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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Gary J. Edles
Dr. Reginald L. Gotchy

September 26, 1984
(ALAB-785)

In the Matter of	
PHILADELPHIA ELECTRIC COMPANY	Docket Nos. 50-352 50-353
(Limerick Generating Station, Units 1 and 2)	

DECISION

D502

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Robert J. Sugarman, Philadelphia, Pennsylvania, for intervenor Del-Aware Unlimited, Inc.

Troy B. Conner, Jr., Mark J. Wetterhahn, and Robert M. Rader, Washington, D.C., for applicant Philadelphia Electric Company.

Ann P. Hodgdon, Michael N. Wilcove, and Benjamin H. Vogler for the Nuclear Regulatory Commission staff.

DECISION

I. Introduction and Summary

This case concerns an application by Philadelphia Electric Company (the applicant or PECo) for an operating license for its Limerick Station, Units 1 and 2. All issues in this appeal involve the applicant's effort to use the Delaware River to provide supplementary cooling water for

the plant.[1] The appellant is Del-Aware Unlimited, Inc. (Del-Aware), an organization with members who live near the area of the Delaware River at issue here. Although it litigated several contentions concerning the environmental impact of using the Delaware River to provide supplementary cooling water, other similar issues it sought to raise were excluded. Following a hearing on the admitted contentions, the Licensing Board concluded that there would be no adverse environmental impact from the use of Delaware River water for the Limerick plant.[2]

Del-Aware's challenges on appeal from the Board's disposition of its various contentions can be divided into four broad categories. First, Del-Aware attacks the Board's decision to hold hearings on its contentions before the NRC staff issued its environmental impact statement. Second, it disputes the Board's determination to exclude certain contentions from consideration at the hearing. Third, it objects to the Board's disposition of those issues actually considered. Fourth, it claims that various recent developments warrant remand to the Board for consideration

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[1] Various issues unrelated to the supplementary cooling water system were recently decided by the Licensing Board in LBP-84-31, 20 NRC ___ (Aug. 29, 1984). Still other issues remain pending.

[2] LBP-83-11, 17 NRC 413 (1983).

of alternatives to the use of Delaware River water. PECo and the NRC staff oppose the appeal.

We affirm the Board's decision on all but two issues. As explained in more detail below, Del-Aware must be given an opportunity to formulate, promptly and in accordance with 10 C.F.R. § 2.714, certain new contentions. They are to be based on the staff's now issued final environmental statement (FES), and should concern (1) the impact of the supplementary cooling water system on the salinity of the Delaware River, and (2) the system's impacts on the Point Pleasant Historic District.

II. Background

Like most electricity generating plants, Limerick will require a substantial amount of water for operation. As the project stands now, PECo intends to draw cooling water primarily from either the adjacent Schuylkill River or the nearby Perkiomen Creek. When water from these sources is inadequate, PECo intends to supplement it by drawing cooling water from the Delaware River and transporting it to the plant through a series of pipelines and pumping stations. This has been termed the "river-follower" method of supplementary cooling. The withdrawal of water from the Delaware River for use at Limerick is part of an overall venture known as the Point Pleasant Diversion (PPD) project, which is to provide water for the Neshaminy Water Resources

Authority (NWRA) (serving Bucks and Montgomery Counties, Pennsylvania), as well as for PECo's use.[3]

The lengthy history of this project is set forth in several earlier NRC decisions.[4] We will not rehearse here the genesis of the river-follower method, except as necessary for the discussion of the issues now before us on appeal. A brief chronology of events pertinent to this proceeding, however, is useful.

A. AEC/NRC and DRBC Reviews

The allocation of Delaware River water among conflicting potential uses, such as the Point Pleasant Diversion project, is determined by the Delaware River Basin Commission (DRBC). This is a regional entity created by an intergovernmental compact and ratified by joint

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[3] The project gets its name because the intake from the Delaware River is located near Point Pleasant, Pennsylvania. Water is to be drawn from the Delaware River and pumped through a transmission main to the Bradshaw Reservoir. Beyond the reservoir the flow will be divided. A portion of the water will flow to the Neshaminy Creek watershed where it is to be used as part of the municipal water supply for NWRA and for low flow augmentation for water quality control. The rest of the water will be used at Limerick. It will flow via pipeline to the East Branch of the Perkiomen Creek. From the East Branch the water will travel into the main stream of the Perkiomen. A final pumping station will transmit the water via a line from an intake on the Perkiomen to the Limerick plant. See map in Appendix A.

[4] See, e.g., LBP-74-44, 7 AEC 1098 (1974); ALAB-262, 1 NRC 163 (1975).

resolution of Congress.[5] The Commission is comprised of the governors of Delaware, Pennsylvania, New York, and New Jersey, plus a federal representative. The Compact requires the DRBC to prepare, and from time to time to revise, a comprehensive plan for the development and use of the water resources of the Delaware River Basin. Federal agencies are precluded from taking action that "substantially conflict[s]" with such comprehensive plan when adopted by the DRBC with the concurrence of the federal representative.[6]

The pumping station at Point Pleasant was originally approved by the DRBC and added to the comprehensive plan in 1966. PECo, which filed its application to construct Limerick in 1970, and NWRA requested DRBC approval for inclusion in the comprehensive plan that same year (1970). In 1973, the DRBC issued a final environmental impact statement on the proposal and tentatively granted approval to PECo to withdraw water from the Delaware River, subject to certain flow restrictions. The DRBC also indicated that

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[5] See DRB Compact, Pub. L. No. 87-328, 1961 U.S. Code Cong. & Ad. News (75 Stat. 688) 775.

[6] Id., § 15.1(s)1, 1961 U.S. Code Cong. & Ad. News at 807-08.

the river-follower method was one of three available options for effecting the withdrawal and that it would reach a final decision on the matter at a later time.

A licensing board authorized the issuance of a construction permit to PECo in 1974, but excluded the river-follower method as a bona fide alternative for providing supplementary cooling water.[7] Although the Atomic Energy Commission's staff (predecessor to the NRC) had prepared a final environmental impact statement for Limerick's construction permit application, the Board found that the environmental impacts of the river-follower method had not been adequately considered. On appeal, we disagreed and concluded that the consideration of this alternative was adequate, noting that it would add no environmental "costs" but might only reduce the "benefits" for economic reasons.[8] The U.S. Court of Appeals for the Third Circuit affirmed our decision.[9]

In 1979, PECo and NWRA filed applications with the DRBC to obtain final approval for construction of their respective portions of the Point Pleasant Diversion pumping

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[7] LBP-74-44, supra, 7 AEC at 1128.

[8] ALAB-262, supra, 1 NRC at 189-97, 199-205.

[9] Environmental Coalition on Nuclear Power v. NRC, 524 F.2d 1403 (3d Cir. 1975).

stations and transmission mains. These applications reflected a downscaled version of the project, as tentatively approved earlier by the DRBC.[10] The DRBC once again performed an environmental review and in August 1980 prepared an "environmental assessment" with a "negative declaration." In other words, the DRBC found no significant environmental impacts from the project and thus no need for another environmental impact statement. It granted final approval to PECo's and NWRA's applications in 1981. Under a condition imposed by the DRBC, however, PECo may not withdraw cooling water from the Delaware River when the flow at Trenton, New Jersey, is less than 3,000 cubic feet per second (cfs), unless PECo releases from offstream storage an amount of water equal to that it withdraws. The DRBC's decision was challenged in federal court and upheld.[11]

PECo filed its operating license application with the NRC in 1981. The Commission published a notice of

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[10] The original plans called for a maximum total withdrawal of 150 million gallons of water per day (mgd). The new plan sought withdrawal of only 95 mgd -- 46 mgd for Limerick and 49 for NWRA.

[11] Delaware Water Emergency Group v. Hansler, 536 F. Supp. 26 (E.D. Pa. 1981), aff'd, 681 F.2d 805 (3d Cir. 1982) (hereafter "Hansler"). The district court noted the several environmental impact statements that had already been prepared in connection with this project, including that of the DRBC in 1973, the AEC in 1973, and the Soil Conservation Service of the U.S. Department of Agriculture in 1976. Id. at 33-34.

opportunity for hearing, and the Licensing Board held a special prehearing conference to consider petitions for intervention. In an order following the conference, the Board, inter alia, admitted Del-Aware as a party to the case and accepted several of its contentions for litigation.[12]

The Licensing Board also made a number of other determinations pertinent to this appeal. First, it concluded that, absent a showing of sufficiently changed circumstances since the construction permit was issued, it would not relitigate environmental matters that were considered in the construction permit proceeding.[13] On a

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[12] LBP-82-43A, 15 NRC 1423, 1440-41, 1479 (1982). As pertinent here, those contentions are:

> Contention V-15 and V-16a (in part) --
>
> > The intake will be relocated such that it will have significant adverse impact on American shad and short-nosed [sic] sturgeon. The relocation will adversely affect a major fish resource and boating and recreation area due to draw-down of the pool.
>
> Contention V-16a --
>
> > Noise effects and constant dredging maintenance connected with operations of the intake and its associated pump station will adversely affect the peace and tranquility of the Point Pleasant proposed historic district.

[13] Id. at 1458-64. The Board based this conclusion on
(Footnote Continued)

related point, the Board also concluded that it lacked jurisdiction to consider "changes in impacts of construction resulting from changed circumstances."[14] In doing so, the Board stressed that the Notice of Opportunity for Hearing in this proceeding limited its authority to consideration of only matters relating to the proposed operation of the plant.[15] The Board thus distinguished construction impacts from "operational impacts of construction changes."[16]

Second, the Board ruled that it would consider the total environmental impacts of the portions of the project to be used jointly by PECo and NWRA -- i.e., the Point Pleasant intake and pumping station, the transmission main to the Bradshaw Reservoir, and the reservoir itself.[17] It would not consider, however, those portions of the water

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(Footnote Continued)
its understanding of the scope of review required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, at the operating license stage. Id. at 1461.

[14] Id. at 1476.

[15] Id. at 1477.

[16] Id. at 1476 (emphasis added). Among the changes alleged by Del-Aware and noted by the Board were a change in the location of the intake structure at Point Pleasant (from the shoreline to farther out into the river); the reported discovery of snortnose sturgeon, an endangered species, in the river since the conclusion of the construction permit proceeding; and the recent eligibility of the Point Pleasant Historic District for listing in the National Register of Historic Places. Id. at 1461, 1476.

