No. 134, Original

IN THE
Supreme Court of the United States

STATE OF NEW JERSEY,
Plaintiff,
v.

STATE OF DELAWARE,
Defendant.

DELAWARE'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING BRIEF

CARL C. DANBERG
Attorney General
KEVIN P. MALONEY
DELAWARE DEPARTMENT OF JUSTICE
Carvel State Office Building
Wilmington, DE 19801
(302) 577-8338

COLLINS J. SEITZ, JR.
MATTHEW F. BOYER
KEVIN F. BRADY
MAX B. WALTON
CONNOLLY BOVE LODGE & HUTZ LLP
The Nemours Building
1007 N. Orange Street
Suite 878
Wilmington, DE 19801
(302) 658-9141
Special Counsel to the State of Delaware

DAVID C. FREDERICK
Counsel of Record
SCOTT H. ANGSTREICH
SCOTT K. ATTAWAY
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
Special Counsel to the State of Delaware

December 22, 2006

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

Federal

ADMINISTRATIVE MATERIALS

Federal

State

OTHER MATERIALS

GLOSSARY

1785 Compact	1785-1786 Md. Laws ch. 1; 1785 Va. Acts ch. 17 (1785 Virginia-Maryland Compact)
1834 Compact	Act of June 28, 1834, ch. 126, 4 Stat. 708 (1834 New Jersey-New York Compact) (DE App. 885-88)
1867 Robeson Report	Opinion Concerning Riparian Rights, Hon. George M. Robeson, Attorney General of New Jersey (1867) (DE App. 905-12)
1877 Compl.	Complaint, *New Jersey v. Delaware*, No. 1, Original (U.S. filed Mar. 13, 1877) (DE App. 6-40)
1872 NJ Fisheries Report	Third Annual Report of the Commissioners of Fisheries of the State of New Jersey (1872) (DE App. 917-26)
1876 NJ Fisheries Report	Seventh Annual Report of the Commissioners of Fisheries of the State of New Jersey (1876) (DE App. 987-92)
1905 Compact	Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1905 New Jersey-Delaware Compact) (DE App. 11-14)
2005 Compl.	Petition for a Supplemental Decree, *New Jersey v. Delaware*, No. 11, Orig. (U.S. filed July 28, 2005)
BP	B.P. p.l.c.
BP Status Decision App.	BP's Request for a Coastal Zone Status Decision (amended Aug. 2004) (DE App. 3793-410)
Castagna Aff.	Affidavit of Richard G. Castagna in Support of Motion To Reopen and for a Supplemental Decree (dated June 27, 2005) (attached as Appendix 5 to Motion To Reopen and for a Supplemental Decree, Petition, and Brief, *New Jersey v. Delaware*, No. 11, Orig. (U.S. filed July 28, 2005))
CMP	Coastal Management Program
CZMA	Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 *et seq.*
DCZA	Delaware Coastal Zone Act of 1971, Del. Code Ann. tit. 7, §§ 7001 *et seq.*

DE App.	Appendix of the State of Delaware on Cross-Motions for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006)
DE Reopen Opp. App.	Appendix to Brief of the State of Delaware in Opposition to the State of New Jersey's Motion To Reopen and for a Supplemental Decree, *New Jersey v. Delaware*, No. 11, Orig. (U.S. filed Oct. 27, 2005)
DNREC	Delaware Department of Natural Resources and Environmental Control
Donlon Aff.	Affidavit of Amy Donlon in Support of Motion To Reopen and for a Supplemental Decree (dated July 25, 2005) (attached as Appendix 12 to Motion To Reopen and for a Supplemental Decree, Petition, and Brief, *New Jersey v. Delaware*, No. 11, Orig. (U.S. filed July 28, 2005))
Farnham	1 Henry P. Farnham, *The Law of Waters and Water Rights* (1904)
FERC	Federal Energy Regulatory Commission
FERC EIS	FERC, Final Environmental Impact Statement – Crown Landing LNG and Logan Lateral Projects, Docket Nos. CP04-411-000 & CP04-416-000 (Apr. 2006) (DE App. 3845-62) (excerpt)
FOIA	Freedom of Information Act
Hoffecker Rep.	Expert Report of Carol E. Hoffecker, Ph.D. (dated Nov. 9, 2006) (DE App. 4213-77)
Hudson County Informant-Resp. Brief	Brief on Behalf of the Informant-Respondent, by Robert H. McCarter, Attorney General of New Jersey, *Hudson County Water Co. v. McCarter*, No. 184 (U.S. filed Feb. 25, 1907) (DE App. 1835-70)
LNG	Liquefied Natural Gas
McCarter Aff.	Affidavit of Robert H. McCarter, *New Jersey v. Delaware*, No. 1, Original (dated Sept. 15, 1906)
NJ Admissions Response	New Jersey's Responses to Delaware's First Requests for Admissions (Sept. 8, 2006)

NJ Reopen App.	Appendix to Motion To Reopen and for a Supplemental Decree, Petition, and Brief, *New Jersey v. Delaware,* No. 11, Orig. (U.S. filed July 28, 2005)
NJ Reopen Br.	Brief in Support of Motion To Reopen and for a Supplemental Decree, *New Jersey v. Delaware*, No. 11, Orig. (U.S. filed July 28, 2005)
NJ Reopen Reply	Reply Brief in Support of Motion To Reopen and for a Supplemental Decree, *New Jersey v. Delaware*, No. 11, Orig. (U.S. filed Nov. 8, 2005)
NJDEP	New Jersey Department of Environmental Protection
ODST	New Jersey Department of Environmental Protection's Office of Dredging and Sediment Technology
Sax Rep.	Expert Report of Professor Joseph L. Sax (dated Nov. 7, 2006) (DE App. 4279-4302)
Webster's 1898	*Webster's International Dictionary* (1898)

Delaware respectfully moves for summary judgment and dismissal with prejudice of New Jersey's Complaint.

INTRODUCTION

This case concerns the power of a State to exercise full sovereignty within its boundary. Under law almost as old as the Republic, this Court has held numerous times that a State has full sovereignty up to its boundary line. The 1905 Compact between Delaware and New Jersey was enacted to address an outstanding dispute over fishing rights that grew out of a centuries-long disagreement over the boundary between the two States. But, on the issues most pertinent here, the Compact did not resolve the simmering boundary squabbles and therefore reflected a standstill or temporary truce between the parties – in the Latin, a "modus vivendi" agreement – in which the parties left for another day the final resolution of matters until the boundary dispute could ultimately be resolved, which this Court decided in 1934.

That "agreement to disagree" influenced the choice of words the drafters used throughout the Compact. In places where they agreed that any subsequent resolution of the boundary dispute would not alter the specific agreements they struck, such as on each State's power to issue service of process or to make arrests with respect to fishing disputes, they chose words specifically demarcating geographical features – such as "low-water mark," "within said river," or "eastern half of the river" – that would govern irrespective of a later resolution of the boundary. Those choices reflected the practical reality that, on a river, police authorities needed the flexibility to operate freely in enforcing state law without the worry that they might inadvertently cross the submerged boundary line while in pursuit of a wrongdoer.

With respect to fixed property rights, on the other hand, the drafters appreciated that they could at most freeze the status quo in place until the boundary dispute could be resolved. That

was true of territorial rights over oyster beds. It was also true of riparian rights of landowners abutting the riverbank. In those instances, the drafters crafted language that deferred final resolution of the issues. Thus, with respect to the riparian rights that New Jersey asserts, the drafters chose to permit each State to "continue to exercise" its "riparian jurisdiction" on "its own side of the river." The use of those terms did not transfer any sovereignty from Delaware to New Jersey over lands that ultimately would be upheld by this Court as belonging to Delaware; rather, it kept in place existing practices until the boundary could be resolved. Thus, once Delaware's rightful boundary was confirmed by this Court as the low-water mark on the New Jersey side of the Delaware River, the specific metes and bounds of the boundary provided the necessary clarity that solidified the location where each State could exercise its "riparian jurisdiction" and "make grants of riparian lands." Because the location where New Jersey seeks to permit BP to build a liquefied natural gas ("LNG") bulk transfer facility is on Delaware submerged lands, Delaware has the authority under ancient legal principles to give or withhold permission for that activity, which the Compact does not disturb.

Even if the text and history of the 1905 Compact were not so clear on that point, Delaware would nonetheless be able to exercise its police power over the activities on a wharf extending from New Jersey into Delaware's submerged lands. Although New Jersey in an earlier compact entered into with New York in 1834 had obtained "exclusive jurisdiction" over wharves, that was not the language agreed upon by the drafters of the 1905 Compact. Rather, they used the term "riparian jurisdiction," a phrase necessarily limited to the exercise of authority with respect to a landowner's riparian rights. In law that is as well-settled as the doctrine that States may not exercise sovereign power beyond their borders, courts have long held that riparian rights are a cluster of private property rights held by the landowner on a shore. Those rights, however, like those of any private property owner, are subordinate to a State's police power. Thus, even if this Court

were to conclude that New Jersey has the right to authorize a New Jersey riparian landowner to wharf out beyond the New Jersey boundary into Delaware, Delaware would retain its well-settled police power to regulate the uses of a wharf on its lands.

Because New Jersey's Complaint rests on a flawed reading of the 1905 Compact and runs afoul of two ancient legal doctrines, summary judgment should be granted to Delaware and New Jersey's Complaint should be dismissed with prejudice.

STATEMENT OF THE CASE

A. New Jersey's and Delaware's Boundary-Related Disputes Through 1935

1. The Long-Running Boundary Dispute

For more than two centuries, Delaware and New Jersey disputed their boundary within the so-called "twelve-mile circle" having its center at the courthouse in New Castle, Delaware.[1] Delaware claimed sovereign title to the waters and submerged lands of the Delaware River over the entire width of the river to the low-water mark on the New Jersey shore, basing its claim on a 1682 grant from the Duke of York to William Penn. From the outset, Penn insisted on his ownership of the subaqueous soil of the Delaware River, instructing one of his commissioners involved in boundary negotiations with the Province of New Jersey as follows: "Insist upon my Title to ye River, Soyl and Islands thereof according to Grant. . . . They have ye Liberty of ye River, but not ye Propriety." *New Jersey v. Delaware*, 291 U.S. 361, 374 (1934) ("*New Jersey v. Delaware II*") (internal quotation marks omitted); *see also New Jersey v. Delaware*, 295 U.S. 694 (1935)

[1] The twelve-mile circle, which encompasses an approximately 29-mile stretch of the Delaware River, *see* NJ Reopen App. 51a (Castagna Aff. ¶ 10), is well-illustrated by the familiar semi-circular boundary between Delaware and Pennsylvania. *See, e.g.*, http://www.udel.edu/delaware/map.html. (Full cites and references to sources and terms for which only abbreviated cites or descriptions are provided in this brief can be found in the glossary, *supra* pp. ix-xi.)

(decree). New Jersey claimed sovereign title to the middle of the Delaware River within the twelve-mile circle.[2]

Following the Duke of York's 1682 grant to Penn and the creation of the Republic a century later, Delaware's sovereignty over the subaqueous land within the twelve-mile circle was upheld in several lawsuits. In a 1750 case, the Lord Chancellor Hardwicke upheld Penn's title against a challenge from Lord Baltimore. *See* 291 U.S. at 367-68 (discussing *Penn v. Lord Baltimore*, 1 Ves. Sen. 444, 27 E.R. 1132 (1750)). In 1813, the United States acquired title from Delaware to Pea Patch Island in the eastern half of the Delaware River for the purpose of building a fort. In 1820, New Jersey passed a law appointing commissioners to meet with any commissioners Delaware might subsequently appoint in order "to make and conclude an agreement between the said states of New-Jersey and Delaware, defining their respective boundaries, jurisdiction, rights to islands, subaqueous soil, fisheries and products of the river and bay of Delaware, southeasterly of the circular boundary between the states of Delaware and Pennsylvania." DE App. 811 (1820 N.J. Laws p. 205). As reported in the 1822 record of the New Jersey General Assembly, however, "[t]o this overture the state of Delaware did not think proper to accede, nor was any answer ever returned to the proposal."[3] Subsequently, a private citizen claimed that New Jersey had title to the riverbed and challenged the conveyance by Delaware (and thus the title of the United States) as invalid. *See In re Pea Patch Island*, 30 F. Cas. 1123 (Arb. Ct. 1848). The court affirmed Delaware's sovereignty to the low-water mark on the New Jersey shore within the twelve-mile circle, in an analysis that this Court later praised as a "careful and able statement of the conflicting claims of right." *New Jersey v. Delaware II*, 291 U.S. at 373, 377.

