 this statement to compute minimum water level whether
24 this is natural flow or combined flow? Doesn't this
25 statement refer to total flow?

1 A (WITNESS BOURQUARD) Yes.

2 Q But then it is incorrect --

3 JUDGE BRENNER: Wait a minute, Mr. Sugarman.

4 Let him finish his answer.

5 WITNESS BOURQUARD: Total flow less what is

6 taken out.

7 JUDGE BRENNER: Excuse me.

8 MR. SUGARMAN: I am sorry. I thought he was

9 finished.

10 JUDGE BRENNER: I don't know if he was or not,

11 but it was close enough where it didn't look to me that

12 he was. I know you want to set your own pace, and I

13 don't want to disrupt the pace, but I do not want his

14 answer to be cut off. Mr. Bourquard, did you complete

15 your answer?

16 WITNESS BOURQUARD: Yes, I had.

17 BY MR. SUGARMAN: (Resuming)

18 Q The statement here is minimum water level. In

19 other words, Mr. Steacy is going to tell us what the

20 minimum water level is. Then he states the premise for

21 maximum withdrawal by the Point Pleasant pumping

22 station, the minimum flow past the intake will be 3,000

23 CFS. That statement is -- has no basis in fact. Isn't

24 that right?

25 A (WITNESS BOURQUARD) Well, it depends upon how

1 you classify maximum withdrawal.

2 Q I am classifying maximum withdrawal as --
3 well, how did Mr. Steacy classify it in his memo?

4 A (WITNESS BOURQUARD) Ninety-five million
5 gallons a day.

6 Q And so isn't that statement false with respect
7 to 95 million gallons a day?

8 A (WITNESS BOURQUARD) I don't see why.

9 Q Because if you are able to replace what you
10 take out with water from Merriel Creek, you can withdraw
11 water from the river when the flow is 1,000, 2,000.

12 A (WITNESS BOURQUARD) I think this does not
13 take into account the fact that it is our understanding
14 that the river master takes over at that time.

15 Q Are you saying that PECO cannot as a matter of
16 right withdraw water at any flow when it replaces it
17 with Merriel Creek flow?

18 A (WITNESS BOURQUARD) No, I am not saying
19 that. I am saying that as far as we are aware of, the
20 maximum withdrawal of 95 million gallons a day, that
21 this becomes a draught condition, and certain other
22 factors come to play in that, and the river master takes
23 control.

24 Q Are you saying that PECO has no -- that this
25 sentence is meant to encompass whatever actions the

1 river master might take? Is that what you are saying?

2 So that a reader would understand that?

3 A (WITNESS BOURQUARD) Well, I don't know what
4 the reader understood, but this was the intention, that
5 95 million gallons a day, this would be the maximum
6 withdrawal rate at that period, something that would
7 fall into another category altogether then, because
8 other factors come into play, and this is the limitation
9 that was set up by DRBC in their docket decision.

10 A (WITNESS BOYER) There is some confusion going
11 back and forth here between the statements --

12 JUDGE BRENNER: Excuse me, Mr. Boyer. Are you
13 answering the question?

14 WITNESS BOYER: I was going to clarify,
15 hopefully clarify the last five minutes of discussion.

16 JUDGE BRENNER: I don't want to do that. I
17 want to get an answer to the questions as they come.

18 BY MR. SUGARMAN: (Resuming)

19 Q Mr. Bourquard, you have now given us three
20 explanations for this sentence, none of which directly
21 respond to the question. Isn't it true that this
22 statement is false, that maximum withdrawal from the
23 Point Pleasant pumping station may occur even though the
24 minimum flow past the intake may be 2,000 feet as long
25 as the water is replaced from Merriell Creek water?

1 MR. CONNER: Objection. The question
2 mischaracterizes the question to which -- the sentence
3 to which it is directly related.

4 MR. SUGARMAN: I read it.

5 WITNESS BOYER: You have not. You read it in
6 error.

7 JUDGE BRENNER: Excuse me, Mr. Boyer. We play
8 a little bit of a game here, and it is that the lawyers
9 argue and the witnesses testify, although I sometimes
10 have heard it said that the definition of an
11 administrative proceeding is the place where the
12 witnesses argue and the lawyers testify.

13 I know it is frustrating, Mr. Boyer, when you
14 feel you have information, but the way to do it is
15 through your counsel on redirect, unless it is pertinent
16 to a question that is directed to you.

17 Now, then, let me have the question again,
18 please.

19 BY MR. SUGARMAN: (Resuming)

20 Q Isn't the statement here a false statement?
21 The statement is, "For maximum withdrawal by the Point
22 Pleasant pumping station, the minimum flow past the
23 intake will be 3,000 CFS."

24 A (WITNESS SOURQUARD) No, not as far as --

25 JUDGE BRENNER: Wait a minute, Mr. Bourquard.

1 The objection is overruled as to that
2 question, and I recognize that the question might be
3 different.

4 MR. CONNER: It is a different question. We
5 have no objection to that question.

6 JUDGE BRENNER: That is what I just said.
7 That question is okay.

8 Do you need the question again, Mr.
9 Bourquard?

10 WITNESS BOURQUARD: No. I am trying to think
11 of how to phrase it. I might point out that this
12 document that you are reading from is set up to design
13 criteria from which a station can be designed or set up
14 operation, and we on the basis of the information we had
15 available had assumed that when we got down to 3,000,
16 then this maximum withdrawal would not occur. Now, this
17 is what I am trying to express in here, or Mr. Steacy is
18 trying to express. We did not go beyond that. But as
19 far as we were able to tell at the time we prepared this
20 and now, that when the 3,000 CFS point is reached, we
21 are in another condition than which the criteria above
22 that is no longer applicable.

23 Now, I possibly should have put an explanation
24 down there and referred to the river master and the
25 effect on that, but in preparation for this, this was

1 primarily to be reviewed by engineers, and it didn't
2 seem necessary to do that because most of them involved
3 -- are familiar with DRBC requirements.

4 BY MR. SUGARMAN: (Resuming)

5 Q Well, you know, Mr. Harmon, didn't you base
6 your conclusions on water velocity on the statement that
7 the intake would not operate at the maximum velocities
8 when the flows were below 3,000 CFS? Isn't that what is
9 in your report?

10 A (WITNESS HARMON) Which report are you
11 referring to?

12 Q The biological report, November, 1980.
13 (Pause.)

14 A (WITNESS HARMON) Can you direct me to a page
15 in that report?

16 MR. SUGARMAN: For the board's purposes, it is
17 D-77 in our collection of exhibits.

18 JUDGE BRENNER: Thank you. I knew it was one
19 of them.

20 BY MR. SUGARMAN: (Resuming)

21 Q Page 3, Line 5, or starting on Line 3, "Data
22 from the river velocity survey conducted on 7 November
23 illustrate that ambient currents at this location are
24 generally one foot per second or even greater at low
25 flow (3,000 CFS)" Page 3 at the top. Didn't you base

1 your conclusion on that understanding? Didn't you so
2 testify in your deposition also?

3 A (WITNESS HARMON) Well, the statement in this
4 report is that the ambient currents are simply in the
5 vicinity of one foot per second at the low flow. I
6 didn't know whether that would be -- it doesn't say here
7 that that is the lowest flow that will ever occur there.

8 Q What does low flow mean?

9 A (WITNESS HARMON) To me it meant approximately
10 3,000 CFS.

11 Q Well, where did you get the information that
12 that is low flow?

13 (Pause.)

14 Q Didn't you testify in your deposition that you
15 understood that that was the level at which the intake
16 would operate at the maximum? That that is what you
17 were told, 3,000 CFS?

18 A (WITNESS HARMON) 3,000 CFS is the figure that
19 we have used as a target for evaluating impact.

20 Q Thank you.

21 Now, Mr. Bourquard, you have testified that
22 Mr. Steacy may have put this together and people
23 understood each other, and I want to direct your
24 attention to the letter of January 22nd which is signed
25 by you, and that document has been marked in a number of

1 different ways, but the way I am looking at it is D-31
2 in our collection, Mr. Bourquard's letter of January
3 22nd, 1982.

4 JUDGE BRENNER: That is Applicant's Exhibit 2
5 for identification -- in evidence. I am sorry.

6 MR. SUGARMAN: Thank you.

7 BY MR. SUGARMAN: (Resuming)

8 Q Page 4. Item 3. Referring to Mr. Steacy's
9 memorandum, you state in your letter, Sheet Number 3 of
10 Exhibit Number 7, looking at the second paragraph of
11 Item Number 3 of Exhibit Number 7 explains how the
12 minimum, normal, and maximum water levels were designed
13 for the Delaware River at the PPS site. The term
14 "minimum water level" as used herein refers to a design
15 condition; that is, this is the lowest water level when
16 the withdrawal rate would be at the maximum.

17 A (WITNESS BOURQUARD) That is correct.

18 Q Would the withdrawal rate be at the maximum at
19 the lowest level? Would that be 3,000 CFS?

20 A (WITNESS BOURQUARD) Would the withdrawal rate
21 be at the maximum? Well, to me that --

22 Q Let me turn the question around. I am sorry.
23 Let me withdraw it and turn it around. Is 3,000 CFS the
24 maximum -- the minimum water level when the withdrawal
25 rate would be at the maximum?

1 A (WITNESS BOURQUARD) To the best of my
2 understanding, yes.

3 Q Then it is not true that PECO can take water
4 out of the river even though the flow may be 3,000 CFS
5 as long as it is replaced from Merriell Creek?

6 A (WITNESS BOURQUARD) I don't know that this
7 particular had anything to do with PECO by itself. It
8 is a combination of both. In other words, the DRBC sets
9 up that as a requirement, after which they take over.

10 Q Is that your understanding of the DRBC order?

11 A (WITNESS BOURQUARD) Yes.

12 Q Do you mean to say that any time the flow is
13 less than 3,000 CFS at Trenton, neither NWRA or PECO has
14 an absolute -- let me finish the question -- has the
15 same status as to their right to take water out of the
16 river? Do you really mean to say that?

17 A (WITNESS BOURQUARD) If you will read in the
18 DRBC docket pertaining to NWRA's taking and also the
19 same provisions are in the docket division, the
20 provisions for PECO, you will see that they require when
21 the flow gets down to draught condition, which has been
22 specified as 3,000 CFS, that they are required to submit
23 to DRBC certain information including what they intend
24 to take.

25 Q Where is -- Is that in the order the 3,000 is

1 specified?

2 A (WITNESS BOURQUARD) I don't know whether it
3 says 3,000 or draught. I would have to check it to see,
4 but my understanding was that 3,000 is the draught
5 condition.

6 Q Are you testifying to that?

7 A (WITNESS BOURQUARD) That what?

8 Q That 3,000 is the draught condition as
9 specified legally by the DRBC?

10 A (WITNESS BOURQUARD) Not without reading it or
11 seeing it, no.

12 Q Have you ever seen it in writing anywhere that
13 3,000 at Trenton is specified as a draught condition at
14 which the status of entitlement allocations changes?

15 A (WITNESS BOURQUARD) I think it is in the good
16 faith documents. It shows a chart in there that goes
17 down to 3,000 unless I am mistaken.

18 Q You are saying that chart is good faith
19 negotiations. What is the status of those
20 negotiations? Are they in effect?

21 A (WITNESS BOURQUARD) I don't think so.

22 Q Were they in effect when the DRBC issued its
23 order?

24 A (WITNESS BOURQUARD) I doubt it.

25 Q So how can you say that 3,000, even if it is

1 in the good faith recommendations, that 3,000 equals
2 draught conditions, how can you say that is the
3 condition of an order when that hasn't been adopted yet?

4 MR. CONNER: Objection, Your Honor, to this
5 whole line of questioning. What may or may not be the
6 interpretation of the DRBC order, whatever the order
7 says will speak for itself, and unless this is for the
8 purpose of impeaching the witness, we think this is a
9 totally improper line. We also think it is circuitous,
10 a circular argument that has no real value.