[17] Id. at 1472.

supply system to be used exclusively by NWRA -- i.e., the transmission main from the Bradshaw Reservoir to the north branch of the Neshaminy Creek, the north branch water treatment plant, and the transmission mains from the treatment plant.[18]

Third, the Board determined that section 15.1(s)1 of the DRB Compact precluded it from reevaluating the DRBC decision allocating water to Limerick via the river-follower mode.[19] This provision bars federal action that substantially conflicts with the DRBC's comprehensive plan, of which water allocation is a principal part. Del-Aware's proposed contention V-16 concerned the Diversion's assertedly adverse effect on water quality in the Delaware River -- specifically an increase in salinity. Because salinity is a function of total water withdrawal and thus allocation, the Board reasoned, this was a matter committed to the DRBC's discretion. The Board therefore refused to admit the contention.[20] It noted, however, that even in the

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[18] Id. at 1473.

[19] Id. at 1469. The Board noted, however, that the Compact did not bar consideration of all environmental issues arising due to the Diversion project -- just those relating to water allocation. Ibid.

[20] Id. at 1484-85. Licensing Board Memorandum and Order of July 14, 1982 (unpublished), at 18-19; LBP-82-72, 16 NRC 968 (1982).

absence of the statutory bar, Del-Aware would have a "heavy burden" in showing why any NRC reliance on the DRBC's salinity analysis was improper or unjustified.[21]

Finally, because NWRA and PECo were soon to begin construction of the Point Pleasant Diversion, the Board decided to review the environmental impacts of its operation on an expedited basis -- even before the staff completed its draft environmental statement. The Board believed that its consideration of Del-Aware's contentions, particularly the need for mitigation of potential adverse operating impacts resulting from or exacerbated by the changes, might be compromised if undertaken after the start of construction.[22] As a result, hearings on Del-Aware's contentions were held in October 1982, some eight months before the issuance of the staff's draft environmental impact statement.[23]

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[21] LBP-82-43A, supra, 15 NRC at 1485. See generally id. at 1464-70.

[22] Id. at 1479-80. See Memorandum and Order of July 14, 1982, supra, at 15-18; LBP-82-92A, 16 NRC 1387 (1982).

[23] NWRA began construction at Point Pleasant on December 15, 1982, but construction has subsequently been suspended. See Applicant's Notice (Oct. 28, 1982). See also p. 61, infra.

As noted, the NRC staff issued its draft environmental statement on the Limerick operating license in June 1983. The final environmental statement (FES) was issued in April 1984.

The Board issued its partial initial decision in March 1983. It summarized its conclusions as follows:

> On the basis of the record before it, the Board finds contrary to the contention of the intervenor, that there would be no significant adverse impact on the populations of American shad and shortnose sturgeon in the Delaware River as a result of operation of the presently proposed Point Pleasant intake. The Board also finds that there is no evidence that the proposed intake would have an adverse impact on recreational activities in the Delaware River.
>
> The Board finds that noise from operation of the intake as it is presently proposed could have a significantly adverse impact on the Point Pleasant proposed historic district. The Board, in its order, is imposing a condition which requires that a determination be made, if the intake is built, as to whether there are such significant noise impacts and, if so, requires that such impact be minimized. The Board concludes that after any necessary noise mitigation measures have been undertaken, operation of and maintenance for the proposed intake and pumping station would not have a significantly adverse effect on the proposed historic district.[24]

This appeal followed.[25]

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[24] LBP-83-11, supra, 17 NRC at 416.

[25] The Licensing Board issued at least 10 orders and decisions dealing with the supplementary cooling water system at Limerick. Many of these ruled on Del-Aware's numerous, belated efforts to litigate new or assertedly new contentions on this subject. Del-Aware's arguments on appeal, however, relate almost exclusively to the Licensing Board's Special Prehearing Conference Order, LBP-82-43A, and its partial initial decision, LBP-83-11. We will discuss or note the Board's other orders and rulings only as pertinent to the resolution of particular arguments on appeal.

B. U.S. Army Corps of Engineers Review

In response to a request from NWRA for a permit authorizing construction of the intake structure, the United States Army Corps of Engineers examined those environmental matters that had arisen since the DRBC's 1981 decision and its affirmance by the court in Hansler.[26] Among the new matters evaluated, insofar as they are pertinent here, were: (1) movement of the intake system from the shore bank into the channel of the Delaware River; (2) a determination by the Advisory Council on Historic Preservation that the village of Point Pleasant was eligible to be placed on the Historic Register; (3) the assertion that shortnose sturgeon had been seen in the area near Point Pleasant; and (4) salinity and ground water studies performed by or for the DRBC.[27] Following its environmental evaluation, the Corps issued the permit on October 25, 1982.

Del-Aware challenged the Corps decision in federal district court, raising issues similar to those presented on appeal to us. The court decided, at least for the purpose of denying a preliminary injunction, that the Corps of

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[26] See note 11, supra.

[27] See Del-Aware Unlimited, Inc. v. Baldwin, No. 82-5115, Tr. 144[illegible] (E.D. Pa. Dec. 15, 1982), aff'd, 720 F.2d 661 (3d Cir. 1983), cert. denied, ___ U.S. ___, 79 L.Ed 2d 679 (1984) (hereafter "Baldwin"). (The district court's opinion was issued from the bench.)

Engineers had adequately considered the environmental effects of moving the intake on salinity, the shad and shortnose sturgeon, and recreation.[28] It also found that the historic character of the area had been properly taken into account.[29] The court observed:

> A study of the complaint in the Hansler case demonstrates that it was wide ranging and touched upon almost all the issues which are raised here as if they were new.[30]

C. State and Local Activity

Developments on several fronts at the state and local level have occurred in connection with PECo's Limerick facility since the record in this proceeding was closed.[31] Del-Aware asserts that they have a bearing on this appeal, and it has filed two motions essentially seeking that we set aside the Licensing Board's decision on this basis. We discuss and rule on the motions in Part III.D. of this opinion. The various legal actions, most of which are ongoing, are summarized below.

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[28] Id., Tr. 1444, 1450-53.

[29] Id., Tr. 1446-50.

[30] Id., Tr. 1444.

[31] These developments have been brought to our attention by both Del-Aware and PECo.

1. Pennsylvania Public Utility Commission

In 1983, the Pennsylvania Supreme Court upheld a decision by the Commonwealth's Public Utility Commission (PUC) that withheld approval of PECo's request to issue additional securities to finance Unit 2.[32] In two other recent decisions, the PUC has rejected PECo's new financing proposals for Limerick.[33] Pending before the PUC is also an investigation of the need for Unit 2.[34]

Because a variance from local zoning ordinances is required, PECo sought approval from the PUC to construct the pumphouse at the Bradshaw Reservoir. In a December 1983 decision, an administrative law judge approved PECo's application to build the pumphouse, but with only one of the four pumps requested. A second pump was authorized, pending the results of a one-year program to monitor the effects of

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[32] Pennsylvania Pub. Util. Comm'n v. Philadelphia Electric Co., 501 Pa. 153, 460 A.2d 734 (1983).

[33] Securities Certificate of Philadelphia Electric Co. in the matter of the Limerick Revolving Credit/Term Loan not in excess of $1,100,000,000, No. S-834987 (Pa. P.U.C. Dec. 23, 1983); Limerick Nuclear Generating Station Investigation, No. I-80100341 (Pa. P.U.C. Dec. 23, 1983).

[34] See NRC Staff Response to Motion by Del-Aware to Set Aside the Partial Initial Decision (Aug. 27, 1984), Attachment.

flooding and erosion.[35] This decision is apparently awaiting further review by the PUC itself.[36]

2. Pennsylvania Department of Environmental Resources

In September 1982, the Pennsylvania Department of Environmental Resources (DER) issued permits to PECo and NWRA for certain construction and maintenance activities in conjunction with the Point Pleasant Diversion project. Del-Aware appealed DER's action before the Commonwealth's Environmental Hearing Board. In an extensive opinion, the Board concluded that DER had not abused its discretion in issuing the permits and had not failed to give adequate consideration to alternatives to PECo's part of the project.[37] It remanded the matter, however, for DER to impose certain technical conditions on the involved permits.[38]

3. Bucks County

The citizens of Bucks County voted in May 1983 to withdraw from that part of the PPD project involving NWRA.

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[35] Application of Philadelphia Electric Co., No. A-00103956 (Pa. P.U.C. Dec. 12, 1983) (ALJ Kranzel).

[36] See Del-Aware's Motion to Set Aside Based on New Evidence (Aug. 6, 1984) at 3-4.

[37] Del-Aware Unlimited, Inc. v. Pennsylvania, Nos. 82-177-H and 82-219-H, slip op. at 149 (Pa. E.H.B. June 18, 1984).

[38] Id. at 152, 154, 155.

Subsequently, a majority of the Bucks County Commissioners notified PECo of its "termination" of the contract between PECo and NWRA for the operation of the Point Pleasant Pumping Station.[39] PECo and others have brought suit in the Bucks County Court of Common Pleas to enjoin Bucks County from terminating its participation in the Point Pleasant project. A recent decision of the court dismissed the defendants' preliminary objections to the complaint.[40] The litigation, however, continues, and work on the project is apparently suspended.[41]

III. Discussion

As indicated earlier, Del-Aware's challenges to the Licensing Board's determinations fall broadly into four categories -- the Board's decision to hold early hearings on the environmental contentions; its determination that certain matters need not be considered; its disposition of

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[39] Letter from T.B. Conner, Jr., to Appeal Board (June 2, 1983).

[40] Sullivan v. County of Bucks, No. 83-8358-05-5 (Bucks Co., Pa., May 29, 1984).

[41] Letter from R.J. Sugarman to Appeal Board (May 15, 1984), treated as a motion, per Appeal Board Order of May 17, 1984 (unpublished).

those issues that were considered; and its asserted refusal to consider alternatives to the Point Pleasant Diversion project in light of recent developments. We discuss these matters in turn.