[2] The historical record is not clear as to whether New Jersey's claim was to the geographic middle or to the main shipping channel of the Delaware River, but nothing here turns on that distinction.

[3] DE App. 813 (Votes and Proceedings of the 47th New Jersey General Assembly, Trenton, 1822).

2. *New Jersey v. Delaware I*: The Fishing Dispute

Despite the *Pea Patch Island* decision, New Jersey officials continued to dispute Delaware's claim to ownership of the submerged lands to the low-water mark on the New Jersey side of the Delaware River and all of the jurisdictional powers associated with sovereignty over those submerged lands. In the 1860s and 1870s, the boundary dispute resurfaced over regulatory control of fishing rights.

As early as the 1600s, Delaware River fish were a highly prized resource. *See* Hoffecker Rep. 3-11 (detailing history).[4] Penn himself wrote colorfully to the Earl of Sunderland that "'[s]turgeon leap day and night that we can hear them . . . in our beds.'" *Id.* at 6 (ellipsis in original). By the latter half of the 19th century, however, sustainability of the resource became an issue at both the federal and the state level due to increasingly greater catches. *See id.* at 11-14. New Jersey appointed Commissioners of Fisheries in 1870, *see id.* at 12, who reported to their Governor that, "[i]n view of the fact that the chief theatre of drift net fishing lies between the shores of Delaware and New Jersey, it was deemed of the highest importance by your Commissioners that the fishing codes of these two States should be in accord." DE App. 921 (1872 NJ Fisheries Report).[5]

In 1871, Delaware enacted "An Act for the Protection of Fishermen," which contained several provisions equivalent to New Jersey laws but also required non-Delawareans to get a $20 annual license from Delaware to fish in the Delaware River, whereas Delaware residents paid only $5. *See id.* at 913-16. On May 2, 1872, Delaware arrested New Jersey citizens at gunpoint for

[4] Ms. Carol E. Hoffecker is the Richards Professor and Alison Professor Emerita of History at the University of Delaware. Her report is reproduced at DE App. 4213-77.

[5] New Jersey and Pennsylvania had enacted concurrent legislation to regulate fishing on the northern portion of the Delaware River as early as 1808. *See* Hoffecker Rep. 12 n.16; DE App. 989 (1876 NJ Fisheries Report) ("[a]s between Pennsylvania and New Jersey, the laws regulating its fisheries have always been concurrent, and indispensably so, because each of these States, under the compact of [1783], exercises jurisdiction over the entire surface of the river, from shore to shore").

fishing east of the middle line of the river without the required Delaware license and impounded their boats. *See* Hoffecker Rep. 14-16. Those arrests ignited a furious dispute between the States. *See id.* at 16-20; DE App. 927-32. On May 8, 1872, six days after the arrests, New Jersey's Governor issued a proclamation asserting that "I hereby give notice and proclaim that the State of New Jersey claims jurisdiction over that part of the river Delaware, between the States of Delaware and New Jersey, which is easterly of the middle line of said river, and further claims that all persons who conform to the fishing laws of the State of New Jersey have the right to fish on the eastern side of said river, without permission or license of any other State."[6] On May 14, 1872, Delaware's Governor responded by stating that "[t]he State of Delaware does not regard the question as to her jurisdiction," which is "exclusive over the waters of said river to low water mark, on the eastern side of said river, within the twelve mile circle from New Castle, and is regarded by said State as paramount to any which may be claimed by any other State."[7]

In 1873, the States attempted to resolve their fishing dispute by appointing commissioners to negotiate an interstate compact, which would then be subject to approval by the respective States and ratification by Congress.[8] Delaware's legislature made clear, however, that "no question was intended to be submitted by the said resolutions respecting the title of this State to the river Delaware, and the soil thereof within the limits of the twelve-mile circle, but only whether,

---

[6] DE App. 39 (Proclamation of NJ Gov. Joel Parker, May 8, 1872); *see also id.* at 928-29 (Letter from NJ Gov. Joel Parker to DE Gov. James Ponder (May 9, 1872)) ("New Jersey [asserts] jurisdiction over the eastern half of the Delaware river").

[7] DE App. 929-30 (Letter from DE Gov. James Ponder to NJ Gov. Joel Parker (May 14, 1872)); *see also id.* at 930 ("The rights of the State of Delaware are too well known for us to fear a judicial investigation, and her citizens can have no objection to a legal trial of the entire question, before the proper tribunal, for final adjudication and settlement."), 930-32 (Letter from NJ Gov. Joel Parker to DE Gov. James Ponder (May 22, 1872)) ("[t]he State of New Jersey denies that Delaware has jurisdiction over any part of the waters of the river east of the middle line"). *See also* Hoffecker Rep. 14-17 (further detailing these exchanges).

[8] *See* DE App. 40 (Joint Resolutions by Delaware Legislature, Jan. 30, 1873), 826-27 (1873 N.J. Laws p. 20). *Cf.* U.S. Const. art. I, § 10, cl. 3 ("[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State").

notwithstanding such title, the citizens of New Jersey have the right to fish in said river within that circle; and if so, the nature and extent of that right."[9] New Jersey's Governor then recommended that the New Jersey legislature similarly amend the scope of its commissioners' powers (rather than terminate them altogether), because "[t]he important practical question which interests most of our citizens is the right of fishing in the river Delaware, its nature and extent." DE App. 939.[10] New Jersey's legislature provided that its commissioners would have a similar scope of negotiating authority as that granted to Delaware's commissioners.[11] *See generally* Hoffecker Rep. 17-20. By act adopted on April 8, 1873, Delaware authorized its commissioners to make such a compromise as would secure to the people of Delaware and New Jersey "the mutual right of fishery" in the Delaware Bay and in the Delaware River within the twelve-mile circle. *See* DE App. 47 (1877 Compl.).

The commissioners were unable to agree on a resolution of the fishing controversy. Delaware's commissioners prepared and served a printed report dated July 2, 1874. Entitled, "The Fishery Question. Argument of the Delaware Commissioners," it set forth the position that Delaware had sovereign title and thus jurisdiction to the low-water mark on the New Jersey shore within the twelve-mile circle. *See* DE App. 963-81; *see id.* at 979-80 (noting *Penn v. Lord Baltimore* and *Pea Patch Island*, concluding that Penn's title was "unassailable"). When New Jersey did not respond, the Delaware legislature revoked the authority of its commissioners in March 1875.[12]

---

[9] DE App. 41-42 (Joint Resolutions by Delaware Legislature, Feb. 14, 1873).

[10] *See also* DE App. 1048-49 (Final Report of New Jersey State Geologist (1888)) ("Uncertainty as to the limits of territory and jurisdiction of these two States has led to serious and sometimes violent disputes, chiefly as to the fisheries.").

[11] *See* DE App. 827-29 (1873 N.J. Laws p. 40).

[12] *See* DE App. 48 (Joint Resolution by Delaware Legislature, Mar. 26, 1875).

On March 13, 1877, New Jersey filed suit in this Court (*New Jersey v. Delaware I*, No. 1, Original) to adjudicate the boundary line, asserting that its "part of the bed of said river extends from the New Jersey shore thereof to the middle of said river." DE App. 20 (Complaint). The sole practical controversy over the boundary identified in New Jersey's complaint was Delaware's 1871 fishing law requiring nonresidents to pay more than residents for a fishing license, which New Jersey set out in detail in both its complaint and attached affidavits from New Jersey fishermen. *See id.* at 37-38. Less than two weeks later, the Court granted New Jersey's motion for a preliminary injunction against Delaware's enforcement of its fishing laws on the eastern half of the river. *See id.* at 66-68 (Order). With the injunction in place, the case lay dormant for nearly 25 years pursuant to a written agreement of counsel. *See id.* at 72-73 (docket entries; stipulation).[13] On February 14, 1901, Delaware's Attorney General, Herbert H. Ward, reported to Delaware's Governor, John Hunn, that the Court would require the case to move forward. Ward reviewed the evidence then available and concluded that "the title and jurisdiction of this State to and over the disputed territory is unimpeachable" and "should be defended by the State." *Id.* at 1059, 1061. On October 15, 1901, Delaware filed its answer to the complaint. *See id.* at 95-162.

In early 1903, the Attorneys General for both States reported to their respective Governors that they were in agreement that an amicable resolution of the controversy should again be attempted through commissioners. *See id.* at 1065-83. Delaware's Attorney General Ward reported to Governor Hunn that the "very laborious and critical examination of ancient documents and reprints thereof" in preparing Delaware's Answer "has greatly strengthened the belief and reliance of counsel for the State upon the justice of her claim," yet, "if the entire controversy between the two States can be settled out of court in a manner creditable and satisfactory to both States, it

[13] In the 1880s, the parties disputed whether the Court's injunction against Delaware's fishing laws applied as well to the Delaware River and Bay below the 12-mile circle, but that fishing dispute was settled amicably. *See* DE App. 1003-15, 1017-19, 1035-38; Hoffecker Rep. 21-22.

would seem the part of good reason to attempt to make such a settlement." *Id.* at 1075-76. Ward noted that much of the evidence regarding Penn's title would be "ancient original documents, which are distributed probably mainly between London, England, and Albany, N.Y.," and therefore that "[t]he proper production of this testimony will entail very considerabl[e] expense." *Id.* at 1074-75. New Jersey's Governor, Franklin Murphy, reported to the legislature that "[t]his matter is one of great importance to the southern section of our State and its fishery interests and it should be adjusted as speedily as possible," "without the continuance of litigation, the labor and expense of which would be very great, the means of securing the necessary evidence extremely difficult and the decision impossible to forecast with accuracy." *Id.* at 1083, 1086.

Accordingly, the States again appointed commissioners to attempt a negotiated resolution of their fishing dispute as well as, if possible, the boundary dispute.[14] Two of Delaware's commissioners, Ward and Bates, met with Delaware fishermen on March 3, 1903, to hear their views on an acceptable settlement of the fishing dispute; the consensus appeared to be that they would not object to a common right of fishing with New Jersey fishermen. *See* Hoffecker Rep. 31-32; DE App. 1099-100 (newspaper article). The commissioners met in Philadelphia on March 12 and 14, 1903, and negotiated a compact that was presented to their respective legislatures on March 16, 1903. *See* DE App. 1103-07 (setting out text of 1903 compact), 1109-10; *see generally* Hoffecker Rep. 20-22, 29-34. Although the New Jersey legislature approved that 1903 compact, *see* DE App. 1123, the Delaware legislature rejected it, *see id.* at 1117-18. At the request of the parties, the Court appointed a special commissioner, *see id.* at 171-72 (Stipulation), who conducted hearings beginning on November 7, 1903, and continuing (though not continuously) into 1905. In

[14] Delaware appointed Governor John Hunn, Attorney General Herbert H. Ward, and its *New Jersey v. Delaware I* counsel, George H. Bates. *See* DE App. 1104-05, 1113. New Jersey appointed Governor Franklin Murphy, Attorney General Thomas N. McCarter, and Chancery Clerk Edward C. Stokes (who in 1905 would succeed Murphy as Governor). *See id.* at 835-36.

