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November 13, 2006

By E-Mail and First Class Mail

Ralph I. Lancaster, Jr., Esquire

Pierce Atwood

One Monument Square

Portland, ME 04101

Re: ***New Jersey v. Delaware*, No. 134 Original
New Jersey's Assertion of the Deliberative Process Privilege**

Dear Mr. Lancaster:

Delaware respectfully submits this letter contesting New Jersey's assertion of the deliberative process privilege. New Jersey should be required to produce forty-four documents on its privilege log because: (1) New Jersey has not properly invoked the privilege; (2) many of the documents are post-decisional and not covered by the privilege; (3) the privilege factors weigh in favor of disclosure; and (4) New Jersey has waived the privilege.

I. Background

The majority of withheld documents relate to New Jersey's Coastal Zone Management Program ("CZMP"), adopted pursuant to the Federal Coastal Zone Act ("Act"). In the late 1970s, New Jersey sent lengthy submissions to the National Oceanic and Atmospheric Administration ("NOAA"), including an environmental impact statement ("EIS"), to obtain approval of its proposed CZMP. Federal approval allowed New Jersey to obtain federal funds to support its CZMP.

In New Jersey's August 1980 final EIS submitted to NOAA for approval, New Jersey represented to NOAA that "any New Jersey project extending beyond mean low water [within the 12 mile circle] must obtain coastal permits from both states" -- *i.e.*, New Jersey and Delaware. New Jersey also represented that the two states would "coordinate reviews of any proposed development that would span the interstate boundary to ensure that no development is constructed unless it would be consistent with both state coastal management programs." *Id.* Ex. A, DE20382. New Jersey further represented to NOAA that "[b]ecause the tankering of LNG could pose potential risk to life and property adjacent to New Jersey's waterways which also serve as boundaries with the states of Pennsylvania and Delaware along the Delaware River . . . [New Jersey] considers decisions concerning the siting of LNG facilities to be an interstate matter." Ex. A, DE20616.

In the early 1990s, New Jersey applied for federal funding to support negotiations between the two states on a memorandum of agreement ("MOA"). The draft MOA was developed and discussed from 1991 to 1994. It would have fleshed out New Jersey's representation to NOAA to coordinate each state's coastal zone reviews within the twelve mile circle, consistent with New

Jersey's statements in its August 1980 EIS. *See* Ex. B, Whitney Dep. at 117-119.¹ Steven Whitney's affidavit submitted with New Jersey's initial filing stated that New Jersey declined to execute the draft MOA because "there were concerns about becoming involved in an overly cumbersome approval process, and about giving a veto to Delaware as to projects that otherwise would have met New Jersey standards."² New Jersey thus placed directly in issue its deliberations and internal reasons for declining to execute the draft MOA with Delaware.³

Most of the documents improperly withheld by New Jersey under the deliberative process privilege relate to New Jersey and Delaware's MOA correspondence in the early 1990s, New Jersey's program updates for its CZMP, or applications for coastal zone management review, including BP's application for the proposed Crown Landing Facility. They appear to be highly relevant to the issues presented in the case because they establish that: (1) until 2005 when BP heavily lobbied the New Jersey government to bring this original action against Delaware, New Jersey government officials believed that Delaware had an important role to play in any project that implicated state and federal coastal zone management laws in the twelve-mile circle; (2) New Jersey's assertion of prescription and acquiescence by Delaware to coastal zone structures would appear to be defeated by New Jersey's consistent recognition throughout the 1980s and 1990s that Delaware's approval was needed for the siting of an LNG facility that extended from New Jersey into Delaware's submerged lands; and (3) however "riparian jurisdiction" is construed in the 1905 Compact, New Jersey did not take the position (until 2005) that it had "exclusive" power to permit projects such as the BP facility over Delaware's objection.

II. Argument

A. New Jersey Has Not Properly Invoked The Deliberative Process Privilege

New Jersey has failed to satisfy the procedural requirements of the privilege for revised log entries 1-40, 42, 45, 47, and 50.⁴ First, New Jersey did not prepare an affidavit "by the head of a governmental agency or by a designated high-ranking subordinate" to justify its privilege assertion. *Kaufman v. City of New York*, 1999 WL 239698, at *4 (S.D.N.Y. April 22, 1999).⁵ The agency head or an authorized designee must state by affidavit as follows: (1) that he or she has reviewed each of the relevant documents; (2) that the withheld documents relate to an agency decision and are pre-

¹ Steven Whitney, a New Jersey witness, retired from his position as the Manager of the Environmental Planning Coastal/Land Planning Group for the State of New Jersey in 1997. Mr. Whitney submitted an affidavit in support of New Jersey's Motion to Reopen and for Supplemental Decree. (S. Ct. filed July 28, 2005) (N.J. App. 73a-77a). A copy of Mr. Whitney's affidavit is attached hereto as Exhibit C.

² Ex. C, Whitney Aff. ¶ 8.

³ Although Mr. Whitney's affidavit appeared to suggest that New Jersey's objection went to Delaware's ability to veto a project by denying a required Delaware permit, Mr. Whitney clarified at his deposition that New Jersey's concern was limited to preventing Delaware from insinuating itself into *New Jersey's* permitting process, and that a boundary-straddling "project could not go forward until an applicant has secured approvals both from Delaware and New Jersey." Ex. C, Whitney Dep. at 130-31; *see generally id.* at 127-34.

⁴ New Jersey did not number each entry on its privilege log. For ease of reference, Delaware has supplied numbers on the log attached as Exhibit D.

⁵ Courts have held that counsel for the government cannot assert the deliberative process privilege. *See Kaufman*, 1999 WL 239698, at *3; *Pierson v. United States*, 428 F. Supp. 384, 395 (D. Del. 1977).

decisional and deliberative,⁶ and (3) the reason(s) why preserving confidentiality -- rather than the agency's interest in the particular action -- outweighs the public interest in disclosure. *Id.*; *see also Resolution Trust Corp. v. Diamond*, 773 F. Supp. 597, 603 (S.D.N.Y. 1991).

Second, New Jersey did not perform a document by document review by an agency head or subordinate to determine "whether the assertion of the privilege is justified in each instance." *Id.* Such an analysis is required because it is inappropriate to assert a blanket privilege for all predecisional and deliberative documents. *Id.*⁷ The document by document review should result in a declaration of "precise and certain" reasons for the privilege assertion. The affiant must set forth "precise and certain" reasons for the privilege assertion; failure to provide precise justifications forces the Court to be a "mindreader" to discern the factual basis for the privilege. *Id.* at 605-06.

Third, New Jersey was required to comply with the foregoing procedural requirements "at the time the privilege is asserted, not months later when the matter is before the Court on a motion to compel." *Pac. Gas & Elec. Corp. v. U.S.*, 70 Fed. Cl. 128, 135 (2006) (citing *Anderson v. Marion County Sheriff's Dep't*, 220 F.R.D. 555, 562 n. 5 (S.D. Ind. 2004)). It failed to do so.

For log entries 1-40, 42, 45, 47, and 50, the Special Master is left "to guess" whether any agency person has reviewed the pertinent documents and made a specific determination that the documents withheld are predecisional and deliberative. Additionally, despite a written request from Delaware that New Jersey cure those deficiencies, New Jersey's revised log falls far short of what the law requires for a proper assertion of the deliberative process privilege. It is now too late to cure the defects. *See Anderson*, 220 F.R.D. at 562 n.5; *Pac. Gas & Elec. Corp.*, 70 Fed. Cl. at 136 (too late to cure defects at motion to compel stage of the proceedings).

B. Factual Material, Instructions, and Post Decisional Material Are Not Protected By The Deliberative Process Privilege

Even if New Jersey's procedural default could be overlooked, the types of documents on the log do not appear to fall within the privilege. The deliberative process privilege does not, as New Jersey seems to suggest in its privilege log, cover all documents originating from a government agency, but instead covers "[o]nly documents that are prepared to assist a decisionmaker in arriving at a decision fall[ing] within the privilege." *Kaufman*, 1999 WL 239698, at *4.⁸ To be protected by the privilege, a document must be connected with an agency decision and be both predecisional and deliberative. *See Pac. Gas & Elec. Corp.*, 70 Fed. Cl. at 132-33. Instructions to subordinates as to how existing policies should be implemented do not qualify as either predecisional or deliberative. *Resolution Trust Corp.*, 773 F. Supp. at 602. And, content in a document that is purely factual, such as findings and conclusions, cannot be protected by the deliberative process privilege. *Id.*; *see also Pac. Gas & Elec. Corp.*, 70 Fed. Cl. at 133.

⁶ Instructions to subordinate officials as to the implementation of policy, or documents containing purely factual information, are not protected by the privilege because they are neither pre-decisional nor deliberative. *See id.*; *see also Mary Imogene Bassett Hosp. v. Sullivan*, 136 F.R.D. 42, 47 (N.D.N.Y. 1991); *Harris v. City of Philadelphia*, 1995 WL 350296, at *7 (E.D. Pa. June 6, 1995).

⁷ Indeed, "[t]he indiscriminate claim of privilege may in itself is sufficient reason to deny it." *United States v. O'Neill*, 619 F.2d 222, 227 (3d Cir. 1980).

⁸ "The privilege, as it is in derogation of the search for truth, is not to be expansively construed." *Id.*

Even with the scant descriptions of documents provided by New Jersey in the privilege log, there are numerous documents that fail to qualify for the privilege. For example, documents 1, 2, 5-9, 18, 22, 26, 28 – 36, 38, and 39 appear to relate to the draft MOA in the early 1990s with Delaware regarding how the parties would coordinate coastal zone reviews within the twelve-mile circle. These documents are not protected by the deliberative process privilege because New Jersey made the decision in its 1980 EIS to “coordinate reviews of any proposed development that would span the interstate boundary to ensure that no development is constructed unless it would be consistent with both state coastal management programs.” *Id.* Ex. A, DE20382. *See Resolution Trust Corp.*, 773 F. Supp. at 602; Ex. B, Whitney Dep. at 83, 123, 127 and 130. Because these documents are post-decisional, they must be produced. *See Mary Imogene Bassett Hosp.*, 136 F.R.D. at 47.

C. The Balance of Interests

Even if the deliberative process privilege applies, the privilege is a qualified one, and “the court should balance the competing interests of the parties.” *Pac. Gas & Elec. Corp.*, 70 Fed. Cl. at 134. The balancing of interests includes: (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the “seriousness” of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. *Resolution Trust Corp.*, 773 F. Supp. at 605; *see also* EDWARD F. CLEARY, MCCORMICK ON EVIDENCE, § 109 (1984) (“Nor may the government as a plaintiff in a civil action proceed affirmatively against a defendant while at the same time seeking under the guise of privilege to deprive the defendant of evidence useful to the defense of the action.”).

When this balancing test is applied, the scales tip decidedly in favor of disclosure. For example, documents 1-13, 16-40, 42, 45, 47, 50 all appear to be documents discussing Delaware’s regulatory authority within the twelve-mile circle, which are highly relevant to Delaware and New Jersey’s course-of-performance, prescription and acquiescence claims. These documents are not available from another source, and the seriousness of the issues can hardly be disputed. Moreover, they are highly relevant to interpret the scope of the statement in Mr. Whitney’s affidavit that appeared to suggest New Jersey had objected to Delaware’s regulatory authority when Mr. Whitney later testified that in fact New Jersey had not. New Jersey should not be able to claim exclusive authority over projects that extend into Delaware territory, and at the same time shield from disclosure evidence that its key governmental officials took the exact opposite position over the course of two decades and at a time when New Jersey was obtaining federal funds on the basis of representations that Delaware had regulatory authority over interstate projects. Likewise, there is little risk of future timidity by government employees because: (1) New Jersey’s own witnesses have already testified that it was always their understanding that Delaware had regulatory authority over projects that straddle the boundary (Ex. B, Whitney Dep. at 71, 75, 83, 95, 123, 127, and 131); and (2) statements of government employees from (in many cases) more than a decade ago will not chill governmental deliberations relating to future decisions. Under these circumstances, even if the deliberative process privilege applied, the balancing test rests in Delaware’s favor and the documents should be produced.

D. Waiver

The deliberative process privilege can be waived by “permitting a breach of the privilege in his presence.” *Harris*, 1995 WL 350296, at *11. Indeed, where an unauthorized disclosure is voluntarily made, there is a waiver of any claim that the information is exempt from disclosure. *See Shell Oil Co. v. Internal Revenue Service*, 772 F. Supp. 202, 211 (D. Del. 1991).

New Jersey has waived any deliberative process privilege for all documents relating to the proposed MOA between Delaware and New Jersey. First, as explained above, New Jersey has placed the reasons it declined to execute the draft MOA directly in issue by submitting Mr. Whitney’s affidavit as part of its initial filing to the Court. It is black-letter law that a party cannot use certain assertions as a sword and then shield under the guise of privilege other materials necessary to probe the veracity of its assertions. *Pacific Gas and Elec. Co. v. Lynch*, 2002 WL 32812098, at *3 (N.D. Cal. Aug. 19, 2003). Second, attached hereto as Exhibit E are MOA documents that New Jersey made available for inspection that contain handwritten notes and other comments from New Jersey personnel.⁹ New Jersey cannot selectively disclose certain drafts and comments and simultaneously claim privilege relating to substantially similar documents.

Finally, New Jersey has also waived any deliberative process privilege relating to the MOA because it has allowed its witnesses to testify extensively without objection about agency deliberations. Steven Whitney testified extensively and without objection about the development of the MOA and the policy determinations made by New Jersey regarding the MOA. *See Ex. B, Whitney Dep.* at 117-135. Documents cannot be withheld while at the same time witnesses testify freely about agency deliberations. *See Kraemer v. Franklin & Marshall College*, 1995 WL 447634, at *2 (E.D. Pa. July 27, 1995) (failure to object for privilege during deposition causes waiver of any privilege attached to the communication).

III. Conclusion

Delaware respectfully requests that the Court bar New Jersey’s assertion of the deliberative process and compel the production of documents 1-40, 42, 45, 47, and 50 listed on New Jersey’s privilege log.¹⁰

Respectfully submitted,


David C. Frederick

cc: Rachel J. Horowitz, Esq.
Barbara Conklin, Esq.
Collins J. Seitz, Jr.