A. The Early Hearings

Construction permit proceedings for Limerick, including judicial review, were completed by 1975. PECo had all necessary NRC authorizations in connection with construction of the plant. Nonetheless, construction of the Point Pleasant Diversion had not yet begun at the time PECo filed its operating license application. Given that happenstance, the Licensing Board decided to conduct early hearings on Del-Aware's supplementary cooling water contentions so that it might have a realistic opportunity to consider any actions necessary to mitigate possible adverse environmental effects before construction began.

Del-Aware argues, however, that the Board erred in conducting hearings on its environmental contentions before the staff had issued either its final or draft environmental impact statement. Del-Aware claims such hearings violated both the Commission's own regulations and the National Environmental Policy Act (NEPA). Further, Del-Aware charges that the premature hearings prejudiced the staff's ultimate evaluation of environmental issues by requiring it to take a tentative position, and compromised Del-Aware's participation by requiring it to develop its own environmental

record from scratch. Del-Aware asserts that the staff's testimony must be stricken.

Although we agree that the Board did not act in literal accordance with agency regulations, we find no prejudice to Del-Aware resulting from the conduct of early hearings. We also find no violation of NEPA. Thus, we decline to strike the staff's testimony and to upset the Board's ruling on those grounds.

The pertinent regulation states:

> In any proceeding in which a draft environmental impact statement is prepared pursuant to this part, the draft environmental impact statement will be made available to the public at least fifteen (15) days prior to the time of any relevant hearing. At any such hearing, the position of the Commission's staff on matters covered by this part will not be presented until the final environmental impact statement is furnished to the Environmental Protection Agency and commenting agencies and made available to the public. Any other party to the proceeding may present its case on NEPA matters as well as on radiological health and safety matters prior to the end of the fifteen (15) day period.[42]

From the clear terms of the regulation, there is no question that it accords members of the public at least 15 days notice of the contents of the staff's draft environmental impact statement before litigation of such issues begins. The regulation also protects the staff against the need to defend any of its environmental determinations until the

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[42] 10 C.F.R. § 51.52(a) (1982) (emphasis added).

final environmental statement is prepared and circulated. Thus, in the usual case, environmental hearings await the preparation and circulation of the staff's FES.[43]

The fact that the Board departed from that course and the terms of the regulation, however, does not mean that the Board's action was ill-advised in the circumstances or warrants remedial action. We recognize that an agency must ordinarily adhere to its own rules and established practices. Nonetheless,

> "[i]t is always within the discretion of . . . an administrative agency to relax or modify its procedural rules adopted for the orderly

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[43] See, e.g., Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539, 546 (1975).

Since the Licensing Board held the hearings in question and issued its partial initial decision, the Commission has substantially amended its environmental regulations, 10 C.F.R. Part 51. See 49 Fed. Reg. 9352 (1984). Our decision, of course, must necessarily focus on the propriety of the Board's actions pursuant to the regulations as they existed in 1982. We note, however, that, while the new counterpart to former section 51.52(a) eliminates the 15-day advance notice of the DES, it makes clear that the FES is to precede the hearing on environmental issues and that the staff "may not offer the final environmental impact statement in evidence or present the position of the NRC staff on matters within the scope of NEPA and this subpart" until the FES is filed with EPA and offered for comment to other agencies and the public. Id. at 9396 (to be codified at 10 C.F.R. § 51.104(a)(1)) (emphasis added). See id. at 9365.

> transaction of business before it when in a given case the ends of justice require it."[44]

It is plainly apparent that the Licensing Board believed the "ends of justice" required early hearings on the Point Pleasant Diversion. We have no cause to disagree. Further, we see no prejudice to any party as a result of the procedures the Board employed.

To begin with, the Board stressed that at the early hearing it sought only an evaluation of certain specific impacts. It explicitly recognized that resolution of the ultimate cost/benefit balance under NEPA must await the issuance of the staff's environmental statement.[45] The Board went ahead with early hearings on Del-Aware's contentions because it was

> concerned that some of the contentions which allege impacts after operation of the supplemental cooling water system could be rendered substantially moot prior to consideration of their merits by virtue of the construction of the intake and reservoir. [The Board was] also concerned that the Applicant will incur the time and expense of major construction work not previously reviewed in a licensing proceeding which may later have to be undone in whole or in part in the event [it were to] find a change in location or design is

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[44] American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970), quoting NLRB v. Monsanto Chemical Co., 205 F.2d 763, 764 (8th Cir. 1953).

[45] Memorandum and Order of July 14, 1982, supra, at 17-18; LBP-82-43A, supra, 15 NRC at 1480.

> necessary to mitigate impacts which would arise from operation.[46]

The Board reiterated these concerns in responding to staff objections to the early hearing.[47] Moreover, for the Board "to wait to hear these issues, quite possibly until construction is completed and certain actions which might minimize environmental harm are no longer feasible[,] . . . [might] appear to violate at least the spirit of NEPA . . . ."[48] The Board's decision to move forward with the hearing was thus reasonably grounded in its legitimate desire to avoid the same potential adverse environmental impacts that prompted Del-Aware's interest in the proceeding in the first place.

We reject Del-Aware's assertion that the failure of the Licensing Board to await the FES placed an unfair burden on Del-Aware to develop its own evidentiary record from scratch. Although the staff did not prepare a formal final or draft environmental impact statement before the hearing, it prepared and filed its testimony in advance. Of course, Del-Aware was served with this testimony, and all parties engaged in what the Licensing Board termed "three months of

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[46] LBP-82-43A, supra, 15 NRC at 1476. See id. at 1480.

[47] Memorandum and Order of July 14, 1982, supra, at 3-4.

[48] Id. at 15.

intensive discovery."[49] Moreover, the issues Del-Aware raised have been the subject of administrative and judicial exploration for more than a decade, and Del-Aware has been an active participant in at least a portion of the earlier litigation.[50] Indeed, at oral argument, counsel for Del-Aware acknowledged that the issues involved here "are essentially within the same broad confines" as those earlier litigated, although some aspects may differ.[51] Thus, Del-Aware has not demonstrated that it was in fact unfairly burdened in presenting its case.

The Board's approach also did not impermissibly interfere with the staff's role or compromise its objectivity, as Del-Aware argues. The staff independently conducted its environmental review and prepared its own testimony for the hearing. The Board did not and could not dictate the contents of that testimony.[52]

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[49] LBP-82-92A, supra, 16 NRC at 1389.

[50] See, e.g., Baldwin, supra.

[51] App. Tr. 99-100.

[52] We note in this connection that the Board did not actually order the staff to prepare any environmental document by a date certain. It simply explained its reasons for proceeding expeditiously and afforded the staff some flexibility in the timing of its submissions. LBP-82-43A, supra, 15 NRC at 1480. Further, as noted at p. 22, supra, the staff had an opportunity to object to the Board's procedures. See Memorandum and Order of July 14, 1982,

(Footnote Continued)

Given the Licensing Board's stated purpose behind the commencement of early hearings on Del-Aware's contentions, as well as the lack of genuine prejudice to Del-Aware's position, it is hardly surprising that the appellant concedes that "the Board commendably moved quickly to insure timely consideration of environmental impacts in scheduling this early hearing . . . ."[53] Indeed, it did not even object to the Board's hearing schedule at the time it was announced.[54] Instead, it waited until after prefiled testimony and trial briefs were submitted, the staff's position was revealed, and the hearing was only a week away, before filing a request to postpone the hearing. We agree

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(Footnote Continued)
supra, at 15-18. Thus, although the Board's action was inconsistent with former section 51.52(a), we do not find it incompatible with our decision in Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194 (1978). There, in commenting on the boards' authority to control the staff's independent NEPA review, we held that "[t]he Licensing Board may direct the staff to publish its environmental documents by specific dates if, after affording the parties -- including the staff -- opportunity to be heard on the matter, it finds no further delay is justified." Id. at 208. See also 49 Fed. Reg., supra, at 9361 & n.14, 9383-84 (the latter to be codified at 10 C.F.R. § 51.15).

[53] Appellants' [sic] Brief (Aug. 23, 1983) at 12.

[54] Del-Aware did not include the hearing schedule when it sought reconsideration of the Board's prehearing conference order. See Request of Del-Aware, Limited [sic] Inc. for Reconsideration of Aspects of Special Pre-Hearing Conference Order (undated, but received June 21, 1982).

with the Licensing Board that the request was without merit and came too late.[55]

Finally, we find no support for Del-Aware's alternative assertion that NEPA independently requires that hearings await the preparation of the staff's environmental impact statement. Generally speaking, NEPA does not address the timing of an environmental statement, as long as it is available by the time of the agency's recommendation or report on the proposed federal action.[56] The Licensing Board's partial initial decision before us on appeal does not constitute such a recommendation or report because it does not authorize the issuance of an operating license to PECo. Thus, while we agree with Del-Aware that an operating license cannot be issued without an environmental impact statement,[57] that is not the situation here. As noted at p. 21, supra, the Licensing Board stressed that it was not passing on the ultimate cost/benefit balance required by NEPA. Rather, it simply held hearings on certain environmental issues earlier than would ordinarily be the

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[55] See LBP-82-92A, supra, 16 NRC 1387.

[56] New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 93-94 (1st Cir. 1978).

[57] The Commission's own regulations require an impact statement for an operating license. See 10 C.F.R. § 51.5(a)(2) (1982); 49 Fed. Reg., supra, at 9384 (to be codified at 10 C.F.R. § 51.20(b)(2)).

case in order to identify and to mitigate, before the Point Pleasant project progressed too far, any potential adverse environmental impacts.

B. Issues Excluded

1. Salinity and Water Quality

Del-Aware's proposed contention V-16 claimed that the operation of the supplementary cooling water system will adversely affect the water quality and water supply of the Delaware River and the receiving streams.[58] In explaining the basis for the contention, Del-Aware asserted that short-term drawdowns of water could increase salinity and adversely affect drinking water.[59] The Licensing Board excluded the contention, essentially on the ground that changes in salinity result from the total quantity of water withdrawn for all uses approved by the DRBC, and that section 15.1(s)1 of the Delaware River Basin Compact

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[58] Contention V-16 reads as follows:

> Operation of the SCWS will adversely affect the water quality and adequacy of water supplies in a critical reach of the Delaware River and estuary. DRBC's determination was based on a number of errors and inadequate information and cannot and should not be accepted by this Commission.