February 1905, the parties again appointed commissioners,[15] who agreed to the terms of the compact negotiated in 1903 with slight differences not material to this case. *See* Hoffecker Rep. 33-40; DE App. 181-87 (Special Master report).[16]

3. The 1905 Compact: Resolution of the Fishing Dispute in *New Jersey v. Delaware I*

The 1905 Compact contains a preamble and nine articles.[17] The Preamble provides that the commissioners were appointed "for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two States," and for "the final adjustment of all controversies relating to the boundary line between said States, and to their respective rights in the Delaware River and Bay." That language was drawn nearly *verbatim* from the joint resolutions passed by the Delaware and New Jersey legislatures by which the commissioners were appointed and given their task, prior to their negotiations. *See* DE App. 1169-71.[18]

Notwithstanding the commissioners' charge to attempt a resolution of "all controversies relating to the boundary line" between the two States, it was immediately recognized that the 1905 Compact had a much more limited effect. Delaware's counsel, George Bates, explained orally to this Court in a February 1906 joint application with New Jersey to stay the proceedings until the Compact could be ratified by Congress that the "main purpose" of the Compact is "to provide for enacting and enforcing a joint code of laws regulating the business of fishing in the Delaware

---

[15] Delaware appointed Governor Preston Lea, Attorney General Robert H. Richards, former Attorney General Herbert H. Ward, and its counsel George H. Bates. *See* DE App. 1169-70. New Jersey appointed Governor Edward C. Stokes, former Governor Franklin Murphy, Attorney General Robert H. McCarter (Thomas McCarter's brother), and attorney Chauncey G. Parker. *See id.* at 1171.

[16] The differences were that the 1905 Compact was made applicable below the twelve-mile circle in the Delaware River and Bay, and provided for monuments marking the division of the River and Bay.

[17] The 1905 Compact is reproduced in the addendum to this brief. *See also* DE App. 1-14.

[18] The language of the joint resolutions, in turn, was apparently drawn from an 1834 Compact between New Jersey and New York containing identical language. *See* DE App. 885-86 ("for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two states").

River and Bay." *Id.* at 190; *see also id.* at 1248 (Letter from DE Att'y Gen. Robert H. Richards to Chairman of the House Judiciary Comm. (Jan. 19, 1907)) ("The object and purpose of this Compact was to settle certain matters concerning fisheries which had been the cause of the litigation for years pending in the Supreme Court of the United States between the two States."). Indeed, as to the boundary dispute and related issues, the parties (through Delaware's counsel) represented to this Court that the Compact is "not a settlement of the disputed boundary, but a truce or *modus vivendi*." *Id.* at 190.

The Compact that flowed out of that standstill agreement with respect to the boundary line contained eight substantive articles. Article I states that New Jersey may, under certain conditions, serve criminal and civil process "from low-water mark on the New Jersey shore to low-water mark on the Delaware shore," and Article II similarly provides that Delaware may do so "from low-water mark on the Delaware shore to low-water mark on the New Jersey shore." The authorized criminal process is for crimes "committed upon the soil of said State" or upon "the eastern half of said Delaware River" for New Jersey and the "western half of said Delaware River" for Delaware. The geographic scope of Articles I and II was thus crafted to apply in the same way regardless of which State might later prevail on its boundary claim.

Articles III and IV create a framework for resolving the remainder of the controversy that had led New Jersey to file its 1877 complaint in this Court: fishing rights. Article III declares the general principle that the inhabitants of both States "shall have and enjoy a common right of fishery" "between low-water marks on each side of said river between the said States." Article IV commits each State to the appointment of commissioners to draft uniform laws to regulate the catching and taking of fish in the Delaware River and Bay. Those uniform laws, upon adoption, were to become the sole laws regulating fishing in the river and bay. Article IV also provides, in language that appears only in this article, that "[e]ach State shall have and exercise exclusive ju-

risdiction within said river to arrest, try, and punish its own inhabitants for violation of the concurrent legislation relating to fishery." The first four articles, therefore, used geographic descriptions in resolving disputes on specific topics that rendered irrelevant the ultimate resolution of the boundary. Article V, on the other hand, mandates that laws not inconsistent with the common right to fish "shall continue in force in said respective States until the enactment of said concurrent legislation as herein provided."

Article VI then provides that "[n]othing herein contained shall affect the planting, catching, or taking of oysters, clams, or other shell fish, or interfere with the oyster industry as now or hereafter carried on under the laws of either State." *See* NJ Reopen Br. 10 (oyster disputes "had been left open by Article VI of the Compact of 1905"). Although the States had previously disputed oyster bed rights in the 1870s and 1880s (outside the litigation in *New Jersey v. Delaware I*), that controversy ended quickly when New Jersey dropped its prosecution of two Delaware oystermen and calm was restored. *See* Hoffecker Rep. 23-26.

Article VII provides in full that "Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States." No historical evidence appears to exist of any actual dispute presented in the pleadings in *New Jersey v. Delaware I* that occasioned the drafting of Article VII. *See also* Hoffecker Rep. 26-29. In addition, unlike Articles I through IV, and despite the States' unresolved boundary dispute, the drafters did not delineate the geographic scope of this Article by referring to the "low-water marks" or "eastern" or "western" half of the river. Instead, the drafters selected the term "own side of the river."

Article VIII generally reserves the States' rights: "Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth."[19]

In March 1905, the Delaware and New Jersey legislatures each approved the 1905 Compact. After submitting it to Congress for ratification and receiving Senate approval, *see* DE App. 1173-96, the States then asked the House to delay action until the fishing-law commissioners could agree on joint fishing laws pursuant to Article IV, *see id.* at 1221-28. As George Bates explained to this Court in support of the parties' joint application for a stay of the proceedings in *New Jersey v. Delaware I* pending congressional ratification of the 1905 Compact:

> Under the terms of the compact and pursuant thereto, the two States appointed Commissioners to frame and submit to the Legislatures a code of joint fishing laws to govern both States. The Commissioners are now engaged in that work. Very soon after the compact had been communicated to Congress, the Commissioners of both States unanimously joined in a request that no action should be taken by Congress pending the action of the Commissioners.

Id. at 190; *see also id.* at 1197-1254; Hoffecker Rep. 41-45.

The fishing-law commissioners reported in January 1907 that they had drafted uniform laws and suggested that their Governors seek congressional ratification. *See* Hoffecker Rep. 44-45; DE App. 1293-1302; *see also id.* at 1303-1834. Congress completed its ratification of the 1905 Compact that same month. *See id.* at 1179-89. Although in 1907 both state legislatures adopted partially comparable fishing laws, they were not "uniform laws" as required to effectuate Article IV. *See* Hoffecker Rep. 45-47; DE App. 1871-89. Despite numerous attempts through

[19] Article IX provides for execution by the commissioners and ratification by Congress, stating that upon ratification the Compact would become "binding in perpetuity" upon both States and that the suit then pending would be "discontinued" without prejudice.

commissioners to draft and adopt uniform fishing laws between 1914-1927 and again from 1938-1939, the States never adopted such laws. *See* DE App. 1891-2024.[20]

4. *New Jersey v. Delaware II*: The Court's Resolution of the Boundary Question

In 1925, a conflict arose over title to oyster beds in the Delaware Bay, and new commissioners appointed by each State were again unable to resolve the long-disputed boundary question. *See* DE App. 2025-78. In 1929, New Jersey filed *New Jersey v. Delaware II*. *See id.* at 199-216 (Complaint), 217-72 (Answer). Shortly after New Jersey filed its complaint, its Attorney General explained in a printed report requested by the New Jersey Governor that the suit was also intended to resolve New Jersey's uncertainty over its rights within the twelve-mile circle regarding "wharves, buildings and other improvements" on lands within the twelve-mile circle, and he reported that "[t]he dispute between the two states has existed since 1799, and although commissions have been appointed, from time to time, under authority of the legislatures of the two states, no agreement has ever been reached between them except upon the right of citizens of both states to fish in the river and bay." *Id.* at 2084, 2087.

In 1934, the Court held that Delaware has sovereignty up to the low-water mark on the eastern, or New Jersey, shore of the river within the twelve-mile circle. *See New Jersey v. Delaware II*, 291 U.S. at 365.[21] The Court rejected each of the bases on which New Jersey claimed

[20] *See also, e.g.*, *Ampro Fisheries, Inc. v. Yaskin*, 588 A.2d 879, 883 (N.J. Super. Ct. App. Div. 1991) (describing New Jersey's contention that "the 1905 Compact has been mutually abandoned by reason of the fact that the two states have never enacted complementary fishing laws"), *aff'd in part and rev'd in part on other grounds*, 606 A.2d 1099 (N.J. 1992); *State v. Mick*, Crim. Nos. 83-05-0092 *et al.*, slip op. at 2 (Del. Super. Ct. May 2, 1984) ("Because no uniform laws ever existed in 1907, nor since, the Delaware General Assembly has never been bound by any of the provisions of the compact.") (DE App. 4189-91); *cf.* Del. Op. Att'y Gen. 77-033, 1977 WL 25804 (1977) ("There is . . . no requirement under the compact that Delaware's fisheries management laws and regulations for the Delaware River and Bay be uniform with those in New Jersey.").

[21] With respect to the boundary between the States south of the twelve-mile circle, an area encompassing five miles of the Delaware River and 45 miles of Delaware Bay, the Court upheld New Jersey's claim of sovereign title to the middle of the navigable channel, or "Thalweg," thus giving New Jersey sover-

title to the subaqueous soil of the Delaware River within the twelve-mile circle. *See id*. at 370-78. The Court explained that the 1905 Compact "provides for the enjoyment of riparian rights, for concurrent jurisdiction in respect of civil and criminal process, and for concurrent rights of fishery," but "[b]eyond that it does not go." *Id.* at 377-78. Indeed, this Court found New Jersey's assertion that the 1905 Compact relinquishes Delaware's ownership of the subaqueous lands within the twelve-mile circle to be "wholly without force." *Id*. at 377. In reaching that determination, the Court made special note of Article VIII's general reservation of rights to the States. *See id.* at 377-78.

Immediately following that decision, the States disputed whether under Article VII of the 1905 Compact Delaware had the right to tax the wharves extending from New Jersey into Delaware, and whether Articles I and II incorporated each State's substantive laws within the specified geographic areas or were instead limited to service of process. *See* DE App. 2095-2135. In April 1935, the States appointed another set of commissioners "to make and conclude an agreement . . . respecting taxation, civil and criminal jurisdiction, and any other question relating to boundary and jurisdiction." *Id.* at 2137, 2143; *see also id.* at 1987-91, 2147-2205. Although the commissioners met over the course of several years, no such agreement was ever reached.

B. Delaware's Consistent Exercise of Jurisdiction Over Structures Extending From New Jersey Into Delaware Within the Twelve-Mile Circle

Delaware Common Law. At the time of the Compact, Delaware exercised jurisdiction over riparian structures by common law and did not issue grants or leases of its submerged lands.[22] Delaware continues to recognize riparian rights at common law, subject to the State's

---

eignty over submerged lands with valuable oyster beds. *See* 291 U.S. at 378-85. The jurisdiction of the States within that geographic area is not at issue in this case.

[22] *See, e.g., Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435, 1882 WL 2713, at *10 (1882); *State v. Reybold*, 5 Harr. 484, 1854 WL 847 (Del. Ct. Gen. Sess. 1854); *Delaney v. Boston*, 2 Harr. 489, 1839 WL 165 (Del. Super. Ct. 1839).