11 JUDGE BRENNER: Okay, the objection is
12 overruled, although the next time you comment while
13 somebody else is objecting, Mr. Sugarman, it is not
14 going to assist you. It is overruled because it is
15 going towards impeaching the witness, given the bases he
16 gave earlier as to his views. We understand he is not a
17 lawyer. You will have your opportunity on your turn, on
18 redirect, to talk about the documents and so on, but the
19 immediate pertinence is the source of the witness's
20 bases for his conclusions.

21 BY MR. SUGARMAN: (Resuming)

22 Q I think that is enough of that at this time.
23 Let me see if I can find the good faith
24 recommendations.

25 (Pause.)

1 Q Do you have a copy of the good faith
2 recommendations, Mr. Bourquard?

3 A (WITNESS BOURQUARD) Pardon?

4 Q Do you have a copy of the good faith
5 recommendations?

6 A (WITNESS BOURQUARD) No, I do not. May I
7 quote from the DRBC docket?

8 Q If you will first deal with my question, then
9 I would be willing to have you quote from the docket. I
10 would just like to ask you if you want to withdraw your
11 answer that you think it is in the good faith
12 recommendations that 3,000 equals draught condition.

13 A (WITNESS BOURQUARD) I think it is in there.

14 Q You do think it is in here? Okay.

15 A (WITNESS BOURQUARD) I think in that chart at
16 the end.

17 Q The chart at the end?

18 A (WITNESS BOURQUARD) It is by months, and it
19 shows when it gets down to a certain level.

20 Q Well, the chart is not at the end. The chart
21 definition of draught.

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1 MR. CONNER: Would you show it to the witness?

2 MR. SUGARMAN: I will show it to the witness.

3 BY MR. SUGARMAN: (Resuming)

4 Q If you can follow along with me on the good
5 faith recommendations, it is bound into your books.

6 JUDGE BRENNER: Are these those Supreme Court
7 recommendations?

8 MR. SUGARMAN: Yes. This should be understood
9 as not at this point -- these are draft recommendations
10 of the parties, that is, the parties to the Supreme
11 Court decree of 1954, and these are the recommendations
12 that they will make to the Supreme Court if they are
13 adopted. These are not the same people. I am sorry.
14 They will make them to the DRBC. The title of the
15 document is very confusing, but it has to be read as two
16 sections. One is the recommendations of the parties to
17 the U.S. Supreme Court decree of 1954. That is who is
18 making the recommendations. Then the next part is to
19 whom they are going to make them, to the DRBC. And
20 these are a draft.

21 BY MR. SUGARMAN: (Resuming)

22 Q If you look at page 3 of that document, it
23 states, "Diversion and releases under this draft
24 operation formula should go into effect automatically
25 whenever combined storage in the city reservoirs" -- and

1 you know that is the City of New York reservoirs and
2 they are defined on the next page -- "declines below the
3 drought warning line and remains below that level for
4 five consecutive days," et cetera. The next paragraph:
5 "Whenever the drought operation formula goes into
6 effect" and so on.

7 If you look at the next page, that provides
8 the operation curves for the three reservoirs and
9 relates the definition of drought to the levels of
10 storage in those three reservoirs combined; is that not
11 correct?

12 A (WITNESS BOURQUARD) You kind of lost me.
13 What page are you on?

14 Q I am on page 3 and then on page 4.

15 A (WITNESS BOURQUARD) On page 3, yes, it is the
16 flow objective for salinity control, and if you go back
17 to Table 2, you will see a table there of the Trenton
18 flow objectives in which at the low line you have
19 drought as 2500 to 2900.

20 Q But if you look up at the first column, you
21 see the definition of drought in the left-hand column of
22 Table 1. The word "drought" is not related to the
23 Trenton flow objective. The Trenton flow objective is
24 an output. The input in terms of defining a drought is
25 the New York City storage condition. Do you see that?

1 A (WITNESS BOURQUARD) I see that on the charts,
2 yes.

3 Q And if you then look at the next sentence just
4 below Table 1, what does it say? It says during drought
5 conditions as defined by the operation curves shown on
6 page 4, the Montague and Trenton flow objectives should
7 vary according to the location of the salt front, et
8 cetera, in accordance with the following tables,
9 dropping to 2700 at Trenton. But that is drought as
10 defined by the levels of those three reservoirs, is it
11 not?

12 A (WITNESS BOURQUARD) I think you are right
13 there. I withdraw that. My conclusion in reading this
14 was that when it got below 3000 cfs, this setup was
15 below the objective that they intended to follow and
16 that DRBC would have taken appropriate action. If I may
17 read from the docket where the 3000 cfs is referred to,
18 it is Docket No. D69210CP.

19 Q What date, sir?

20 A (WITNESS BOURQUARD) The date of this is
21 3/29/73.

22 Q That is not the current order governing the
23 PECO withdrawal; is that not correct?

24 A (WITNESS BOURQUARD) Well, this condition
25 remains, yes.

1 Q Hasn't that condition been superceded by the
2 1975 order?

3 A (WITNESS BOURQUARD) Not to my knowledge, no.

4 JUDGE BRENNER: Mr. Sugarman, I don't know
5 what condition this condition is yet.

6 MR. SUGARMAN: I'm not quite sure either.

7 JUDGE BRENNER: You stopped him from reading
8 it. You told him in the course of your questions that
9 you would let him do it. You can change your line if
10 you want, but I think it would be more efficient to let
11 him do it.

12 MR. SUGARMAN: I will let him do it. I just
13 wanted to get those orders in front of me so that I
14 could look at them. I had no idea they were going to
15 come up and I don't have them with me, but I will look
16 at the witness' copies if he has the other orders. Do
17 you have the other orders too in your packet?

18 A (WITNESS BOURQUARD) Yes.

19 MR. SUGARMAN: I will let him read. Then I
20 would like the privilege of looking at the orders
21 because there are three orders to PECO, the '73 order,
22 the '75 order and the '81 order.

23 JUDGE BRENNER: You don't have any of them
24 yourself?

25 MR. SUGARMAN: I don't have any of them with

1 me, no.

2 JUDGE BRENNER: Let's go off the record a
3 minute.

4 [Discussion off the record.]

5 JUDGE BRENNER: Let's go back on the record
6 now.

7 We had a discussion off the record in which it
8 was determined that the so-called good faith
9 recommendations, which Mr. Sugarman will more fully
10 identify in a moment, should be marked as an exhibit for
11 identification.

12 MR. SUGARMAN: This is a document entitled
13 "Draft Interstate Water Management Recommendation of
14 the Parties to the U.S. Supreme Court Decree of 1954, to
15 the Delaware River Basin Commission," dated July 1982,
16 consisting of 25 pages and then an attachment entitled
17 "Draft Background Report" without appendices, prepared
18 by the staff of the parties and the Delaware River Basin
19 Commission, consisting of six Roman pages and 16 Arabic
20 pages.

21 JUDGE BRENNER: And that will be marked as
22 Del-Aware Exhibit 8 for identification.

23 (The document referred to
24 was marked Del-Aware
25 Exhibit No. 8 for

1 identification.)

2 [Pause.]

3 MR. SUGARMAN: Just to be absolutely sure, we
4 are not going to get to Mr. Lewis tomorrow in any event;
5 is that right? Ms. Coe is on her way to meet him over
6 at Point Pleasant; that is why I am asking.

7 JUDGE BRENNER: Well, here is the situation.
8 You couldn't tell me whether he had a problem going to
9 Washington, but you said you didn't believe he would.
10 If he has no problem being in Washington, then we don't
11 need him this week. If he does --

12 MR. SUGARMAN: We will get back to you.

13 JUDGE BRENNER: Well, if you get back to me
14 too late, we are going to have too many witnesses
15 scheduled for tomorrow.

16 MR. SUGARMAN: I told Ms. Coe as soon as she
17 gets there to call us.

18 JUDGE BRENNER: That was one of the reasons I
19 inquired as to the availability of the other witnesses
20 for starting this afternoon, just in case you suddenly
21 came back to us tomorrow morning and said you needed to
22 put --

23 MR. SUGARMAN: We will wait and see, but I
24 think we are okay on that.

25 BY MR. SUGARMAN: (Resuming)

1 Q Mr. Bourquard, you wanted to read from the
2 DRBC docket?

3 A (WITNESS BOURQUARD) Yes. Where the first
4 occasion of the 3000 cfs came into being. This is from
5 DRBC Docket 69-210CP, page 6, the third paragraph. "The
6 Delaware River, as augmented for the purposes of the
7 water supply by upstream reservoirs, may be used by the
8 Point Pleasant pumping facilities, a pipeline, the east
9 branch of the Perkiomen Creek, and Perkiomen Creek, with
10 limitations that such use will not reduce the flow as
11 measured at the Trenton gauge below 3000 csf, 1,940 mgd,
12 and that such use will not be permitted when the flow as
13 measured at the Trenton gauge is less than 3000 cfs,
14 provided that annually after pumping from the Delaware
15 River, the rate of pumping will be maintained at not
16 less than 27 cfs, 17.5 mgd, throughout the normal low
17 flow season for the protection of aquatic life in the
18 Perkiomen Creek and its east branch, regardless of
19 ultimate downstream consumptive use requirements."

20 Now, this is where the 3000 cfs was set. It
21 was continued on the most recent DRBB docket pertaining
22 to this subject, D69-210CP, dated November 7, 1975.

23 Q Is that what you were reading from?

24 A (WITNESS BOURQUARD) No, I was reading from
25 the '73.

1 Q I don't have it front of me. Now you are
2 reading from the '75? You will recall I asked you
3 whether the '75 docket decision didn't change that
4 condition, and you said no.

5 A (WITNESS BOURQUARD) No, it says in here the
6 project as described in Docket D69-210CP and as
7 supplemented above, with the modifications included in
8 Docket decision of March 29, 1973 and specified is
9 hereby added to the comprehensive plan.

10 Q And then doesn't it go on to propose a
11 different condition on flow withdrawals, different from
12 the '73 decision?

13 A (WITNESS BOURQUARD) No.

14 Q May I look at a copy of it, please?

15 MR. CONNER: To save time, you can look at
16 ours.

17 BY MR. SUGARMAN: (Resuming)

18 Q Woul you read paragraph 2(c) of that decision
19 that you were just reading from? You read paragraph 1.
20 Now read paragraph 2(c).

21 A (WITNESS BOURQUARD) "Prior to January 1,
22 1977, the Commission will in its sole discretion
23 determine the adequacy of then existing storage
24 facilities on the Delaware and its tributaries, together
25 with additional storage to be built or supplied, for all

1 needs, including the applicant's, for water supply from
2 that source by the year 1981. If the Commission then
3 determines that storage will not be adequate for all
4 projected needs of the basin, the applicant must build
5 or cause to be built, at its own expense, at a location
6 approved by the Commission for service in 1981 a
7 reservoir with sufficient storage capacity to assure the
8 water supply needs for consumptive use by the Limerick
9 plant during periods when such use will reduce the flow
10 in the Delaware River at the Trenton gauge below 3000
11 cfs."

12 It says the same thing. It just says in here
13 they have to build to a reservoir if they want to use it
14 below 3000 cfs.

15 Q So in both cases you are saying that if they
16 build a reservoir they can use it at any flow of the
17 Delaware; is that correct?

18 A (WITNESS BOURQUARD) I would assume so,
19 subject to whatever conditions are imposed by the DRBC.

20 Q Let me come back to the statement in Mr.
21 Steacy's memo, then, and in your letter. Didn't you
22 state that the intake will not be operated at the
23 maximum velocities if the flow in the river is below
24 3000 cfs, and didn't you just now testify that if the
25 applicant replaces the flow, that constraint does not

1 exist?

2 A (WITNESS BOURQUARD) No, that constraint
3 applies only to PECO's taking.

4 Q That is what I am talking about. And didn't
5 you just testify that if the applicant replaces the
6 water that it takes out, that constraint doesn't exist
7 on PECO's withdrawals?