Supplemental Petition of Coordinated Intervenors (Nov. 24, 1981) at 69.

[59] Ibid. The NRC staff did not oppose the admission of this contention. LBP-82-43A, supra, 15 NRC at 1485.

precludes redetermination by the NRC of the DRBC's decisions concerning the allocation of water for Limerick.[60] Del-Aware now argues that such exclusion was error.[61] We agree that the Board erred, as a matter of law, in concluding that the Compact precludes consideration of contention V-16.

Section 15.1(s)1 provides that nothing in the Compact shall impair or affect any powers or functions of the United States. This reservation of authority, however, is subject to a proviso that prohibits federal agencies from taking action that "substantially conflict[s]" with any portion of the comprehensive plan approved by the DRBC with the concurrence of the federal member.[62] In discussing this provision, the Licensing Board explained:

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[60] Id. at 1484-85; Memorandum and Order of July 14, 1982, supra, at 18-19; LBP-82-72, supra, 16 NRC at 969-71; Memorandum and Order of January 24, 1983 (unpublished), at 6-7.

[61] We are unable to discern from Del-Aware's brief precisely why it believes the Board erred. It mentions two matters in this connection, however -- (1) the "contradiction" of the Board's exclusion of the salinity issue and the staff's inclusion of this subject in its subsequent draft environmental impact statement; and (2) the assertedly "continuing concerns" of the Environmental Protection Agency (EPA) about salinity. See Appellants' Brief, supra, at 2, 13.

[62] Section 15.1(s)1 provides, as pertinent:

> Nothing contained in this Act or in the Compact
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> (Footnote Continued)

> We do not believe that the NRC is precluded by the Compact provision from considering all environmental questions arising from the diversion . . . . However, in light of the DRBC's role in determining the uses for water in the basin, we believe that it bars us from reevaluating the DRBC decision to allocate water to the Limerick facility operating in the river follower mode. . . . [A]lthough we will not look at the allocation decision itself, we might determine whether changes in the plan since the construction permit stage call for new mitigation efforts or would cause significantly increased environmental impacts such that overall alternative cooling methods should be examined.[63]

We agree that the NRC may not reevaluate the DRBC's "allocation decision itself." As the Board correctly noted, the "DRBC's function is to regulate water supply and control consumptive uses of water in the basin through development

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(Footnote Continued)

> shall impair or affect the constitutional authority of the United States or any of its powers, rights, functions, or jurisdiction under other existing or future legislation in and over the area or waters which are the subject of the Compact including projects of the Commission: Provided, That whenever a comprehensive plan, or any part or revision thereof, has been adopted with the concurrence of the member appointed by the President, the exercise of any powers conferred by law on any officer, agency or instrumentality of the United States with regard to water and related land resources in the Delaware River Basin shall not substantially conflict with any such portion of such comprehensive plan . . . .

DRB Compact, supra, § 15.1(s)1, 1961 U.S. Code Cong. & Ad. News at 807-08 (emphasis added).

[63] LBP-82-43A, supra, 15 NRC at 1469.

of the Comprehensive Plan."[64] We part company with the Board, however, in its determination that any NRC appraisal of the salinity or water quality issue would necessarily and substantially conflict with the plan.

The fact that the salinity of the water is a function of the total amount withdrawn does not prevent either the NRC staff or the adjudicatory boards from examining the effects of the amount withdrawn for Limerick. To be sure, following such examination the NRC could not authorize PECo to withdraw water from the Delaware River in amounts that exceed that allocated by the DRBC. Nor could the agency require the DRBC to make any particular allocation decision among the competing interests for the Delaware River. On the other hand, the NRC might well conclude -- after its own consideration of available data and despite the findings of the DRBC -- that the amount of water that must be withdrawn from the Delaware River to permit safe operation of Limerick would nonetheless adversely affect the quality of the water to an unwarranted degree.[65] In such a case, nothing in the

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[64] Ibid. See DRB Compact, supra, § 1.3, 1961 U.S. Code Cong. & Ad. News at 776.

[65] This is not to say that the NRC must perform a wholly independent analysis from scratch. As the Licensing Board correctly observed, the staff may rely on the scientific data and inferences drawn by the DRBC. LBP-82-43A, supra, 15 NRC at 1467-68. See ALAB-262, supra,

(Footnote Continued)

DRBC's decision would either require the Commission to license the plant or preclude it from imposing conditions on its operation. This is so because the DRBC's allocation is permissive, not mandatory: it does not require, but rather permits, PECo to withdraw from the Delaware for use at Limerick.[66] Thus, action the Commission might take to

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(Footnote Continued)
1 NRC at 193. On the other hand, the Commission need not slavishly defer to either the DRBC's findings or its conclusions about water quality. But cf. Hansler, supra, 536 F. Supp. at 42 n.25 ("DRBC is the agency charged with this decision, and it, not this court, has the necessary expertise to make [salinity and flow rate] determination"). (The DRBC, which was created eight years before NEPA, is, by the terms of the Compact, principally concerned with water supply and allocation -- not its "quality" from an environmental standpoint. See generally Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth., 545 F. Supp. 138, 140-42 (E.D. Pa. 1982).)

The critical factor is that the staff (and the NRC) exercise independent judgment with regard to its ultimate conclusions about the environmental impacts of the project. See LBP-82-43A, supra, 15 NRC at 1468. In this way, the Commission will discharge its independent responsibility to fulfill the purposes of NEPA "to the fullest extent possible." 42 U.S.C. § 4332. See Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), ALAB-506, 8 NRC 533, 544-49 (1978). But see Bucks County Bd. of Comm'rs v. Interstate Energy Co., 403 F. Supp. 805, 808 (E.D. Pa. 1975) (DRBC is "the federal agency designated to implement NEPA for all projects affecting the Delaware River Basin").

[66] See Philadelphia Electric Co. (Bradshaw Reservoir, Pumping Station and Transmission Main), No. D-79-52CP (DRBC Feb. 18, 1981) (attached to Applicant's Answer to Petition for Intervention of Del-Aware Unlimited, Inc. (Oct. 7, 1981)). The DRBC itself recognized that it may have to reconsider its decision "in light of further information developed by, or decisions rendered in, pending or future proceedings conducted by other State and Federal agencies concerning the development and operation of the Limerick

(Footnote Continued)

lessen the impact of the Limerick facility on salinity or water quality would not "substantially conflict" with the DRBC's allocation determination.[67]

Despite the Licensing Board's erroneous ruling on the effect of the DRB Compact's preclusion clause on contention V-16, we do not order the admission of the contention per se. In the time since the Licensing Board's ruling, the NRC staff has issued its draft and final environmental impact statements for the Limerick operating license.[68] Both address the issue of salinity and water quality, and the FES takes account of the EPA comments in this regard noted by

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Nuclear Generating Station and related facilities." Id. at 8. If the DRBC construed the section 15.1(s)1 preclusion as strictly as the Licensing Board, we do not believe it would have so clearly recognized the possibility that other agencies might consider the full range of issues and might reach different conclusions on them.

[67] The "substantially conflict" standard of the Compact's preclusion clause can be distinguished from stronger preemptions in other statutes. For example, the Federal Water Pollution Control Act precludes any agency, including the NRC, from even reviewing EPA's findings under section 401 of that Act. See New England Coalition, supra, 582 F.2d at 98.

There have been but few occasions where section 15.1(s)1 has been construed by the courts and other agencies. We have found none, however, where this provision has been read to preclude an agency from even considering an issue. See, e.g., Pennsylvania Hydroelectric Development Corp., 15 FERC ¶ 61,152 (1981).

[68] See note 23, supra.

Del-Aware.[69] In this circumstance, the best course is to afford Del-Aware (assuming that it is dissatisfied with the FES on this score) the opportunity to reformulate its contention V-16 in light of the specific information included in the FES.[70]

The Licensing Board recognized the possibility that the Compact might not preclude consideration of contention V-16. It observed that, if such were the case, the staff might reasonably be able to rely on the DRBC's evaluation.[71] Thus, "Del-Aware would have a heavy burden of specifying why any NRC reliance on analysis by DRBC (or other agencies) was improper."[72] We agree that, once Del-Aware reformulates its contention in light of the FES, it may well have a heavy burden in prevailing on the merits. Nonetheless, it is entitled to the opportunity to challenge the staff's

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[69] NUREG-0974, "Final Environmental Statement Related to the Operation of Limerick Generating Station, Units 1 and 2," at 9-27 to 9-28. See note 61, supra.

[70] Because Del-Aware's original contention V-16 should have been admitted initially, a reformulation of it pursuant to our decision here does not make it subject to the Commission's standards for admitting late contentions, 10 C.F.R. § 2.714(a)(1). See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).

[71] See note 65, supra.

[72] LBP-82-43A, supra, 15 NRC at 1485. See also LBP-82-72, supra, 16 NRC at 971.

determinations on the salinity issue, as presented in the FES.[73]

2. Construction Impacts

The Licensing Board concluded that it did not have jurisdiction to consider "changes in impacts of construction resulting from changed circumstances," but could properly consider "the operational impacts of construction changes."[74] In its view, the former lies within the authority of the Director of Nuclear Reactor Regulation (NRR). Del-Aware contends, by way of only a passing reference in its brief, that the Board's distinction between construction and operational impacts results in "segmented decisions" in violation of NEPA.[75] Del-Aware fails to explain how NEPA is thereby violated and to specify what particular environmental issues have gone unevaluated.[76] In

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[73] The admission and litigation of any reformulated salinity contention must, of course, be tied to changes or new information that has come to light since the issuance of the construction permit for Limerick. See p. 35, infra.

[74] LBP-82-43A, supra, 15 NRC at 1476-79.

[75] Appellants' Brief, supra, at 13.

[76] This section of Del-Aware's brief is typical of its overall quality. For example, it refers to "Overlook Alliance." Ibid. Although no citation or discussion of its contents and relevance is provided, we assume that, by this truly cryptic reference, Del-Aware means Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973). As explained below, that case is inapposite. Other parts

(Footnote Continued)

such circumstance, we would be fully justified in ignoring Del-Aware's claim entirely. But because we find the Licensing Board's reasoning on this point somewhat unclear, we address it briefly.