"power to regulate or restrict private riparian property rights for public purposes." *City of Wilmington v. Parcel of Land Known as Tax Parcel No. 26.067.00.004*, 607 A.2d 1163, 1168-69 (Del. 1992). Toward the end of the 19th century, Delaware established pier and bulkhead lines (geographic lines beyond which riparian structures may not extend in order to protect the public right of navigation) for approximately nine miles of urban areas within its approximately 86 miles of coastline along the Delaware River and Bay.[23]

Delaware Subaqueous Lands Act. Environmental regulation became common in the latter half of the 20th century. In 1961, Delaware adopted its first statute regulating subaqueous lands, *see* 53 Del. Laws ch. 34; Del. Code Ann. tit. 7, § 4520 (repealed 1966), and in 1966 adopted a more comprehensive Underwater Lands Act containing provisions governing the lease of subaqueous lands by the State. *See* 55 Del. Laws ch. 442, § 1; Del. Code Ann. tit. 7, §§ 6151-6159 (repealed 1986). In 1969, Delaware adopted regulations implementing the Underwater Lands Act. *See* DE App. 4023-24; *id.* at 4350 (Moyer Aff. ¶ 4). Structures such as piers and wharves built before the 1969 regulations took effect were thereafter treated by Delaware as a grandfathered use (including but not limited to structures extending from New Jersey), but Delaware thereafter required a permit for any modifications to those grandfathered structures. *See id.* at 4350-51 (¶¶ 5-7). In 1986, Delaware adopted its current Subaqueous Lands Act, 65 Del. Laws ch. 508, Del. Code Ann. tit. 7, ch. 72. That Act authorizes DNREC both to regulate any potentially polluting use made of Delaware's subaqueous lands[24] and to grant or lease property interests

[23] *See* Del. Code Ann. tit. 23, § 1501 (enacted 1871, authorizing New Castle to establish lines); *id.* § 1505 (enacted 1901, adopting lines established by the Secretary of the Army for Wilmington and Edgemoor); 33 U.S.C. § 404 (enacted 1899, authorizing Secretary of the Army to establish lines).

[24] *See* Del. Code Ann. tit. 7, § 7203(b) ("Owners of private subaqueous lands must obtain a permit from [DNREC] before making any use of such lands which may contribute to the pollution of public waters, infringe upon the rights of the public, infringe upon the rights of other private owners or make connection with public subaqueous lands."); *see also id.* § 7201 ("Subaqueous lands within the boundaries of Delaware constitute an important resource of the State and require protection against uses or changes which

in those state lands.[25] *See generally* DE App. 4351-53 (Moyer Aff. ¶¶ 8-11), 4323-25 (Herr Aff. ¶¶ 2-8).

Delaware Coastal Zone Act. In 1971, Delaware enacted the Delaware Coastal Zone Act, Del. Code Ann. tit. 7, §§ 7001 *et seq.* ("DCZA"), which prohibits "[h]eavy industry uses of any kind" and "offshore gas, liquid or solid bulk product transfer facilities" within the coastal zone, *id.* § 7003.[26] This statute was invoked by DNREC to deny permission to operate the Crown Landing facility at issue in this case. The purpose of the DCZA and submerged lands statutes "is to protect the environment by controlling and abating pollution in the State." *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 907 (Del. 1994). *See generally* DE App. 4304 (Cherry Aff. ¶ 4).

Delaware's DCZA Permit Rejection to El Paso Eastern's Proposed LNG Facility. In 1971, shortly after the DCZA was enacted, El Paso Eastern Company applied for a status decision as to whether the DCZA would permit it to build an LNG unloading facility that would extend from the New Jersey shore into Delaware waters (much like BP's proposed Crown Landing project). *See* DE App. 3469-72.[27] Delaware's State Planning Office (DNREC's predecessor in ad-

---

may impair the public interest in the use of tidal or nontidal waters. The purposes of this chapter are to empower the Secretary to deal with or to dispose of interest in public subaqueous lands and to place reasonable limits on the use and development of private subaqueous lands, in order to protect the public interest by employing orderly procedures for granting interests in public subaqueous land and for issuing permits for uses of or changes in private subaqueous lands.").

[25] *See* Del. Code Ann. tit. 7, § 7206(a) ("[T]he Secretary shall have exclusive jurisdiction and authority over all projects to convey a fee simple or lesser interest or to grant easements with respect to subaqueous lands belonging to the State.").

[26] The Act defines "bulk product transfer facility" as "any port or dock facility, whether an artificial island or attached to shore by any means, for the transfer of bulk quantities of any substance from vessel to onshore facility or vice versa. Not included in this definition is a docking facility or pier for a single industrial or manufacturing facility for which a permit is granted or which is a nonconforming use. Likewise, docking facilities for the Port of Wilmington are not included in this definition." Del. Code Ann. tit. 7, § 7002(f).

[27] Applicants have the option to seek a DCZA status decision or to file a full permit application. *See* DE App. 4304 (Cherry Aff. ¶ 5 n.1). Applicants such as El Paso (and also BP in this case) typically seek a

ministering the DCZA) sought an opinion from Delaware's Attorney General, *see id.* at 3473-74, who concluded in an opinion letter to the State Planning Office that the project was a prohibited bulk transfer facility under the DCZA. The Delaware Attorney General stressed that Delaware has jurisdiction to regulate projects that begin in New Jersey to the extent that they include "docking facilities extending into the Delaware River." *Id.* at 3477-78; *see also id.* at 4304-05 (Cherry Aff. ¶ 5).

Delaware's Coastal Management Program. Also in 1972, Congress passed the federal Coastal Zone Management Act ("CZMA") (*see* 16 U.S.C. §§ 1451 *et seq.*), finding, *inter alia*, that "[i]mportant ecological, cultural, historic, and esthetic values in the coastal zone which are essential to the well-being of all citizens are being irretrievably damaged or lost" (*id.* § 1451(e)), and "that it is the national policy . . . to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations" (*id.* § 1452(1)). The CZMA provides that coastal States may submit their own coastal management programs ("CMPs") (and amendments thereto) to the Secretary of Commerce for review and approval; in return, a State gets substantial federal funding for its coastal management program. *See id.* §§ 1454-1455.

Delaware's Coastal Management Program, which received federal approval in August 1979, contains an extended discussion on the dangers and other pitfalls of LNG facilities and concludes "that there is no site in Delaware suitable for the location of any LNG import-export facility." DE App. 2591; *see also id.* at 2578-90 (detailing safety concerns and discussing prior LNG spills in other States and countries). A 1978 formal opinion by Delaware's Attorney General likewise had concluded that the DCZA would be applied to prohibit bulk transfer facilities located

---

status decision because the process is more streamlined. *See id.* Status decisions have the force of law no less than decisions on formal applications. *See Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1244 (Del. 1985).

in Delaware on a pier originating on the New Jersey shore. *See id.* at 3882-84 (Del. Op. Att'y Gen. 78-018). Delaware's CMP also rejected Salem County, New Jersey's complaint that "Delaware law, in particular the [DCZA], unduly restricts development along the Delaware River in New Jersey." *Id.* at 2600. Citing this Court's decision in *New Jersey v. Delaware II*, the Delaware CMP responded that "Delaware's jurisdiction extends to the low water mark on the New Jersey shore." *Id.* at 2600, 2605. Thus, Delaware concluded, "[i]nasmuch as coastal resources of Delaware may be affected by certain uses of such waters, the Delaware CMP has opposed Salem County efforts to waive the [Act's] regulatory provisions which may relate to development in Salem County." *Id.* at 2605. Delaware also noted that, under the 1905 Compact, the States had never enacted the joint fishing laws envisioned by Article IV. *See id.* at 2534.[28]

Boundary-Straddling Wharves and Piers Within the Twelve-Mile Circle. Very few wharves and piers have been built extending from the New Jersey shore into Delaware within the twelve-mile circle. The record contains evidence of only 14 boundary-straddling structures capable of receiving a vessel in the 155 years between 1851 (when New Jersey began issuing riparian grants) and 2006. *See* DE App. 4328-37 (Herr Aff. ¶¶ 18-31). Eleven of those wharves or piers were constructed before 1969, when Delaware's only regulation of such structures was through its judge-made common law. All of those were grandfathered under Delaware's first administrative regulations governing subaqueous lands enacted in 1969. *See id.* at 4332-37 (¶¶ 27-31). Only three of those structures arguably extended more than 500 feet from the boundary, the longest being between 600 and 700 feet. *See id.* at 4332-33 (¶ 28(a), (c), (d)). Since that time, only three additional structures have been built. *See id.* at 4373 (Schenck Aff. ¶ 12) (review of aerial photographs dating back to 1961). And all three of those projects have been regulated by Delaware.

[28] Delaware's CMP documents refer to the 1905 Compact as the "New Jersey-Delaware Fisheries Compact of 1907," thus referring to its primary purpose and the year it was ratified by Congress. *See* DE App. 2534.

First, in 1971, Delaware granted a subaqueous lands lease to E.I. du Pont de Nemours & Co. ("DuPont") to dredge Delaware subaqueous soil, build a dock, and construct a fuel oil storage tank at the DuPont Chambers Works facility extending from the New Jersey shore. *See id.* at 3403-08; *see also id.* at 3395-402 (DNREC correspondence to DuPont requiring permit). Since then, Delaware has issued numerous permits for activities at DuPont facilities that extend past the boundary and into Delaware territory within the twelve-mile circle. *See id.* at 3409-67; *id.* at 4353-54 (Moyer Aff. ¶¶ 13-18).

Second, in 1990 and 1991, Delaware issued a status determination ruling that a proposed coal unloading pier by Keystone Cogeneration Systems is a permissible use under the DCZA, as well as a DCZA permit. *See id.* at 3505-10, 3607-08; *id.* at 4306 (Cherry Aff. ¶ 8). Delaware also issued a subaqueous lands lease, including subsequent renewals. *See id.* at 3557-627; *id.* at 4355 (Moyer Aff. ¶¶ 23-27), 4326 (Herr Aff. ¶¶ 10-12).[29]

Third, Delaware issued a permit in 1996 to New Jersey's Parks and Forestry Division (located within NJDEP) to refurbish a stone pier at New Jersey's Fort Mott State Park. *See id.* at 3715-25; *id.* at 4356 (Moyer Aff. ¶ 30), 4326 (Herr Aff. ¶ 13). In August 2006, New Jersey applied to Delaware for a renewal of that permit. *See id.* at 3731-34; *id.* at 4327 (Herr Aff. ¶ 14).[30]

---

[29] Delaware has also issued air quality permits and performs air quality inspections for equipment at the Keystone dock. *See* DE App. 4347 (Mirzakhalili Aff. ¶ 8 & n.1).

[30] New Jersey's Fort Mott renewal application is just the latest of numerous events in the last 30 years in which New Jersey consistently acknowledged that Delaware may regulate boundary-straddling projects within the twelve-mile circle. Delaware will discuss those events in detail when addressing New Jersey's course of performance in Delaware's opposition to New Jersey's motion for summary judgment. In brief, New Jersey's coastal management documents from the 1970s and 1980s repeatedly and expressly acknowledge that Delaware has jurisdiction to apply its coastal zone laws, including the DCZA, to boundary-straddling projects and thereby require permits or prohibit a project altogether to the extent that it extends into Delaware. From 1991 through 1994, New Jersey initiated a three-year process funded by its federal CZMA grant monies attempting to craft a memorandum of agreement with Delaware to coordinate the respective States' review of boundary-straddling projects, which New Jersey expressly premised on the notion that Delaware has jurisdiction over those projects. As a result, New Jersey's own permits in 1991 for Keystone and in 1996 for Fort Mott expressly required the applicant, before beginning construction, to provide proof to New Jersey that it had obtained all of the required Delaware permits.

Finally, in 2005, Delaware issued a permit to Fenwick Commons to refurbish an existing dilapidated pier at Penns Grove that was originally built in the late 1800s. *See id.* at 3839-44; *id.* at 4327 (Herr Aff. ¶ 15). Construction for that refurbishment has apparently not yet begun. Current aerial photographs of the full length of the twelve-mile circle depict those four projects. *See id.* at 4207 (Keystone), 4208 (Penns Grove/Fenwick Commons), 4209 (DuPont Chambers Works), 4210 (Fort Mott), 4211-12 (no structures); *see also id.* at 4367-69 (Reuther Aff. ¶¶ 56-71).

Delaware has also required permits for pipelines and power lines crossing the Delaware River within the twelve-mile circle. *See id.* at 3323-30, 3337-43, 3351-61, 3367-70, 3375-79, 3381, 3755-59 (Columbia Gas, Delmarva Power, and Colonial Pipeline). Delaware does not typically issue permits for treated wastewater discharges into the Delaware River from the New Jersey shore, but that is because federal law pursuant to the Clean Water Act requires New Jersey's permitting processes to "ensure compliance with the applicable water quality requirements of all affected States." 40 C.F.R. § 122.4(d); *see also* DE App. 4320-21 (Hansen Aff. ¶¶ 3-5). Delaware has, however, intervened to protect its interests where necessary. In 2004, the Governors of Delaware and New Jersey wrote a joint letter protesting the Acting Secretary of the Army's proposal to ship wastewater resulting from the destruction of the deadly VX nerve agent to DuPont's Chamber Works facility for treatment and disposal into the Delaware River. *See id.* at 3447-48; *id.* at 4321 (Hansen Aff. ¶¶ 6-7). Finally, Delaware regularly responds to police, fire, and other 911 requests on the eastern half of the river. *See id.* at 4339-42 (Hutchins Aff. ¶¶ 1-15), 4359-66 (Reuther Aff. ¶¶ 1-52), 4381-99 (Streets Aff. ¶¶ 1-169).