8 A (WITNESS BOURQUARD) That's right.

9 Q So that there can be maximum withdrawals as a
10 matter of right from the river, despite the fact that
11 the flows might be 2000 cfs, as long as PECO replaces
12 the water it takes out? Isn't that correct?

13 A (WITNESS BOURQUARD) As far as PECO is
14 concerned. Now, you have to understand that the
15 documents that we are submitting there are for design
16 purposes, and what we did, we assumed that once they got
17 below 95 cfs, there would be certain restrictions
18 placed, particularly on NWRA's water.

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1 Q You think there are going to be restrictions
2 on NWRA's water when the flows are below 3,000 CFS?

3 A (WITNESS BOURQUARD) Yes.

4 MR. CONNER: We object to the interrogator
5 shouting at the witnesses.

6 MR. SUGARMAN: I will reduce the volume of my
7 voice. I am trying to do that now.

8 JUDGE BRENNER: I guess in light of that I
9 don't have to rule.

10 BY MR. SUGARMAN: (Resuming)

11 Q So what you are saying now is that the
12 explanation of the statement in Mr. Steacy's memo and in
13 your letter of January 22nd is that you anticipate that
14 there will be limitations on the Neshaminy water
15 resources withdrawal when the flows in the water are
16 below 3,000 CFS?

17 A (WITNESS BOURQUARD) Yes.

18 Q Has that been disclosed to the NWRA bond
19 holders?

20 MR. CONNER: Objection, irrelevant.

21 JUDGE BRENNER: Can you give me the relevance
22 without unnecessarily educating the witness? Is that
23 possible, Mr. Sugarman?

24 MR. SUGARMAN: Yes, sir. It impugns the
25 witness's credibility. He is the engineer who has

1 consulted and reviewed all of those financial
2 disclosures. Perhaps I should have raised it a little
3 differently.

4 BY MR. SUGARMAN: (Resuming)

5 Q Have you so informed the NWRA bond holders?

6 JUDGE BRENNER: Does your objection still
7 apply, Mr. Conner?

8 MR. CONNER: Yes, it is still irrelevant to
9 the three issues, and it really has nothing to do with
10 the witness's credibility.

11 JUDGE BRENNER: It is in the area of prior
12 statements. I won't characterize as to whether they are
13 consistent or inconsistent. I will let it go for a
14 little while, but if it isn't tied up quickly, it could,
15 although arguably relevant, it starts to get too
16 collateral.

17 MR. SUGARMAN: I understand.

18 BY MR. SUGARMAN: (Resuming)

19 Q Mr. Bourquard?

20 A (WITNESS BOURQUARD) Did I notify them? No.

21 Q Have you reviewed the NWRA financial
22 prospectuses that have been released?

23 A (WITNESS BOURQUARD) Yes.

24 Q Did you require that any such statement be in
25 them?

1 A (WITNESS BOURQUARD) No. As I recall, I don't
2 recall when the last bond issue was, but I think it was
3 probably around 1972 or '73, I think.

4 Q Is it your intention to put such a disclosure
5 in the next bond issue?

6 MR. CONNER: Objection, Your Honor. There is
7 no premise that this is accurate, and that it certainly
8 has anything to do with credibility.

9 MR. SUGARMAN: I will withdraw it, because of
10 your prior statement, sir, not because it is irrelevant.

11 JUDGE BRENNER: Well, in that case I will
12 sustain the objection. I mean, if we are going to
13 argue --

14 MR. SUGARMAN: What I am saying is, I will
15 withdraw it because I think it does go off into the
16 distance, but it is relevant.

17 JUDGE BRENNER: Okay. Put the next question.

18 BY MR. SUGARMAN: (Resuming)

19 Q Mr. Boyer, I would like to come back to your
20 statement about the eddy, and I would like to know, when
21 did you formulate the judgments that you expressed at
22 length this morning concerning how the eddy works and
23 how it relates to that bar from the mouth of the
24 Tohickan?

25 A (WITNESS BOYER) I believe that was yesterday,

1 wasn't it?

2 Q That is possible.

3 A (WITNESS BOYER) Yes, I haven't discussed the
4 eddy this morning.

5 Q Then I would like to refer you to your
6 testimony of yesterday then. Thank you for the
7 correction.

8 A (WITNESS BOYER) Some months ago, as I stated
9 before, when some statements were coming in about the
10 horrible things that this eddy was potentially going to
11 do to the intake.

12 Q And what did you do to formulate your
13 judgments concerning the intake, concerning the eddy
14 that you expressed in your testimony?

15 A (WITNESS BOYER) I expressed in my verbal
16 testimony yesterday that you are talking about?

17 Q Yes.

18 A (WITNESS BOYER) I visited the site. I looked
19 at the locale, so to speak, and looked at the contour
20 lines in the river, and came to the conclusion that I
21 drew and reported yesterday.

22 Q How many months ago did you visit the site?

23 MR. CONNER: Objection, Your Honor. This has
24 been asked and answered and gone into yesterday. Why
25 are we going back to it again? Absent some showing, I

1 think it is objectionable.

2 MR. SUGARMAN: It is a different subject,
3 sir. Yesterday when I was asking him when he formulated
4 his judgments, we were talking about the velocity. Now
5 I want to ask him about the character of the eddy. He
6 gave two separate, long statements orally that were not
7 in his prepared testimony. One related to his estimate
8 of the relative velocity of the river and the intake,
9 and the other related to his description as an
10 engineering judgment as to how the eddy is formed and
11 how it works.

12 JUDGE BRENNER: Mr. Conner's immediate point
13 is that he thinks it has been established as to when Mr.
14 Boyer visited the so-called bar which, even though your
15 subject is different, is a common link.

16 MR. SUGARMAN: His testimony, as I recall it,
17 was that he visited the bar some years ago, but not for
18 this purpose, that he went out on the site and looked
19 over the eddy some months ago. I am not asking him when
20 he went to the -- if I did, I will rephrase the
21 question. I am not trying to re-explore that area.

22 JUDGE BRENNER: Okay. It is probably a short
23 question and answer, and I frankly don't remember, Mr.
24 Conner, whether the questions he asked are the same or
25 not. They might be, but it might be more efficient to

1 just get it.

2 BY MR. SUGARMAN: (Resuming)

3 Q Let me clarify my question, Mr. Boyer. What I
4 want to know is, when did you go out and make the site
5 visit as part of your determination as to the character
6 of the eddy?

7 A (WITNESS BOYER) Well, I can't recall the
8 exact date, because I visited the site a number of times
9 during this past year, but if it was with relation to
10 the questions, whatever the questions were submitted
11 about isn't the eddy going to expand into the intake,
12 and all of these questions about fish and so forth.

13 Q Well, let me ask you this. Was it before your
14 deposition on August 5?

15 A (WITNESS BOYER) Yes.

16 Q And was it at high flow or low flow
17 conditions?

18 A (WITNESS BOYER) Well, I would say basically
19 moderate flows this past few months.

20 Q Were they passing -- were the flows passing
21 over the bar?

22 A (WITNESS BOYER) Not completely. The bar is
23 maybe a mistermiology, because people think of sandbars
24 as being a projection above the surface of the river.
25 This bar is a shallow area consisting of jagged rocks

1 poking up through and forming 50 percent of -- occupying
2 50 percent of the surface area, so it may be completely
3 clear or it usually is, even at low flows, is covered
4 with some small measurement of water, but like six
5 inches or something like that.

6 Q Are there trees on the bar?

7 A (WITNESS BOYER) No, not the protrusion. Back
8 beyond the shoreline, what I would call the shoreline,
9 are trees.

10 Q Well, let's define for a moment the
11 shoreline. Let's define the bank of the river and what
12 you call the shoreline at the river.

13 A (WITNESS BOYER) It was shown on the drawing
14 yesterday.

15 Q Have you got that drawing? I would like you
16 to keep it in front of you, since you brought it up in
17 your testimony, so that I can ask you questions about
18 it, please.

19 (Pause.)

20 JUDGE BRENNER: Let's go off the record.

21 (Whereupon, a discussion was held off the
22 record.)

23 JUDGE BRENNER: Let's go back on the record.

24 BY MR. SUGARMAN: (Resuming)

25 Q The question is, where is the shoreline in

1 relation to this exhibit which is to be proposed as
2 PolICASTRO 1.

3 JUDGE BRENNER: It is already in evidence.

4 WITNESS BOYER: The shoreline --

5 JUDGE BRENNER: Wait a minute. I am checking
6 my memory here. The PolICASTRO testimony is in evidence
7 when it was bound in. Now, this chart is oversized.
8 Did that get bound in with it?

9 (Whereupon, a discussion was held off the
10 record.)

11 JUDGE BRENNER: This answers my immediate
12 question. Let's proceed. It was bound in with the
13 testimony. Someone reduced it. If by the time we
14 finish this, if we don't have something with a larger
15 size, I hope as a housekeeping matter someone else can
16 take care of this, that someone can propose at least one
17 exhibit for identification in a larger size.

18 MR. SUGARMAN: So this is PolICASTRO
19 Attachment 1?

20 BY MR. SUGARMAN: (Resuming)

21 Q Now, the question is, where is the shoreline
22 versus the bar?

23 A (WITNESS BOYER) Well, the shoreline as I
24 identified yesterday, the elevation 71 that we marked on
25 the chart on the upper lefthand side, that peninsula

1 coming out, and it is a little bit darker line than the
2 other contour lines, the bar extends to the right of
3 that through that first 100 feet or roughly an inch or
4 so, or inch and a half, until the slope starts going
5 down rapidly from 68 to 66 to 64, down to 60. That is
6 where it becomes deeper water.

7 JUDGE BRENNER: Okay, Mr. Boyer. It is my
8 recollection, and I will ask you if it is correct now in
9 case my recollection is wrong, that you testified that
10 you would consider the edge of the 70-foot contour to be
11 the end of the bar. Is that right?

12 WITNESS BOYER: Well, actually, I would say,
13 if I said that yesterday, I think I would extend it
14 maybe out to the 68 or 69, somewhere in between the 68
15 and the 70, depending upon how that changes slope in
16 that area.

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1 JUDGE BRENNER: My recollection might have
2 been faulty also.

3 BY MR. SUGARMAN: (Resuming)

4 Q And you're saying that's about 100 feet out
5 from the shoreline measuring along?

6 A (WITNESS BOYER) Right.

7 Q When did you -- you indicated at high flow
8 conditions the bar, the water flows directly over the
9 bar affecting --

10 A Right.

11 Q Is that right?

12 A Yes. Whenever, as the elevation increases it
13 would exceed the elevation of the rocks that are
14 sticking out of the water and would flow over them, and
15 after it gets about six inches higher than that, why, it
16 would really start to have some volumetric mass which
17 would affect the eddy.

18 Q And you say you knew all of that before your
19 deposition?

20 A (WITNESS BOYER) Well, basically. I have been
21 up there and looked at it.

22 Q Well, did you form your opinion before the
23 deposition?

24 A (WITNESS BOYER) My opinion of what?

25 Q As to how the eddy worked, the things you

1 described yesterday?

2 A (WITNESS BOYER) Yes, basically. I hadn't
3 crystallized it to any extent because I had determined
4 -- the reason I was looking at giving the eddy
5 consideration was the number of questions about the
6 changing location of the eddy and its effect on the
7 intake.

8 Q Did you know at the time you gave your
9 deposition whether the eddy exists even at high
10 conditions?

11 A (WITNESS BOYER) I didn't really care. I
12 hadn't given it that much thought. We were concerned
13 about low flows with relation to the eddy.