In making its ruling, the Board stressed that, under the Commission's rules, its jurisdiction is governed by the hearing notice for this proceeding. That notice limits the Board's (as well as our) jurisdiction to matters involving PECo's application for a license to operate Limerick.[77] Having defined the scope of its jurisdiction, however, the Board was faced with applying that definition to the particular matters before it -- not an easy task. In distinguishing between the impacts of construction and operation, and taking account of changes since issuance of the construction permit, the Board, we believe, meant the

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(Footnote Continued)
of the brief can best be described as "gobbledygook," for the juxtaposition of the English words makes neither sentences nor sense. The following is illustrative: ". . . subsequent revelation that construction is not needed now, and failure of the staff to comply with NEPA renders present has to illadvised an unnecessary. (See Motion)". Id. at 12. Having rejected Del-Aware's first effort at briefing, we denied PECo's motion to strike this brief. Although we found it comprehensible enough for the other parties to reply to it, we cautioned Del-Aware that it was to bear the risk of the shortcomings of its own brief. Appeal Board Order of September 2, 1983 (unpublished). We repeat that caveat here.

[77] LBP-82-43A, supra, 15 NRC at 1477.

following. To the extent that PECO's application for the Limerick operating license reflects some actual changes in connection with the facility as it was contemplated at the time of issuance of the construction permit (e.g., the change in the location of the intake for the Point Pleasant Diversion), such changes are within the scope of this operating license proceeding and can be litigated.[78] On the other hand, if activity already authorized by the construction permit results in impacts not previously expected, that is a matter for resolution by the Director of NRR pursuant to 10 C.F.R. §§ 2.202, 2.206.[79]

As noted, Del-Aware has not explained how this results in a violation of NEPA, and we see none. Del-Aware's elliptical reference to Indian Lookout Alliance is unavailing.[80] In any event, the Board permitted Del-Aware

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[78] This is consistent with the Board's discussion of the Commission's earlier decision concerning the construction permit. The Board concluded that it would not reevaluate environmental matters considered before the permit was issued, except where circumstances had significantly changed. Id. at 1461.

[79] See Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-674, 15 NRC 1101 (1982). Del-Aware has taken advantage of this procedure at least twice. See DD-82-13, 16 NRC 2115 (1982); DD-84-13, 19 NRC 1137 (1984).

[80] See note 76, supra. In Indian Lookout Alliance, the court found that the environmental impact statement for a portion of a proposed federal highway was too limited because it did not cover enough mileage of the interstate.

(Footnote Continued)

to litigate the operational impacts from the various changes in the project since the construction permit was issued.[81] NEPA requires no more.

3. Impacts Attributable Solely to the NWRA Project

As noted above, the Point Pleasant Diversion includes (1) the intake, reservoir, and pumping station to be used jointly by PECo and NWRA; (2) transmission facilities to be used solely for Limerick; and (3) transmission mains intended solely for NWRA's use.[82] The Licensing Board concluded that the environmental impacts of that part of the system to be used jointly by PECo and NWRA could not be meaningfully apportioned to each user. Thus, the Board

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After noting that this was a problem unique to highway projects, the court stressed that a segmented approach to the impact statements for many projects is often unavoidable, and that segments need only be as large as practicable in the circumstances. 484 F.2d at 15, 19. The "segmented decisions" to which Del-Aware objects here are of a different nature. The Licensing Board's distinction between construction and operational impacts is a function of the Commission's traditional two-stage (construction permit and operating license) licensing process for commercial reactors. See generally Power Reactor Dev. Co. v. International Union of Electrical, Radio & Mach. Workers, 367 U.S. 396 (1961). It is also a jurisdictional distinction, concerning the NRC's internal division of decisionmaking authority based on the particular stage of the licensing process involved. It does not result in the indefinite deferral of consideration of impacts of a portion of a project, which the court in Indian Lookout Alliance found violative of NEPA.

[81] See LBP-83-11, supra, 17 NRC 413.

[82] See note 3, supra, and Appendix A.

considered not only the impacts solely attributable to Limerick, but also the total environmental impacts of the Point Pleasant intake and pumping station, the transmission main to the Bradshaw Reservoir, and the Reservoir itself.[83] The Board determined, however, that NEPA does not require the NRC to consider the part of the system to be used solely by NWRA to supplement municipal water supplies (i.e., the separate transmission main from the Bradshaw Reservoir to the North Branch of the Neshaminy Creek, the North Branch Water Treatment Plant, and the transmission mains from the treatment plant).[84]

In another rather limited argument on appeal, Del-Aware claims that the Board erred in not considering these latter impacts attributable solely to the NWRA part of the project.[85] As we understand it, the gist of Del-Aware's argument is that this part of the project would not be built but for Limerick and the financial commitment of PECo to the system. Assuming arguendo that this is so,[86] Del-Aware

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[83] LBP-82-43A, supra, 15 NRC at 1470-72.

[84] Id. at 1473-75.

[85] Appellants' Brief, supra, at 21.

[86] Del-Aware points to a Licensing Board reference to the statement of an NWRA official committing NWRA to constructing that part of the system to be used solely by NWRA, "with or without" PECo. Memorandum and Order of July

(Footnote Continued)

fails to explain why this would require the NRC, pursuant to NEPA, to evaluate impacts of a part of the project otherwise unassociated with Limerick.

We agree with the Licensing Board that NEPA does not require the NRC to consider the environmental impacts solely attributable to the NWRA part of the project, but for somewhat different reasons than those expressed by the Board. The Board's analysis relied on NEPA cases addressing the issue of "segmentation."[87] Those cases use a three-part test to determine if a project has been arbitrarily divided into segments with smaller environmental impacts, so as to avoid consideration of the possibly greater, cumulative impacts of the project as a whole.[88] The project segments usually follow one another in time, with no one agency

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14, 1982, supra, at 9 n.2. Del-Aware complains that this commitment is now in substantial doubt. Appellants' Brief, supra, at 21. The extent to which the Licensing Board actually relied on the NWRA official's "commitment" is not clear. As explained below, however, NWRA's intentions with regard to its separate part of the project are of no relevance to the NRC's NEPA obligations vis-a-vis Limerick. We therefore accept for argument purposes only Del-Aware's claim that NWRA is no longer interested in pursuing the municipal water supply part of the project.

[87] LBP-82-43A, supra, 15 NRC at 1473-74.

[88] See, e.g., Swain v. Brinegar, 542 F.2d 364 (7th Cir. 1976) (en banc); Duke Power Co. (Amendment to Materials License SNM-1773 -- Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-651, 14 NRC 307 (1981).

having evaluated the overall project for NEPA purposes. That is not this case. The respective PECo and NWRA "segments" of the Point Pleasant Diversion project have been planned and are being executed on essentially a concurrent basis, and the DRBC has twice evaluated the environmental impacts of the total project.[89] Thus, the segmentation cases relied on by the Board are largely inapposite to the situation at hand.

We believe that Henry v. FPC,[90] also discussed by the Board, provides the more appropriate guidance for the disposition of this case. Henry involved a coal gasification project that -- much like the Point Pleasant Diversion -- required approval from several different agencies. The Bureau of Reclamation of the Department of the Interior was the "lead agency" for NEPA purposes and it (like the DRBC here) prepared an impact statement for the entire project. Because the Federal Power Commission's (FPC) jurisdiction was limited to granting a certificate of public convenience and necessity for the project's "tap and valve" facilities, the FPC contended that it need consider only the incremental environmental impacts of those facilities. Although the court actually held that the NEPA

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[89] See pp. 5-6, 7, supra.

[90] 513 F.2d 395 (D.C. Cir. 1975).

issue was raised prematurely, it opined that the FPC was obliged by both NEPA and the Natural Gas Act to consider the environmental impacts of the entire gasification project.[91]

The Licensing Board correctly noted that, under Henry, the NRC must consider the impacts of the jointly used portions of the PPD project.[92] But we think it is also clear from Henry that the NRC need not consider the impacts attributable solely to the NWRA segment. The District of Columbia Circuit stressed that, in making its certification decision under the Natural Gas Act, the FPC would necessarily have to consider the overall gasification project, even though it did not have complete jurisdiction over it.[93] By contrast here, consideration of the solely-NWRA portion of the project has no role whatsoever in the NRC's decision under the Atomic Energy Act concerning the issuance of a license to PECo to operate Limerick. Whether this part of the project is ever constructed may be of interest to the DRBC and Army Corps of Engineers, but it

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[91] Id. at 405-07. The court noted, however, that the FPC could rely on the lead agency's impact statement. Id. at 407.

[92] LBP-82-43A, supra, 15 NRC at 1472.

[93] 513 F.2d at 406-07.

is of no decisional significance to the NRC.[94] Thus, the NRC has "no jurisdictional toehold"[95] over that part of the Point Pleasant Diversion and, even under Henry, there is no basis for requiring the NRC to evaluate the environmental impacts solely attributable to the NWRA branch.[96]

The seminal decision on the proper scope of an agency's environmental review under NEPA supports this conclusion. In Kleppe v. Sierra Club, the Supreme Court held that

> when several proposals for . . . related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.[97]

The DRBC -- the agency with oversight of the entire Point Pleasant Diversion project -- has "considered together" the

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[94] And, by the same token, Limerick -- absent possible complications from the private contracts involved -- is not foreclosing NWRA's options. See LBP-82-43A, supra, 15 NRC at 1474-75.

[95] Henry, supra, 513 F.2d at 407 n.33.

[96] Compare Committee for Auto Responsibility v. Solomon, 603 F.2d 992, 1002 n.44 (D.C. Cir. 1979), cert. denied, 445 U.S. 915 (1980) (GSA consideration of parking needs in conjunction with FES for federal building found reasonable); Public Service Co. of New Hampshire v. NRC, 582 F.2d 77 (1st Cir.), cert. denied, 439 U.S. 1046 (1978) (NRC consideration of environmental impacts of power plant transmission lines found proper); City of Rochester v. Postal Service, 541 F.2d 967 (2d Cir. 1976) (Postal Service, which considered impacts of new construction site, improperly failed to consider impacts of abandonment of old post office as well).