C. *New Jersey v. Delaware III*: The Current Dispute

In 2002, BP contacted DNREC regarding a proposal to construct a new LNG unloading terminal named "Crown Landing" that would extend 2,000 feet into Delaware, with associated onshore structures in New Jersey. *See* DE App. 4306, 4307 (Cherry Aff. ¶¶ 9, 15). BP expected

the terminal to transmit up to 1.2 billion cubic feet of natural gas daily, and to connect to major pipeline systems serving the Northeast. *See id.* at 3862 (FERC EIS). The unloading facility would be designed to handle supertankers with cargo capacities of up to 200,000 cubic meters (more than 40 percent larger than the largest LNG ships in today's world fleet), *see id.* at 3861, and BP expects that a ship would offload LNG at the facility every two to three days. The unloading facility would consist of a structure with a 2,000-foot-long trestle and a 6,000-square-foot unloading platform. *See id.* at 4307 (Cherry Aff. ¶ 15).

An LNG transfer system would be installed on the unloading platform to transfer the LNG from the ship to three 150,000-cubic-meter storage tanks located onshore. The transfer system located on a structure built on Delaware's submerged lands would consist of three "unloading arms" for transfer of LNG to the storage tanks, an arm for the return of vapor to the ship, a "cryogenic transfer line" connecting the LNG unloading arms to the onshore tanks, a "vapor return line" connecting those tanks to the vapor return arm, and an additional cryogenic line. The unloading facility would also require the dredging of 1.2 million cubic yards of Delaware subaqueous soil,[31] which would disturb more than 30 acres of riverbed. *See id.* at 3862 (FERC EIS).

On February 3, 2005, DNREC issued a status decision determining that BP's proposed project was prohibited under the DCZA. *See id.* at 4308 (Cherry Aff. ¶ 19). That decision found that the "proposed facility represents a prohibited offshore bulk product transfer facility and does not meet the exemption under the bulk product transfer facility definition in that the facility cannot be considered a 'manufacturing use' under the Act." *Id.* at 3811. After losing an administra-

[31] For comparison, 1.2 million cubic yards is the rough equivalent of 100,000 to 120,000 dump trucks worth of soil. *See, e.g.*, State of Alaska, Department of Natural Resources, *Fact Sheet: Material Sale in Alaska* (Feb. 2004) ("A standard dump truck has a capacity of 10-12 cubic yards."), *at* http://www.dnr.state.ak.us/mlw/factsht/material_sites.pdf.

tive appeal to the Delaware Coastal Zone Industrial Control Board, BP chose not to exercise its right to take the matter to state court, and the time for any appeal has long since expired. *See id.* at 4308-09 (Cherry Aff. ¶¶ 20-21).

On January 7, 2005, BP filed a Waterfront Development Application with NJDEP's Office of Dredging and Sediment Technology ("ODST"). On February 4, 2005, ODST notified BP in a letter also filed with FERC that its application was deficient in numerous respects under New Jersey law, and in particular that "activities taking place from the mean low water line . . . outshore are located in the State of Delaware and therefore are subject to Delaware Coastal Zone Management Regulations." DE Reopen Opp. App. 85a.

Subsequently, BP representatives urged New Jersey officials to reverse course and take the position that Delaware lacked any regulatory authority over projects extending from New Jersey into Delaware, on the theory that "riparian jurisdiction" as used in Article VII of the 1905 Compact means "exclusive jurisdiction" over any activities occurring on a wharf extending into Delaware. The Federal Energy Regulatory Commission ("FERC") granted BP's application under § 3(a) of the Natural Gas Act, 15 U.S.C. § 717b(a), but made its approval contingent on a number of future events, "subject to its filing, prior to construction, documentation of concurrence from the DNREC that the projects are consistent with applicable Delaware law, in conformance with CZMA," as well as satisfying all New Jersey requirements. *Crown Landing LLC*, 115 FERC ¶ 61,348, ¶ 31 (June 20, 2006). Although New Jersey had not (and even today still has not) issued the required New Jersey permits for Crown Landing to be built, it filed this suit invoking the original jurisdiction of the Supreme Court. Following appointment of the Special Master and the close of discovery, Delaware now respectfully moves for summary judgment.[32]

[32] The Special Master prohibited discovery of the communications between New Jersey and BP, which Delaware sought to show that the Court should not exercise its original jurisdiction because BP is in fact

ARGUMENT

Under the plain language of the 1905 Compact, which was enacted by Congress, Delaware has regulatory power over projects straddling the New Jersey-Delaware border. Because "[c]ongressional consent 'transforms an interstate compact into a law of the United States,'" this Court will "interpret a congressionally approved interstate compact '[j]ust as if [it] were addressing a federal statute.'" *Virginia v. Maryland*, 540 U.S. 56, 66 (2003) (quoting, in turn, *Cuyler v. Adams*, 449 U.S. 433, 438 (1981), and *New Jersey v. New York*, 523 U.S. 767, 811 (1998)) (first and last alterations added; ellipsis omitted). "[W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded." *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89-90 (1823). The Court will explore "textual reasons" for compact terms and examine the structure and the entirety of an agreement to evaluate the reasonableness of an interpretation of one portion. *Cuyler*, 449 U.S. at 446-47. The Court also "must look to the history of the times, and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief and the remedy." *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 723 (1838) (citation omitted). Only if the text of the compact is ambiguous will the Court consider extrinsic evidence, including the course of negotiations, course of performance, or other post-execution history. *See, e.g.*, *Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991); *O'Connor v. United States*, 479 U.S. 27, 33 (1986).

---

the real party in interest and could bring its legal challenges without the need for a State to invoke this Court's original jurisdiction. *See* Order on New Jersey's Motion to Strike at 2-4 (June 13, 2006). Delaware believes that ruling was erroneous and inconsistent with this Court's precedents, including *Wyoming v. Oklahoma*, 502 U.S. 437 (1992). Moreover, subsequent discovery has revealed strong evidence that New Jersey for decades has consistently upheld Delaware's right to regulate boundary-straddling projects until BP persuaded it to file this suit, *see supra* note 30, and New Jersey's sudden change of course further amplifies Delaware's claim that BP is the real party in interest here.

I. THE 1905 COMPACT DID NOT ALTER THE GENERAL RULE THAT DELAWARE EXERCISES SOVEREIGN POWER WITHIN ITS BOUNDARY

A. The Baseline Rule Is That A State Has Full Sovereignty Within Its Borders

At the time the 1905 Compact was negotiated, each State indisputably had full sovereign authority all the way to the boundary between the States. In numerous cases, this Court has recognized the fundamental principle that "[o]wnership of submerged lands – which carries with it the power to control navigation, fishing, and other public uses of water – is an essential attribute of sovereignty." *United States v. Alaska*, 521 U.S. 1, 5 (1997).[33] Those attributes of sovereignty necessarily extend to the limits of the sovereign's boundary, for, as this Court has long held, "when a place is within the boundary, it is a part of the territory of a state; title, jurisdiction, and sovereignty, are inseparable incidents, and remain so till the state makes some cession." *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) at 733. This Court likewise applied that bedrock principle in holding that, "[w]hatever jurisdiction the State of Indiana may properly exercise over the Ohio River, it cannot tax this bridge structure south of low-water mark on that river, for the obvious reason that it is beyond the limits of that State and permanently within the limits of Kentucky." *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 622 (1899); *see also* 1 Henry P. Farnham, *The Law of Waters and Water Rights* 38-39 (1904) ("*Farnham*") ("If one state owns the whole river, it may enact and enforce laws as far as the opposite shore, since the whole river is within its territorial jurisdiction."). Accordingly, when a State has made a grant of property later found to be outside the lawful boundary of that State, this Court has held the grant to be invalid. *See, e.g.*, *Coffee v. Groover*, 123 U.S. 1, 29 (1887) (discussing the rule in *Poole v. Lessee of Fleeger*, 36 U.S. (11 Pet.) 185 (1837), "to the effect that the grants of North Carolina and Tennessee were not rightfully made, because they were originally beyond their territorial boundary").

[33] *See also, e.g.*, *Montana v. United States*, 450 U.S. 544, 551 (1981) ("[T]he ownership of land under navigable waters is an incident of sovereignty.").

B. The 1905 Compact Preserved Delaware's Authority To Regulate Structures Built On Delaware's "Own Side Of The River" And Did Not Give New Jersey Any Riparian Authority In Delaware

By its plain terms and purposes, Delaware did not relinquish to New Jersey any jurisdiction over Delaware's submerged lands in the 1905 Compact. Delaware plainly retained authority over its own submerged lands within the twelve-mile circle on "its own side of the river." Art. VII. In 1905, the parties knew that "almost from the beginning of statehood Delaware and New Jersey ha[d] been engaged in a dispute as to the boundary between them." *New Jersey v. Delaware II*, 291 U.S. at 376. But the drafters of the Compact were unable to resolve that long-running boundary dispute. Instead, Article VII provides (emphasis added): "Each State may, *on its own side of the river*, *continue* to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States." Significantly, the drafters did *not* select language specifying the geographical reach of Article VII regardless of where the boundary would ultimately be determined to lie. The activities that each State may conduct are thus limited to each State's "own side of the river."

The text, structure, and history of the Compact as a whole show that the phrase "own side of the river" must be read to mean with reference to each State's boundary. That language left open in Article VII the precise metes and bounds of where the States' "riparian jurisdiction" extended until the boundary dispute could be resolved. Under New Jersey's interpretation, Article VII places no limit upon the extent to which New Jersey may intrude into, and functionally annex, Delaware territory, so long as the structure is "appurtenant" to the New Jersey shore. NJ Reopen App. 270a (Proposed Decree). Contrary to New Jersey's complaint, the Compact did not confer on New Jersey the power to extend a structure or lease of land from its shore into Delaware without Delaware's consent.

1. The text of the 1905 Compact as a whole confirms that "own side" refers to the boundary

The 1905 Compact addressed service of process (Articles I & II), fishing rights (Articles III, IV & V), oyster beds (Article VI), and riparian jurisdiction (Article VII), each in different articles with different geographic terms. Those provisions demonstrate that the drafters selected precise geographic terms to resolve the fishing and related service-of-process disputes, but a less precise term to specify the location where each State could continue to exercise riparian jurisdiction – "own side of the river" – that would not intrude upon any subsequent decision about the precise location of the boundary.

Thus, Article III provides (emphasis added):

> The inhabitants of the said States of Delaware and New Jersey shall have and enjoy a common right of fishery throughout, in, and over the waters of said river *between low-water marks* on each side of said river between the said States, except so far as either State may have heretofore granted valid and subsisting private rights of fishery.

The specific geography denoted by the phrase "between low-water marks" is in stark contrast to Article VII's non-specific geographic phrase "own side of the river." The parties thus knew how to take a dispute over the right to use the Delaware River out of the shadow of the underlying boundary dispute, yet they plainly did not do so in Article VII. Moreover, Article III uses the word "side" to denote – not the middle of the river – but the shore ("between low-water marks on each side of said river"). *See* DE App. 4199 (*Webster's 1898*) (defining "side" as "[t]he margin, edge, verge, or border of a surface . . . as, the *side* . . . of a river").

Article IV likewise provides that "[e]ach State shall have and exercise exclusive jurisdiction *within said river* to arrest, try, and punish its own inhabitants for violation of the concurrent legislation relating to fishery herein provided for." (Emphasis added). No matter where the boundary might ultimately be adjudicated to lie, the drafters deployed that language to indicate that enforcement rights referred to in Article IV could be exercised from shore to shore.