14 Q Do you remember in your deposition that you
15 didn't know whether the eddy exists even at high flow
16 conditions?

17 A (WITNESS BOYER) No, I don't know that. Can
18 you tell me the paragraph?

19 Q Well, I direct you to page 32 of your
20 deposition on August 6th.

21 JUDGE BRENNER: Mr. Sugarman, I don't know if
22 we will need it or not. I just want to tell you we only
23 have the August 5th one through your courtesy earlier
24 but not the August 6th one. And I don't want to take it
25 if it is your copy.

1 MR. SUGARMAN: I may have an extra.

2 (Counsel handing document to Board.)

3 JUDGE BRENNER: Remind us to return all of
4 these things to you.

5 MR. SUGARMAN: It would be my intention to
6 file one set with the Board.

7 JUDGE BRENNER: We don't need it except to the
8 extent we have it on the record here. Well, we will see
9 later.

10 BY MR. SUGARMAN: (Resuming)

11 Q Now, Mr. Boyer, at that point I was asking a
12 series of question to the panel, and Mr. Bourquard was
13 answering. And starting on page 30, and I was asking
14 Mr. Bourquard how he would describe the flow of the
15 Tohican water into the eddy, and you said I would
16 suggest that perhaps this flow was high at the time this
17 was taken, and the eddy was either vastly decreased in
18 size or maybe nonexistent under this flow condition.

19 Question by Mr. Boyer: "Do you know, Paul?
20 Does that eddy exist under high flow conditions?" Page
21 32.

22 A (WITNESS BOYER) Go on.

23 Q Mr. Boyer asked Paul, "Does that eddy exist
24 under high flow conditions?" Mr. Bourquard: "It is
25 possible." Mr. Harmon: "If the flow is high enough,

1 the eddy would not exist in some of my experience being
2 up on the river in very high flows."

3 My only question to you, Mr. Boyer, is when
4 did you really make the judgments that you are now
5 testifying to?

6 A (WITNESS BOYER) I made the judgments when I
7 said I made them, and I made them with regard to low
8 flows. I was not considering high flows. They were of
9 no concern to me. Since the velocities in the river
10 would be higher and there would be a nonexistent concern
11 relative to bypass velocities with relation to the
12 screen.

13 Q Yesterday you gave a great deal of testimony
14 about how the eddy would not exist at high flows.

15 A (WITNESS BOYER) Only in response to your
16 questions. I have no interest in the eddy at high
17 flows. You asked me, and I gave you my opinion.

18 Q When did you form that opinion?

19 MR. CONNER: Objection. Asked and answered.
20 Irrelevant in any event, it would seem to me.

21 JUDGE BRENNER: Why is it irrelevant?

22 MR. CONNER: Because when he formed his
23 opinion hasn't anything to do with anything here.

24 JUDGE BRENNER: Okay. But the question about
25 the eddy at high flow isn't irrelevant, in your view?

1 MR. CONNER: I'm not sure it is relevant.

2 JUDGE BRENNER: But your objection was
3 directed to the other part?

4 MR. CONNER: Correct.

5 JUDGE BRENNER: No. It is reasonable leeway
6 which we would allow a cross examiner to follow up on
7 the basis of conclusions given by the witness. So the
8 question stands.

9 Do you need the question repeated?

10 WITNESS BOYER: I don't think there is a
11 question pending.

12 BY MR. SUGARMAN: (Resuming)

13 Q There is a question pending.

14 A (WITNESS BOYER) Then you would have to repeat
15 it, please.

16 JUDGE BRENNER: Could you repeat it?

17 (The Reporter read the record as requested.)

18 BY MR. SUGARMAN: (Resuming)

19 Q What was the answer?

20 A (WITNESS BOYER) I haven't answered.

21 Q Would you answer?

22 A (WITNESS BOYER) To clarify it, I take it the
23 question is that when did I form the opinion that there
24 would be no eddy at high flows.

25 Q Right.

1 A (WITNESS BOYER) I can't really tell you.

2 Q Was it after the deposition?

3 A (WITNESS BOYER) No. I would say in response
4 to the question here. We were looking at a photograph,
5 and the eddy did not show. Whether you would be able to
6 see if it was there in that photograph I question, but
7 at least there wasn't any evidence of an eddy in the
8 photograph. So I said -- he was asking about the
9 pattern. Mr. Sugarman was asking about the pattern of
10 Tohican Creek and how it gets into the eddy: "Does it
11 flow directly to the eddy" -- and I'm quoting from the
12 transcript -- "or does it flow out against the main
13 channel and then come back around?" And I said, "It is
14 pretty hard to tell from the photograph."

15 Oh, wait a minute. That is somebody else's
16 answer. That is probably Mr. Bourquard's answer. Then
17 I answered, "I would suggest that perhaps this flow was
18 high at the time this picture was taken. There was no
19 flow identification on the picture. The rocky area did
20 not appear, though, so that was my basis for saying that
21 the flow was higher than it is today, let's say. And
22 the eddy was either vastly decreased in size or maybe
23 nonexistent because of it flowing over the rocks under
24 this flow condition."

25 And then Paul Harmon who is on the river

1 frequently doing biological studies under various
2 conditions, and since my visits are intermittent and I
3 don't necessarily identify the flow in the river at the
4 time I'm visiting the place, I turned to Paul in a
5 natural way and said, "Do you know, Paul? Does that
6 eddy exist under high conditions?" To me it was a
7 perfectly natural thing to do.

8 Q Would it be natural for one who already knew
9 the answer?

10 MR. CONNER: Asked and answered.

11 JUDGE BRENNER: I never heard that question
12 put before. Overruled.

13 WITNESS BOYER: If I had been there at high
14 flows and been aware of an eddy and had some specific
15 interest in identifying whether the eddy existed at high
16 flows, then I would have known for sure. But I had not
17 done all of those three things, so therefore, I was
18 using engineering judgment on the fact that there would
19 be no eddy there at high flow, which is what I am still
20 doing today.

21 BY MR. SUGARMAN: (Resuming)

22 Q Isn't it true, Mr. Boyer, that you really
23 didn't get into studying these things closely until
24 after the deposition and even after Del-Aware's
25 testimony was submitted?

1 MR. CONNER: Objection. If this relates to
2 his opinion as to the eddies it has indeed been asked
3 and answered, and if it relates to something else, it
4 has not; these things have not been identified. More
5 importantly, I don't know what this has to do with
6 impeachment.

7 JUDGE BRENNER: I didn't hear your last point,
8 Mr. Conner. You don't know what this has to do with?

9 MR. CONNER: I don't realize what this type of
10 questioning has to do with impeachment, which I
11 understood to be the line of it.k

12 JUDGE BRENNER: Well, as to the last point, as
13 has been discussed yesterday, terms like "studies,"
14 "analyses," "measurements" and so on mean different
15 things in different contexts. And Mr. Sugarman is
16 within reason until it gets overly redundant, which it
17 has not yet. He is entitled to explore what the bases
18 is for certain conclusions so long as the conclusions
19 are material. And as we discussed yesterday, there is
20 that formula and the sandbar could affect -- not sandbar
21 -- but the bar could affect the formula.

22 As to whether it's been asked and answered, a
23 lot of questions very much like it have been, at least
24 since the deposition. I don't know about since the
25 testimony.

1 WITNESS BOYER: Are you waiting?

2 JUDGE BRENNER: No. I'm thinking.

3 We will allow the question, but why don't you
4 break it up as to particular things? You see, the
5 question in that case was compound, and the witness is
6 capable of answering; but then if you are really
7 interested in was it after the deposition or after the
8 testimony, you're going to have to ask another
9 question. So you might as well break it up as you go
10 through it, unless your only point is --

11 MR. SUGARMAN: Well, I don't want to keep on
12 this.

13 JUDGE BRENNER: Wait a minute. If your only
14 point is before or after the deposition, then you didn't
15 have to introduce the testimony part of your question;
16 but if your point is something else, so ask it again.

17 BY MR. SUGARMAN: (Resuming)

18 Q Isn't it true that you only got into this in
19 detail sometime after the deposition?

20 A (WITNESS BOYER) Got into what in detail?

21 Q To the whole question of whether the
22 velocities were going to be at the intake, where the
23 intake water was going to come from, whether it was
24 going to have to do with the pool or the main channel.

25 A (WITNESS BOYER) No, that is not true.

1 Q Have you been in it all along?

2 A (WITNESS BOYER) Since certainly all this year.

3 Q Did you ever -- are you aware that Mr.

4 Bourquard expressed a concern about the location of the
5 pump station in relationship to the mouth of the Tohican
6 because of that bar back in 1972?

7 A (WITNESS BOYER) No.

8 Q Have you ever read Design Report No. 2?

9 A (WITNESS BOYER) Yes.

10 Q You don't recall that?

11 A (WITNESS BOYER) I can't recall everything
12 I've read, I'm sorry to say.

13 Q Perhaps if I show it to you it would refresh
14 your recollection.

15 A (WITNESS BOYER) I don't know how. Well, I
16 guess I will --

17 Q Well, let me read the relevant language, and
18 then I will show it to you.

19 JUDGE BRENNER: I have difficulty when I'm
20 being asked to give a precise answer that in an official
21 proceeding that I know people are going to rely on from
22 sitting there and having something read and then having
23 to look at it. Is there another copy of it around so he
24 could follow along? Otherwise, we will do it your way.

25 MR. SUGARMAN: I don't have another copy.

1 JUDGE BRENNER: If you're going to read a lot
2 I think it is unfair to Mr. Boyer not to have it in
3 front of him while you are reading it.

4 MR. CONNER: We wish to object to the question
5 on the ground as to some report back in 1972 proposed
6 something. What earthly relevance that has to anything
7 now if this is an attempt at impeachment. I can't
8 object on this basis, but it is certainly unfair to
9 expect the witness to remember something ten years ago.
10 But if it relates to the present design of the intake,
11 it is irrelevant in our view.

12 JUDGE BRENNER: If it relates to the present
13 design of the intake it is irrelevant in your view?
14 Maybe I misheard you. Is that what you said?

15 MR. CONNER: That's what I said. I was
16 talking about a 1972 design which at that time the
17 intake was on the shore, if anywhere.

18 JUDGE BRENNER: The inquiry is relevant.

19 MR. SUGARMAN: Thank you.

20 WITNESS BOYER: What page?

21 MR. SUGARMAN: Page 12.

22 (Panel of witnesses conferring.)

23 WITNESS BOYER: Go ahead.

24 BY MR. SUGARMAN: (Resuming)

25 Q Plate number 7 shows the proposed locations of

1 the river intake, the pumping station and the
2 transmission main at Point Pleasant. The key
3 determinants in citing these installations are: one,
4 confirmation of river channel; two, transmission main
5 alignment; three, foundation conditions; four, flooding
6 considerations; five, right-of-way considerations; and,
7 six, environmental effects.

8 The first consideration, confirmation of river
9 channel, the intake should be so situated as to avoid or
10 minimize the following possible hazards to which such
11 structures may be subjected: blocking by ice, blocking
12 by locks and heavy debris, blocking by siltation,
13 undermining of intake foundation by river current.

14 The approximate direction of the currents of
15 the Delaware River near the proposed intake, as
16 indicated on Plate 7, was determined from a study of the
17 existing erosion pattern of the riverbed and banks. It
18 may be seen from the plate that below the mouth of the
19 Tohican Creek the river flow has been affected
20 significantly by crosscurrents from both Tohican Creek
21 and Hickory Creek, resulting in material deposition
22 followed by some channel scouring of the west bank.

23 The proposed intake alignment would intercept
24 the actual river channel and thus main river current at
25 about a right angle at about 800 feet downstream of the

1 mouth of the Tohican Creek. At this point the river
2 channel has about returned to its normal cross-section
3 after being restricted by the deposition below Tohican
4 Creek. An intake at this location should have minimum
5 difficulties with loose surface ice, frazzle ice, and
6 floating logs being drawn into the intake, and with silt
7 and sand being deposited at the intake entrance. In
8 addition, the alignment would require the construction
9 of a minimum length entrance channel.