⁹ Even though drafts containing handwritten notes and comments were produced, New Jersey erroneously claims deliberative process privilege regarding other handwritten notes on the same or similar documents. *See* privilege log entries 2, 3, 9, 31, 33, 35, 38, and 39.

¹⁰ Attached hereto as Exhibit F is a chart that provides a summary of Delaware’s arguments opposing the deliberative process privilege assertion and the log entries that correspond to each argument.

EXHIBIT A

CZIC 1862

NEW JERSEY COASTAL MANAGEMENT PROGRAM

AUGUST 1980

FINAL ENVIRONMENTAL IMPACT STATEMENT

U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of Coastal Zone Management

Nelson Oceanic and Atmospheric Administration



DEPARTMENT OF ENVIRONMENTAL PROTECTION

Brandon Byrne
Governor

Jerry Fitzgerald English
Commissioner

EXHIBIT
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SAO 9/27/06

NEW JERSEY COASTAL MANAGEMENT PROGRAM
AND
FINAL ENVIRONMENTAL IMPACT STATEMENT

Commissioner's Letter
Note to Reader/NEPA Summary
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CHAPTER TWO - BOUNDARY.

Summary
Inland Boundary
Seaward and Interstate Boundaries

Summary

New Jersey's coastal zone extends from the New York border south to Cape May Point and then north to Trenton. It encompasses the waters and waterfronts of the Hudson River and related water bodies south to the Raritan Bay, the Atlantic Ocean and some inland areas from Sandy Hook to Cape May, the Delaware Bay and some inland areas, and the waterfront of the Delaware River and related tributaries.

The coastal zone encompasses areas in which the State, through the Department of Environmental Protection and the Hackensack Meadowlands Development Commission, has the authority to regulate land and water uses that have a significant impact on coastal waters. These authorities include the Coastal Area Facility Review Act (CAFRA), the Wetlands Act, the Waterfront Development Law, Tidelands statutes, and the Hackensack Meadowlands Reclamation and Development Act.

Inland Boundary

The inland boundary for the portion of the coast from Raritan Bay south to Cape May Point and then north along the Delaware Bay (consisting of parts of Middlesex, Monmouth, Ocean, Burlington, Atlantic, Cape May, Cumberland and Salem Counties), is defined as:

the landward boundary of the Coastal Area as defined in the Coastal Area Facility Review Act (CAFRA, N.J.S.A. 13:19-4), or the upper boundary of coastal wetlands located landward of the CAFRA boundary along tidal water courses flowing through the CAFRA area, whichever is more landward, including State-owned tidelands.

In the more developed portions of the State (including portions of Salem, Gloucester, Camden, Burlington, Mercer, Middlesex, Somerset, Union, Hudson, Essex, Passaic and Bergen Counties), the coastal zone boundary is defined as:

the landward boundary of the State's jurisdiction under the Waterfront Development Act (N.J.S.A. 12:5-3)* or Wetlands Act (N.J.S.A. 13:9A-1), or the landward boundary of State-owned tidelands, whichever extends farthest inland.

* The definition of the inland jurisdictional boundary of the Waterfront Development Law is: the first public road, railroad right-of-way, or property line generally parallel to any navigable waterway, but in no case more than 500 feet or less than 100 feet inland from mean high water.

This boundary (discussed below in "Principal Program Authorities") ensures that the State will regulate at least the first 100 feet inland from all tidal waters. The State will consider all land within 500 feet of tidal water to be within this boundary unless demonstrated otherwise. This represents a substantial reduction from the coastal zone boundary DEP proposed in several publications between December 1976 and March 1979, which would have extended the coastal zone inland to the first road or railroad, regardless of its distance from the water (See Appendix B).

The boundary of the Hackensack Meadowlands region is defined as:

the boundary of the area defined as the Hackensack Meadowlands District by the Hackensack Meadowlands Reclamation and Development Act. (N.J.S.A. 13:17-4)

A generalized map of the Statewide Coastal Zone Boundary is shown in Figure 1 in Part I of this document, and Figure 2 is a sketch of the boundary in different parts of the State.

The boundary encompasses approximately 1,792 miles of tidal coastline, including 126 miles along the Atlantic Oceanfront from Sandy Hook to Cape May. It ranges in width from one hundred feet to twenty-four miles (near Batsto and the Mullica River, in Burlington County). The total land area of the Bay and Shore region is approximately 1,376 square miles or 17 percent of New Jersey's land area.

Research indicates that there has been a rising trend in the level of the ocean, relative to coastal land, along the northern East Coast of the United States. Hicks' data places the rise at about 8 inches between the 1890s and 1970. If this trend continues, tidal waters will penetrate further up the State's coastal rivers. Should this change become significant, the coastal zone boundary and the area under the jurisdiction of the Waterfront Development Law, will be redelineated accordingly.

Seaward and Interstate Boundaries

The seaward boundary of the coastal zone is the three nautical mile limit of the United States Territorial Sea, and the interstate boundaries of the States of New York and Delaware and the Commonwealth of Pennsylvania.

In most of Salem County, the Delaware-New Jersey State boundary is the mean low water line on the eastern (New Jersey) shore of the Delaware River. The New Jersey and Delaware Coastal Management agencies have discussed this issue and have concluded that any New Jersey project extending beyond mean low water must obtain coastal permits from both states. New Jersey and Delaware, therefore, will coordinate reviews of any proposed development that would span the interstate boundary to ensure that no development is constructed unless it would be consistent with both state coastal management programs.

* S.D. Hicks, "As the Oceans Rise", National Ocean Survey, NOAA, Vol. 2, No. 2, pp. 22-24, 1972.

Energy Production and Transmission

In determining the national interest in energy production and transmission, the following plans and federal agencies were consulted:

- The National Energy Plan, April 29, 1977
- U.S. Department of Energy (formerly ERDA and PEA)
- Federal Energy Regulatory Commission (formerly Federal Power Commission)
- Nuclear Regulatory Commission
- U.S. Department of Interior
 - Bureau of Land Management
 - U.S. Geological Survey
- U.S. Department of Transportation
 - U.S. Coast Guard
 - Office of Pipeline Safety
- Department of Defense
 - U.S. Army Corps of Engineers
- Maritime Administration
- Environmental Protection Agency

The most useful articulation of the national interest in energy is found in the National Energy Plan, which has three overriding objectives:

- as an immediate objective that will become even more important in the future, to reduce dependence on foreign oil and vulnerability to supply interruptions;
- in the medium term, to keep U.S. imports sufficiently low to weather the period when world oil production approaches its capacity limitation; and
- in the long term, to have renewable and essentially inexhaustible sources of energy for sustained economic growth. (Plan Overview, page IX)

The salient features of the National Energy Plan are:

- conservation and fuel efficiency,
- national pricing and production policies,
- reasonable certainty and stability in Government policies,
- substitution of abundant energy resources for those in short supply; and
- development of nonconventional technologies for the future (Plan Overview, page IX-X)

The National Energy Plan also notes that its "cornerstones" are "conservation" (page 35 of the Plan). New Jersey's recognition of the need for energy conservation was one factor leading to the second Basic Coastal Policy which states: "Concentrate rather than disperse the pattern of coastal residential, commercial, industrial, and resort-oriented development, and encourage the preservation of open space". Specifically, the Coastal Program encourages the clustering of development within a site, the use of renewable and recoverable sources of energy, mass transportation, and the incorporation of energy conservation techniques into all proposed coastal development in accordance with the Energy Conservation Plan being administered by the N.J. Department of Energy pursuant to the Energy Policy and Conservation Act of 1975.

Oil and Gas Facilities

New Jersey recognizes its key role in the transportation, transfer, treatment and storage of national oil and gas supplies. In addition, the exploration for crude oil and natural gas in the Baltimore Canyon has presented New Jersey with the prospect of new offshore and onshore OCS related activities. Given the national interest in recreational and resource protection in the coastal zone, pipelines and pumping and compressor stations will be permitted in the entire coastal zone to the extent they can meet existing federal and state requirements. Oil and gas facilities, other than pipelines, are encouraged to locate in the developed areas of the state where the infrastructure and labor market already exist to absorb such activity. The decision to encourage oil and gas facilities including certain OCS related activities in areas of the state which already house many oil and gas production facilities has been reached as a result of weighing the competing and conflicting national interest in recreation and resource protection as called for in the CZMA. A study undertaken for DEP by Rutgers University Center for Coastal and Environmental Studies (Onshore Support Bases for OCS Oil and Gas Development: Implications for New Jersey, 1977) as well as a study done by the Port Authority of New York and New Jersey to identify the New York Harbor's potential for OCS support bases contributed to this decision by indicating that sites which may be acceptable for oil and gas facilities exist along the Raritan Bay and River and the Hudson River.

Electric Power

The Coastal Program directs additional fossil fueled generating stations away from particularly scenic or natural areas that are important for recreation and open space purposes, and directs that they be built consistent with applicable air and water quality standards. (See Chapter Four, Section 7:7E-7.4(m)).

In considering the national interest in the development of nuclear power, New Jersey finds applicable the rules and regulations promulgated by the Nuclear Regulatory Commission (10 CFR 100) which provide firm siting criteria with guidelines to prevent siting of future nuclear plants in densely populated locations, in valuable natural areas, or in potentially hazardous locations.

New Jersey was one of the first states to recognize the potential of nuclear power to meet U. S. energy needs. The State has six operating or fully approved nuclear plants, including the Hope Creek I and II Generating Stations which received a CAFRA permit from DEP in 1975. The only other recent application for a nuclear facility filed in New Jersey was a 1974 application to construct two floating plants, which has since been cancelled by the applicant.

The New Jersey Coastal program energy policies considering electric generating stations can be found in Chapter Four, Section 7:7E-7.4(q).

Liquified Natural Gas - The National Energy Plan contains the following statements applicable to New Jersey:

"Due to its extremely high costs and safety problems, LNG is not a long-term secure substitute for domestic natural gas. It can, however, be an important supply option through the mid-1980s and beyond, until additional gas supplies

may become available. The previous Energy Resources Council guidelines are being replaced with a more flexible policy that sets up no upper limit on LNG imports. Under the new policy, the Federal Government would review each application to import LNG so as to provide for its availability at a reasonable price without undue risks of dependence on foreign supplies. This assessment would take into account the reliability of the selling country, the degree of American dependence such sales would create, the safety conditions associated with any specific installation, and all costs involved." (p. 57)

The New Jersey Coastal Program states that LNG terminals are discouraged unless they are constructed so as to neither unduly endanger human life nor property nor otherwise impair the public health, safety and welfare, and comply with the Coastal Resource and Development Policies. Because the tankering of LNG could pose potential risk to life and property adjacent to New Jersey's waterways which also serve as boundaries with the states of Pennsylvania and Delaware along the Delaware River and the state of New York in the Port of New York and New Jersey, the state considers decisions concerning the siting of LNG terminals to be an interstate matter.

Recreation

The New Jersey coast is a national recreational resource. In considering the national interest in recreation, New Jersey reviewed the Nation-wide Outdoor Recreation Plan, the New Jersey State Comprehensive Outdoor Recreation Plan (SCORP), the Land and Water Conservation Fund Act, and the Historic Preservation Act of 1966 as amended. In addition, New Jersey has offered draft coastal documents for review to the National Marine Fisheries Service, Bureau of Outdoor Recreation and its successor Heritage Conservation and Recreation Service, U.S. Fish and Wildlife Service, National Park Service and staff of Gateway National Recreational Area-Sandy Hook, and the Advisory Council on Historic Preservation.

Major objectives of the national interest in recreation are:

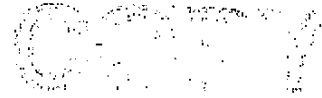
- To consider recreation as an equal among competing uses of the coastal region.
- To provide high quality recreational opportunities to all people of the United States, while protecting the coastal environment.
- To increase public recreation in high density areas
- To improve coordination and management of recreation areas.
- To protect existing recreation areas from adverse contiguous uses.
- To accelerate the identification and no-cost transfer of surplus and under-utilized federal property.

New Jersey will consider the recreational potential of a site in each decision under the Coastal Program. The Basic Coastal Policies require each waterfront municipality to provide or plan for at least one waterfront park. Residential, commercial and industrial projects are to be designed to include recreation areas, and public access to the water is to be part of waterfront development, whenever it is feasible. The Policies are consistent with the New Jersey State Comprehensive Outdoor Recreation Plan (SCORP), which was also prepared by DEP.

EXHIBIT B

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY :
v. :
STATE OF DELAWARE :



October 10, 2006

Oral deposition of Steven Whitney was held at the Offices of NJDEP, Bureau of Tidelands, 9 Ewing Street, Trenton, New Jersey, commencing at 9:30 a.m., on the above date, before Samantha A. Oakley, Certified Shorthand Reporter and Notary.

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- - -

1 coastal zone without any consideration
2 for review by a department on whether the
3 project should or should not be sited in
4 Delaware's coastal zone.

5 Q. Without review by you said
6 the department, which department?

7 A. The department in Delaware.

8 Q. The Delaware equivalent of
9 the New Jersey DEP?

10 A. Yes, DNREC.

11 Q. Delaware Natural
12 Resources -- I can't remember the rest
13 off the top of my head.

14 The last paragraph on page
15 141, which is one sentence long states,
16 "Consequently, under Delaware law, some
17 types of activities would be prohibited
18 from locating along the Delaware River in
19 Salem County, while other facilities
20 desiring to locate along the river would
21 need to obtain permit approval from the
22 State of Delaware." Is that consistent
23 with your understanding at the time?

24 A. Yes.

1 Q. Do you know why the report
2 singles out Salem County?

3 A. No, I don't.

4 Q. Were you involved with any
5 discussions during this time period about
6 the liquified natural gas unloading
7 facility --

8 A. No.

9 Q. -- to be located ~~within the~~
10 Twelve Mile Circle?

11 A. No.

12 Q. At any time period at DEP?

13 A. Within this area?

14 Q. Yes.

15 A. No.

16 Q. What about other areas?

17 A. There were some discussions
18 related to several types of
19 petroleum-type of facilities for the
20 Raritan Bay/New York Harbor area.

21 Q. Are you aware of any
22 discussions about liquified natural gas
23 facilities within the Twelve Mile Circle
24 -- discussions by others in which you

1 were not involved?