The drafters took the same approach to the service-of-process issues addressed in Articles I and II. In language similar to that in Article III, Articles I and II describe the location for serving criminal and civil process to be "from low-water mark on the New Jersey [or Delaware] shore to low-water mark on the Delaware [or New Jersey] shore." As with Articles III and IV, those precise geographic lines would apply regardless of the later resolution of the boundary dispute.

Moreover, Article I refers to New Jersey's service of criminal process for offenses committed, among other things, "upon the *eastern half* of said Delaware River"; Article II correspondingly refers to the criminal process that may be served by Delaware for offenses committed "upon the *western half* of said Delaware River." (Emphases added). But Article VII does not contain such language. It says that each State has certain "riparian jurisdiction" "on its own side of the river." In view of the care with which the drafters expressly specified precise geographic boundary lines in other articles of the Compact, Article VII by its plain terms does not grant New Jersey any authority within Delaware.

Finally, Article VIII of the Compact provides that "[n]othing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein *expressly* set forth." (Emphasis added). Delaware's right to exercise its authority over structures on those lands can in no way be said to be "expressly" precluded by Article VII. By limiting each State's jurisdiction to its "own side of the river," the drafters of the Compact did not authorize one State, such as New Jersey, to determine how the other State's submerged lands would be utilized. Sovereign jurisdiction stopped at the boundary line and went no further. *See*, *e.g.*, *Coffee*, 123 U.S. at 9-10, 27-30. Read in relation to the specific geographical references contained in the other articles of the 1905 Compact, therefore, Article VII affirms that each State could continue to exercise riparian jurisdiction to wherever it had sovereign authority, *i.e.*, to its boundary line.

2. The structure of the 1905 Compact confirms that "own side" refers to the boundary

The location of Article VII within the Compact provides further support for Delaware's reading. Articles I through IV confer on each State certain rights concerning service of process and fishing. Article V then specifies that, until concurrent fishing laws were enacted, each State's fishing laws would be effective only "in said respective States," thus referring to the then-unresolved boundary. Article VI likewise carves out "the planting, catching, or taking of oysters, clams, or other shell fish" from the other resolutions struck in the Compact. As New Jersey stated in its brief in support of its Motion to Reopen, oyster disputes "had been left open by Article VI of the Compact of 1905" (NJ Reopen Br. 10); indeed, an oyster bed dispute led New Jersey to file *New Jersey v. Delaware II*. Thus, Articles V and VI indisputably gave neither State any territorial rights they did not already have on their respective sides of the boundary. That treatment contrasts with the very different geographic text selected by the drafters in Articles I through IV, and the proviso in Article VIII that the Compact did not resolve any territorial or jurisdictional issues not "expressly" provided in the Compact. In context, therefore, Article VII reserves each State's rights within its territorial lines wherever that boundary might later be adjudicated to lie.

Importantly, authority over oyster beds and riparian structures directly implicated property rights in the bed of the river – a critical issue on which the drafters could not agree. The riparian grants, leases, and conveyances mentioned in Article VII, like the oyster bed issue reserved until later resolution of the boundary question, also implicated property rights. Under New Jersey's theory, Article VII authorizes it "to make grants, leases, and conveyances" of Delaware lands. In view of the unresolved boundary dispute, the Compact's plain language evinces a clear intent that Delaware did *not* relinquish sovereign control with the requisite clarity demanded in Article VIII and this Court's cases. *See supra* p. 24; *infra* pp. 40-43. The "own side" language of Article VII

therefore preserves Delaware's authority over riparian property rights in the submerged lands on its side of the boundary.

3. The history of the litigation resolved by the 1905 Compact confirms that "own side" refers to the boundary

The 1905 Compact was drafted to settle the nearly 30-year-old case of *New Jersey v. Delaware I*. The disputes leading to that case and alleged in New Jersey's complaint (*see* DE App. 20-64) concerned only fishing rights and service of process, the subjects addressed in Articles I through V. It did not concern disputes over oyster beds or riparian rights, the subjects dealt with in Articles VI and VII.[34] Thus, Articles I through IV were sufficient to resolve the matters then in dispute and to warrant dismissal of *New Jersey v. Delaware I*. Because that case presented no dispute over oyster beds or riparian rights, the parties would not have needed to resolve any issues concerning those topics to dismiss the pending litigation.

Nor is there any evidence that the States otherwise had any disputes over oyster beds or riparian rights in need of resolution. Although they had one dispute over oyster beds in 1887, there is no record of any disputes between the States over riparian structures or lands. *See* Hoffecker Rep. 23-29. As to riparian structures, under the Delaware common law that controlled at the time, any wharves extending from the New Jersey shore into Delaware would not have been subject to arbitrary or automatic removal as a purpresture or public nuisance at Delaware's insistence. Rather, such structures would have been subject to the same Delaware common law of wharfing out that applied to wharves extending from the Delaware side of the river. *See Harlan & Hollingsworth*, 1882 WL 2713, at *10. The common-law principles accepted at that time were generally permissive of the types of wharves then in existence. *See id.* at *11 ("Obstructions in navigable rivers made in aid of commerce, which do not materially injure the navigation, are not

[34] Although New Jersey's complaint alleged that wharves had been erected beyond the boundary, *see* DE App. 36, it identified no live dispute over those wharves at that time.

nuisances. The court cannot pronounce a simple obstruction in a navigable river a nuisance; it is a fact to be found."). Given the lack of any need to resolve the scope of the respective States' authority over riparian rights, the fact that Articles V and VI gave New Jersey no rights beyond its boundary, and Article VIII's general reservation of rights, Article VII should be construed as a provision whose ultimate scope and effect would depend upon the final resolution of the boundary.[35]

4. Pre-1905 New Jersey references to boundaries buttress the conclusion that "own side" cannot be read to refer to the middle of the river

Contemporary usage shows that courts, legislatures, and litigants referred specifically to the "middle of the river" or similar language when that is what they meant, rather than referring merely to a State's "own side" without defining the limits of that "side." New Jersey's attempt to rewrite the Compact to provide that "Each State may, ~~on its own side~~ to the middle of the river, continue to exercise riparian jurisdiction," must be rejected. *See* NJ Reopen Br. 3 (claiming right "to exercise riparian jurisdiction on its side of the Delaware River east of the main channel").

Contemporaneous New Jersey Pleadings. New Jersey's pleadings in the case resolved by the 1905 Compact, *New Jersey v. Delaware I*, repeatedly referred to the "middle" of the river, or "easterly" of the "middle" of the river, in delineating New Jersey's boundary claims. Thus, for example, New Jersey's bill of complaint filed in 1877 asserted that its "part of the bed of said river extends from the New Jersey shore thereof *to the middle of said river*." DE App. 20 (emphasis added).[36] New Jersey's consistent specificity in referring to the middle of the river as the extent of its jurisdiction contrasts starkly with the Compact's phrase, "own side of the river."

---

[35] *See Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) at 723 ("[W]e must look to the history of the times, and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief and the remedy.") (citation omitted).

[36] *See also* (all emphases added) DE App. 34-35 ("that portion of the bed of the Delaware river . . . to the *middle of said river*, became vested in fee-simple in the State of New Jersey"); *id.* at 35-36 (claiming

New Jersey's consistency in this linguistic respect continued in the hearing phase of *New Jersey v. Delaware I*. In November 1903, the commissioner appointed by the Court conducted live hearings in the case. In his opening statement, New Jersey's Attorney General, Robert McCarter, likewise used similar language, asserting that New Jersey owns "the bed of the Delaware River East of the middle line thereof." *Id.* at 1141; *see also id.* at 1143 ("[s]uch claim to the centre of the river"). McCarter's usage there is significant, because he was one of New Jersey's commissioners appointed in 1905 to negotiate the Compact, which does not use such precise language in Article VII but rather refers to each State's "own side" at a time when the boundary had not been adjudicated.[37]

Contemporaneous New Jersey Statutes. The "middle of the river" usage that pervades *New Jersey v. Delaware I* is fully consistent with the way New Jersey laws had asserted title to the middle of the river. New Jersey statutes provided that "the boundary lines of the counties of Salem, Cumberland and Cape May, are hereby declared to be the *main ship channel of the river* and bay of Delaware adjoining said counties respectively." DE App. 859 (1821 N.J. Laws p. 6, § 1) (emphasis added).[38] By contrast, using similarly precise language, the Revised Code of Delaware,

---

Delaware's chain of title "cannot and should not be construed to include or control any part of the bed of said river lying northerly or *easterly of the middle of said river*"); *id.* at 38 (stating Delaware construed its 1871 fishing laws to apply "on *easterly side of said river, and easterly of the middle and near to the easterly shore* of said river"; and that Delaware, "on the *easterly side of the middle of the river* Delaware, arrested twenty or more citizens and inhabitants of the State of New Jersey"); *id.* at 51 (" 'this State hath always claimed and now doth claim to own the bed of said river *to the middle thereof*, so far as said river lies between this State and the State of Delaware, and to be entitled to exclusive jurisdiction (subject to [federal law]) over its *half of said river*' ") (quoting NJ Resolution of Mar. 30, 1876).

[37] In *New Jersey v. Delaware II*, New Jersey described the 1872 fishing dispute as being over Delaware's arrest of New Jersey fisherman "*east of the middle of the river*," NJ Reopen App. 166a (emphasis added), thus again showing that "middle of the river" was the common usage when that result was intended. Notably, New Jersey's FOIA request in 2005 found it necessary to define New Jersey's "own side" of the river as follows, thus acknowledging that it is not self-defining: " 'the New Jersey side of the Delaware River, i.e., from the main channel of the Delaware River to the New Jersey shoreline, within the Twelve-Mile Circle.' " *Id.* at 85a (Donlon Aff. ¶ 4) (quoting *id.* at 100a).

[38] *See also* (all emphases added) DE App. 861 (1823 N.J. Laws p. 36, § 4) (providing for boundary of Salem County "to extend from the middle of the channel at the mouth of Oldman's Creek to the *main ship*

1874, ch. 1, § 2, specifically defined the limits of Delaware to be the "low-water mark on the eastern side of the river Delaware within the twelve-mile circle from New Castle."

Contemporaneous New Jersey Judicial Precedents. Numerous pre-1905 cases from New Jersey likewise referred to the "middle" of the river to denote the boundary between New Jersey and other States, rather than using a phrase such as "own side of the river" as a shorthand to denote jurisdiction or title all the way to the middle of a river.[39] Those contemporaneous and pervasive uses of the phrase "middle of the river" show that the drafters' selection of different terminology – "own side of the river" – should not be interpreted to mean "middle of the river."

---

channel of the River Delaware, striking the same at a right angle"); *id.* (§ 5) (similar language regarding Cumberland County); *id.* at 889 (1846 N.J. Laws § 61 (Rev. 1877, p. 203)) ("That the boundary lines of the counties of Salem, Cumberland and Cape May are hereby declared to be the *main ship channel in the river* and bay of Delaware adjoining said counties respectively."); *id.* at 999 (1881 N.J. Laws p. 367, § 1) (boundary of Upper Penns Neck, Salem County, extends "*to the ship channel*").