10 Now, Mr. Conner has already pointed out that
11 the intake at the proposed location that that report
12 refers to was on the riverbank and not 200 feet or 245
13 feet into the river. I read that to ask you if you were
14 aware before this year of the fact that there was a
15 concern as to where that intake would be located in
16 relationship to the mouth of the Tohican Creek so as to
17 minimize at least those concerns, much less the fish
18 problems.

19 A (WITNESS BOYER) Well, I have to say two
20 things. One, when you're locating intake it is natural
21 to look at all of those things. And, two, specifically
22 to your question, I do not recall a discussion at my
23 level with regard to these particular concerns back in
24 1972.

25 Haynes, would you have been involved in that,

1 do you know?

2 A (WITNESS DICKENSON) Not in any great detail.
3 Mr. Bourquard was just beginning to submit those
4 documents to us because we had only in the previous year
5 probably joined the project.

6 A (WITNESS BOYER) You must realize this was a
7 document prepared in March 1972 by Bourquard for the
8 Point Pleasant pumping facility.

9 Q Go ahead.

10 A (WITNESS BOYER) We were, I guess, in
11 negotiations with NWRA for the installation of a
12 combined facility, and I guess this report was based
13 upon the combined facility.

14 Q For you?

15 A (WITNESS BOYER) For NWRA, and through them to
16 us, yes.

17 Q Does it say anywhere through them?

18 A (WITNESS BOYER) Well, there's nothing on the
19 title page that says even us. It says location of the
20 Point Pleasant --

21 Q Well, let's take a look at page 1 then, the
22 last sentence on page 1.

23 MR. CONNER: We would object to the
24 interruption of the witness' attempt to answer the
25 question by the constant changes by Mr. Sugarman.

1 JUDGE BRENNER: I think there was some
2 interruption there, Mr. Sugarman.

3 MR. SUGARMAN: I apologize.

4 WITNESS BOYER: Going back to the question,
5 previous question -- and I will come to the one that you
6 are excited about after I finish answering your former
7 question, if you don't mind. So the documents would
8 have gone to NWRA and then to us for review,
9 consideration and discussion.

10 Now, if you want to turn to something on page
11 1 and ask me about it, I will be delighted to answer.

12 BY MR. SUGARMAN: (Resuming)

13 Q If you would just read the last sentence on
14 page 1 which describes the facilities that are part of
15 the report.

16 A (WITNESS BOYER) Combined transmission main?
17 A 2.6 mile water transmission main for the combined uses
18 of Bucks and Philadelphia Electric, extending from the
19 above pumping station to Bradshaw described below. And
20 as I said, this was based on the combined facilities for
21 both companies, but the contract had not yet been
22 signed, and we were working with them on the design
23 effort.

24 Q You stated before that they would come to them
25 and through them to you.

1 A (WITNESS BOYER) Yes. Since Bourquard is
2 hired by NWRA.

3 Q And not by PECO?

 A (WITNESS BOYER) Not by PECO. You can ask Mr.
5 Bourquard that if you would like since he is here.

6 Q For this facility, Mr. Bourquard -- that is,
7 for these reports at this stage in 1970 to '72 -- were
8 you retained by Philadelphia Electric Company for any
9 purpose?

10 A (WITNESS BOURQUARD) I don't remember for any
11 purpose. We were doing these reports for NWRA.

12 Q Well, who was doing the work on the Perkiomen
13 transmission main, Design Report No. 1, December 1971?

14 A (WITNESS BOURQUARD) We were.

15 Q And who were you doing it for?

16 A (WITNESS BOURQUARD) I would have to look back
17 and see. We may have been doing that part of it for
18 PECO. I don't know. Basically we were working for NWRA.

19 Q We won't pursue that further at this time.

20 JUDGE BRENNER: Mr. Sugarman, I would like to
21 take the mid-afternoon break now unless you have a
22 burning question.

23 MR. SUGARMAN: If I could just close up with
24 this Design Report No. 2. It will just be a minute.

25 JUDGE BRENNER: If it will just be a minute,

1 proceed.

2 BY MR. SUGARMAN: (Resuming)

3 Q So your -- while we are on Design Report No.
4 2, Mr. Bourquard, in case the question comes or since
5 the question is part of your testimony or part of
6 Applicant's testimony and has been brought up elsewhere
7 as to what the impacts that were estimated from the pump
8 station on fish at the original location -- that is, the
9 shoreline location on page 22 of Design Report No. 2 --
10 if you would simply read that, the first sentence of the
11 paragraph starting "Impact on fish and wildlife
12 resources."

13 MR. CONNER: We object to this, Your Honor,
14 for the same reason. This is totally remote in time. I
15 think it is nothing but a transparent attempt to
16 introduce ancient history in the form of cross
17 examination. And it was offered under the guise of
18 impeachment.

19 Now, if this is offered as an attempt to build
20 a case by cross examination, we submit that it is wholly
21 irrelevant.

22 JUDGE BRENNER: Well, we didn't state that
23 everything he was going to ask after was impeachment.
24 When I ruled on that, the particular question I ruled on
25 was impeachment. I could ask Mr. Sugarman, but it seems

1 to me the relevance of this is to whether or not as
2 contended in the contention we admitted the change in
3 location is such that there will be a significant
4 increase in adverse impact on the shad and shortnose
5 sturgeon, sticking with the first part of the contention
6 for now. And when you compare things, that is what you
7 do: you compare things. And that is what he is doing.

8 BY MR. SUGARMAN: (Resuming)

9 Q Would you please read the title and the first
10 two sentences of that paragraph?

11 A (WITNESS BOYER) The change that was referred
12 to in the contention is the change from 200 to 245 feet,
13 though, sir.

14 MR. SUGARMAN: May I object, sir, to the
15 witness arguing as counsel? And furthermore, may I
16 state that the witness is clearly wrong. When the
17 contention was submitted in October 1981 the intake was
18 located 200 feet from shore.

19 JUDGE BRENNER: Yes. You did two bad things,
20 Mr. Boyer. One is you took the role of counsel. The
21 other thing is you are wrong. But you can discuss it
22 with your counsel.

23 WITNESS BOURQUARD: Would you tell me what you
24 want me to read?

25 BY MR. SUGARMAN: (Resuming)

1 Q Yes. The first two sentences, the title and
2 the first two sentences of the third paragraph on page
3 22 of Design Report No. 2.

4 A (WITNESS BOURQUARD) "Impact on fish and
5 wildlife resources."

6 Q Would you wait a minute, sir?

7 JUDGE BRENNER: Go ahead. I didn't mean to
8 stop you.

9 MR. SUGARMAN: I just wanted you to hear it.

10 WITNESS BOURQUARD: "The proposed
11 installations are not expected to impose any adverse
12 effect on fish and wildlife resources. At the intake of
13 the Point Pleasant pumping stations screens will be
14 provided to prevent fish in the Delaware River from
15 being drawn into the pumping well."

16 MR. SUGARMAN: Thank you.

17 Did you say you wanted to take a break now?

18 JUDGE BRENNER: Incidentally, for your
19 benefit, Mr. Sugarman, we can catch things while we
20 confer. If we stop the proceeding every time we confer,
21 it would be a problem. In addition, I can assure you
22 that when you are reading things from other documents
23 that we don't have, which makes it a little harder, we
24 will take a look at the transcript to see what it says.
25 And we get the transcript fairly promptly.

1 Beyond that, when things are important they
2 will be in your proposed findings, and then we will be
3 sure to read them. But I appreciate --

4 MR. SUGARMAN: I didn't mean to imply anything.

5 JUDGE BRENNER: I appreciate your courtesy. I
6 just wanted to explain.

7 We will be back at 3:45.

8 (Recess.)

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1 JUDGE BRENNER: Welcome. Before you get
2 comfortable, would you stand there and I will swear you
3 in, please.

4 Mr. Sugarman, why don't you inform us as to
5 what the status is of the Plevyak testimony, given the
6 conversations, and after that you can introduce the
7 witnesses so we know which one is which.

8 MR. SUGARMAN: The situation is this. Mr.
9 Kaufmann and Mr. Emery are familiar with the information
10 in Mr. Plevyak's testimony. However, they are familiar
11 with it mostly through what they have heard from Mr.
12 Plevyak in the course of his duties. In other words,
13 they do not have direct knowledge of it.

14 Mr. Conner is understandably reluctant. And
15 the Staff also wishes to have cross-examination of Mr.
16 Plevyak. And so I am going to withdraw my effort or my
17 original thought that they might adopt and be
18 cross-examined on his testimony. Therefore, it would be
19 necessary to have him separately as a witness.

20 I am going to discuss with Mr. Kaufmann and
21 Mr. Emery after they are finished testifying whether
22 there is some way we can get him in here tomorrow. He
23 has said he cannot, and they explain it in detail.

24 JUDGE BRENNER: They do not have to explain it.

25 MR. SUGARMAN: Well, they also think there may

1 be a problem arranging for him to come to Washington, so
2 we will go to work on that. And otherwise, it would not
3 be a big problem. So we will go to work on that.

4 JUDGE BRENNER: You might be able to work out
5 some stipulations as to some of the facts in there and
6 eliminate others in the meaning of the Plevyak
7 testimony. But that is up to you also after the
8 examination of other witnesses. You can determine again
9 how important Mr. Plevyak's testimony is.

10 But let me make this point for the record.
11 Originally, we were scheduled only to be here this
12 week. Had we followed that schedule, the way things wer
13 going it is very likely that Mr. Plevyak is a
14 nonsubpoenaed witness, or at least one of the witnesses
15 that we were not going to work in out of order, would
16 have been called normally today or tomorrow or perhaps
17 yesterday. We have left it open all week for you to
18 raise that, because we raised the logistical problem
19 certainly today and perhaps even before.

20 So I want to emphasize that if we end up in
21 the Washington area, as has been the consensus, that is
22 not the reason why he is not being taken this week. Had
23 that never occurred, this would probably have been the
24 time he would have had to be available. So none of that
25 has anything to do with this last-minute information

1 that he is now not available to you.

2 MR. SUGARMAN: No. That is correct. And I do
3 not disagree with anything you have said. The only
4 thing I would say is that we did --- originally, he made
5 his plans sometime in advance, and he made his plans
6 when we did not know when during the week we would need
7 him. And he made his plans to be here early in the week
8 and therefore put things off until later in the week.
9 And we did not know that until now.

10 And if there is fault on that on our side, I
11 accept that responsibility in trying to keep track of
12 all the witnesses.

13 JUDGE BRENNER: My point is that had we been
14 advised of a particular problem, we might have attempted
15 to work it out.

16 MR. SUGARMAN: I understand that. I
17 appreciate that.

18 JUDGE BRENNER: Okay. Let's proceed with
19 these two witnesses. And in the future, you can let us
20 know what the situation is with Mr. Plevyak. Now, if
21 you get him in tomorrow, if you can, do so.

22 Mr. Conner, do you have something?

23 MR. CONNER: I had understood that we were to
24 be furnished -- I am not sure what you call it -- but an
25 outline as to the parts that had been stricken or were

1 not applicale and the witnesses' qualifications.

2 JUDGE BRENNER: You have testimony of these
3 witnesses.

4 MR. CONNER: I have only the so-called direct
5 testimony of each.

6 JUDGE BRENNER: That is it. These witnesses
7 have regular prepared prefiled direct testimony. This
8 is unlike the subpoenaed witnesses for which only an
9 outline is furnished.

10 MR. CONNER: Okay. And a statement of their
11 qualifications was the other point.

12 JUDGE BRENNER: Well, that was filed with the
13 testimony. I have got it.

14 MR. CONNER: I do not have it.

15 MR. SUGARMAN: All I can say is that I thought
16 we filed it. I mean we did file it.

17 JUDGE BRENNER: Yes. We received it with the
18 testimony. A resume for Mr. Kaufmann and a resume for
19 Mr. Emery. We will get you copies if you are missing
20 them. As you may recall, on our rulings on the motion
21 to strike, in part, we relied on our review of their
22 qualifications, and we had them before us for that
23 purpose.