[97] 427 U.S. 390, 410 (1976) (footnote omitted).

cumulative or synergistic environmental consequences of the discrete parts of the project. Further, its environmental review has passed judicial muster.[98] The question here then is how much of this review does NEPA require the NRC to duplicate. We believe it is entirely reasonable that the NRC decline to duplicate or to consider the DRBC's review of the environmental impacts solely attributable to NWRA's part of the PPD project whose only nexus to Limerick is economic.[99]

C. Other Licensing Board Rulings

1. Impact on the Point Pleasant Historic District

Del-Aware complains that the Licensing Board erred in failing to make any findings under the National Historic Preservation Act (NHPA).[100] Its argument is essentially twofold. First, it asserts that the Board incorrectly distinguished between construction and operating impacts in

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[98] See Hansler, note 11, supra.

[99] Indeed, if the NRC were to consider the impacts solely attributable to NWRA's municipal water supply part of the project, there would be considerable question as to what recourse the agency would have, were it to find significant adverse impacts. For example, could it decline to license Limerick or impose license conditions on account of the environmental impacts caused by NWRA's effort to "piggyback" onto Limerick for economic reasons? Although we need not decide this hypothetical question, we think the answer would be "no."

[100] Appellants' Brief, supra, at 21-23.

its Memorandum and Order of July 14, 1982, supra, and thereby excluded consideration of the impacts on the Point Pleasant Historic District. Second, Del-Aware alleges that the Board "refused to consider" the impacts of proposed baffling walls to stifle the noise emanating from the transformers at the Point Pleasant pumping station.[101] According to Del-Aware, such barriers would have an adverse effect on the nearby Delaware Canal, a National Historic Landmark. We find no merit to the latter argument, but agree with Del-Aware that the Board erred in its Memorandum and Order of July 14, 1982.

The Licensing Board rewrote Del-Aware's proposed contention V-14, as follows:

> The esthetic impacts of the Point Pleasant pumping station, and associated hillside clearance and river-edge rip rap wall will adversely affect the peace and tranquility of the proposed Point Pleasant Historic District.[102]

Because of the Board's ruling that it had no jurisdiction over construction impacts,[103] the Board initially admitted contention V-14 only to the extent it concerned "impacts arising from the existence of the diversion."[104] The Board

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[101] Id. at 22.

[102] LBP-82-43A, supra, 15 NRC at 1479.

[103] See pp. 33-36, supra.

[104] LBP-82-43A, supra, 15 NRC at 1483.

also noted that the determination of the Point Pleasant Historic District's eligibility for inclusion in the National Register of Historic Places was a significant change in circumstance since issuance of the construction permit, warranting present consideration.[105] On reconsideration and in response to PECo's objection, however, the Board struck the contention. Acknowledging that it was "a close question," the Board concluded that contention V-14 concerned essentially construction impacts.[106]

We agree with the Board's original reasoning. The Point Pleasant Historic District had not been declared eligible for the National Register at the time of issuance of the construction permit. Thus, there was no occasion for consideration of the impacts that Limerick's supplementary cooling water system might have on the Historic District. This is clearly a significant change in circumstances that, by the Licensing Board's own reckoning, warrants consideration in the context of this operating license

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[105] Ibid. The NRC staff also found the contention admissible. Ibid.

[106] Memorandum and Order of July 14, 1982, supra, at 4-5.

proceeding.[107] More important, NHPA requires it. Section 106 of that act states, as pertinent:

> . . . the head of any Federal department or independent agency having authority to license any undertaking shall, . . . prior to the issuance of any license, . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470v of this title a reasonable opportunity to comment with regard to such undertaking.[108]

Del-Aware must therefore be afforded the opportunity to litigate its contention V-14. We note, however -- as in the case of Del-Aware's salinity contention -- that the staff's FES has been issued and addresses the possible impacts on the Point Pleasant Historic District.[109] If it still chooses to pursue this issue, Del-Aware must do so with reference to the staff's review, alleging specifically why that review might be inadequate under section 106 of NHPA.[110]

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[107] See LBP-82-43A, supra, 15 NRC at 1461. See also pp. 33-36 and note 78, supra.

[108] 16 U.S.C. § 470f.

[109] See NUREG-0974, supra, at 5-36.

[110] The Licensing Board observed -- correctly, in our view -- that, in order to comply with NHPA, the staff may properly rely on the historical impact reviews of other agencies. LBP-82-43A, supra, 15 NRC at 1483. See note 65,

(Footnote Continued)

As for Del-Aware's second point with respect to the NRC's obligations under NHPA, it fails for several reasons. Del-Aware charges that the Licensing Board "refused to consider" the impacts of proposed sound barriers placed around the Point Pleasant pumping station on the Delaware Canal.[111] Del-Aware has provided no citation for the Board's asserted "refusal" and we can find none. Indeed, we can find no place where Del-Aware ever properly sought to raise the matter, let alone where the Board explicitly ruled against it.

The issue of sound barriers arose at the hearing, during the litigation of Del-Aware's contention V-16a, which concerned noise effects on the proposed Point Pleasant Historic District.[112] The staff witness testified that the transformers outside the pumphouse would produce objectionable noise at two nearby residences. Baffling walls were suggested as sound barriers, if necessary. In response to this potential problem, the Licensing Board

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(Footnote Continued)
supra. The Army Corps of Engineers has apparently undertaken such a review of the PPD project. See LBP-82-43A, supra, 15 NRC at 1483; Baldwin, note 27, supra.

We also note that Del-Aware raised a similar matter and others in a petition to the Director of NRR. See DD-82-13, supra, 16 NRC at 2134-36.

[111] Appellants' Brief, supra, at 22.

[112] See note 12, supra.

imposed a license condition requiring PECo to perform noise tests, at specified times and sites, after the pumping station is constructed and operating, and to report the results to the staff. If the tests show audible noise offsite, mitigation measures -- e.g., sound barriers -- must be undertaken promptly.[113]

When the possibility of sound barriers was suggested, Del-Aware's counsel questioned the involved witnesses about them generally, but did not attempt to pursue the specific matter about which it now complains -- the assertedly adverse impact of proposed baffling walls on the Delaware Canal.[114] In its proposed findings of fact to the Licensing Board, Del-Aware simply stated that construction of the proposed walls "might require further review for historical compliance," and that the staff and applicant had not taken any action "to minimize the impact of the facility on the Historic Landmark" in light of NHPA.[115] In these circumstances, we think it is neither accurate nor fair for Del-Aware to allege that the Board "refused to consider" a

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[113] LBP-83-11, supra, 17 NRC at 436-38, 461-62, 463-64.

[114] See Tr. 1056-61, 1090-92, 1120-58, 1184-85, 1186-87.

[115] Intervenor Del-Aware's Proposed Findings of Fact, Conclusions of Law, and Opinion (Nov. 17, 1982) at 60-61.

rather specific matter that Del-Aware did not put squarely before the Board.

There is an additional infirmity in Del-Aware's argument. Del-Aware argues that the Licensing Board has not protected the Delaware Canal by complying with section 110(f) of NHPA. That provision requires agencies to undertake in advance all possible "planning and actions" necessary to minimize any direct and adverse harm to a National Historic Landmark as a consequence of any federal approval.[116] Del-Aware's concern, however, is beyond the scope of both contention V-14 (which the Board erroneously excluded) and contention V-16a (which was litigated). Even as originally drafted by Del-Aware, both refer only to the

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[116] 16 U.S.C. § 470h-2(f). That section reads as follows (emphasis added):

> Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Counsel on Historic Preservation a reasonable opportunity to comment on the undertaking.

This provision, which Congress added to NHPA in 1980, complements section 106, 16 U.S.C. § 470f, supra, by setting a higher standard for governmental action insofar as National Historic Landmarks are concerned. It requires the agency to plan and to act to minimize adverse impacts, rather than simply to "take into account" such impacts. See H.R. Rep. No. 1457, 96th Cong., 2d Sess. 38, reprinted in 1980 U.S. Code Cong. & Ad. News 6378, 6401.

recent eligibility of the Point Pleasant Historic District for inclusion in the National Register of Historic Places; neither refers to the Delaware Canal or to any other National Historic Landmark.[117] By raising its concerns about the Delaware Canal and compliance with section 110(f) of NHPA, Del-Aware is clearly injecting a new element into its contention. Admittedly, there was no cause for Del-Aware's specific concern about the effect of the sound barriers on the Canal until the prospect of the barriers was mentioned at the hearing.[118] But if Del-Aware wanted to pursue the matter, it was incumbent upon it to do so at that time by seeking to amend and expand its contention V-16a.[119] As explained above, Del-Aware made no serious effort to do so then, and it is too late to do so now in this forum.[120]

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[117] See Supplemental Petition of Coordinated Intervenors, supra, at 67, 69½. See also 16 U.S.C. § 470a(a) (distinction between National Historic Landmark and areas listed on the National Register); Tr. 1136 (Delaware Canal is a National Historic Landmark).

[118] According to the Licensing Board, there is no "plan" for the barriers. LBP-83-11, supra, 17 NRC at 437.

[119] It would have been obliged, of course, to satisfy the requirements of 10 C.F.R. §§ 2.714(b), (a)(1).

[120] See Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 348 (1978). In any event, it is problematical whether the baffling walls will even be necessary. That will depend on the results of the noise tests ordered by the Board. Further, other mitigating measures could be employed, if necessary.

2. Impact on Shortnose Sturgeon and American Shad

The Licensing Board devoted a considerable portion of its partial initial decision to the effect of moving the location of the Point Pleasant intake structure on shortnose sturgeon (an endangered species) and American shad.[121] Del-Aware does not challenge any of the Board's detailed factual findings in this regard. Rather, it raises essentially three legal arguments, all concerned with the Board's compliance with relevant federal statutes.[122] We address each in turn, finding none to be of any merit.

First, Del-Aware complains that because of the early hearing on its environmental contentions,[123] the NRC staff did not obtain the comments of the U.S. Fish and Wildlife Service (F&WS) prior to the hearing, assertedly "as required" by the Fish and Wildlife Coordination Act.[124] That statute, however, simply provides that the agency "first shall consult" with F&WS whenever any waters are proposed or authorized to be diverted pursuant to a federal

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[121] See LBP-83-11, supra, 17 NRC at 421-32, 450-57. This issue was raised in Del-Aware's combined contentions V-15 and V-16a (in part). See note 12, supra.