2 A. No.

3 Q. Turning to page 141, this is
4 figure 11 and it shows the New Jersey
5 Delaware boundary as it goes up the
6 Delaware Bay and then at the bottom of
7 what's termed Elsinboro on the map it
8 shifts over from roughly the middle of
9 the river to the New Jersey shore; is
10 that correct?

11 A. Yes.

12 Q. The bottom of the Twelve
13 Mile Circle?

14 A. Yes.

15 Q. Turning to page 143 this
16 first paragraph discusses in some detail
17 Delaware's Underwater Lands Act; is that
18 correct?

19 A. Yes.

20 Q. It sets out five different
21 situations -- five different examples of
22 a project that would require approval
23 under Delaware's Underwater Lands Act,
24 correct?

1 A. Yes.

2 Q. The first sentence, the
3 second half of that sentence states,
4 Projects involving the use of public
5 submerged lands -- I'm sorry. Let me
6 read the whole sentence.

7 "Because the State of
8 Delaware exercises jurisdiction along the
9 Salem County shoreline from the mean low
10 water line waterward, projects involving
11 the use of public submerged lands would
12 require approval under Delaware's
13 Underwater Lands Act." Did I read that
14 correctly?

15 A. Yes.

16 Q. And this is consistent with
17 your understanding at the time; is that
18 correct?

19 A. Yes.

20 Q. The second paragraph, rather
21 than reading it, I'll paraphrase. It
22 appears to me to state that New Jersey's
23 jurisdiction is limited to what is called
24 "a narrow strip of tideland between the

1 mean high water line and mean-low water
2 line in Salem County"; is that correct?

3 A. Yes.

4 Q. Is that your understanding
5 at the time of the extent of New Jersey's
6 regulatory authority in this geographic
7 area?

8 A. For those areas within
9 the -- below the mean high water line but
10 New Jersey had jurisdiction upland in
11 some areas under the Coastal Facilities
12 Review Act and Coastal Wetlands Act.

13 Q. But no jurisdiction beyond
14 the boundary between Delaware and New
15 Jersey?

16 A. That's correct.

17 Q. Do you know how -- we looked
18 at this map on page 142 at the spot where
19 the boundary changes from roughly the
20 middle of the river to the New Jersey
21 shore, is that in Salem County?

22 A. Yes, it is.

23 Q. Do you know how far up Salem
24 County goes? It's not exactly clear on

1 this map.

2 A. I believe the boundary line,
3 it's a darker line, and I believe it's
4 this line that runs between Oldmans
5 Township and Logan Township. I believe
6 that's the boundary line between
7 Gloucester and Salem counties.

8 Q. At the point where the
9 Delaware-Pennsylvania boundary crosses
10 the Delaware River, is that still in
11 Salem County or is that in Gloucester
12 County?

13 A. I believe that's Gloucester
14 County.

15 Q. Would you say it's the case
16 that Salem County borders most of the
17 land territory within the Twelve Mile
18 Circle?

19 A. Yes.

20 Q. So that's probably why the
21 report focuses on Salem County. I would
22 presume.

23 A. I would assume so, yes.

24 Q. Halfway down on 143 there's

1 a title that says, "Delaware Jurisdiction
2 in Salem County". Then there are two
3 headings. The first one is Delaware
4 Coastal Zone Act. The first sentence
5 there says, "Since the Delaware Coastal
6 Zone Act took effect in 1971, no activity
7 has taken place along the Salem County
8 shoreline which would come under the
9 jurisdiction of the Act." Did I read
10 that correctly?

11 A. Yes.

12 Q. Is that consistent with your
13 understanding at the time?

14 A. Yes.

15 Q. So while New Jersey was
16 aware that Delaware had the Coastal Zone
17 Act, it was of the opinion that there was
18 no activity proposed to extend from New
19 Jersey into Delaware that would implicate
20 the Delaware Coastal Zone Act, correct?

21 A. At this time, correct.

22 Q. The carryover paragraph at
23 the bottom of 143 is entitled Delaware
24 Underwater Lands Act. Toward the bottom

1 of the page there is a sentence that
2 states, "The only experience with the
3 Delaware Underwater Lands Act and
4 development in New Jersey was in 1971
5 when Delaware granted a lease to the
6 Dupont Chambers Works in Deepwater to use
7 subaqueous lands in the Delaware River."

8 I'll just read the next
9 sentence for context. "DuPont received
10 of the lease to dredge, fill and bulkhead
11 the area to locate an oil tank."

12 Were you aware of Delaware's
13 issuance of this lease in 1971?

14 A. No.

15 Q. The question may have been
16 unclear. Were you aware at any time
17 during your tenure at DEP that Delaware
18 in 1971 had issued this lease?

19 A. Yes.

20 Q. When did you become aware of
21 that?

22 A. I think I first became aware
23 of that when I read this document.

24 Q. So today?

1 A. No. I read this document --
2 I was aware of this document when it was
3 first published in 1979.

4 Q. I'm sorry. I misremembered
5 your answer.

6 Delaware's issuance of the
7 lease under the Subaqueous Lands Act was
8 consistent with your understanding of the
9 scope of its regulatory authority within
10 the Twelve Mile Circle at that time,
11 correct?

12 A. Yes.

13 Q. Moving to page 144 states --
14 there's a reference to a Delaware Coastal
15 Management Program discussion draft
16 September 1978. Are you familiar with
17 that document?

18 A. No.

19 Q. So you don't recall ever
20 having heard of it during your time?

21 A. I recall hearing of it
22 because almost every state submitted a
23 draft Coastal Management Program to the
24 federal government for approval but I

1 never read the document.

2 Q. I'd like to introduce two
3 more exhibits and these are going to be
4 the draft and final 1980 CMP.

5 (Whereupon documents were marked
6 White-5 and Whitney-6 for
7 identification.)

8 BY MR. ATTAWAY:

9 Q. What we have had marked as
10 Exhibit-5 is the May 1980 draft CMP. It
11 says on the first page it was prepared by
12 State of New Jersey, Department of
13 Environmental Protection, Division of
14 Coastal Resources, also by the US
15 Department of Commerce. I'm turning to
16 the following page which is Bates stamped
17 DE24185. This is a one-page letter like
18 the previous CMP from the commissioner
19 submitting what's called proposed New
20 Jersey Coastal Management Program and
21 Draft Environmental Impact Statement; is
22 that correct?

23 A. Yes.

24 Q. The penultimate paragraph

1 refers to public meetings we have held
2 during the past five years. Is that
3 consistent with your recollection?

4 A. Yes.

5 Q. So the preparing of this
6 document was a long and arduous process,
7 correct?

8 A. Yes.

9 Q. It involved a lot of people,
10 a lot of resources?

11 A. Yes.

12 Q. And took, based on this
13 letter, at least five years?

14 A. That's correct.

15 Q. Or maybe longer. You said
16 when CAFRA was passed in 1973 that
17 initiated the development of the Coastal
18 Management Plan?

19 A. That's correct.

20 Q. I'd like you to turn to page
21 4 of the actual document after the
22 tables, and it's Bates stamped DE24199
23 for clarity. About halfway down the
24 lower half of the page it states, "The

1 first step toward continuing the Coastal
2 Management Program into the more
3 developed portions of the state was
4 publication of Options for New Jersey's
5 Developed Coast in March 1979."

6 Is that consistent with your
7 understanding? Just to be clear, Options
8 for New Jersey's Developed Coast in 1979
9 is Exhibit-4 that we were just discussing
10 before, the 1980 draft; is that correct?

11 A. Yes.

12 Q. The Options report is the
13 report that had all of the language about
14 the Delaware and New Jersey boundary and
15 the regulatory authority of each state,
16 correct?

17 A. Yes.

18 Q. Turning to page 18 of the
19 report or I should say the draft 1980
20 CMP, this is the section on the
21 boundaries which begins on page 17,
22 correct?

23 A. Yes.

24 Q. The last two paragraphs of

1 page 18 of this section, they're entitled
2 Seaward and Interstate Boundaries and the
3 final paragraph it states, "In most of
4 Salem County, the Delaware-New Jersey
5 State boundary is the mean low water line
6 on the eastern (New Jersey) shore of the
7 Delaware River. The New Jersey and
8 Delaware Coastal Management agencies have
9 discussed this issue and have concluded
10 that any New Jersey project extending
11 beyond mean low water must obtain coast
12 permits from both states." That is
13 consistent with your understanding of the
14 states' respective regulatory authority
15 at that time, correct?

16 A. Yes.

17 Q. We read language in the
18 draft and final 1978 reports that talked
19 about coordination of permit reviews. Do
20 you remember that language that we talked
21 about?

22 A. Yes.

23 Q. Would you say that this
24 language in the 1980 report is much

1 stronger in asserting the scope of each
2 states' regulatory authority within the
3 Twelve Mile Circle?

4 A. I would say that this
5 document makes it clearer regarding the
6 two programs on which programs would
7 regulate what functions.

8 Q. So it's clearer in stating
9 that Delaware laws would apply to any
10 projects extending from New Jersey past
11 the boundary line into Delaware, correct?

12 A. Well, it's clear -- it
13 basically says it's clear that we would
14 coordinate the reviews, but it doesn't
15 specifically mention where the
16 jurisdictions end or begin in each state.

17 Q. But it does say that, "Any
18 New Jersey project extending beyond mean
19 low water must obtain coastal permits
20 from both states?"

21 A. Yes.

22 Q. That can only be premised on
23 the judgment that Delaware has regulatory
24 authority over the project to the extent

1 that it extends into Delaware; is that
2 correct?

3 A. I assume that assumption is
4 there, yes.

5 Q. Thank you. Turning to page
6 426, which I excerpted this exhibit -- I
7 don't think I said that earlier. It's
8 Bates Delaware 24620. This is Appendix I
9 and it's a -- I'm sorry. It goes a
10 little bit onto the second page.
11 Appendix entitled, Preparers of the
12 Proposed New Jersey Coastal Management
13 Program and Draft Environmental
14 Statement. It lists the people who were
15 involved in preparing the draft 1980 CMP;
16 is that correct, Mr. Whitney?

17 A. Yes.

18 Q. The first name is one that
19 you mentioned before, David Kinsey,
20 acting director at the time?

21 A. Yes.

22 Q. And then below there are a
23 number of names from the Bureau of
24 Coastal Planning and Development some of

1 whom you mentioned earlier. Do you
2 recognize all these names?

3 A. Yes.

4 Q. Do you know which of these
5 people would have had the primary
6 authority for drafting the language on
7 the boundaries in the CMP?

8 A. No, I do not. At this time
9 it was probably written by someone within
10 the Bureau of Coastal Planning and
11 Development, probably someone on the
12 planning staff. I don't recall who may
13 have been assigned the task of writing
14 that particular section.

15 Q. Toward the end of the list
16 there is Neil Yoskin?

17 A. That's correct.

18 Q. It looks like he was an
19 attorney. Do you know what his
20 responsibilities were in the Bureau of
21 Coastal Planning?

22 A. He was basically a staff
23 attorney within the planning section.

24 Q. Was he employed as an

1 attorney or was he in another function
2 and simply had a law degree?

3 A. I'm not sure what his title
4 was.

5 Q. Then the last paragraph
6 says, Planning assistance was also
7 provided by and then it lists, you, Chief
8 Steven Whitney and a number of other
9 names, including Ruth Ehinger?

10 A. Ehinger.

11 Q. What was her involvement in
12 the CMP process?

13 A. The names referred here
14 under the -- they're all employed by the
15 Bureau of Coastal Project Review having
16 to do with issuing permits, and the staff
17 was consulted on the draft of the main
18 document. The main document was prepared
19 by the Bureau of Coastal Planning and
20 Development and the Bureau of Coastal
21 Project Review had input into that
22 document.

23 Q. Did you ever talk to Ms.
24 Ehinger about the boundary issues between

1 Delaware and New Jersey within the Twelve
2 Mile Circle?

3 A. I don't believe so because
4 at the time when this document was being
5 prepared Ruth Ehinger had worked in a
6 different section of the coast. Our
7 bureau was divided into two or I think I
8 recall three sections. There may have
9 been more. No, I believe there was three
10 at the time. There was one section that
11 was known as the northern coastal area,
12 which included Monmouth and Ocean
13 counties. Another one included southern
14 which included Atlantic, Salem, Cape May
15 and Salem counties. Then there was
16 another section that included Gloucester,
17 Camden, Mercer as well as the Hackensack
18 Meadowlands areas. I believe at the time
19 Ruth worked in the Monmouth/Ocean area.
20 So I don't think I ever discussed with
21 her any boundary issues because this area
22 was outside of her jurisdiction at the
23 time.

24 Q. Do you know if she ever

1 discussed these boundary issues with
2 anyone else?

3 A. She may have. I'm not sure.

4 Q. The very last page of the
5 excerpt, which I believe is the last page
6 of the CMP as well, DE6422 lists a number
7 of public hearings and states public
8 comments will be accepted until July 7,
9 1980. Is it fair to say that -- there
10 are four public hearings listed here. Do
11 you know if those were held?

12 A. I believe they were held,
13 yes.

14 Q. Were other hearings held?

15 A. I'm not sure.

16 Q. Do you know what the turnout
17 was to these public hearings?

18 A. In some areas -- I believe
19 in Toms River and in Trenton there was a
20 pretty good turnout. I think there was a
21 lesser turnout in Jersey City and Camden.

22 Q. The public comments, there's
23 a July 7, 1980 deadline for written
24 public comments. Did the DEP receive

1 comments?

2 A. Yes.

3 Q. How many comments?

4 A. I don't recall.

5 Q. More than 100?

6 A. I don't recall.

7 Q. Let's turn to what's been
8 marked as Exhibit-6, which is the
9 August 1980 final Environmental Impact
10 Statement and New Jersey's Coastal
11 Management Program. You have had a
12 chance at least skim through this
13 excerpt; is that correct?

14 A. Yes.

15 Q. If it's okay with you I will
16 start asking a few questions about this
17 and if you need to stop and read
18 something, you can obviously do that.
19 Let's turn to page 20, which is Bates
20 stamped DE20382. This concerns, again,
21 the boundary section of the report. I'll
22 ask you to refer back to the draft.
23 There's a paragraph that begins, "In most
24 of Salem County the Delaware-New Jersey

1 state boundary is mean low water line on
2 the eastern (New Jersey) shore of the
3 Delaware River." Then it talks about the
4 New Jersey and Delaware agencies having
5 discussed the issue and concluded that
6 any New Jersey project extending beyond
7 mean low water would have to obtain
8 permits from both states.