[39] *See* (all emphases added) *Fitzgerald v. Faunce*, 17 Vroom 536, 1884 WL 7449, at *7 (N.J. 1884) (claim that the "State of New Jersey extends to the *middle of the Delaware river*"); *New York, Lake Erie, & W.R.R. Co. v. Hughes*, 17 Vroom 67, 1884 WL 7630, at *2 (N.J. Sup. Ct. 1884) ("*middle of the Hudson river*"); *Lehigh Valley R.R. Co. v. Mutchler*, 13 Vroom 461, 1880 WL 7765, at *2 (N.J. Sup. Ct. 1880) (taxation "for that part of its bridge over the Delaware river [from Pennsylvania and New Jersey] which is *east of the middle line of the river*"); *Central R.R. Co. v. Mutchler*, 12 Vroom 96, 1879 WL 6970, at *1 (N.J. Sup. Ct. 1879) ("The piers, abutments and superstructure of the bridge, to the *middle line of the river*, are within this state."); *Attorney General v. Delaware & B.B.R.R. Co.*, 27 N.J. Eq. 631, 1876 WL 323, at *9 (N.J. 1876) ("*middle of the Delaware river*"); *Attorney General ex rel. Bd. of Riparian Comm'rs v. Hudson Tunnel R.R. Co.*, 27 N.J. Eq. 176, 1876 WL 320, at *1 (N.J. Ch.) ("*middle of the Hudson river*"), *rev'd on other grounds*, 27 N.J. Eq. 573, 1876 WL 321 (N.J. 1876); *Attorney General v. Delaware & B.B.R.R. Co.*, 27 N.J. Eq. 1, 1876 WL 322, at *11 (N.J. Ch.) ("Surely, it would not be contended . . . that this court has jurisdiction to decree the prostration of the part of the bridge which is west of the *middle of the river*. That is within the domain of Pennsylvania."), *aff'd*, 27 N.J. Eq. 631, 1876 WL 323 (N.J. 1876); *Easton Delaware Bridge Co. v. Metz*, 3 Vroom 199, 1867 WL 83, at *2 (N.J. Sup. Ct. 1867) ("[t]he boundary line between this state and Pennsylvania, above the falls of the Delaware, extends to the *middle of the river*") (internal quotation marks omitted); *Delaware & Easton Bridge Co. v. Metz*, 29 N.J.L. 122, 1860 WL 5262, at *2 (N.J. Sup. Ct. 1860) (same); *State v. Babcock*, 1 Vroom 29, 1862 WL 2775, at *2 (N.J. Sup. Ct. 1862) ("New Jersey has the exclusive right of property in and to the land under the water lying west of the *middle of the [Hudson] river*"); *State v. Davis*, 25 N.J.L. 386, 1856 WL 4398, at *3 (N.J. 1856) ("I think the prisoner might have been legally convicted, had it appeared that in fact the crime was committed on the *Jersey side of the middle of the river*, so as to be within the limits of the county"); *Gibbons v. Livingston*, 6 N.J.L. 236, 1822 WL 1235, at *30 (N.J. Sup. Ct. 1822) (Rossell, J.) ("It is true, that by the law of 1807, the exclusive jurisdiction of New Jersey is confined *to the middle of the Hudson*").

1834 Compact Between New Jersey and New York. The 1834 Compact to which New Jersey was a party also adopted the "middle of the river" usage.[40] Much litigation arose over that compact at the turn of the 20th century,[41] and the textual evidence shows that the drafters of the 1905 Compact were aware of the 1834 Compact because they borrowed much of its language with respect to service of process on the river.[42] The drafters of the 1834 Compact had used precise geographic phrases to describe the geographic scope of each State's jurisdiction, and such precision was followed in other Articles of the 1905 Compact except Article VII.

5. The purposes the States sought to achieve, as reflected in what they bargained for, support Delaware's construction of "own side"

Analysis of the *quid pro quos* in the various articles further buttresses Delaware's position. For centuries, Delaware had claimed title to all submerged land in the Delaware River within the twelve-mile circle to the low-water mark on the New Jersey shore, while New Jersey had claimed to the middle (or navigable channel) of the river; the disputed territory thus consisted of the lands from the low-water mark on the New Jersey shore to the middle of the river. The Compact, moreover, was negotiated against the backdrop of two centuries of unsuccessful challenges to Delaware's title as derived from Penn. Two notable decisions (*Penn v. Lord Baltimore* (1750) and *Pea*

---

[40] *See, e.g.* (all emphases added) DE App. 886-87 (Arts. 3(1) ("exclusive right of property in and to the land under water lying *west of the middle* of the bay of New York"), 3(3) ("exclusive right of regulating the fisheries on the *westerly side of the middle* of the said waters"), 5(1) ("exclusive right of property in and to the land under water lying *between the middle of the said waters and Staten Island"*), 5(3) ("exclusive right of regulating the fisheries *between the shore of Staten Island and the middle of the said waters*")).

[41] *See Central R.R. Co. v. Mayor of Jersey City*, 56 A. 239, 243 (N.J. Sup. Ct. 1903) ("Article 1, in clear and explicit language, fixed the boundary line between the states as the *middle of the Hudson river* and of the Bay of New York.") (emphasis added), *aff'd*, 61 A. 1118 (N.J. 1905) (per curiam), *aff'd*, 209 U.S. 473 (1908); *New York Cent. & Hudson R.R. Co. v. Board of Chosen Freeholders*, 65 A. 860, 863-64 (N.J. Sup. Ct. 1907) ("New York is given exclusive jurisdiction over the waters of the Hudson river to the low-water mark on the New Jersey shore, subject to the right of property of New Jersey to the land under water *west of the middle of the river*, and to the exclusive jurisdiction of New Jersey over the wharves, docks, and improvements on its shore, and all vessels aground on that shore or fastened to such wharves or docks, and subject to the exclusive right of New Jersey to regulate the fisheries on the westerly side of the river.") (emphasis added), *rev'd on other grounds*, 74 A. 954 (N.J. 1909), *aff'd*, 227 U.S. 348 (1913).

[42] *Compare* 1905 Compact Articles I & II *with* 1834 Compact Articles 6 & 7 (DE App. 887-88).

Patch Island (1848)) had vindicated Delaware's sovereignty within the twelve-mile circle to the low-water mark on the New Jersey shore – decisions upon which Delaware's commissioners in 1874 had presciently relied in asserting Penn's title to be "unassailable." *See supra* p. 7; DE App. 980; *New Jersey v. Delaware II*, 291 U.S. at 364-78.

In Articles I through IV, each State got specific rights within the disputed territory. Thus, Articles I and II addressed certain rights of the States to serve process between the low-water marks on each shore. Article III, which declared a common right of fishery throughout the river, likewise specified each State's rights within the disputed territory. Article IV gave each State "exclusive jurisdiction within said river" to enforce the concurrent fishing laws against its own inhabitants, which was intended to apply regardless of which State's boundary claim might later be upheld. In Articles V and VI, neither State received any jurisdiction it did not already have by virtue of its boundary.

Under New Jersey's reading of Article VII, however, Delaware received nothing in exchange for New Jersey receiving riparian jurisdiction within the disputed territory from the navigable channel to the low-water on the New Jersey shore. Nothing in the text, structure, or historical background of the Compact, however, supports reading Article VII to be such a one-way street favoring New Jersey.

C. Article VII's Use Of "Continue To Exercise" Indicates That The States Intended To Maintain The Status Quo And Not To Confer New Jurisdictional Rights

Another important indication that Article VII conveyed no new jurisdictional entitlements not already possessed by the States is the fact that it merely authorizes continuation of a course of conduct – "continue to exercise." By the plain language of those words and the historical context in which they were used, the drafters did not intend to convey Delaware's sovereign authority over its lands to New Jersey.

1. By its plain terms, Article VII provides in pertinent part that "[e]ach State may, on its own side of the river, *continue to exercise* riparian jurisdiction of every kind and nature." (Emphasis added). "Continue" means "[t]o remain in a given place or condition." DE App. 4195 (*Webster's 1898*). "Exercise" means "[t]o put in practice" or "to use." *Id*. at 4197. By using the verb "continue," therefore, the parties clearly intended to carry on exercising the same principles with respect to riparian rights as they had before. And, by using the word "exercise," the parties were not intending a permanent transfer of any sovereign rights from one State to the other but rather to permit the States to make use of the river as they had before until the boundary was determined. It cannot be disputed that neither State had the right to exercise any jurisdiction (riparian or otherwise) beyond its boundary. *See supra* p. 25. Accordingly, to "continue to exercise" the jurisdiction then held by each State necessarily meant that each State would ultimately be confined to exercising sovereign power within its borders but, in the meantime, they agreed to disagree by permitting each State to continue to make use of the river as they had before. Thus, even if prior to 1905 New Jersey might have authorized riparian improvements on certain sites appurtenant to its shores that proved to be beyond the boundary adjudicated by this Court nearly 30 years later, the Compact in no way confers jurisdiction on New Jersey to regulate exclusively any *new* riparian structures extending from New Jersey's "own side of the river" into Delaware territory. *See, e.g., Coffee,* 123 U.S. at 29-30.

That reading of "continue to exercise" is supported by the absence of any other language in Article VII indicating that Delaware intended to concede or surrender any sovereign power within its boundaries in light of the still-unresolved boundary dispute. By contrast, Article III proclaims that each State's inhabitants "*shall have and enjoy* a common right of fishery throughout, in, and over the waters of said river," and Article IV provides that each State "*shall have and exercise* exclusive jurisdiction within said river" to enforce concurrent fishing laws once enacted.

(Emphases added). The language "shall have" plainly conveyed jurisdictional rights to each State. *See Virginia v. Maryland*, 540 U.S. at 66 (holding that Article Seventh of the 1785 Compact between Virginia and Maryland, which provides that "[t]he citizens of each state respectively *shall have* full property in the shores of Potowmack river adjoining their lands," by its plain terms "grants" to the citizens of each State full property "rights") (emphasis added). In contrast, Article VII provides only that each State "*may*, on its own side of the river, *continue to exercise* riparian jurisdiction." DE App. 13 (emphases added). Notably absent from Article VII is any language by which the States declared, granted, or conceded that New Jersey "shall have" riparian jurisdiction beyond the line where the boundary would be determined, as the drafters provided in Articles III and IV.[43] Construing the Compact as a federal statute, the governing principle is that, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted). That longstanding interpretive principle was also adhered to in New Jersey at the time of the Compact's drafting. *See Norfolk & N.B. Hosiery Co. v. Arnold*, 45 A. 608, 609 (N.J. 1900) ("The express reservation of an election in the latter clause excludes the inference of such reservation in the former. If an option was to obtain in both instances, the parties knew how to express it, and would have used language appropriate to secure it.").

2. The Compact's plain language is further supported by the history underlying the dispute the drafters of it sought to address. In their pleadings in *New Jersey v. Delaware I*, the

[43] *See Virginia v. Maryland*, 540 U.S. at 66-67 (contrasting Article Seventh with other articles without the "shall have" language). The 1834 Compact between New York and New Jersey also provided that "New Jersey *shall have* the exclusive jurisdiction" over wharves extending from New Jersey. DE App. 887 (Art. 3(2)) (emphasis added). Despite having borrowed other language from that compact regarding service of process, *see supra* note 42, the drafters in Article VII did not use any "shall have" language conferring jurisdiction.

parties had argued that the other State's possession and exercise of jurisdiction in the Delaware River did not establish ownership, sovereignty, or jurisdiction.[44] Indeed, Delaware had argued that the building of wharves on New Jersey's side "cannot and should not be held effectual in law or in equity . . . to affect in any way or to any extent the title or right of this defendant to or its jurisdiction over, any portion of the soil or bed of the said river or of the waters thereof." DE App. 117-18 (Delaware's Answer). Such possession and exercise of jurisdiction had been insufficient to establish title under the doctrines of prescription and acquiescence. *See, e.g.*, *New Jersey v. Delaware II*, 291 U.S. at 375-76 ("From acquiescence in these improvements of the river front, there can be no legitimate inference that Delaware made over to New Jersey the title to the stream up to the middle of the channel or even the soil under the piers. The privilege or license was accorded to the owners individually and even as to them was bounded by the lines of their possession.").[45] Use of the phrase "continue to exercise," therefore, captured the States' decision to use the 1905 Compact as a standstill agreement until the boundary could ultimately be resolved. *See supra* pp. 10-11.

3. New Jersey's apparently contrary construction of "continue to exercise" should be rejected. First, New Jersey's construction conflicts with the plain meaning of the words and the intent of the parties in deferring resolution of the precise boundary line. Indeed, then as now, New Jersey's riparian laws expressly limited the State to granting such transfers of rights to "lands of

[44] *See* DE App. 51 (New Jersey's Complaint) (alleging that Delaware "claims to own the bed and to have exclusive jurisdiction . . . of a portion of the Delaware river").