[122] See Appellants' Brief, supra, at 18-20, 23.

[123] See pp. 18-26, supra.

[124] Appellants' Brief, supra, at 18.

license.[125] The statute does not prescribe exactly when and how this consultation is to occur, so long as it precedes any definitive agency action. That consultation requirement was clearly satisfied here. In June 1982, before the hearing got under way, the staff solicited input from F&WS for the staff's environmental review of Limerick.[126] Moreover -- albeit through the efforts of Del-Aware -- the Licensing Board heard extensive testimony at the hearing from Del-Aware witnesses Joseph P. Miller and Richard W.

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[125] See 16 U.S.C. § 662(a), which states:

> Except as hereafter stated in subsection (h) of this section, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development.

[126] See Letter from R.L. Ballard to H.N. Larsen (June 14, 1982), attached to Exhibit J of Appellants' Brief, supra. The staff subsequently referred to the F&WS input in the FES. See NUREG-0974, supra, at 4-37, 9-16, 9-17, 9-18.

McCoy, fishery biologists from F&WS.[127] The Board also referred to and relied on this testimony in reaching its decision.[128] In this circumstance, we cannot find a failure to comply with the Fish and Wildlife Coordination Act.

Second, in an argument that is somewhat difficult to follow, Del-Aware claims that "the Board failed to properly identify the issue" concerning the intake's impact on the fish species in the Delaware River.[129] Del-Aware appears to concede that some impacts are permissible and that no significant impacts on American shad and shortnose sturgeon, as species, have been demonstrated on this record. It argues, however, that NEPA nonetheless requires consideration of alternatives to the Point Pleasant Diversion.[130] Del-Aware cites no NRC or court precedent to support its interpretation of NEPA and we know of none.[131] In view of the lack of support for Del-Aware's legal argument, and its failure to challenge any of the Licensing

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[127] See Tr. 3039-73, 3128-75.

[128] See, e.g., LBP-83-11, supra, 17 NRC at 451, 453, 454.

[129] Appellants' Brief, supra, at 19.

[130] Id. at 19-20.

[131] Cf. Section 102, NEPA, 42 U.S.C. § 4332(2)(C) (consideration of alternatives required only for major federal actions "significantly affecting the quality of the human environment").

Board's extensive factual findings that undergird its conclusion of "no significant adverse effect on the Delaware River populations of either American shad or shortnose sturgeon," we must reject Del-Aware's NEPA argument.[132]

Third, Del-Aware claims -- again, without the benefit of any case or other citations -- that the Board's decision violates the Endangered Species Act (ESA) insofar as shortnose sturgeon, an endangered species, are concerned. It contends that ESA protects "the members" of such species.[133] It points out that no actual sampling was done at the time shortnose sturgeon would be expected near the intake, and that the Licensing Board did not, and could not, find "no effect" on the sturgeon.[134] It also claims that, according to the National Marine Biological (sic) Service, the absence of sampling "made it impossible to reach any conclusion" concerning the impact on sturgeon.[135] Thus, in Del-Aware's view, the Board's decision does not comply with ESA.

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[132] LBP-83-11, supra, 17 NRC at 432. Indeed, the Board concluded that the impact of the new intake location might "very probably be less" than that of the shoreline site previously evaluated and approved. Ibid.

[133] Appellants' Brief, supra, at 23 (emphasis in original).

[134] Ibid.

[135] Ibid.

Section 7 of ESA, as amended in 1979, provides, in pertinent part:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.[136]

The agency has complied fully with ESA with respect to the shortnose sturgeon involved here. The principal staff witness on this issue, Dr. Michael T. Masnik, based his "no jeopardy" conclusion in part on the Biological Opinion of the National Marine Fisheries Service (NMFS) of the U.S. Department of Commerce.[137] NMFS, like Dr. Masnik, reviewed the biological assessment of Harold M. Brundage, III. Brundage is a fishery biologist who has studied shortnose

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[136] 16 U.S.C. § 1536(a)(2) (emphasis added).

[137] Masnik, fol. Tr. 3504, at 5-6.

sturgeon in the Delaware River since 1978 and who testified as a witness for Del-Aware.[138]

NMFS found Brundage's assessment "reasonably thorough" and "based on the best scientific and commercial data presently available."[139] That assessment was bottomed on a "worst-case" assumption that all life stages of shortnose sturgeon were present in the Point Pleasant area: no empirical data were available because no shortnose sturgeon have been found in that area.[140] NMFS concluded that "construction and operation of the Point Pleasant Pumping Station is not likely to jeopardize the continued existence of the endangered shortnose sturgeon in the Delaware River."[141] Nevertheless, NMFS recommended that field studies be conducted to determine whether shortnose sturgeon are in fact present in the project area, especially during spawning season.[142]

Del-Aware has thus misstated the NMFS conclusion. The evidence clearly supports the finding that the PPD project

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[138] Professional Qualifications of Harold M. Brundage III, fol. Tr. 2965; Tr. 2965; Tr. 2923, et seq.

[139] Masnik, fol. Tr. 3504, Attachment 4, Enclosure at 11, 14 (hereafter "NMFS Opinion").

[140] Id. at 11.

[141] Id. at 16.

[142] Id. at 16-17.

is not likely to jeopardize the continued existence of shortnose sturgeon.[143] The fact that NMFS recommended further study of the matter does not detract from its conclusion of no likely jeopardy, based on the best scientific and commercial data available.[144] Moreover, further study would not likely alter the results of the Brundage analysis reviewed by NMFS, as it was already a worst-case analysis. The staff and Licensing Board thus properly relied on the Brundage and NMFS opinions; ESA requires no more.[145]

Del-Aware's unsupported claim that ESA protects the individual members of endangered species also fails. Apart

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[143] And, again, Del-Aware does not take issue with any of the underlying findings of fact concerning the intake structure or the habits and life cycle of the sturgeon.

[144] NMFS Opinion, supra, at 16, 14.

[145] This case is easily distinguished from Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041 (1st Cir. 1982), where the court found more studies were required for full compliance with ESA. Unlike here, that conclusion was preceded by a finding that "the best scientific and commercial data" available had not been tapped. Id. at 1055. Further, NMFS was unable to make a "no likely jeopardy" determination. Id. at 1045.

In any event, section 7 of ESA does not require acquiescence to NMFS views, just consultation. Sierra Club v. Froehlke, 534 F.2d 1289, 1303-04 (8th Cir. 1976). Cf. Lake Erie Alliance for the Protection of the Coastal Corridor v. Army Corps of Engineers, 526 F. Supp. 1063, 1081 (W.D. Pa. 1981), aff'd, 707 F.2d 1392 (3d Cir.), cert. denied, __ U.S. __, 104 S.Ct. 277 (1983).

from the practical difficulty of ensuring such a high level of protection for each fish, Congress did not provide for that in the statute. "Species" means just that, and not "each member thereof." The smallest units afforded protection are "subspecies" and "any distinct population segment . . . which interbreeds when mature."[146] Moreover, the existence of a species is jeopardized if it "reasonably would be expected to reduce the reproduction, numbers, or distribution of a listed species to such an extent as to appreciably reduce the likelihood of the survival and recovery of that species in the wild."[147] The Board's "no significant impact" finding does not conflict with ESA's intended focus on the species as a whole. We therefore reject Del-Aware's construction of the Act.

D. Recent Developments

Del-Aware claims, on brief, that the Licensing Board refused to consider assertedly environmentally preferable alternatives to the Point Pleasant Diversion.[148] Specifically, Del-Aware argues that two recent developments warrant reexamination of the Point Pleasant option: (1) the

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[146] 16 U.S.C. § 1532(16).

[147] 50 C.F.R. § 402.02 (1983). See Roosevelt Campobello, supra, 684 F.2d at 1048-49.

[148] Appellants' Brief, supra, at 24-28.

possible cancellation of Limerick Unit 2 as a consequence of the Pennsylvania PUC's decision declining to approve PECo's issuance of new securities for Unit 2,[149] and (2) the opinion of F&WS that the Blue Marsh Reservoir on the Schuylkill River is available and fully capable of providing water for the one remaining unit at Limerick. But a review of the Licensing Board's decisions reveals anything but a "refusal" to consider Del-Aware's arguments. It is obviously the Board's disposition of its claims to which Del-Aware now objects.

Before the hearing began, Del-Aware sought to litigate several additional contentions. One of them, V-24, referred to the PUC decision affecting Unit 2 and asserted that Schuylkill River alternatives were available and preferable, both economically and environmentally, to the river-follower method using the Point Pleasant Diversion.[150] The Licensing Board stated that it did not have enough facts to determine whether cancellation of Unit 2 is so remote that it could be ignored. But it assumed arguendo that Unit 2 would be cancelled, and it considered the effect of such a

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[149] See p. 15, supra.

[150] See Licensing Board Memorandum and Order of January 24, 1983 (unpublished), at 2-3.

development on the proposed supplementary cooling water system.[151]

In order to determine how often just one unit at Limerick would have to rely on supplementary cooling water, the Board requested from the parties, and PECo supplied, additional historical flow data on the Schuylkill River and Perkiomen Creek (the primary sources of cooling water for Limerick). Based on these data, the Board found that supplementary cooling water would be necessary for solely one unit an average of 31 percent of the time -- only three percent of the time less than for operation of two units.[152] Describing this as "manifestly insignificant in view of the requirement for supplementary cooling water more than 30 percent of the time even with only one unit operating," the Board concluded that the Point Pleasant Diversion would therefore be necessary even if Unit 2 were cancelled.[153] In response to Del-Aware's argument that the Blue Marsh Reservoir was available to supplement the Schuylkill flows, the Board pointed out that DRBC allocation restrictions

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[151] Id. at 8-9.

[152] Id. at 10-12.