9 I just want you to compare
10 that paragraph with the similar paragraph
11 on page 18 of the draft 1980 report and
12 tell me if they're the same or if they're
13 not tell me what the difference is.

14 A. As far as I can see, they're
15 identical.

16 Q. So the final report
17 contained exactly the same language with
18 respect to the Delaware-New Jersey
19 boundary as did the draft even after the
20 agency received public comments, correct?

21 A. Yes.

22 Q. I'd like to turn now to
23 Exhibit-6. Still it's the 1980 final
24 CMP. There's Appendix H, which I have

1 provided in the excerpt. It starts at
2 DE18925. The first few pages are the
3 table of contents and the list of
4 commentors.

5 MS. CONKLIN: I'm officially
6 lost. We're on exhibit --

7 MR. ATTAWAY: Keep going.

8 MS. CONKLIN: Thank you.

9 MR. ATTAWAY: You're
10 welcome.

11 BY MR. ATTAWAY:

12 Q. Starting at page 419 of the
13 report there's a list of commentors and
14 it goes from 419 through 423, correct?
15 It's an eight-page list of commentors on
16 the draft report or the draft CMP?

17 A. Yes.

18 Q. Continuing on, there's page
19 499 -- I apologize. It's a little hard
20 to read but this is the way it is in the
21 original. This is a summary of comments
22 by interested parties and the response by
23 the New Jersey DEP. There are two
24 columns on this page. If you look on the

1 right side there's a number 392, which I
2 believe this is comment number 392 or
3 issue number 392. It's from Salem
4 County.

5 It says, "Salem
6 County..." -- the comment is from the
7 Salem County Planning Board. It says
8 that, "Salem County is strongly opposed
9 to the statement in this revision that
10 any project in the area must be
11 consistent with both Delaware's and New
12 Jersey's coastal programs and obtain
13 permits from two states."

14 The New Jersey DEP response
15 is, "This disagreement is noted, but DEP
16 has found no other solution available by
17 administrative action to address the
18 peculiar N.J.-Delaware boundary in Salem
19 County where the Delaware State line
20 reaches to low tide on the New Jersey
21 shore." Were you familiar with this
22 comment at the time the CMP was being
23 developed?

24 A. No.

1 Q. This comment shows that
2 Salem County objected to the statement in
3 the draft CMP, the draft 1980 CMP, that
4 any project crossing in the Delaware
5 would have to get permits from both
6 states, correct?

7 A. Yes.

8 Q. And New Jersey DEP's
9 response that there is no other solution
10 to this issue is consistent with your
11 understanding of the respective states'
12 regulatory authority in the Twelve Mile
13 Circle at that time, correct?

14 A. It basically states that
15 there is no administrative action to
16 address the particular issue. That
17 doesn't mean there could be something --
18 some other action that might be
19 available.

20 Q. In a cooperative sense do
21 you mean?

22 A. In a cooperative --
23 something beyond the capability of the
24 Bureau of Coastal Planning and

1 Development within the Department of
2 Environmental Protection of coming up
3 with some type of administrative remedy
4 at the state level.

5 Q. But this statement is
6 consistent with your understanding at the
7 time that Delaware could apply its
8 coastal zone laws to a project that
9 extended the boundary into Delaware,
10 correct?

11 A. Yes.

12 Q. Turn back in the excerpts to
13 page 254. There's a section starting on
14 254 entitled, Liquified Natural Gas that
15 carries over to 255. Just take a moment
16 and read that. It's about two paragraphs
17 long.

18 A. (Witness reading.)

19 Q. The first paragraph quotes
20 some language from the National Energy
21 Plan and then the second paragraph and
22 final paragraph in this section states
23 that, "The New Jersey Coastal Program
24 states that LNG terminals are discouraged

1 unless they are constructed as to neither
2 unduly endanger human life nor property
3 nor otherwise impair the public health,
4 safety and welfare and comply with the
5 coastal resource and development policy.
6 Because the tankering of LNG could pose
7 potential risk to life and property
8 adjacent to New Jersey's waterways, which
9 also serve as boundaries along the states
10 of Pennsylvania and Delaware along the
11 Delaware River and the state of New York
12 and the Port of New York and New Jersey,
13 the state considers decisions concerning
14 the siting of LNG terminals to be an
15 interstate matter."

16 Is that consistent with your
17 understanding of the respective states'
18 regulatory authority in the Twelve Mile
19 Circle?

20 A. Yes.

21 Q. I know I asked you earlier
22 but does this refresh your recollection
23 at all as to whether you had any
24 discussions about LNG terminals? For the

1 record, LNG is liquified natural gas.

2 A. Yeah, I did not have any --
3 I don't believe I have ever had
4 discussions with LNG facilities.

5 Q. Do you know how this passage
6 would have gotten into the CMP?

7 A. It was developed probably
8 jointly by the planning staff. I think
9 the department then had an office or the
10 State of New Jersey had an Office of
11 Energy Policy as well as the federal
12 Coastal Zone Management staff. But I
13 don't believe I was ever involved in any
14 of the discussions.

15 Q. Do you know whether there
16 was an amendment process for the New
17 Jersey CMP?

18 A. Yes, there is.

19 Q. What is that process?

20 A. Under the federal Coastal
21 Zone Management Act anytime New Jersey
22 wants to amend its particular program it
23 must petition the federal government with
24 the amendments and with arguments for the

1 amendment, why the program should be
2 amended. Then it subsequently has to be
3 approved by the federal government.

4 Q. Has New Jersey ever used
5 that procedure to amend its CMP?

6 MS. CONKLIN: Obviously,
7 we're talking about during the
8 time he was present and employed
9 at DEP, right?

10 BY MR. ATTAWAY:

11 Q. At any time during your
12 knowledge.

13 MS. CONKLIN: I'm going to
14 object on the basis of foundation.
15 If he left the agency in 1997?

16 THE WITNESS: Yes.

17 MS. CONKLIN: How about we
18 break it into two parts?

19 MR. ATTAWAY: This is a
20 foundational question. I'm asking
21 him if he knows whether New Jersey
22 has ever used the CMP process --
23 the CMP amendment process.

24 THE WITNESS: When I was in

1 the department we did use it. I
2 believe on several occasions to
3 make minor amendments to New
4 Jersey's Coastal Management
5 Program, yes.

6 BY MR. ATTAWAY:

7 Q. On approximately how many
8 occasions?

9 A. That, I don't recall.
10 Technically any amendment that's made
11 such as revisions in coastal regulations
12 must be presented to the federal
13 government for review and approval.

14 Q. So anytime New Jersey
15 revised its regulations it would have to
16 seek and receive approval for amendment
17 of its coastal management plan?

18 A. Yes, and I'm not sure
19 whether it was any amendment or any major
20 amendments because I know anytime we made
21 an amendment to a regulation we would
22 submit those revisions to the federal
23 government. Now, which ones required
24 approval by the federal government and

1 which ones did not I'm not sure. But
2 they were informed of all of the
3 amendments, or most of the amendments
4 they knew of.

5 Q. Did New Jersey ever seek to
6 amend its coastal management plan to
7 remove the statements about Delaware's
8 regulatory authority within the Twelve
9 Mile Circle?

10 A. I don't recall.

11 Q. Do you recall whether anyone
12 at DEP ever suggested that that occur?

13 A. No.

14 Q. Are you familiar with the
15 Delaware River and Bay Authority?

16 A. Yes.

17 Q. What's your understanding
18 generally?

19 A. It's an agency that has
20 jurisdiction over certain activities
21 within all of the Delaware River and Bay.
22 It has independent authority.

23 Q. Is there a compact between
24 Delaware and New Jersey concerning the

1 Delaware River and Bay Authority?

2 A. I'm not sure. I don't know.

3 Q. Are you familiar with a 1962
4 compact between Delaware and New
5 Jersey --

6 A. No, I'm not.

7 Q. -- establishing the Delaware
8 River and Bay Authority?

9 A. No. I know the agency
10 exists and that we have had dealings with
11 them over permit matters and other
12 planning matters, but I'm not familiar
13 with the genesis of that agency.

14 Q. Anything concerning the
15 boundary between New Jersey and Delaware?

16 A. No.

17 Q. The application of
18 Delaware's regulatory laws to projects
19 extending from New Jersey?

20 A. Under the Delaware River and
21 Bay Authority?

22 Q. Right.

23 A. No.

24 Q. Now would probably be a good

1 time to break for lunch.

2 (Whereupon a break was taken.)

3 BY MR. ATTAWAY:

4 Q. I have another question
5 about your affidavit, paragraph 3. I'm
6 going to ask you a question about the
7 last sentence but feel free to read the
8 whole thing if you want to for context.

9 A. (Witness reading.)

10 Q. That sentence, "Further,
11 during my term of service with the DEP,
12 to my knowledge, New Jersey never adopted
13 any regulation requiring any person
14 seeking to construct an improvement
15 appurtenant to the New Jersey side of the
16 River to obtain any permit of approval
17 from the State of Delaware." Is that
18 still your understanding?

19 A. That is my understanding,
20 yes.

21 Q. Did New Jersey ever issue a
22 permit requiring anyone to first get a
23 permit from Delaware?

24 A. Not that I recall because

1 when I was in charge of the permitting
2 staff I don't remember -- I don't
3 remember any particular requirement of
4 any permits that were issued requiring
5 that the applicant get a permit from
6 Delaware. There's some vague
7 recollection of a pier that was approved
8 that's within that area. I don't know if
9 it was Salem or even Gloucester County;
10 it's very fuzzy.

11 (Whereupon document was marked
12 Whitney-7 for identification.)

13 BY MR. ATTAWAY:

14 Q. Let me know when you have
15 had enough time to review Exhibit-7.

16 A. I have.

17 Q. This is a permit issued by
18 State of New Jersey, Department of
19 Environmental Protection, dated
20 September 24, 1991 to Keystone
21 Cogeneration System, Incorporated. Mr.
22 Whitney, have you seen this permit
23 before?

24 A. I saw it for the first time

1 yesterday.

2 Q. Yesterday?

3 A. Yes.

4 Q. It says this was issued by
5 the Land Use Regulation Element?

6 A. Yes.

7 Q. How is that division, or
8 element, how is that related to your
9 position at DEP?

10 A. This was after the
11 department's reorganization where we went
12 from resource lines to functional lines.
13 At this time I was serving under a
14 different assistant commissioner than the
15 permitting section. So it was a
16 different part of the department.

17 Q. If you could turn to page 5
18 of the permit and the Bates stamp on that
19 page for the record is New Jersey 4408.
20 At the top of the page it says, Terms and
21 Conditions continued, and the letter e.
22 is what I want to focus on, particularly
23 e.4. Would you agree that this language
24 makes the Keystone permit conditioned on

1 the issuance of a permit by Delaware?

2 A. Yes.

3 Q. Does this refresh your
4 recollection in any way about this permit
5 and New Jersey's permit conditioned on
6 approval by Delaware?

7 A. No. Like I said, I was not
8 involved in the issuance of this permit
9 and I only saw it the first time as of
10 yesterday.

11 Q. Fair enough. Just another
12 question or two about this. This was
13 signed by Ruth Ehinger, looking at page
14 6. Her name is printed underneath the
15 signature line. It gives her title as
16 manager Bureau of Coastal Regulation. I
17 gather from this that she was in charge
18 of issuing this permit and other similar
19 types of permits; is that correct?

20 A. That's correct but that is
21 not her signature.

22 Q. Do you know whose signature
23 that is?

24 A. It looks like Bob Tudor --

1 Robert Tudor.

2 Q. T-U-D-O-R?

3 A. Yes.

4 Q. What was his position?

5 A. At this time in '91 I
6 believe Bob may have been Ruth Ehinger's
7 immediate supervisor. If not immediate
8 but a supervisor. I know Bob was then
9 director of the division or assistant
10 commissioner at that time.

11 Q. In the hierarchy of the
12 division, can you start at the top and
13 list the titles? I assume assistant
14 commissioner would be the top of the
15 division; is that correct?

16 A. Not of the division. I
17 believe at the time there was the
18 commissioner.

19 Q. When you say division, you
20 mean the Department of Environmental
21 Protection?

22 A. No.

23 Q. Which division?

24 A. Starting at the top there's

1 the commissioner. Then under the
2 commissioner there are several assistant
3 commissioners. Then under each
4 commissioner there are several divisions,
5 so there would be division directors.
6 Then under division directors there would
7 be bureaus or offices, and over time they
8 were either considered -- the heads of
9 those offices were considered to be
10 managers, bureau chiefs, something along
11 the lines like that.

12 Q. So Tudor was perhaps the
13 director or above that the assistant
14 commissioner?

15 A. Yes.

16 Q. For the Bureau of Coastal
17 Regulation?

18 A. Yes.

19 Q. And the assistant
20 commissioner reports to whom?

21 A. The commissioner.

22 Q. There's one commissioner of
23 DEP, right?

24 A. Yes.

1 Q. So it would go, the
2 commissioner of DEP and then assistant
3 commissioner of a particular function and
4 then below that would be the director?

5 A. Yes. Below that would be
6 manager or bureau chief.

7 Q. Are manager and bureau chief
8 synonyms?

9 A. Over the history of the
10 department that I'm aware they were very
11 similar, yes.

12 Q. Your title in the 1980 CMP
13 it lists you as chief of -- I forget what
14 bureau.

15 A. Coastal Project Review.

16 Q. That was equivalent to being
17 a manager?

18 A. Yes.

19 Q. Equivalent to Ms. Ehinger's
20 position here?

21 A. Yes.

22 Q. Do you know who would have
23 done the work on drafting the Keystone
24 permit?

1 A. According to this document,
2 it looks like it was prepared by William
3 Berns and David Fanz.

4 Q. Where do you see that?

5 A. It would be the second page.

6 Q. What were their titles and
7 responsibilities at this time?

8 A. They would be staff within
9 the bureau that would review and prepare
10 the document for signature by the
11 manager. I don't know how detailed you
12 want to get as far as civil service
13 functions.

