

(1977). Such practical foreclosure of "action to avoid" environmental impacts would be inconsistent with the teachings of Calvert Cliffs. This Board, therefore, proceeded to avoid such a result by insuring that those environmental impacts raised by Del-AWARE which merit full consideration in an EIS are, in fact, considered to the extent they would be considered in an EIS prior to action which would render attempts to avoid or mitigate such impacts meaningless.

In order to determine which contentions raised by Del-AWARE presented "substantial environmental issues" requiring consideration in or at a par with that in an EIS prior to the commencement of construction, the Board has relied on an allocation of burdens between Del-AWARE and the Applicant. Under the Commission's regulations governing proceedings on license applications, the applicant had the burden of proof on any admitted contentions. (10 C.F.R. § 2.732). In this particular proceeding, with respect to the NEPA component, Del-AWARE should bear a somewhat lesser burden than that imposed on a petitioner who seeks to show that an agency "finding of no significant impact" with respect to proposed agency action is in error, and that an EIS must be prepared. Under that test, the petitioner must simply allege fact which, if shown to be true, would establish the existence of a "substantial environmental issue". Del-AWARE's burden here should be lighter as here no such negative finding has yet been made. Once Del-AWARE has met its burden, Applicant, must establish by a preponderance of the evidence that no such impact will arise and that, accordingly, an EIS is not necessary for

that impact prior to construction. Hiram Clarke Civic Club, Inc. v. Lynn, 476 F. 2d 421,425 (5th Cir. 1973); Save Our Ten Acres v. Kreger, 472 F.2d 463. 466-67 (5th Cir. 1973).

Pursuing the analogy, Del-AWARE met its burden when we accepted its contentions. Our review of the record, then, must determine whether PECO has satisfied its burden of showing that formal NEPA consideration via an EIS is not warranted by having carried its burden to show that no significant impact will occur. Absent such a finding, the Board must act to preclude a permit to operate LGS utilizing the facility.

ANALYSIS

In essence, the Board has had to evaluate the potential effects of the proposed intake in the Delaware River at Point Pleasant, taking into account a number of variables, each of which is subject to some uncertainty in predictive ability, to some extent because of the nature of predicting, and to some extent because of the inadequacy of data.

The ultimate question is the extent to which the intake, in operation, is likely to adversely impact on American Shad and shortnose sturgeon. The subsidiary elements in determining this evaluation are, in logical sequence, the presence of shad and shortnose sturgeon at times that they would be vulnerable to entrainment and/or impingement in the intake, the time of vulnerability, and the likely characteristics of the intake that would increase or decrease the extent of loss. The latter factor includes such matters as the location and operation of the intake with respect to ambient water flow, and therefore, the direction and speed of the flow of the water in the area of the intake, and characteristics of the intake itself as it operates in relationship to the ambient water, e.g., its