[153] Id. at 12.

preclude such augmentation.[154] The Board reiterated these views on at least two more occasions.[155]

We find no basis for upsetting the Licensing Board's determination. First, Del-Aware did not and does not challenge the historical flow data submitted by PECo that support the Board's conclusion that supplemental cooling water from the Delaware River will be needed even if Unit 2 is cancelled and only one unit is operated.[156] Second, the Board correctly noted that the Blue Marsh Reservoir is not now a real alternative for supplementing the Schuylkill River water for Limerick. DRBC Executive Director Gerald M. Hansler explained at the hearing that current DRBC restrictions prohibit use of Blue Marsh for the Limerick project.[157] This is clearly a water allocation determination committed to the DRBC's judgment, the F&WS opinion notwithstanding.[158]

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[154] Id. at 13.

[155] Licensing Board Memorandum and Order of March 8, 1983 (unpublished), at 6-8; Licensing Board Memorandum and Order of March 17, 1983 (unpublished), at 6-8.

[156] See Memorandum and Order of January 24, 1983, supra, at 11.

[157] Tr. 1205-11.

[158] See pp. 26-31, supra.

Since the briefing of its appeal, Del-Aware has filed two motions that ask us to "set aside" the Licensing Board's partial initial decision on the basis of certain "new evidence."[159] The first motion states that (1) NWRA has suspended work on the Point Pleasant Diversion and is seeking to terminate its participation in the project with PECo; (2) Bucks County wants to halt the project; (3) PECo has commented publicly on the possible use of the Blue Marsh Reservoir; and (4) the Pennsylvania PUC has under study PECo's application to build the pumphouse necessary for the Perkiomen Creek.[160] Del-Aware's second motion refers to the following, inter alia: (1) a recent decision of the Pennsylvania Environmental Hearing Board, which Del-Aware claims supports its contention V-16 concerning salinity and water quality; (2) a 1973 internal PECo memorandum about the cooling water system; (3) a recently instituted Pennsylvania PUC investigation of the need for Unit 2; and (4) the decision of a PUC administrative law judge approving, for the time being, only one pump for the Bradshaw Reservoir.[161]

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[159] Del-Aware, in effect, appears to be asking us to take official notice of the assertedly new evidence upon which it relies.

[160] Sugarman Letter (May 15, 1984), note 41, supra.

[161] Del-Aware's Motion (Aug. 6, 1984), note 36, supra. The motion also complains about allegedly improper ex parte

(Footnote Continued)

The gist of both motions is that PECo will be unable to operate both units at Limerick or to rely on the Point Pleasant Diversion for supplementary cooling water. In this circumstance, according to Del-Aware, NEPA requires consideration of other alternatives.

What Del-Aware is seeking, in fact, is an order directing PECo to abandon Unit 2 and to rely on a source of supplementary cooling water for the remaining Unit 1 other than the Delaware River via the river-follower method. But we have no legal basis here for making such an order. There is no question that PECo has some formidable obstacles to surmount if it is to operate both Limerick Units 1 and 2 in the manner currently proposed. Whether PECo will change its plans to effect an easier resolution of the problems confronting it is a matter for PECo's management, and possibly its shareholders, to decide. But the fact is we now have before us PECo's application for a license to

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(Footnote Continued)
contacts between the NRC staff and PECo. Id. at 2-3. Such contacts are not ex parte under the Commission's Rules. Those rules prohibit communications between the parties to contested proceedings, on the one hand, and, on the other, those with decisionmaking responsibilities -- i.e., Commissioners, their staffs and advisers, members of adjudicatory boards, and their staffs and advisers. 10 C.F.R. § 2.780. See Administrative Procedure Act, 5 U.S.C. § 557(d). The "NRC staff" does not advise the Commission or the boards. Rather, it is a distinct and separate entity that is a party to this proceeding and may confer with other parties, including PECo and Del-Aware. See 10 C.F.R. § 2.102(a).

operate two units, using the river-follower method to supplement the plant's cooling water system. We have previously approved the river-follower method in ALAB-262, supra. The purpose of this proceeding, in that regard, is consideration of the impacts of any subsequent changes relating to that supplementary cooling system. Except for two matters that we have determined should have been, but were not, litigated,[162] we agree with the Licensing Board's conclusion that the impacts of the subsequent changes are not significant. In the absence of a finding to the contrary, we are without the legal predicate to dictate to PECo that it must pursue other options.[163]

Moreover, Del-Aware would have us act on the basis of rulings of other federal and state entities concerned with

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[162] Viz., Del-Aware's contentions on salinity and the impacts on the Point Pleasant Historic District. See pp. 26-33, 42-45, supra.

[163] Of course, if PECo does change its plans and modify its pending application accordingly, it is obliged to notify us and the parties promptly. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387, 1391-94 (1982). And, as the Licensing Board correctly observed, in such circumstance the Commission "would have to reconsider its previous assessment of environmental impacts in light of changes proposed by PECo." Licensing Board Memorandum and Order of June 1, 1983 (unpublished), at 9 n.3. The parties would also have to be afforded an opportunity to challenge any newly amended, significant portion of the application. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC __, __ (July 23, 1984) (slip opinion at 8-9).

various aspects of Limerick and the PPD project. Apart from the facts that, in many instances, these rulings are not final and that overall the situation is rather dynamic, we must decide only the federal questions before us, without being unduly influenced by the decisions of others with differing concerns and responsibilities.[164] Accordingly, we deny Del-Aware's motions to set aside the Board's partial initial decision on the basis of new evidence.

IV. Conclusion

As the history of this case over the last decade makes clear, the environmental impacts of the Limerick supplementary cooling water system have been the subject of considerable attention both at this agency and in numerous other forums. Del-Aware's general assertion that there has been an effort to avoid review of these impacts or to conceal them in some manner is without merit. With regard to its more specific complaints, however, we agree that its contentions concerning salinity and the impacts on the Point Pleasant Historic District should have been considered by the Licensing Board. We therefore affirm, in part, the Licensing Board's decisions concerning the supplementary

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[164] See Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 269 (1982), aff'd sub nom., City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983), and cases cited. See also Cross-Sound Ferry Services, Inc. v. United States, 573 F.2d 725, 732-33 (2d Cir. 1978).

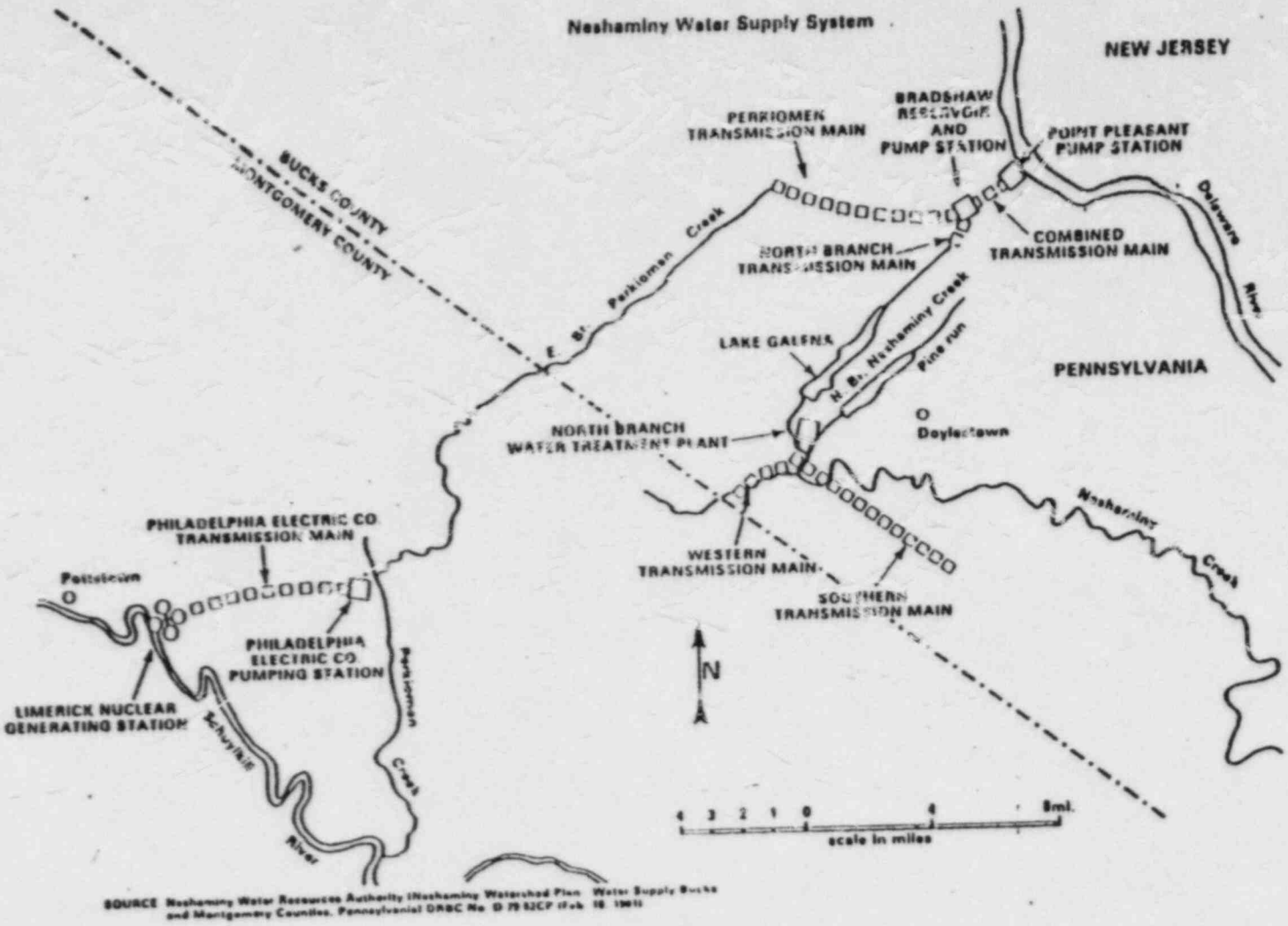
cooling water system. We reverse and remand with instructions that Del-Aware be given an opportunity to resubmit its contentions V-14 and V-16 in accordance with this opinion. Del-Aware's motions (filed May 15 and August 6, 1984) to set aside the Board's decisions are denied.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

APPENDIX A



SOURCE: Neshaminy Water Resources Authority (Neshaminy Watershed Plan: Water Supply Bucks and Montgomery Counties, Pennsylvania) DRBC No. D 79 52CP (Feb. 16, 1961)