14 Q. We can go a little ways into
15 that.

16 A. When I was there, underneath
17 the bureau position you would have had
18 such positions along the lines of
19 environmental specialist. That would be
20 in a series of an assistant environmental
21 specialist, senior environmental
22 specialist, principal and supervising
23 environmental specialist. Then you may
24 have had some other titles -- geology

1 titles or engineer, assistant engineer,
2 senior engineer, principal.

3 A lot of the time the
4 bureaus were arranged that under each
5 bureau there may have been sections that
6 were then supervised by a supervising
7 environmental specialist or supervising
8 engineer, depending on what function they
9 may have had. Under those people would
10 have been a hierarchy of principal,
11 senior and assistant positions.

12 Q. Okay. Do you know how long
13 Mr. Berns and Mr. Fanz stayed with the
14 DEP?

15 A. No, I do not.

16 Q. Can you remember a
17 subsequent point in time when they were
18 still with DEP?

19 A. No. I'm unfamiliar with Mr.
20 Berns. I'm unfamiliar with David Fanz.
21 I don't believe I ever supervised them in
22 any capacity.

23 Q. How would they have gone
24 about determining whether to condition

1 this permit on the issuance of permits by
2 Delaware?

3 A. I have no idea.

4 Q. Who would they have gone to
5 for advice on resolving an issue that
6 came up in a permit drafting process?

7 A. I assume they would have
8 taken it up to their immediate
9 supervisor.

10 Q. Ms. Ehinger?

11 A. It could be a supervisor
12 below.

13 Q. Intermediate?

14 A. Or it could be directly to
15 Ms. Ehinger.

16 Q. You know Mr. William
17 Andersen, correct?

18 A. Yes.

19 Q. He was in the room all
20 morning?

21 A. Yes.

22 Q. Are you aware whether he
23 ever advised permit applicants as to the
24 scope of Delaware's regulatory authority

1 within the Twelve Mile Circle?

2 A. No.

3 Q. No knowledge one way or the
4 other?

5 A. No knowledge.

6 Q. Do you know that Mr.
7 Andersen submitted an affidavit in this
8 case?

9 A. No.

10 Q. You haven't seen or read
11 that affidavit?

12 A. That's correct.

13 Q. Are you aware of anyone else
14 at the department that advised permit
15 applicants as to the scope of Delaware's
16 permitting authority?

17 A. Regarding this particular
18 permit or --

19 Q. Regarding any permit for
20 let's say that a proposed project like
21 the Keystone project initiated in New
22 Jersey but then extended out into the
23 water beyond the boundary, do you know of
24 anyone at DEP having advised a permit

1 applicant as to the scope of Delaware's
2 regulatory authority over that project?

3 A. In what time frame?

4 Q. In any time frame while you
5 were at the department.

6 A. I don't recall any
7 connections -- any connection like that.
8 The main reason, a lot of times we relied
9 upon the Attorney General's Office in
10 most cases when a particular permit
11 application was appealed. And then the
12 Attorney General's Office would represent
13 the Department of Environmental
14 Protection in the proceedings. I do know
15 that in the past if there was some legal
16 matter related to a permit application
17 that we were unsure of we would contact a
18 DAG for advice, but I don't recall any
19 case where we dealt with a DAG or any
20 other legal staff regarding the boundary
21 issue.

22 Q. Thank you.

23 MR. ATTAWAY: Why don't we
24 go off the record and mark some

1 documents?

2 (Whereupon documents were marked
3 Whitney-8 through Whitney-16 for
4 identification.)

5 BY MR. ATTAWAY:

6 Q. Mr. Whitney, I have just had
7 marked exhibits 8 through 16, a number of
8 documents from the State of Delaware all
9 pertaining to permits issued to Keystone
10 by the State of Delaware. Is that
11 basically a correct description of these
12 documents?

13 A. Yes.

14 Q. Have you seen any of these
15 permits before?

16 A. No.

17 Q. Were you aware of any
18 permits that Delaware issued to Keystone?

19 A. No.

20 Q. Would you agree that these
21 nine documents are consistent with your
22 understanding that you stated earlier
23 that Delaware had regulatory authority
24 over projects extending from New Jersey

1 into Delaware?

2 A. Yes.

3 Q. Thanks. I'd like to move
4 on. Let's move on to the memorandum of
5 understanding that you mentioned earlier.
6 We may as well go ahead and introduce
7 that as Exhibit-17.

8 (Whereupon document was marked
9 Whitney-17 for identification.)

10 BY MR. ATTAWAY:

11 Q. Before I ask you a question
12 about this, and I'll give you time to
13 review it, I want to look at paragraphs 5
14 and 6 of your declaration. Take time to
15 review the MOA and let me know when
16 you're ready to continue.

17 A. Okay.

18 Q. Looking at paragraph 5 of
19 your affidavit this references
20 discussions with the Coastal Management
21 Program regulatory and planning staffs
22 about the New Jersey-Delaware boundary
23 line and what its effects it had on permit
24 decision-making. It also mentions other

1 discussions and conferences with Delaware
2 staff addressing this same topic. I
3 understand from our previous discussion
4 that this is primarily focused on the
5 time period from 1991 to 1994; is that
6 correct?

7 A. Yes.

8 Q. Tell me generally about how
9 the memorandum of understanding came
10 about. First, you can explain what it
11 is. I'm not asking any questions about
12 the document itself yet but just the
13 process leading up to it.

14 A. The process leading up to it
15 took -- well, the impetus comes from the
16 Federal Coastal Zone Management Act which
17 basically says any state that has an
18 approved coastal management program
19 should strive to improve its program. By
20 the 1980s, one of the things that we
21 identified and may have been a forgotten
22 improvement item was the boundary issue
23 between Delaware and New Jersey and that
24 it would be beneficial to both Delaware

1 and New Jersey's coastal management
2 programs that we would try to come up
3 with some type of agreement that would
4 involve issues over the boundary and
5 projects that would straddle the boundary
6 itself as well as any activity that would
7 affect the resources of the Delaware
8 River and the Delaware Bay.

9 So we had applied for
10 permission to get funding from the
11 federal government to work on a
12 memorandum of agreement with the State of
13 Delaware to come up with an agreement
14 that would basically look at the Delaware
15 as a whole resource and try to coordinate
16 our efforts so we would better protect
17 the national interest and our interstate
18 interest -- intrastate interest where the
19 Delaware River and Delaware Bay of...

20 Q. Who initiated the process of
21 discussing these matters?

22 A. I don't recall. This may
23 have come out of an ongoing program known
24 as the Delaware Estuary Program whereby I

1 believe at the same time staff and
2 agencies from both New Jersey and
3 Delaware and Pennsylvania were looking at
4 how best to manage the resources of the
5 Delaware Estuary. I think one of the
6 things we were talking about was
7 coordinating planning regulatory efforts
8 among all the agencies, not only at the
9 state level but county and municipal
10 levels in order to carry out the plan
11 that would protect the resources of this
12 area. And I think that jogged the memory
13 somewhat, I don't know if it was either
14 Delaware or New Jersey, that this might
15 be something to work on to improve.

16 Q. What part did the boundary
17 issue play in initiating this process?

18 A. The boundary was an element
19 probably weighted more than other
20 elements when you look at such things as
21 wetlands issues or water quality issues
22 or air issues, but the boundary itself
23 was a major issue because we knew that
24 there would be -- probably would be in

1 the future some projects that would
2 straddle this boundary and that it would
3 require closer coordination of one
4 project than say a project that might
5 generally affect a particular resource.

6 Q. You mentioned applying for
7 federal funding for this process. Is
8 that the DEP applied for federal funding?

9 A. Yes.

10 Q. When was that?

11 A. Probably somewhere in 1990
12 or '91 that we started the process. It
13 was all part of the annual federal
14 Coastal Zone Management grant that the
15 state receives. Every year we have to
16 apply for and designate how that money
17 will be used both in a regulatory fashion
18 as well as a planning fashion.

19 Q. In the application documents
20 to the federal government was the
21 boundary issue mentioned in New Jersey's
22 application?

23 A. I don't recall.

24 Q. Did you participate in

1 preparing that application?

2 A. Yes.

3 Q. Would the application be in
4 your files?

5 A. That, I don't know. I don't
6 know how presently DEP purges files and
7 what documents it keeps, which ones it
8 doesn't keep.

9 Q. When you left the department
10 in 1997, was this application in your
11 possession, in your files?

12 A. It was -- it was probably in
13 the files within the section that I was
14 head of, yes, but again, how long those
15 documents are saved -- I'm not really
16 sure exactly if applications are saved on
17 a five-year, ten-year basis or whatever.

18 Q. Did DEP receive federal
19 funding to pursue the memorandum of
20 agreement with Delaware?

21 A. Yes.

22 Q. Was the funding sought
23 specifically for this memorandum of
24 agreement?

1 A. No. The funding was -- the
2 memorandum of agreement was a part of
3 planning task that the planning section
4 would hopefully pursue within a certain
5 time frame.

6 Q. Let's turn to the memorandum
7 of agreement. There's a draft what's
8 been introduced as Exhibit-17. There's a
9 cover memorandum to distribution from
10 Steven Whitney, manager, and attached is
11 a draft of the memorandum of agreement
12 between New Jersey Department of
13 Environmental Protection and Delaware
14 Department of Natural Resources and
15 Environmental Control. The cover
16 memorandum is dated July 7, 1994. Your
17 affidavit in paragraph 6 says that this
18 draft was in the works between 1991 and
19 1994. When did you produce a first draft
20 of the memorandum?

21 A. I honestly don't recall.

22 Q. Was it before 1994?

23 A. I have no -- we had several
24 drafts prior to July 1994.

1 Q. You got comments and
2 suggestions back from various people
3 within the DEP and also from Delaware?

4 A. Yes.

5 Q. I'm looking at the cover
6 memorandum. The second paragraph says,
7 "A few representatives of NJDEP and DNREC
8 have reviewed previous drafts. I would
9 appreciate it if you would now provide us
10 with your comments and suggestions." Do
11 you remember who the representatives of
12 DEP and DNREC were that you mention here?

13 A. I believe -- I know we
14 talked to Sarah Cooksey from DNREC. I
15 believe at the time she headed the
16 coastal program. I know we talked to
17 Ernie Hahn -- Ernest Hahn, Ruth Ehinger,
18 Tom Wells. And I know I discussed it
19 with both Martin Bierbaum and John
20 Weingart.

21 Q. In those discussions, was it
22 always understood that Delaware would
23 have regulatory authority over projects
24 that straddled the boundary with

1 Delaware?

2 A. Yes.

3 Q. Did anyone comment that that
4 was incorrect, that Delaware lacked
5 regulatory authority over projects that
6 extended into Delaware?

7 A. No.

8 Q. The bottom of the cover
9 memorandum -- well, the "To" line on the
10 memorandum at the top says distribution
11 colon, so I assume the above reference is
12 a shorthand for the list of approximately
13 10 names, although I haven't counted
14 them, at the bottom? It's 10?

15 A. 11. Close.

16 Q. You mention Sarah Cooksey.
17 She's at the top. Bob Tudor, it says
18 USEPA. When we were looking at the
19 Keystone permit, is that the same Bob
20 Tudor that you said signed for Ruth
21 Ehinger?

22 A. Yes.

23 Q. He moved from DEP to EPA?

24 A. Yes. Bob was heading up the

1 Delaware National Estuary program.

2 Q. When did he move from DEP to
3 USEPA?

4 A. I don't recall.

5 Q. Do you remember ever
6 discussing the boundary issue with Mr.
7 Tudor?

8 A. No, I don't recall
9 specifically discussing the boundary
10 issue with him. Coordination issues, yes
11 but...

12 Q. John Weingart you mentioned
13 earlier. What was his title and
14 responsibilities?

15 A. I believe at this time John
16 Weingart was the assistant commissioner,
17 or I should say an assistant
18 commissioner.

19 Q. Do you remember what bureau
20 or division or whatever the proper term
21 is?

22 A. No, I do not.

23 Q. Martin Bierbaum, what was
24 his title?

1 A. He was my immediate
2 supervisor.

3 Q. Ernest Hahn?

4 A. Ernest Hahn at the time
5 headed one of the regulatory programs
6 within DEP.

7 Q. Are you able to remember
8 which one?

9 A. No.

10 Q. Ruth Ehinger, do you know
11 what her title and responsibilities were
12 in 1994?

13 A. No, but she did head one of
14 the regulatory sections as well.

15 Q. Was it Land Use?

16 A. It may have been; I don't
17 recall.

18 Q. Theresa Fowler?

19 A. She headed one of the
20 regulatory programs within Water.

21 Q. Dennis Hart?

22 A. He headed a regulatory
23 program within water as well.

24 Q. Bill O'Sullivan?

1 A. He headed one of the
2 regulatory programs in air quality.

3 Q. Tom wells?

4 A. He was in charge of the
5 Green Acres program.

6 Q. Very briefly, what is the
7 Green Acres program?

8 A. The Green Acres program is a
9 program set up by legislation that allows
10 the State of New Jersey on a voluntary
11 basis to purchase lands for conservation
12 or recreational purposes.

13 Q. And JoAnne Cubberly?

14 A. JoAnne headed the Bureau of
15 Tidelands. I believe that was the name
16 of the bureau at that time.

17 Q. That's the bureau that would
18 issue riparian grants?

19 A. Yes.

20 Q. Do you know when she became
21 the head of the Bureau of Tidelands?

22 A. No, I do not.

23 Q. Do you know about how long
24 she kept that position?

1 A. No, I don't.

2 Q. Turning to the memorandum of
3 agreement as opposed to the cover
4 memorandum that we were just talking
5 about. The bottom of page 2 says, "Both
6 agencies recognize that each agency has
7 the independent authority to approve or
8 deny applications pursuant to its own
9 regulations." I think you said earlier
10 that the working understanding of
11 everyone involved in this was that
12 Delaware did have regulatory authority
13 over projects that straddled the
14 boundary?

15 A. Yes.

16 Q. Let's go back to your
17 affidavit, paragraph 8, please. The
18 first sentence of paragraph 8 says,
19 "However, during the review process of
20 the draft MOA within DEP, objections were
21 raised." What were those objections and
22 who raised them?