24 Speaking of the motion to strike, Mr.
25 Sugarman, I hope you conformed the testimony of Mr.

1 Kaufmann as to the one minor portion which we struck.

2 MR. SUGARMAN: I am afraid, sir, I have
3 neglected to do that. I will do it instantly.

4 JUDGE BRENNER: All right. It is page 17.
5 The heading on effects of construction and the two
6 bullets, if you will, under there. That portion was
7 struck in our oral ruling on October 4, 1982, and the
8 copy being bound into the record should indicate that.
9 I am not worried about their copy, I am only worried
10 about the copy that we are going to bind in in a moment.

11 MR. SUGARMAN: I was going to give the
12 reporter Xeroxes of this copy. So I was going to mark
13 this copy.

14 JUDGE BRENNER: You only need one copy for
15 this purpose for the reporter.

16 MR. SUGARMAN: Yes, I know. It starts, "The
17 effects of construction." Is it those five lines after
18 that section?

19 JUDGE BRENNER: Yes; consisting of two
20 sections.

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1 JUDGE BRENNER: I presume as a courtesy to the
2 witnesses, since they weren't here at some point off the
3 record, you will explain to them why they were stricken
4 and the fact that they are being stricken has nothing to
5 do with the truth of the statements or anything of that
6 nature; it dealt with our view of the issues in
7 controversy before us. I guess I just did what I asked
8 you to do.

9 Whereupon,

10 MICHAEL KAUFMANN and CHARLES EMERY,
11 called as witnesses by counsel for Intervenor, Del-Aware
12 Unlimited, Inc., having been duly sworn by the Chairman,
13 were examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. SUGARMAN:

16 Q Mr. Kaufmann, first would you identify
17 yourself and your occupation for the record, please?

18 A (WITNESS KAUFMANN) My name is Michael
19 Kaufmann. I am the area fisheries manager for the
20 Pennsylvania Fish Commission, with jurisdiction over the
21 southeastern part of the state, including the lower
22 Delaware River drainage and the lower Susquehanna River
23 drainage.

24 JUDGE BRENNER: Excuse me. Mr. Conner, did
25 you have something?

1 MR. CONNER: Have these witnesses been sworn?

2 JUDGE BRENNER: Yes.

3 MR. CONNER: I'm sorry.

4 BY MR. SUGARMAN: (Resuming)

5 Q And Mr. Kaufmann, do you adopt and offer as
6 your testimony the testimony that is set forth next to
7 your name in the offer of the written testimony, the
8 direct testimony?

9 A (WITNESS KAUFMANN) The testimony itself isn't
10 clear in that it doesn't separate out Mr. Emery's
11 testimony from my testimony.

12 Q In all respects, no.

13 A (WITNESS KAUFMANN) But I accept it to the
14 point of if we eliminate the typographic errors in there
15 I accept it.

16 Q And Mr. Emery, do you likewise accept the
17 testimony that is offered on behalf of yourself and Mr.
18 Kaufmann?

19 A (WITNESS EMERY) As Mike said, yes. I haven't
20 had a chance to read all of it yet, but I assume so.

21 Q Thank you.

22 MR. SUGARMAN: This was written by them and
23 typed by us.

24 WITNESS EMERY: So we haven't read it yet.

25 JUDGE BRENNER: You wrote it. When you said

1 you haven't read it, you only meant you haven't read
2 this final typed version.

3 WITNESS EMERY: Well, that is correct. We
4 also transcribed some of the recorder, so we did not
5 write all of it.

6 JUDGE BRENNER: But you authored it. I hate
7 to be picky, Mr. Sugarman, but I hate to put testimony
8 into evidence that witnesses haven't read in case there
9 is some material error in there.

10 MR. SUGARMAN: I appreciate that, but Mr.
11 Kaufmann has been through it all.

12 JUDGE BRENNER: Is that right, Mr. Kaufmann?

13 WITNESS KAUFMANN: I have been through the
14 portion that I prepared.

15 JUDGE BRENNER: Let's do this. We will put it
16 in now, recognizing that in my mind, however you want to
17 word it, there is not a fully adequate assurance that
18 this is the true and correct testimony of the
19 witnesses. In fact, I have got a better idea. We will
20 let them continue testifying but we won't bind it in
21 today, and they are to read it overnight, and any
22 corrections -- typos I'm not worried about reading on
23 the record, but I nevertheless want them hand corrected
24 for the copy that is bound in -- and then if there are
25 any corrections beyond mere typos that are obvious to

1 any reader, they can make those corrections on the
2 record tomorrow.

3 However, as a courtesy to the other parties, I
4 want them apprised of all such corrections at 8:30
5 tomorrow morning in this room here so they can have time
6 to react, just in case there are such corrections. If
7 you see a major correction tonight, perhaps as a
8 courtesy you can get in touch with the other parties
9 tonight, even. I won't require that.

10 MR. SUGARMAN: Very good, sir.

11 JUDGE BRENNER: Subject to that, we would
12 allow the cross-examination on the testimony as we have
13 it to proceed.

14 Mr. Conner?

15 MR. CONNER: I was going to ask to be allowed
16 to conduct voir dire like right now to determine just
17 what they did prepare and what they may not have
18 prepared. I don't really understand what the situation
19 is from their answers.

20 JUDGE BRENNER: Okay, that is fine, and then
21 you could continue beyond that into the substantive
22 cross by yourself also. I'm just not sure Mr. Sugarman
23 has completed everything on his introduction.

24 Have you, Mr. Sugarman?

25 MR. SUGARMAN: Yes.

1 JUDGE BRENNER: Why don't we just pick up with
2 your cross-examination, Mr. Conner, and you can start
3 out as you indicated. I was somewhat confused by one of
4 the answers also.

5 CROSS EXAMINATION

6 BY MR. CONNER:

7 Q Mr. Kaufmann, as you heard me say, I'm not
8 quite sure what your answer meant. Let me ask you:
9 Looking at the document entitled "Direct Testimony of
10 Michael Kaufmann and Charles Emery," did you prepare any
11 of this testimony?

12 A (WITNESS KAUFMANN) Yes.

13 Q Did Mr. Emery prepare any of this testimony?

14 A (WITNESS EMERY) Yes.

15 Q All right. Now, I would ask you, Mr.
16 Kaufmann, to just go through and tell us, subject to
17 correction of typos and so forth, any parts of this,
18 just identify the parts of this which you prepared.

19 A (WITNESS KAUFMANN) Up to page --

20 [Panel of witnesses conferring.]

21 A (WITNESS KAUFMANN) Up to the sentence that
22 says, on page 14 -- it would be the first -- really it
23 is the incomplete paragraph at the top, up to the
24 sentence that says, "If this occurs, one of the six best
25 shad fishing shores on the Delaware River," et cetera,

1 "will be lost.

2 MR. CONNER: I would note parenthetically that
3 my copy does not have a consecutive pagination and that
4 the numbers skip around.

5 BY MR. CONNER: (Resuming)

6 Q Let me ask you this in the simplest way.
7 Looking at the bottom of the pages that you have just
8 responded to, are they numbered as 4, 5, 6, 7, 8, 9, 10,
9 11, 12, 13 -- I withdraw my question. It is not this
10 one.

11 JUDGE BRENNER: Off the record.

12 [Discussion off the record.]

13 BY MR. CONNER: (Resuming)

14 Q Now, did you write all of the questions that
15 appear in those pages?

16 A (WITNESS KAUFMANN) Chuck asked me the
17 questions and I answered them. They were on a tape.

18 Q "Chuck" meaning?

19 A (WITNESS KAUFMANN) Chuck Emery.

20 Q In other words, he knew the questions but you
21 knew the answers?

22 A (WITNESS KAUFMANN) We had some difficulty
23 with the tape machine.

24 Q Well, were they Mr. Sugarman's questions,
25 Del-Aware's questions, or were these ones that you

1 decided were the relevant ones?

2 A (WITNESS KAUFMANN) They were questions that
3 we decided were relevant to the importance of the
4 location of the intake.

5 Q Did Mr. Sugarman or anyone from Del-Aware
6 assist you in preparing these?

7 A (WITNESS KAUFMANN) The questions themselves
8 that Mr. Emery asked me that I answered?

9 Q Right.

10 A (WITNESS KAUFMANN) No.

11 Q How about the answers?

12 A (WITNESS KAUFMANN) No.

13 Q Now, you were on page 14, I believe, when you
14 indicated that this was something that you had not
15 prepared or were starting to go on to it. Would you
16 explain what you meant?

17 A (WITNESS KAUFMANN) Yes. In our testimony, in
18 the preparation of the written testimony, Mr. Emery
19 prepared the segment or at least discussed the segment
20 that is included from about two-thirds of the way up
21 page 14 until the end, and that is the segment that he
22 has indicated he has not completely read yet.

23 Q Well, I was going to come to that in a
24 minute. Do I understand that you both have completely
25 read everything from page 14 back, back to the beginning?

1 A (WITNESS KAUFMANN) We have read it rapidly.
2 I wouldn't say that we have read it word for word, each
3 and every word that is there, that is necessarily
4 correct.

5 Q And you will tell us tomorrow if any of this
6 has somehow been changed from what you originally put
7 down?

8 A (WITNESS KAUFMANN) Yes, and we can change it
9 to have it written exactly as we meant it.

10 Q And you have indicated, as I understand, that
11 Mr. Emery prepared the question and answer appearing on
12 the bottom of page 14 and, I gather, continuing over
13 onto the top of page 15? .

14 A (WITNESS EMERY) What did you ask?

15 Q Mr. Emery, did you prepare this portion of the
16 proffered testimony beginning with the question "What
17 impact will intake have," et cetera, and the answer to
18 it?

19 [Panel of witnesses conferring.]

20 A (WITNESS EMERY) I prepared the answers to the
21 questions, yes.

22 Q I thought you prepared all of the questions.

23 A (WITNESS KAUFMANN) Not all of them, just the
24 ones I answered.

25 Q Who prepared the question, "What impact will

1 the intake have on the immediate intake area?"

2 A (WITNESS KAUFMANN) Mr. Sugarman.

3 Q Who prepared the portion beginning on page 15
4 and 16 beginning with the summation of the facts?

5 JUDGE BRENNER: Excuse me. Give us a moment.
6 We need to pause for a second. Let's go off the record.

7 [Discussion off the record.]

8 JUDGE BRENNER: We are ready to proceed. Do
9 you have the question?

10 WITNESS EMERY: I think I do. The area that
11 the gentleman, that Mr. Conner is talking about --

12 BY MR. CONNER: (Resuming)

13 Q Would you talk in the mike, please? We can't
14 hear you.

15 A (WITNESS EMERY) I'm sorry. The area that you
16 were discussing, the summation of facts on page 15
17 through to page 16 was a collection of notes that I
18 prepared. They were just rough notes on a page that was
19 typed up.

20 Q Mr. Emery, I want to make sure we are on the
21 same wave-length. I was talking about the almost full
22 page, on pages which appear on 15 and 16, entitled
23 "Summation of Facts."

24 A (WITNESS EMERY) That is what I am talking
25 about.

1 Q You prepared all of that?

2 A (WITNESS EMERY) Yes, sir.

3 Q Now, on page 16, there is the word "notes"
4 followed by a series of small paragraphs or notations.

5 A (WITNESS EMERY) They are mine.

6 Q Is there any particular reason they were
7 prepared in that format?

8 A (WITNESS EMERY) I don't want to waste your
9 time or bore you, but when I was putting this together,
10 it was just a collection of random notes, and I was
11 making notes. I did not necessarily know that this is
12 how it was going to be entered into the testimony. It
13 was a collection of notes while we were sitting there,
14 and I was putting these notes together as facts that
15 were coming out at one time, so that is why they are
16 presented in this particular fashion. It is just a
17 collection of notes on my part. So that is why I
18 presented it in this fashion.