23 A. They were raised by the
24 different regulatory agencies that we

1 shared this memorandum of agreement with.
2 Their main concern was either delaying
3 the review process or creating a process
4 whereby Delaware would have veto power
5 over a permit process. At the time when
6 this memorandum of agreement was being
7 prepared there was an emphasis by the
8 then administration to speed up the
9 permit decision-making process. The
10 administration had promised that DEP
11 would be more responsive and make
12 decisions more quickly than in the past.

13 A lot of the heads of the
14 different programs were feeling pressure
15 to issue decisions in a timely manner and
16 they felt that this agreement would
17 somehow jeopardize that time frame as
18 well as somehow allow the agency to lose
19 its independent permit decision making to
20 other agencies outside of DEP.

21 Q. So if I understand you
22 correctly, the thinking was that by
23 entering into this cooperative agreement
24 there could be a process whereby say if

1 Delaware didn't meet its deadline or come
2 through with some interim decision that
3 it would stop New Jersey from acting
4 further based on the agreement between
5 them; is that fair to say?

6 A. Yes.

7 Q. When you say there were
8 concerns about giving a veto to Delaware
9 as to projects which otherwise would have
10 met New Jersey's standards, that's not
11 talking about Delaware's independent
12 regulatory authority over a project that
13 straddled the boundary, is it?

14 A. No. I think they were more
15 concerned that somehow an agency would be
16 interjecting itself into their permit
17 decision making and would have a veto or
18 overruling process within their decision
19 making.

20 Q. Over New Jersey's own
21 permitting process?

22 A. Yes.

23 Q. But it's also true that even
24 if the agencies were completely

1 separate -- in other words, if the
2 memorandum of agreement was never
3 consummated -- that Delaware would still
4 have the independent right to regulate
5 the project, correct?

6 MS. CONKLIN: I'm going to
7 object to that because I think
8 it's calling for a legal
9 conclusion.

10 BY MR. ATTAWAY:

11 Q. I'm just asking for your
12 understanding as a regulator.

13 MS. CONKLIN: You can answer
14 the question based on your
15 understanding as a regulator.

16 THE WITNESS: It was my
17 understanding that a project that
18 would require -- that started in
19 New Jersey and then maybe extended
20 out into the State of Delaware
21 would need to get permits from
22 both states and that a project
23 could not go forward until an
24 applicant has secured approvals

1 both from Delaware and New Jersey.
2 We saw it that way
3 simplistically because that's the
4 way we looked at permits not only
5 between states but also within
6 different agencies and governments
7 within New Jersey. For instance,
8 in New Jersey's coastal zone a
9 major development would have to
10 get a CAFRA permit, but that's not
11 the only permit major development
12 would usually have to get. They
13 usually have to get some type --
14 sometimes county approvals or some
15 municipal approvals, and there was
16 some legal discussions for a while
17 that municipal approvals may be
18 excerpt by state approvals in the
19 sense if an applicant could go to
20 the state and get state approval,
21 then regardless of what the
22 municipality, whether approved to
23 or denied, the state approval
24 would stand and the project would

1 go forward.

2 It was always our
3 understanding within DEP that an
4 applicant had to get green lights
5 all the way down, had to get state
6 approvals, county approvals and
7 municipal approvals before it
8 could proceed.

9 BY MR. ATTAWAY:

10 Q. So in that sense the state
11 and local authorities in New Jersey in a
12 way had a veto power over the project
13 just as Delaware had a veto power over
14 the project if it didn't issue a permit,
15 correct?

16 A. Yes.

17 Q. But that's not the kind of
18 veto that you were talking about in
19 paragraph 8, is that right?

20 A. The concern was the veto
21 power had to do with somehow an agency
22 outside the Department of Environmental
23 Protection and in another state could
24 have some type of mechanism -- legal

1 mechanism whereby they could come inside
2 the decision-making process within the
3 Department of Environmental Protection
4 for those permits that are mentioned here
5 and have some legal precedent to halt or
6 deny a permit by the New Jersey
7 Department of Environmental Protection in
8 issuing its permit.

9 Q. Just to clarify, the veto
10 power that you mention here was a veto
11 power over how New Jersey conducted its
12 own permitting processes but it didn't
13 have anything to do with functional veto
14 that Delaware would have if it decided
15 not to approve the Delaware portion of
16 the project?

17 A. That's correct.

18 Q. Was this draft memorandum or
19 a prior version of it ever reviewed by
20 legal counsel?

21 A. I don't recall.

22 Q. The last sentence of
23 paragraph 8 of your affidavit says, "As a
24 result, in 1994, New Jersey abandoned

1 efforts to reach an agreement on these
2 matters." Could you talk a little bit
3 about the abandonment process?

4 A. The different agencies that
5 were reviewing this felt strongly. They
6 had strong opinions about this memorandum
7 of agreement and they refused to sign off
8 on it. So as a result we met with them
9 and tried to assure them that we could
10 put in language or whatever, revise the
11 memo in such a way that they would be
12 satisfied. And we couldn't reach any
13 agreement on any language and raised it
14 enough in the department so that it was
15 discussed at a higher level than just the
16 manager or the assistant director level.
17 There was no agreement reached at that
18 level either, so basically the agreement
19 just died.

20 Q. Did anyone at that higher
21 level of review raise any objections over
22 as to Delaware's regulatory authority?

23 A. I don't recall.

24 Q. Do you know after the MOA

1 was abandoned, did New Jersey ever
2 continue to condition permits -- New
3 Jersey permits on the issuance of
4 Delaware permits?

5 A. I don't know.

6 MR. ATTAWAY: I'd like to
7 mark Exhibit-18.

8 (Whereupon document was marked
9 Whitney-18 for identification.)

10 BY MR. ATTAWAY:

11 Q. Unfortunately, I'm going to
12 ask you to read the smudge part. This is
13 the best copy that we were able to come
14 up with.

15 A. (Witness reading.) Okay.

16 Q. Marked as Exhibit-18 is a
17 letter dated January 8, 1995 from Dan
18 Saunders to Gregory A. Marshall,
19 Director. It's on letterhead of State of
20 New Jersey, DEP, Division of Parks and
21 Forestry, Historic Preservation Office.
22 This letter concerns a pier --
23 rehabilitation of a pier at Fort Mott.
24 Mr. Whitney, are you familiar with Fort

1 Mott generally and the pier specifically?

2 A. I am familiar with Fort Mott
3 generally and I am not that familiar with
4 the pier at all.

5 Q. Are you aware that the pier
6 at Fort Mott was rehabilitated in the
7 1990s?

8 A. No.

9 Q. In 1995 when this letter was
10 written, your position was please remind
11 me?

12 A. I was within another part of
13 the department. Gregory Marshall as
14 director was director of the Division of
15 Parks and Forestry under one assistant
16 commissioner and I was in another part
17 under another assistant commissioner.

18 Q. Who is Dan Saunders?

19 A. I don't know. I believe he
20 worked in the Historic Preservation
21 Office.

22 Q. It says Dorothy Guzzo,
23 administrator. Do you know who she was?

24 A. No.

1 Q. Then a couple more names on
2 the second page. It's copied to Carl
3 Nordstrom and Indrek Ojamaa. Do you know
4 either of those people?

5 A. I know Carl. I believe at
6 the time Carl was the assistant director
7 of the Division of Parks and Forestry.

8 Q. On the first page of this
9 two-page letter is a middle paragraph
10 that's unfortunately smudged. I'll try
11 to read it starting at the second
12 sentence. "The pier, which is
13 essentially a timber grillage filled with
14 rock and sand was constructed before the
15 Supreme Court decision establishing the
16 Delaware State line at the mean low water
17 line of the New Jersey coast. Our
18 working assumption has been that the pier
19 itself, which is above the low water line
20 is in New Jersey. However, the
21 rehabilitation of the pier will be
22 accomplished by building new structure
23 around the existing pier. The new
24 structure will, therefore, be in the

1 State of Delaware."

2 Would you say that this
3 passage was written based on the
4 understanding that Delaware would have
5 regulatory authority over the portion of
6 rehabilitation that occurred in Delaware?

7 A. No. I'm not sure. This is
8 written by someone within the Historic
9 Preservation Office. That is in a
10 different section of the department than
11 the waterfront development permits or
12 riparian sections. So I don't know if
13 this person had an understanding of where
14 the boundary is -- well, it appears that
15 the person has an understanding where the
16 boundary is, but I don't know if they
17 really had a clear understanding of the
18 jurisdiction issues as contained -- as
19 spelled out in the coastal management
20 program.

21 Q. Okay.

22 MR. ATTAWAY: I'd like to
23 mark for identification two more
24 exhibits. Maybe we should take a

1 five or ten-minute break. Is that
2 all right with you?

3 MS. CONKLIN: Sure.

4 (Whereupon a break was taken.)

5 (Whereupon documents were marked
6 Whitney-19 and Whitney-20 for
7 identification.)

8 BY MR. ATTAWAY:

9 Q. I have introduced exhibits
10 19 and 20. Exhibit-19 is an application
11 by the New Jersey Department of
12 Environmental Protection, Division of
13 Parks and Forestry to the State of New
14 Jersey, Department of Environmental
15 Protection, Land Use Regulation Program.
16 So essentially this is an application by
17 a division of DEP to DEP to rehabilitate
18 the Fort Mott pier; is that correct, Mr.
19 Whitney?

20 A. Yes.

21 Q. And this is Bates stamped,
22 for the record, New Jersey 5423 through
23 5439. On page 5424 there's a line that
24 says, other and then typewritten is State

1 - Delaware Department of Natural
2 Resources and Environmental Control,
3 Federal US Army Corps of Engineers. Does
4 this indicate, Mr. Whitney, that the DEP
5 was stating that it was also applying to
6 Delaware for a permit for the
7 rehabilitation?

8 A. I don't know. I have never
9 seen this permit before and I have never
10 seen this form before. This is
11 interesting. On the face of it, I would
12 say that that's what it looks like.

13 Q. Then on 5425 it's signed by
14 Carl Nordstrom, Deputy Director. I think
15 you said earlier he was Deputy Director
16 of Parks and Forestry?

17 A. Parks and Forestry, yes. I
18 was unaware that he at sometime moved
19 from Parks and Forestry to Land Use
20 Regulation.

21 Q. Is he -- I think he is
22 signing as the applicant. As I read this
23 on page 5423 the applicant is Division of
24 Parks and Forestry and the division

EXHIBIT C

73a

**APPENDIX 10 — AFFIDAVIT OF STEVEN C.
WHITNEY, DATED JULY 27, 2005**

NO. 11, ORIGINAL

**In The
Supreme Court of the United States**

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

**AFFIDAVIT OF STEVEN C. WHITNEY
IN SUPPORT OF MOTION TO REOPEN
AND FOR A SUPPLEMENTAL DECREE**

Steven C. Whitney, of Little Deer Isle, Maine, of full age, being duly sworn according to law hereby deposes and says:

1. I am retired from a twenty-seven year career at the New Jersey Department of Environmental Protection ("DEP") from 1970 to 1997.
2. From January 1975 to July 1979, I served as Supervisor in the Office of Coastal Zone Management in the Division of Coastal Resources. The office implemented and administered New

EXHIBIT

Whitney - 1
S. Oakley/01/10/06

Appendix 10

Jersey's Coastal Area Facilities Review Act, N.J. Stat. Ann. 13:19-1 to -33, first effective September 18, 1973. During that time, I was part of the staff that prepared the New Jersey Coastal Management Program and Final Environmental Impact Statement (August 1980) ("1980 CMP"). New Jersey's CMP was adopted in two segments. In 1978, New Jersey adopted a CMP for the Bay and Ocean Shore (1978 CMP). With respect to the area known as the Twelve Mile Circle, the 1978 CMP stated that continued coordination and work toward appropriate agreements between the coastal management programs of the two states would be required to resolve potential conflicts between the coastal policies of New Jersey and Delaware. (1978 CMP at 19.) In 1980, New Jersey adopted a revised CMP, which also covered waterfront areas along New Jersey's tidally influence waterways. (1980 CMP).

3. The 1980 CMP was an extensive document, covering many issues. With respect to the area known as the Twelve Mile Circle, the 1980 CMP stated that New Jersey and Delaware coastal management agencies had discussed the boundary issue and concluded that ". . . any New Jersey project extending beyond mean low water must obtain coastal permits from both states. New Jersey and Delaware, therefore, will coordinate reviews of any proposed development that would span the interstate boundary to ensure that no development is constructed unless it would be consistent with both state coastal management programs." (1980 CMP, page 20). However, as set

Appendix 10

forth below, the States were unable to reach any final agreement about how to accomplish this. Further, during my term of service with the DEP, to my knowledge, New Jersey never adopted any regulation requiring any person seeking to construct an improvement appurtenant to the New Jersey side of the River to obtain any permit or approval from the State of Delaware.

4. From July 1979 to June 1988, I served as Chief of the Bureau of Planning and Project Review in the Division of Coastal Resources. Then, from June 1988 to July 1991, I served as Assistant Director of the Division of Coastal Resources. From July 1991 to January 1997, I served as Manager, Environmental Planning, Coastal/Land Planning Group.
5. In these capacities, I participated in discussions with the Coastal Management Program regulatory and planning staffs about the New Jersey/Delaware boundary line and what effects it had on permit decision-making. I also participated in other discussions and conferences with Delaware staff which addressed these topics.
6. The 1978 and 1980 CMPs and the discussions which followed led my office to develop between 1991 and 1994 a draft Memorandum of Agreement between *New Jersey and Delaware*. The purpose of the MOA was to establish a framework within which the DEP and Delaware's Department of Natural Resources and Environmental Control could share relevant

Appendix 10

information regarding specified regulatory programs and actions along the States' common boundary within the Twelve Mile Circle.

7. The June 16, 1994 draft MOA would have provided that New Jersey and Delaware would share information concerning relevant applications and concerning proposed relevant rulemaking, and that the States would agree to work together to resolve inconsistencies between the Programs. In addition, the draft MOA stated that each agency had "the independent authority to approve or deny applications pursuant to its own regulations."
8. However, during the review process of the draft MOA within DEP, objections were raised. In general, there were concerns about becoming involved in an overly cumbersome approval process, and about giving a veto to Delaware as to projects that otherwise would have met New Jersey standards. As a result, in 1994, New Jersey abandoned efforts to reach an agreement on these matters.
9. The above statements are true to the best of my knowledge, and I am aware I am subject to penalties for any knowingly false statements contained herein.

/s/
Steven C. Whitney
27 Mourning Dove Lane
Little Deer Isle, ME 04650

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Appendix 10

Sworn and subscribed before
me on this 27 day of July 2005

_____/s/_____
Myra P. Weed
Notary Public of the
State of Maine



EXHIBIT D

NEW JERSEY v. DELAWARE
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 PLAINTIFF'S PRIVILEGE LOG

BATES STAMP	DATE	SENDER	REC(S) & CC	GENERAL SUBJECT	PRIVILEGE CLAIMED	DETAILS
Coastal Management Docs						
	10/29/1991 Memo	Lawrence J. Baier, Principal Planner Office of Regulatory Policy	Steven C. Whitney, Asst. Director Office of Regulatory Policy	Delaware - New Jersey Coastal Management Plans	Deliberative Process	Contains author's opinion on differences between State plans and suggested options to improve inter- plan consistency
	10/28/1991 Handwritten note	Trudie	Steve Whitney	Meeting	Deliberative Process	Suggests issues to discuss with DNREC

1

2

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3	5/17/1994 Letter: handwritten note on document	Helen C. P. Farr, Program Specialist National Oceanic and Atmospheric Administration	Ernest Hahn Steve Whitney Laurie McGilvray Brett Joseph	Rules on Coastal Management	Handwrit- ten Notes on Document, Deliberative Process	Internal notes commenting on communication
4	11/30/1994 Memo	Steven Whitney	Larry Schmidt Ernie Hahn Marty Bierbaum	Revision of OCS Policy within the rules of Coastal Zone Management	Deliberative Process	Discusses NJDEP's interaction with Fed. OCRM
5	7/18/1994 Email	Ruth Ehinger	Dorina Frizzera	t. fowler - marinas	Deliberative Process	Policy discussion of proposed revisions to draft MOA with Delaware
6	7/19/1994 Email	Dorina Frizzera	Ruth Ehinger	DE/NJ Comp	Deliberative Process	Seeks policy input on possible permit coordination
7	7/21/1994 Email	JoAnn Cubberley	Steven Whitney	Draft MOA/NJ & DE	Deliberative Process	Suggests revisions to draft MOA

NEW JERSEY v. DELAWARE
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8	10/28/1993 Draft	None	None	Draft MOA between New Jersey Department of Environmental Protection and Delaware Department of Natural Resources and Environmental Control	Deliberative Process	Suggests revisions to draft MOA
9	7/7/1994 Memo: handwritten notes on document	Steven Whitney	Distribution: Sarah Cooksey, DNREC Robert Tudor, USEPA John Weingart, NJDEP Martin Bierbaum, NJDEP Ernest Hahn, NJDEP Ruth Ehinger, NJDEP Theresa Fowler, NJDEP Dennis Hart, NJDEP Bill O'Sullivan, NJDEP Tom Wells, NJDEP JoAnn Cubberly, NJDEP	New Jersey/Delaware Memorandum of Agreement,	Handwritten notes on document, Deliberative Process	Suggests revisions to draft MOA

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10	10/18/1994 Letter: handwritten notes on document	Vickie A. Allin, Chief Policy Coordination Division, National Oceanic and Atmospheric Administration	Robert C. Shinn, Commissioner, NJDEP Steven Whitney	Coastal Zone Management Act,	Handwrit- ten Notes on Document. Deliberative Process.	Notes commenting on document contents
11	Dec. 05 (no year) handwritten notes	NJDEP Staff	none	Shoreline Master plan	10 pages of handwritten notes, deliberative process	Internal notes raising various issues of concern in shoreline management
12	7/17/1996 Letter. handwritten notes on document	Helen C. P. Grady, Program Specialist National Oceanic and Atmospheric Administration	Dorina Frizzera, Environmental Specialist Office of Environmental Planning	FY96 Award Application	Handwrit- ten notes on document, deliberative process	Suggests responses to issues raised by NOAA
13	5/11/1995 email	Steven Whitney	Ernie Hahn	312 Evaluation	Deliberative Process	Discusses issues raised in evaluation

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14	11/16/1994 email	Marin Bierbaum	Dan Van Abs Steve Whitney Barry Chalofsky	Reorganization Memorandum	Deliberative Process	Discusses issues associated with NJDEP reorganization
15	11/17/1994	Steven Whitney	Martin Bierbaum	Reorganization Memorandum	Deliberative Process	Discusses issues associated with NJDEP reorganization
16	11/30/1994 Memo	Steven Whitney	Larry Schmidt, Policy and Planning	Revision of OCS Policy within the Rules on Coastal Zone Management	Deliberative Process	Discusses NJDEP interaction with fed. OCRM on OCS policy
17	7/14/1995 Email Memo	Martin Bierbaum	Ernie Hahn Leroy Cattaneo Bernie Moore	Coastal Planning Meeting 7/14/1995	Deliberative Process	Discusses policy and internal coordination issues arising from NJDEP reorganization.

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18	6/15/1995 Email Memo	Martin Bierbaum	Lewis Nagy Steven Whitney	CZM Program	Deliberative Process	Identifies issues in preparation for meeting
19	6/2/1995 Email Memo	Martin Bierbaum	Lewis Nagy Steven Whitney	Confidential Memorandum	Deliberative Process	Discusses internal process for comment on NOAA eval.
20	5/18/1995 Memo	Ernest P. Hahn, Administrator Land Use Regulation Program	Management Team	Comments on NOAA Evaluation	Deliberative Process	Proposed responses to draft NOAA findings
21	3/12/1996 Memo	Kimberly Springer	Steven Whitney	Comments on Draft response to NOAA evaluation meeting and report	Deliberative Process	Proposed responses to draft NOAA findings
22	11/18/1994 Email and attached memo	Martin Bierbaum	Steven Whitney	Coastal Briefing	Deliberative Process	Suggests revisions for draft memo

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23	11/22/1994	Steven Whitney	Robert Shinn, Commissioner Mark Smith, Chief of Staff Catherine Cowan, Asst. Commissioner, Environmental Regulation Lewis Nagy, Asst. Commissioner, Policy & Planning Marlen Dooley, Asst. Commissioner, Enforcement Ronald Tuminski, Asst. Commissioner, Management & Budget	Federal Evaluation of New Jersey's Coastal Management Program	Deliberative Process	Internal briefing memo on issues raised by federal OCRM
24	6/2/1995 Email	Steven Whitney	Ernie Hahn	312 Evaluation	Deliberative Process	Discusses internal process for response to NOAA
25	4/26/1995 Memo	Ernest P. Hahn	Asst. Commissioner Cowan	Comments on NOAA Evaluation	Deliberative Process	Proposed response to draft NOAA findings

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	No date Handwritten Notes	DEP Staff:	n/a	Chapter 69 Title 7, Beach Preservation Act	Deliberative Process	Personal notes on Delaware laws
26	April 1993 Draft Memo	Martin Bierbaum, Administrator Office of Land and Water Planning	Richard J. McManus, Director Office of Legal Affairs	Public Notice - New Jersey Register Federal Approval on Routine Program: Implementation Changes to N.J.'s Coastal Management Program	Deliberative Process	Suggests revisions for draft memo
27	7/21/1994 Email	JoAnn Cuhberley	Steven Whitney	Draft MOA/NJ & DE	Deliberative Process	Duplicative of prior log entry: see above
28	7/19/1994 Email	Dorina Frizzera	Ruth Ehinger	DE/NJ Comp	Deliberative Process	Duplicative of prior log entry: see above
29	7/18/1994 Email	Ruth Ehinger	Dorina Frizzera	L. fowler - marina	Deliberative Process	Duplicative of prior log entry: see above
30	5/26/1994 Handwritten Notes	none	none	MOA	Deliberative Process	Proposed revisions to draft MOA

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31	8/11/1994 Email	Dorina Frizzera	Ruth Ehinger	DE/NJ Comp	Deliberative Process	Seeks policy input on potential coordination with Delaware
32	1/12/1994 Handwritten notes	NJDEP Staff	none	NJ/DE Management Programs	Deliberative Process	Notes on possible options for coordination with Delaware
33	11/05/1993 Email	NJDEP Staff	Steve Whitney	DE/NJ Comparison	Deliberative Process	Proposed revisions to draft MOA
34	10/28/1993 Handwritten Notes	NJDEP Staff	none	Draft MOA between NJ Department of Environmental Protection and Energy and Delaware Department of Natural Resources and Environmental Control	Deliberative Process	Proposed revisions to draft MOA

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35	8/3/1993 Memo	Terry Fowler	Steve Whitney	DE/NJ Comparison	Deliberative Process	Discusses possible options for coordination with Delaware
36	7/2/1993 Letter: Handwritten Notes on Document	Clement Lewsey, Acting Chief, NOAA	State Coastal Program Managers	Final Statement of Purpose Between the Offices of Ocean and Coastal Resources Management and the Office of Wetlands, Oceans and Watersheds	Deliberative Process	Personal views on issues raised in documents
37	No Date Handwritten Notes on Document	none	none	MOA NJ DEP Division of Coastal Resources and NJ Pinelands	Deliberative Process	Suggests options for draft MOA with Delaware
38	No Date Handwritten	none	none	309 Interstate grants	Deliberative Process	Notes on possible MOA with Delaware
39	5/7/1993 Email	Steven Whitney	Ruth Ehinger	Navy Dredging/Salem Nuc.	Deliberative Process	Request for policy input

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40	June 7, 1994 email	Judeth Piccinini, DAG	Dorina Frizzera	Delaware boundary	Attorney-Client Privilege and Deliberative Process	Attorney communication to client on boundary
	BP Docs					
41	No Date Email	David Risilia	Bradley Campbell, Commissioner	Crown Landing LNG Facility	Deliberative Process	Presents issues on which guidance is needed to review application
42	6/8/05 and 6/9/05 Email	Rachel Horowitz, Deputy Attorney General	Catherine Tormey, Counselor to the Commissioner	FERC Process	Attorney-Client Privilege	Attorney communication to client re FERC process
43	4/20/05 Notes			Discussions with William Anderson, Rachel Horowitz, and "Jenny Bunk," DAGs regarding BP Crown Landing	Attorney-Client Privilege	Client summary of discussion with counsel

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	No Date Email	David Risilia	Catherine Tormey, Counselor to the Commissioner	FEIS process	Deliberative Process	Discusses options for input to FERC from Nj
44	8/305 Email	Tim Crowly, Deputy Attorney General	James Guiliano, NJBPU, William Connelly, NJDCA, Gary Sondermeyer, NJDEP, Harold Neil, NJDOT, Lorri Hennon-Bell, NJSP, Cherrie Black, NJLPS, Dennis Quinn, NJLPS, Gene Halplea, NJLPS, Lawrence O'Reilly, NJLPS, Martellen Dugan, NJLPS, Robert Wall, NJLPS, Thomas Balint, NJLPS	Meeting with Coast Guard Captain of the Port	Attorney- Client Privilege	Attorney communication to clients on homeland security issues
45	No Date Email	David Risilia	Lisa Jackson, Joanna Dunn-Samson, Deputy Commr, Joseph Seebode, Asst. Commr, Gary Sondermeyer, Chief of Staff, Catherine Tormey, Counselor to Commr	Summary Issues for BP Crown Landing	Deliberative Process	Summary of outstanding issues for consideration in review

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46	6/22/05 Email	Tim Crowley, Deputy Attorney General	James Guiliano, NJBPU, William Connelly, NJDCA, Gary Sondermeyer, NJDEP, Harold Neil, NJDOT, Lori Hennon-Bell, NJSP, Bill Brown, NJLPS, Cherrie Black, NJLPS, Dennis Quinn, NJLPS, Gene Haplea, NJLPS, Lawrence O'Reilly, NJLPS, Mariellen Dugan, NJLPS, Robert Wall, NJLPS, Thomas Balint, NJLPS	Update, US Coast Guard Meeting.	Attorney- Client Privilege	Attorney communication to clients on homeland security issues
47	2/18/05 Facsimile	Rachel Horowitz, Deputy Attorney General	Suzanne Dietrick, NJDEP	Compact	Attorney- Client Privilege	Attorney communication regarding Compact of 1905
48	No Date Email	David Risilia	S. Dietrick	BP Crown Landing	Deliberative Process	Discussion of issues raised by review process

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49	7/6/05 Memo	Tim Crowley, Deputy Attorney General	Dennis Quinn, NJ Dept. Of Law & Public Safety	BP Crown Landing and USCG NVIC 5-05	Attorney- Client Privilege	Attorney communication on homeland security issues
	Attorney General Opinions					
50	Letter, 2/28/2005	William Andersen, Deputy Attorney General and Amy Donlon, Deputy Attorney General	Paul T. Fader, Chief Counsel to Governor	Assertion of Jurisdiction by State of Delaware over NJ Riparian Lands	Attorney- Client Privilege and Work Product	Attorney analysis of jurisdiction within Twelve Mile Circle, 1905 Compact
51	Letter, 2/28/2005	William Andersen, Deputy Attorney General and Amy Donlon, Deputy Attorney General	Paul T. Fader, Chief Counsel to Governor	Coastal Zone Act Status Decision, Crown Landing LLC	Attorney- Client Privilege and Work Product	Attorney analysis of options to contest Delaware assertions of jurisdiction

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52	Memo, 3/3/2005	William Andersen, Deputy Attorney General, and Amy Donlon, Deputy Attorney General	Catherine Tormey, Counselor to Commissioner	Delaware assertions of jurisdiction and 1905 Compact	Attorney-Client Privilege and Work Product	Attorney communication and analysis
53	Memo with attached memo	William Andersen, Deputy Attorney General	Richard Mroz, Counsel to the Governor	Tidelands Application No. 95-0306-T w/attached memo from William Andersen, Deputy Attorney General to Attorney General Farmer	Attorney-Client Privilege	Attorney communication with legal advice on tidelands application
	Privileged Pursuant to Confidentiality Agreement - Critical Energy Infrastructure Data					
54				Waterway Suitability Assessment for LNG Marine Traffic with appendices A - J.		Confidential under U.S. Coast Guard protocol

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55	4/18/05			Map, Waterfront Development Area, Environmental Sensitivity, Sheet B..		Confidential under U.S. Coast Guard protocol
56	11/17/03			Surveyed Wetlands, Sheet No. 1		Confidential under U.S. Coast Guard protocol
57	July 2004			Draft Environmental Resource Report, Crown Landing LLC, Vol. Ii, Binder IIIA and Volumes IV and IVB.		Confidential under U.S. Coast Guard Protocol

EXHIBIT E

Draft 6/16/94

**Memorandum of Agreement
Between
New Jersey Department of Environmental Protection
and
Delaware Department of Natural Resources and
Environmental Control**

Purpose and Applicability

This Memorandum of Agreement between the New Jersey Department of Environmental Protection (DEP) and the Delaware Department of Natural Resources and Environmental Control (DNREC) establishes a framework for coordinating the policies and activities of each state's Coastal Management Program in the area of the Delaware River and Delaware Bay transected by the common state boundary [as defined in *State of New Jersey v. State of Delaware* 295 US 694(1934)].