19 Q Okay. And that is true to the end of the
20 document?

21 A (WITNESS EMERY) That is correct.

22 Q Mr. Kaufmann didn't participate in any of that?

23 A (WITNESS EMERY) To the end of which document?

24 Q To the end of the document we are talking
25 about, direct testimony of both of you, ending on page

1 19.

2 A (WITNESS EMERY) Ending on page 19? Yes, that
3 is all mine.

4 Q Now going over to the page with no heading on
5 it, which starts out, "Mr. Emery, what techniques,"
6 which is numbered page 1, did you prepare all of this
7 testimony yourself?

8 A (WITNESS EMERY) I prepared the testimony, yes.

9 Q Did you prepare the questions?

10 A (WITNESS EMERY) The questions aren't too
11 clear as to whether or not I prepared them in the sense
12 that I don't think I posed the actual questions. I posed
13 the answers to the questions, yes.

14 Q Are you suggesting the questions were provided
15 after you had given the answers?

16 A (WITNESS EMERY) I think the questions were
17 fitted around the collection of facts that are presented
18 there, yes.

19 Q Has any more been done to this testimony we
20 are looking at right now other than retyping by Mr.
21 Sugarman's office? In other words, has it been edited
22 or reorganized?

23 A (WITNESS EMERY) This is the part I have not
24 read at all yet, sir.

25 Q And you will tell us that tomorrow?

1 A (WITNESS EMERY) That is correct.

2 Q And you will also tell us if any of this has
3 been changed, edited, reorganized from what you wrote
4 for the pages 4 through 19?

5 MR. SUGARMAN: That was 14 through 19, I think
6 you meant to say.

7 BY MR. CONNER: (Resuming)

8 Q I will withdraw the other question and say:
9 Will you tell us tomorrow if you see anything in all of
10 the documents that we have just been talking about that
11 have been edited or reorganized or changed by Mr.
12 Sugarman?

13 JUDGE BRENNER: Mr. Conner, this is getting a
14 bit redundant. That is what I have ordered them to do
15 and that is what we will do tomorrow, so we don't have
16 to ask them if they are going to do it. I have ordered
17 their counsel to have them do it. The witnesses are
18 here and that is what is going to be done.

19 I want to do one housekeeping matter. I want
20 everybody on their copies, and including particularly
21 the copy that is going to be bound into the transcript
22 on the page following 19, I want that page to be
23 renumbered page 20 in hand, the page after that to be
24 renumbered page 21, and then the last page of the
25 testimony, which presently has a "3," to be renumbered

1 page 22, so for findings purposes when we refer to this
2 as testimony of Kaufmann and Emery following transcript
3 page whatever, we will have an even sequence of pages,
4 albeit it starts with page 4.

5 MR. CONNER: May I have just a moment to look
6 at their qualifications? We have the Staff's copy and
7 this was not served upon us. I don't know why. I
8 understood we were to get one.

9 JUDGE BRENNER: Mr. Conner, if you haven't had
10 the chance to read the qualifications before today --

11 MR. CONNER: May I defer this until tomorrow
12 if I have any questions in this area?

13 JUDGE BRENNER: Yes. In other words, even
14 though you wanted your substantive questions now, you
15 can go back anytime you want on qualifications
16 questions. We are going to stop the testimony pretty
17 soon -- I was hoping things would get rolling
18 faster -- at about 4:45 because we have some matters
19 that we want to take up with the parties.

20 MR. CONNER: For what it is worth, I can start
21 now, but it might go faster in the morning, if you just
22 went ahead with the procedural matters now. I will have
23 a better chance to organize this after I have seen their
24 qualifications.

25 JUDGE BRENNER: Okay, we will give you that

1 opportunity.

2 Well, we tried but we didn't get very far, and
3 the reason for trying was to make sure you weren't
4 unduly delayed tomorrow. So we will excuse you now, and
5 we will put you back on the stand when we resume at
6 9 o'clock tomorrow morning; but you have some work to do
7 with your counsel to get to the parties before that in
8 terms of any changes. So you can be excused for now.

9 MR. SUGARMAN: May I have a moment with them
10 before we go on?

11 JUDGE BRENNER: Are they leaving?

12 [Discussion off the record.]

13 JUDGE BRENNER: All right. We have a few
14 miscellaneous matters we wanted to take up. As we have
15 discussed a number of times, we have before us
16 Del-Aware's application for approval of petition to
17 amend contentions. Initially we thought it would be
18 useful in that we might be in a position to rule on that
19 this week on the record. Consistent with that and what
20 we perceived as the immediacy of the time frame, we
21 requested the Staff, contrary to the normal procedure,
22 to provide us with what they had in writing in terms of
23 a response at that time, which they did and which we
24 appreciated, as I hope we made clear then but in any
25 event I want to make clear now.

1 We view this as an advance written draft as
2 kind of an extra courtesy to assist us in our
3 deliberations, which it did because we did in fact meet
4 and discuss it that very evening, as I knew we would.
5 We also indicated we were going to give the Staff an
6 additional opportunity on any oral argument to modify
7 this or supplement it or whatever the Staff wished given
8 the somewhat surprise nature of -- what was no surprise
9 to us but the somewhat surprise nature to the Staff of
10 when we felt we needed it.

11 Now that we have the benefit of the views, we
12 see that with respect to the last of the three proposed
13 contentions, which Del-Aware has called proposed
14 Contention V-24, involving the possible effect of not
15 going ahead with Unit 2 of the proposed Limerick plant,
16 the Staff took a position rather briefly -- but again we
17 recognize that this was an advance draft, so to
18 speak -- that so long as Philadelphia Electric does not
19 intend to withdraw its application to operate Unit 2,
20 that we could not consider the possible situation of not
21 having Unit 2.

22 I think we were pretty clear on the record
23 that we rejected that in and of itself as a sole reason
24 as to why we didn't have to look at Unit 2. Now, that
25 doesn't mean that for other reasons we might determine

1 that the posture of Unit 2 is not such that we should
2 not consider it. I am not precluding that at all. But
3 just the mere fact that Philadelphia Electric says yes,
4 they still intend to build it does not by itself
5 convince us of the proposition stated by the Staff.

6 Therefore, in the event -- and I emphasize in
7 the event -- that we feel we have to look at other
8 possible considerations and the acceptance of the
9 contention under the assumption, for the sake of
10 analysis only at this point, that Unit 2 would not
11 exist, would that present a material change in
12 circumstance such that there is a basis for admitting
13 the contention, the proposition of the contention being
14 because of this change the benefit/cost determination is
15 no longer valid for further reasons given in the
16 contention and in the supporting argument of Del-Aware?

17 It would assist us if the Staff would be
18 willing to provide us its further views on that
19 circumstance. We are not requiring it and the Staff is
20 entitled to express its position as it wishes, but we
21 could use all the help we can get on this as in most
22 things. And given the position the Staff took in its
23 pleading, it did not reach the second proposition. It
24 did recite accurately that the Applicant took that
25 position, but we perceive no analysis by the Staff in

1 the pleading purposes. I don't know, perhaps we might
2 have seen such an analysis in the document beyond the
3 draft and maybe we would have heard on our oral argument.

4 Now that we have had more time, we would
5 appreciate it if the Staff would consider the
6 possibility of taking the position in writing before
7 us. We are not requiring it, and unless you know, we
8 won't ask now for you to commit to do it. But in order
9 to be timely, we would have to receive it sometime next
10 week. We won't order any date earlier than Friday, but
11 it would be very helpful if we could get it before
12 Friday or early Friday so that we could have a chance to
13 deliberate on that before we end up in hearing again on
14 this next week. Although we will all be involved in
15 various hearings next week too, we will find time to do
16 the work. So we would appreciate it if the Staff could
17 consider that.

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1 MS. HODGDON: Thank you. We will do that. We
2 will try to have that by Thursday, but in any case, by
3 Friday.

4 JUDGE BRENNER: Okay. And again, since it is
5 not required, if you change your mind and decide not to
6 file anything, that is fine, too. But if you do that,
7 we would appreciate some word by telephone to my
8 secretary or otherwise.

9 MS. HODGDON: As soon as we have decided not
10 to file, we will so inform you.

11 JUDGE BRENNER: Okay. If you do file
12 something, remember it may be complicated. There is,
13 quite a bit involved, some of which we have alluded to,
14 with Mr. Hansler. There are things cited by the
15 Applicant. We have now received some information by
16 letter from Mr. Hansler for particular years. There is
17 the existing appeal board and licensing board decisions
18 that have some things that arguably may bear upon it and
19 perhaps even the underlying record reference there.

20 The one thing that is time-consuming -- and I
21 want to phrase this diplomatically -- the licensing
22 board decision does not have references that are very
23 helpful to somebody such as myself who is not intimately
24 familiar with everything in the record, and it may be
25 that there are still Staff people around with enough

1 oral history of what was used for the reliance on the
2 findings there so that you could be very helpful in that
3 regard, too, just as a possibility.

4 It may be after reading the decision, that
5 there is nothing there that you want to use in your
6 pleading, which of course would be your decision.

7 (The Board conferred.)

8 JUDGE BRENNER: Judge Morris has something
9 also.

10 JUDGE MORRIS: These remarks I direct to the
11 Staff also. In our discussions of the noise question,
12 we were left with the impression from Dr. Policastro
13 that it was his opinion the noise level which might be
14 measured after the transformers were installed and
15 operating might be significant with respect to
16 background noise at the site boundary. And we also got
17 the impression if that were the case that the Staff
18 might impose some condition or take some action.

19 And this left us a little uncertain as to,
20 first, how a decision would be made by the Staff as to
21 whether or not action would be needed, and, second, what
22 criterion or criteria would be used to make that
23 decision.

24 And the reason that we bring it up is that we
25 are a little uncertain as to what the Board's

1 jurisdiction situation would be under those
2 circumstances.

3 Now, can you enlighten us any on it now? Or
4 should I phrase some further questions?

5 MS. HODGDON: We have also discussed this in
6 much the same way you have, and we are not sure of what
7 the Staff's jurisdiction is there either. We would
8 appreciate any help we can get from you. And we have
9 not reached any conclusions about how that might be done
10 either, although we will let you know as soon as we make
11 some determination about that.

12 JUDGE BRENNER: In your proposed findings you
13 can argue whatever you want about our jurisdiction.
14 However, what we would request is, regardless -- and
15 this really applies to all parties, not just the Staff;
16 the reason we were thinking of the Staff primarily is
17 because of Dr. Policastro's testimony -- but regardless
18 of your views of our jurisdiction to impose such a
19 condition and regardless of your views as to whether you
20 think such a condition is appropriate as distinguished
21 from requiring something before or as distinguished from
22 not requiring anything at all after, and the endless
23 possibilities in between those extremes, we would like
24 to see what such a condition could look like in the
25 event we wanted to impose it.

1 And that would include, as Judge Morris
2 pointed out, the criteria or criterion that would
3 trigger possible mitigation measures and also what the
4 mitigation measure or measures might be and how they
5 would be phrased.

6 Bear in mind, case law and posthearing
7 delegation of issues in controversy and -- well, I will
8 stop there and add that the pertinent inquiry, in part,
9 is whether the discretion in the triggering device for
10 whatever the condition would require has to be precise
11 enough such that posthearing delegation could be
12 permitted, usually, something readily ascertainable over
13 which only unreasonable people would differ -- and that
14 may or may not be difficult -- in drafting such a
15 possible condition.

16 And, in turn, give it your best shot in
17 drafting such a possible condition, but feel free to
18 take a position, for example, that that is your best
19 shot but that you think that your best shot is not
20 precise enough and what consequences would flow from
21 that view; that is, that it is very difficult to draft
22 such a workable condition, and we thought with the
23 benefit of the record and your own experts, including
24 Dr. Policastro, you might be able to think of things.

25 We have some possibilities, in mind, but they

1 are just possibilities, and we have no preconceived
2 notion at this time that such a condition is necessary
3 or desirable either way.