DEP and DNREC agree to the principles, procedures, and responsibilities that follow, recognize the statutory limitations of both agencies, and do not intend this memorandum of agreement to expand, limit, or bind their existing statutory powers in any way.

Points of Agreement

It is mutually agreed by the above parties that:

Regulatory Consistency/Inconsistency

1. The New Jersey and Delaware Coastal Management Programs

are generally consistent with respect to the area of the Delaware River and Delaware Bay transected by the common state boundary.

New Jersey and Delaware will mutually compare their coastal zone management policies and water quality standards on a biannual basis.

Sharing of Development Applications

2. DEP and DNREC shall administer their respective statutorily mandated permit and review functions. DEP shall, within five working days of receipt of a completed application proposing a regulated activity which would extend into or discharge into the area of the Delaware River and Delaware Bay transected by the common state boundary, notify DNREC of the application for development by sending a copy of the application to DNREC for comment. DNREC shall, within five working days of receipt of a completed application proposing a regulated activity which would extend into or discharge into the area of the Delaware River and Delaware Bay transected by the common state boundary, notify DEP of the application for development by sending a copy of the application to DEP for comment. Both agencies recognize that each agency has the independent authority to approve or deny applications pursuant to its own regulations. DEP and DNREC will share applications under the following authorities:

New Jersey Department of Environmental Protection

Waterfront Development Permits
Coastal Area Facility Review Act Permits
Wetlands Permits
Tidelands Conveyances
Green Acres Funding
NJPDES Permits
Treatment Works Approvals
Stream Encroachment Permits
Air Quality Permits

Delaware Department of Natural Resources and Environmental
Control

NPDES Permits
Delaware Coastal Zone Permits
Air Permits
Wetland Mitigation
DCMP Federal Consistency Reviews

Sharing of Rulemaking Process

3. In the event that one or both agencies propose to amend their adopted coastal regulations or policies, they will share the proposed amendment(s) with the other agency to determine how the amendments will affect the administration of their respective programs, and will attempt to resolve any differences prior to taking action.

4. Where inconsistencies are identified between those

portions of the New Jersey and Delaware Coastal Zone Programs which apply to the area at which the common state boundary is defined, DEP and DNREC shall work together to make the two sets of policies more complementary, including, if necessary, eliminating inconsistencies through amendments to either or both sets of policies. In order to identify, discuss, and resolve policy and interpretation inconsistencies, and to ensure success of the cooperative application review and comment procedures, designated representatives of the DEP and DNREC staffs shall meet periodically at a time and location to be mutually agreed upon, to discuss permit review coordination and specific policies and their interpretation. A report of each meeting shall be prepared for review by the appropriate administrators of DEP and DNREC.

Sharing of Data

5. DEP and DNREC recognize similarity in their data bases and needs, and will share data whenever possible.

Sharing of Other Coastal Zone Management Activities

6. DEP and DNREC will share, when requested, information relevant to each state's Coastal Nonpoint Pollution Program authorized by the federal Coastal Zone Act Reauthorization Amendments.
7. The appropriate administrators of DEP and DNREC may

jointly propose revisions to the terms and procedures of this Memorandum of Agreement from time to time.

- 8. This Memorandum of Agreement shall take effect upon signing by both parties and subsequent to the Governors' review for a period of ten business days. This agreement may be terminated by either party by providing notice of termination on the other party sixty (60) days prior to termination.

 Commissioner
 New Jersey Department of
 Environmental Protection

 Secretary
 Delaware Department of
 Natural Resources and
 Environmental Control

Date

Date

6/16/94

Steve,
 changes made as per S. Cooksey's
 letter & my conversation of 5/26 w/you.
 OK to send to JRW + S. Cooksey?

Terry F

Terry

This is fine. I believed
 memo outlining next steps should
 accompany this memo. Let's discuss.
 Steve 6/21

Draft 10/28/93

**Memorandum of Agreement
Between
New Jersey Department of Environmental Protection
and Energy
and
Delaware Department of Natural Resources and
Environmental Control**

Purpose and Applicability

This Memorandum of Agreement between the New Jersey Department of Environmental Protection and Energy and the Delaware Department of Natural Resources and Environmental Control is intended to formalize a framework for coordinating the policies and activities of the New Jersey Coastal Management Program (program rules and decisionmaking process) and the Delaware Coastal Management Program in the area at which the common state boundary is defined by the mean low water line of the New Jersey shoreline. This memorandum applies to those portions of the Delaware River and Delaware Bay which are transected by the common state boundary.

The New Jersey Department of Environmental Protection and Energy and the Delaware Department of Natural Resources and Environmental Control agree to the principles, procedures, and responsibilities that follow, recognize the statutory limitations of both agencies, and do not intend this memorandum of agreement to expand, limit, or bind their existing statutory powers in any way.

Points of Agreement

Regulatory Consistency/Inconsistency

1. The New Jersey Department of Environmental Protection and Energy (DEPE) and the Delaware Department of Natural Resources and Environmental Control (DNREC) agree that the New Jersey and Delaware Coastal Management Programs are generally consistent with respect to the area of the Delaware River and Delaware Bay transected by the common state boundary.

A comparison of New Jersey's and Delaware's Coastal Zone Management Program policies and water quality criteria is located in Attachment A. **(Perhaps this shouldn't be in an MOU because it refers to a point in time and the MOU is indefinite.)**

Agreed upon methods of resolving current and future inconsistencies between the above referenced policies and criteria include the following:

(Work on the following list. Need to address inconsistent regs, applicants faced w/two sets of regs & two application processes, each State hassling w/ 1/2 a project, secondary impacts which are out-of-state.)

- a. Sharing of development applications
- b. Sharing of rulemaking process.

- c. Sharing of data
- d. Joint review of applications
- e. Binding Federal Consistency Review
(40 CFR 122.4: No permit may be issued when the imposition of conditions cannot ensure compliance with applicable water quality requirements of all affected states.
40 CFR 123.24: No waiver of [EPA] review [of NPDES Permits] may be granted for discharges which may affect the waters of a state other than the one in which the discharge originates.)
- f. Sharing of other Coastal Zone Management activities (public access, water quality, wetlands mitigation)
- g.

Sharing of Development Applications

- 2. Within the area at which the common state boundary is defined by the mean low water line of the New Jersey shoreline, both DEPE and DNREC shall administer their respective statutorily mandated permit and review functions. DEPE shall, within five working days of receipt of a completed application proposing waterfront development in the area at which the common state boundary is defined by the mean low water line of the New Jersey shoreline, notify DNREC of the application for development by sending a copy of the application to DNREC for comment. DNREC shall, within five working days of receipt of a completed application proposing development in the water

area at which the common state boundary is defined by the mean low water line of the New Jersey shoreline, notify DEPE of the application for development by sending a copy of the application to DEPE for comment. Both agencies recognize that each agency has the independent authority to approve or deny applications pursuant to its own regulations.

Sharing of Rulemaking Process

3. In the event that one or both agencies propose to amend their adopted coastal regulations or policies, they will consult with the other to determine how the amendments will affect the administration of their respective programs, and will attempt to resolve any differences prior to taking action.

4. Where inconsistencies are identified between those portions of the New Jersey and Delaware Coastal Zone Programs which apply to the area at which the common state boundary is defined, DEPE and DNREC shall work together to make the two sets of policies more complementary, including, if necessary, eliminating inconsistencies through amendments to either or both sets of policies. In order to identify, discuss, and resolve policy and interpretation inconsistencies, and to ensure success of the cooperative application review and comment procedures, designated representatives of the DEPE and DNREC staffs shall meet periodically at a time and location to be mutually agreed upon, to discuss permit review coordination and specific policies and their interpretation. A

report of each meeting shall be prepared for review by the appropriate administrators of DEPE and DNREC.

Sharing of Data

5. DEPE and DNREC recognize similarity in their data bases and needs, and agree to share data whenever possible.
6. The appropriate administrators of DEPE and DNREC may jointly propose revisions to the terms and procedures of this Memorandum of Agreement from time to time.
7. This MOA shall take effect upon signing by both parties and subsequent to the Governors' review for a period of ten business days. This agreement may be terminated by either party by providing notice of termination on the other party sixty (60) days prior to termination.

Acting Commissioner
New Jersey Department of
Environmental Protection and Energy

Date

XXXXXXXXXXXXXXXXXX

Delaware Department of Natural
Resources and Environmental Control

Date

Approved as to form only by:

Deputy Attorney General
State of New Jersey

Date

Deputy Attorney General
State of Delaware

Date

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TEMP038698

Draft 10/18/93

**Memorandum of Agreement
Between
New Jersey Department of Environmental Protection
and Energy
and
Delaware Department of Natural Resources and
Environmental Control**

Purpose and Applicability

This Memorandum of Agreement between the New Jersey Department of Environmental Protection and Energy and the Delaware Department of Natural Resources and Environmental Control is intended to formalize a framework for coordinating the policies and activities of the New Jersey Coastal Management Program (program rules and decisionmaking process) and the Delaware Coastal Management Program in the area at which the common state boundary is defined by the mean low water line of the New Jersey shoreline. This memorandum applies to those portions of the Delaware River and Delaware Bay which are transected by the common state boundary.

The New Jersey Department of Environmental Protection and Energy and the Delaware Department of Natural Resources and Environmental Control agree to the principles, procedures, and responsibilities that follow, recognize the statutory limitations of both agencies, and do not intend this memorandum of agreement to expand, limit, or bind their existing statutory powers in any way.

Points of Agreement

Regulatory Consistency/Inconsistency

1. The New Jersey Department of Environmental Protection and Energy (DEPE) and the Delaware Department of Natural Resources and Environmental Control (DNREC) agree that the New Jersey and Delaware Coastal Management Programs are generally consistent with respect to the area of the Delaware River and Delaware Bay transected by the common state boundary.

(identify points of inconsistency and how will resolve)

Sharing of Development Applications

2. Within the area at which the common state boundary is defined by the mean low water line of the New Jersey shoreline, both DEPE and DNREC shall administer their respective statutorily mandated permit and review functions. DEPE shall, within five working days of receipt of a completed application proposing waterfront development in the area at which the common state boundary is defined by the mean low water line of the New Jersey shoreline, notify DNREC of the application for development by sending a copy of the application to DNREC for comment. DNREC shall, within five working days of receipt of a completed application proposing development in the water area at which the common state boundary is defined by the mean low water line of the New Jersey shoreline, notify DEPE

of the application for development by sending a copy of the application to DEPE for comment. Both agencies recognize that each agency has the independent authority to approve or deny applications pursuant to its own regulations.

(This doesn't really solve the problem - just leaves it the same. Inconsistent regs, applicants faced w/two sets of regs & two application processes, each State hassling w/ 1/2 a project, doesn't address secondary impacts which are out-of-state.)

Sharing of Rulemaking Process

3. In the event that one or both agencies propose to amend their adopted coastal regulations or policies, they will consult with the other to determine how the amendments will affect the administration of their respective programs, and will attempt to resolve any differences prior to taking action.

4. Where inconsistencies are identified between those portions of the New Jersey and Delaware Coastal Zone Programs which apply to the area at which the common state boundary is defined, DEPE and DNREC shall work together to make the two sets of policies more complementary, including, if necessary, eliminating inconsistencies through amendments to either or both sets of policies. In order to identify, discuss, and resolve policy and interpretation inconsistencies, and to ensure success of the cooperative application review and

comment procedures, designated representatives of the DEPE and DNREC staffs shall meet periodically at a time and location to be mutually agreed upon, to discuss permit review coordination and specific policies and their interpretation. A report of each meeting shall be prepared for review by the appropriate administrators of DEPE and DNREC.

Sharing of Data

5. DEPE and DNREC recognize similarity in their data bases and needs, and agree to share data whenever possible.
6. The appropriate administrators of DEPE and DNREC may jointly propose revisions to the terms and procedures of this Memorandum of Agreement from time to time.
7. This MOA shall take effect upon signing by both parties and subsequent to the Governors' review for a period of ten business days. This agreement may be terminated by either party by providing notice of termination on the other party sixty (60) days prior to termination.

Acting Commissioner
New Jersey Department of
Environmental Protection and Energy

Date

XXXXXXXXXXXXXXXXXX

Delaware Department of Natural
Resources and Environmental Control

Date

Approved as to form only by:

Deputy Attorney General
State of New Jersey

Date

Deputy Attorney General
State of Delaware

Date

EXHIBIT F

EXHIBIT “F”

DELAWARE’S GROUNDS FOR CHALLENGING THE DELIBERATIVE PROCESS PRIVILEGE	PRIVILEGE LOG ENTRIES THAT SHOULD BE DISCLOSED TO DELAWARE
Entries Where the Deliberative Process Privilege is Improperly Invoked.	1-40, 42, 45, 47, and 50.
Entries Where New Jersey Appears to Improperly Assert the Deliberative Process Privilege for Post-Decisional Agency Communications.	1, 2, 5-9, 18, 22, 26, 28-36, 38, and 39.
Entries Where the Deliberative Process Privilege Balancing Test Requires Disclosure.	1-13, 16-40, 42, 45, 47, and 50.
Entries Where the Deliberative Process Privilege Has Been Waived.	2, 3, 9, 31, 33, 35, 38, and 39.