4 JUDGE MORRIS: Let me just add a little
5 addendum that I hope that what Judge Brenner has just
6 said is not misleading in the sense that the Staff will
7 come up with something which, in effect, would be
8 imposed on the Applicant, because in my own mind, at
9 least conceptually, a simple criterion on decibel, for
10 example, might not be the most appropriate action.

11 And I do not think we want to get in the
12 position of imposing a design condition at this stage,
13 so that just in framing possible criterion I think this
14 thought should be kept in mind: that if there is going
15 to be a problem, the Applicant ought to have some input
16 into how that problem might be resolved.

17 (The Board conferred.)

18 JUDGE MORRIS: Judge Brenner points out -- and
19 Mr. Wetterhahn, I will address the remark to you -- that
20 the Applicant, of course, is free to volunteer whatever
21 information it wishes on this subject.

22 MR. WETTERHAHN: I think Mr. Conner was trying
23 to get some information.

24 MR. CONNER: I think that we will look further
25 into this, and instead of being perhaps pennywise and

1 pound-foolish, we might be able to report to the Board
2 or somebody in the very near future something that might
3 moot this entire matter. But at this point in time we
4 simply do not have the information.

5 JUDGE MORRIS: Fine. Thank you very much.

6 MR. SUGARMAN: And I would like to express my
7 hope that the discussion of conditions imposed on the
8 construction does not imply that the Board is assuming
9 or that anybody -- and I know this is probably
10 gratuitous -- but that nobody is assuming that
11 construction is going to take place either.

12 JUDGE BRENNER: Yes. I thought we made very
13 clear what the posture is.

14 MR. SUGARMAN: Absolutely.

15 JUDGE BRENNER: We wanted to cover all of the
16 bases so that after having findings before us, we did
17 not want to be in the position of requesting further
18 assistance. And it was an area in which we felt we
19 could use assistance.

20 MR. SUGARMAN: Absolutely. And I was just
21 suggesting, or I was leading up to a condition which I
22 could suggest.

23 JUDGE BRENNER: I think your position is
24 easier to draft than this other condition.

25 And we understand what you said, Mr. Conner,

1 and I am glad you said it, because we should have
2 emphasized that if something material happens before the
3 proposed finding stage, and hopefully, while we are
4 still in evidentiary hearing, please feel free to bring
5 it to our attention.

6 Mr. Conner.

7 MR. CONNER: I would like to go back to the
8 first matter you discussed about the Staff giving
9 something in writing on the proposed Contention B-24.

10 JUDGE BRENNER: Yes, sir.

11 MR. CONNER: We truly do not understand what
12 in the Board's mind. And perhaps we are reading that
13 contention somewhat differently than the Board is. But
14 my question is, may we also, after reviewing the
15 transcript and the words that have been said, have the
16 right to supplement our answer, which was indeed
17 necessarily given on very short notice?

18 In case, if so, we would file it at the same
19 time the Staff would. I am not saying we would.. I
20 just wanted the opportunity because we had to file this
21 thing on very short notice, but we wanted to give it to
22 the Board promptly.

23 JUDGE BRENNER: Yes, you may.

24 Mr. Sugarman.

25 MR. SUGARMAN: I would like to, in view of the

1 discussions as to whether -- I would like to know
2 whether it would be possible and allowable for me to
3 focus and refine the proposed contention and the basis
4 thereof.

5 JUDGE BRENNER: Yes.

6 MR. CONNER: We have to object. If he is
7 going to change the contention, we do not know what we
8 are responding to, then.

9 JUDGE BRENNER: Well, I am going to allow him
10 to do it in the spirit in which he offered it: focus
11 and refine it in view of the discussion and answers we
12 have had. And we would like to receive that -- I guess
13 we would have to receive it -- by Friday. And Friday
14 would have to be I hope not the end of the day Friday.

15 (The Board conferred.)

16 JUDGE BRENNER: In addition, I want
17 discussions among the parties to take place, primarily
18 from you, Mr. Sugarman, as to the wording of any
19 different contention. But if it expands the scope, as
20 distinguished from refining it, we have got a whole new
21 ballgame and the timing again would have to be
22 considered and so on. We are probably going to be
23 entertaining some argument on it anyway, and I do not
24 have to recite the Allens Creek as to responses to
25 objections to contentions and so on. Most of you are

1 familiar with that. So there will be that kind of
2 opportunity.

3 But, Mr. Sugarman, I want you to give them the
4 wording of any new contention as well as at least orally
5 what you think you mean by it, but certainly the
6 wording, very early next week.

7 MR. SUGARMAN: Yes, sir.

8 JUDGE BRENNER: In fact, let's make it by
9 Wednesday morning over the phone. Wednesday morning is
10 the morning.

11 MR. SUGARMAN: Yes, sir. You want us to give
12 them notice by Wednesday morning.

13 JUDGE BRENNER: I want you to call them up and
14 read your new contention and anything that would form
15 part of the contention and basis, give them word for
16 word as you will file it on Friday to be received on
17 Friday. Anything else in support of it, I am not going
18 to require you to give it word by word, and you will
19 have it between Wednesday and Friday to develop it a
20 little better. But give them the gist of it.

21 I think that I have made very clear that this
22 process just does not work if the parties do not keep
23 talking.

24 MR. SUGARMAN: Yes, sir. If I may, I might
25 say something now that might be helpful to them. In my

1 mind, these three contentions were independently offered
2 but were also related to each other and, therefore, the
3 basis that I asserted for 22 and 23, I intended to have
4 included in considering 24.

5 JUDGE BRENNER: Well, I understand your point,
6 and also you have to understand my point that the first
7 two of those contentions are readily separable to some
8 extent from the last, and we are only addressing further
9 arguments on the last one. That is all we are
10 permitting now.

11 MR. SUGARMAN: I understand that. I am just
12 informing them right now so that they can understand
13 that the bases that were there were related to all
14 three, although -- but I know that right now, and I am
15 trying to give them as much notice as possible.

16 JUDGE BRENNER: Okay. As a housekeeping
17 matter, one of the Del-Aware exhibits only consisted of
18 three pages. It is Del-Aware Exhibit 7 for
19 identification. That, you may recall, is the January 4,
20 1982, document entitled "Developmental Relationship
21 Between Water Discharge and Water Surface Elevation,
22 Delaware River at PPS Site, Point Pleasant,
23 Pennsylvania."

24 I would like to bind it in. And that is the
25 one that has the name of Mr. Steacy, S-t-e-a-c-y, on the

1 third page. I would like to bind it in solely for
2 convenience. I am not changing the evidentiary status
3 of it. It is Del-Aware Exhibit 7 for identification,
4 and we will bind it into the transcript at this point.

5 (The material referred to, Del-Aware Exhibit
6 Number 7, follows:)

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DEVELOPMENT OF RELATIONSHIP BETWEEN WATER DISCHARGE
AND WATER SURFACE ELEVATION

January 4, 1982.

DELAWARE RIVER AT PPPS SITE
POINT PLEASANT, PENNSYLVANIA

Water Surface Elevation. Employees of Neshaminy Water Resources Authority determine water surface elevation, as needed, by using a surveying instrument and backsighting on a bench mark at the PPPS site.

Water Discharge Determination. The following discharge information was used for this analysis:

1. Current meter discharge measurements made by the USGS of flows in the Delaware River and the Raritan Canal on September 12, 1981 at the Park Bridge at Lumberville, Pa., 1.5 miles downstream from the PPPS site. Also, a discharge measurement was made of Paunacussing Creek, which drains the only major contributing watershed on this 1.5 mile reach.
2. Numerous simultaneous determinations of water surface elevations at the PPPS site and water discharge at the USGS gaging station at Trenton, N. J., 22.7 miles downstream from the PPPS site. Where necessary, the discharge figures were corrected for change in storage in the 22.7 miles of channel and for the difference in drainage area. These determinations cover the period October 1, 1980 to October 23, 1981 and include the drought of 1980 when flows at Trenton, N. J. were as low as 2,770 cfs.
3. The Kingwood Township, N. J. Flood Insurance Study of May 4, 1981 provided water surface elevation and water discharge figures for the PPPS site which were calculated for floods of 10 year, 50 year, 100 year and 500 year recurrence interval.

Those data used for this analysis are tabulated below.

Tabulation of Available Data

<u>Item No.</u>	<u>Source of Data</u>	<u>Date</u>	<u>PPPS W. S. Elev. (ft.)</u>	<u>PPPS Discharge (cfs)</u>
1	USGS Measurement	9/12/81	71.27	3,640
2	Trenton Gage	10/ 1/80	70.63	2,700
3	Trenton Gage	5/ 1/81	73.10	11,800
4	Trenton Gage	5/ 4/81	72.83	10,000
5	Trenton Gage	5/ 6/81	72.42	8,600
6	Trenton Gage	5/ 8/81	72.13	7,300
7	Trenton Gage	5/11/81	71.76	5,900
8	Trenton Gage	5/15/81	77.48	33,800
9	Trenton Gage	5/18/81	77.79	37,200
10	Trenton Gage	5/20/81	75.25	20,200
11	Trenton Gage	5/22/81	73.88	14,900
12	Trenton Gage	5/25/81	72.92	9,720
13	Trenton Gage	5/27/81	72.47	8,350
14	Trenton Gage	5/29/81	72.30	7,790
15	Trenton Gage	10/ 9/81	70.82	3,300
16	Trenton Gage	10/14/81	70.91	3,210
17	Trenton Gage	10/21/81	70.70	2,970
18	Trenton Gage	10/23/81	70.93	2,850
19	Kingwood FIS	5/ 4/81	93.0	170,000
20	Kingwood FIS	5/ 4/81	99.3	248,000
21	Kingwood FIS	5/ 4/81	101.9	284,000
22	Kingwood FIS	5/ 4/81	108.1	376,000

Rating. The above data were plotted on semi-log graph paper. A rating curve based on these points has been drawn and is identified by the date 12/10/81. A print of this graph is attached.

Minimum Water Level. For maximum withdrawal by the Point Pleasant Pumping Station, the minimum flow past intake will be 3000 cfs. The corresponding water surface elevation is 70.8, but to be conservative, use Elevation 70, which relates to a flow of 1400-1500 cfs.

Normal Water Level. According to Penna. Water Resources Bulletin No. 12 (page 92), the River flow 50% of the time is 8,000 cfs which flow will have a water surface elevation of 72.4 at the intake site.

Maximum Water Level. The most recent pertinent F.I.S. is for Kingwood Township, Hunterdon County, N.J. and is dated May 4, 1981. The computed water surface elevation for a 100 Year Flood is 101.9 at the intake site, to which 1.0 foot is added for allowable floodway encroachment to obtain a water surface elevation of 102.9, which has been rounded to Elevation 103.

Robert E. Steacy

1 JUDGE BRENNER: We are prepared to adjourn.
2 The only other matter is we are still working out
3 logistics as to the site visit. We have been discussing
4 this off the record, and I do not need belabor it on
5 the record. But perhaps tomorrow morning during one of
6 the breaks we can huddle, so to speak, and figure out
7 what the logistics are and who is going and where we
8 will meet and what the mode of transportation during the
9 site visit will be.

10 All right, if there is nothing else, we will
11 be adjourned until 9:00 o'clock tomorrow morning.

12 (Whereupon, at 4:55 p.m., the hearing in the
13 above-entitled matter was adjourned, to reconvene at
14 9:00 a.m. on Friday, October 8, 1982.)

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NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the matter of: Philadelphia Electric Company (Limerick Generating
Station Units 1 and 2)

Date of Proceeding: October 7, 1982

Docket Number: 50-352 OL & 50-353 OL

Place of Proceeding: Norristown, Pennsylvania

were held as herein appears, and that this is the original transcript
thereof for the file of the Commission.

Ray Heer

Official Reporter (Typed)

Ray Heer

Official Reporter (Signature)