[45] *See also Pea Patch Island*, 30 F. Cas. at 1154-56. By the early 1900s, this Court had made clear that the doctrine required the exercise of dominion or jurisdiction by the claimant State and the other State's lengthy acquiescence therein. *See, e.g.*, *Louisiana v. Mississippi*, 202 U.S. 1, 53 (1906) ("this court has many times held that, as between the states of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it should be accepted as conclusive"); *Indiana v. Kentucky*, 136 U.S. 479, 510 (1890) (noting Indiana's "long acquiescence in the exercise by Kentucky of dominion and jurisdiction" over the island at issue, and stating that "[i]t is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority").

the state" – not lands of an adjacent State.[46] Thus, New Jersey plainly could not "continue" to exercise the rights of a landowner with respect to land it has never owned. As this Court held in *Coffee*, a State cannot "confer title by the mere exercise *de facto* of jurisdiction and government" outside its proper boundary. 123 U.S. at 22-23. Grants made by the States that "rest on but her actual possession of the disputed territory, and her exercise of government *de facto* therein," are invalid. *Id*. at 23.[47] No language in Article VII supports an argument that Delaware gave up its sovereign right to grant, lease, or convey its own titled lands; rather, "continue" signals that the status quo would remain in place without increasing or decreasing jurisdictional rights.

Second, even if "continue to exercise" were read to authorize the exercise of jurisdiction beyond New Jersey's boundary up until the boundary dispute was resolved and in the absence of a definitive ruling by this Court, that interpretation would at best grandfather existing structures, grants, and leases by New Jersey.[48] Article VIII's proviso that no territorial or jurisdictional rights were conferred unless "expressly" set forth in other parts of the Compact absolutely forecloses New Jersey's contention now that Article VII granted New Jersey in perpetuity the power to regulate riparian structures on Delaware's side of the boundary line. In fact, when this Court eventually adjudicated the boundary dispute in 1934, it rejected a similar argument by which New Jersey claimed title to the middle of the river by virtue of the very same riparian improvements on which

---

[46] N.J. Stat. Ann. §§ 12:3-9 (enacted 1869), 12:3-18 (enacted 1877), 12:3-21 (enacted 1891), 12:3-22 (enacted 1891), 12:3-23 (enacted 1891), 12:3-24 (enacted 1891), 12:3-25 (enacted 1891).

[47] In *Coffee*, the Court addressed the validity of grants made by a State in disputed territory before the boundary was settled. In holding that the grantor State was found not to have had the authority to make the grants of property, the Court ruled that title had not passed to the private property owner absent some indication of an intent to grandfather those grants upon resolution of the boundary dispute. 123 U.S. at 9-10. Likewise here, by application of the rule in *Coffee*, any grants made by New Jersey on lands not within the State would have been invalidated upon the resolution of the boundary dispute unless the 1905 Compact were construed to grandfather existing structures.

[48] *See Coffee*, 123 U.S. at 10 (noting that "proper stipulations" in certain circumstances may enable property to be titled in a grantee who received the grant from a State lacking the power to make such a grant because the lands were outside the granting State's boundary).

it relies here, claiming that Delaware had acquiesced in those improvements. The Court concluded that "almost from the beginning of statehood Delaware and New Jersey have been engaged in a dispute as to the boundary between them," and held that "[a]cquiescence is not compatible with a century of conflict." *New Jersey v. Delaware II*, 291 U.S. at 376-77. That "century of conflict" was no more resolved as to riparian jurisdiction by the word "continue" than by "own side of the river" as used in Article VII.

D. The Compact Must Be Read In Light Of Interpretive Canons Preserving Delaware's Sovereignty

In addition to the Compact being clear, it is also well settled that judicial review of the scope of an incursion on the "'title to the bed of navigable water must . . . begin with a strong presumption' against defeat of a State's title." *United States v. Alaska*, 521 U.S. at 34 (quoting *Montana v. United States*, 450 U.S. at 552) (ellipsis in original). And "all grants by or to a sovereign government as distinguished from private grants, must be construed so as to diminish the public rights of the sovereign only so far as is made necessary by an *unavoidable* construction." *Massachusetts v. New York*, 271 U.S. 65, 89 (1926) (emphasis added). Thus, any doubt about whether the 1905 Compact caused a transfer of Delaware sovereignty to New Jersey over Delaware lands must be resolved against New Jersey. Because New Jersey's theory of this case is that Delaware relinquished jurisdiction over its sovereign lands, the general rule is that "a waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms." *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987) (holding that grant of title by federal government of subaqueous lands to Indian tribe withheld the federal government's navigational easement).

Thus, the Court will not find a relinquishment of sovereignty in "vague forms of expression, what perhaps could not have been accomplished in an open manner, or by employing such

clear, distinct language as the occasion and the interests involved alike demanded." *United States v. Texas*, 162 U.S. 1, 68 (1896) (rejecting claim that a federal statute indirectly relinquished United States' claim to disputed territory).[49] New Jersey has likewise required "conclusive proof" of any purported relinquishment of property rights in lands owned by the State. *Stevens v. Paterson & Newark R.R. Co.*, 34 N.J.L. 532, 1870 WL 5140, at *10 (N.J. 1870) ("The claim is, that the legislature has granted to these defendants the use of a part of the public domain. The state is never presumed to have parted with any part of its property, in the absence of conclusive proof of an intention to do so.").

Furthermore, the 1905 Compact was negotiated against the backdrop of the then-unresolved boundary dispute, and therefore must be "read . . . in light of the ongoing dispute over sovereignty." *Virginia v. Maryland*, 540 U.S. at 69. Article VIII of the Compact provides that "[n]othing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein *expressly* set forth" (emphasis added), thus requiring that any relinquishment of incidents of sovereignty must be done in express terms.

The presumption against any impairment to the title of a State's submerged lands derives at least in part from the fact that a State's "title to soils under tide water" "is a title held in trust for

[49] *See also Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837) ("[W]henever any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same."); *id.* (Baldwin, J., concurring) ("[t]he rule that public grants pass nothing by implications, has been most rigidly enforced as to all grants of toll for ferries, bridges, wharves, quays, on navigable rivers and arms of the sea"), *reprinted in* WESTLAW, beginning at page 113 of the computer version of the Court's opinion, with the following notation: "**West Editorial Note:** the source of the following opinion is Baldwin's Constitutional Views, p. 134-169" (Justice Baldwin's concurring opinion apparently was not printed in the Peters Reports of this Court's decision in *Proprietors of Charles River Bridge* or subsequently in the U.S. Reports); *Harris v. Elliott*, 35 U.S. (10 Pet.) 25, 54 (1836) (giving a "strict, legal, technical interpretation" to purchase of land by United States for a navy yard in Charlestown, with the assent of Massachusetts).

the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).[50] To be sure, a State may convey a property interest for the purpose of erecting a wharf to aid navigation, "consistent[ ] with the trust to the public upon which such lands are held by the State." *Id*. But "[t]he State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Id.* at 453.

That incidence of sovereignty over submerged lands acts as a check against efforts by legislators and other government officials to relinquish the power and authority of a State over those lands. In *Illinois Central*, for example, this Court held that the Illinois legislature's transfer to a railroad of title to a large part of the Chicago harbor in Lake Michigan was "beyond the authority of the legislature since it amounted to abdication of its obligation to regulate, improve, and secure submerged lands for the benefit of every individual." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 285 (1997) (citing *Illinois Central*, 146 U.S. at 455-60).[51] Delaware could convey its submerged lands for use by private persons, but it would still retain its regulatory authority over those lands as part of its governmental responsibility.

---

[50] This rule had its origins in England, where, at " 'common law, the title and dominion in lands flowed by tide water were in the King for the benefit of the nation. . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution of the United States.' " *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473-74 (1988) (ellipsis in original) (quoting *Shively v. Bowlby*, 152 U.S. 1, 57 (1894)); *see also Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410-12 (1842).

[51] Although that holding "was necessarily a statement of Illinois law, it invoked the principle in American law recognizing the weighty public interests in submerged lands." *Coeur d'Alene Tribe*, 521 U.S. at 285 (internal quotation marks and citation omitted). Indeed, New Jersey courts have interpreted *Illinois Central* to stand for the principle that, "[a]lthough the states have the inherent authority to convey riparian grants to private persons, the sovereign never waives its right to regulate the use of public trust property." *Karam v. New Jersey Dep't of Envtl. Protection*, 705 A.2d 1221, 1229 (N.J. Super. Ct. App. Div. 1998) (citation omitted), *aff'd*, 723 A.2d 943 (N.J. 1999).

That principle, however, does not ordinarily extend beyond the boundaries of the State's territory, even when the boundary is determined by a body of water. "The dominion over navigable waters and property in the soil under them, are so identified with the exercise of sovereign powers of government that a presumption against their separation from sovereignty must be indulged." *Massachusetts v. New York*, 271 U.S. at 89. As Farnham explains, "[i]n the absence of any agreement or understanding between the opposite states, the jurisdiction of each is limited to its own side of the stream, and does not extend beyond its boundary." 1 *Farnham* at 31; *see also id.* at 39 ("Whatever acts involve title to the soil are exclusively under the jurisdiction of the owner of the soil. . . . [But a state] cannot pass a law to govern another state, or realty situated therein.").[52]

E. *Virginia v. Maryland* Supports Delaware's Construction

This Court's analysis of the 1785 Compact at issue in *Virginia v. Maryland* supports Delaware's reading of the 1905 Compact. The 1785 Compact provided that "'[t]he citizens of each state respectively shall have full property in the shores of the Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river.'" 540 U.S. at 66 (quoting Article Seventh). Examining the various provisions of that compact, the Court observed that the Article Seventh "privilege of making" wharves by the "citizens of each state" "was not explicitly subjected to any sovereign regulatory authority," while the fishing right in Article Eighth "was subjected to mutually agreed-upon regulation." *Id.* at 66-67; *see also id.* at 67 ("Other portions of the 1785 Compact reflect this design."). The Court found "that

[52] Though not at issue here, a State's sovereign power over navigable waters is, under the Supremacy Clause of the United States Constitution, subject "to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the General government." *Weber v. Board of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 65-66 (1873).

these differing approaches to rights" "indicate that the drafters carefully delineated the instances in which the citizens of one State would be subject to the regulatory authority of the other." *Id.* Indeed, the Court found those differences dispositive.

The "differing approaches to rights" used by the drafters in the 1905 Compact are likewise conclusive here. The 1905 Compact drafters "carefully delineated" with precise geographic language certain agreements that would be unaffected by subsequent resolution of the boundary in Articles I through IV, but they did not do so in Article VII. Those textual differences are as dispositive here as they were in *Virginia v. Maryland*. Thus, just as this Court's resolution of the boundary dispute in *New Jersey v. Delaware II* gave definition to the geography to which the status quo agreements in Articles V, VI, and VIII applied, Article VII's phrases "own side" and "continue to exercise" gained a more precise geographical application when this Court finally adjudicated the boundary.

Although the 1905 and 1785 Compacts are alike in that they show how the use of different language in similar contexts in an interstate compact is meaningful, they are quite different in an important respect that also supports Delaware's reading here. The 1785 Compact provided, at a time when the boundary between Virginia and Maryland was still under dispute, that each State's citizens "'shall have full property in the shores'" and "'the privilege of making and carrying out wharves and other improvements.'" *Virginia v. Maryland*, 540 U.S. at 66 (quoting Article Seventh). That language contained no geographic limitation and made no reference to the boundary between those States. Thus, although Maryland was found in 1877 to own the bed of the river to the low-water mark on the Virginia shore, "Maryland did not dispute that Virginia had rights to withdraw water and construct improvements under the 1785 Compact and the [1877] Black-Jenkins Award." *Id.* at 65. The language of the 1905 Compact at issue here is entirely different in that geographic respect: it limits the exercise of each State's authority to "its own side of the

river," thus providing the crucial boundary reference that was lacking in the 1785 Compact between Virginia and Maryland.

F. The Course Of Performance Evidence Is Consistent With Delaware's Reading

Until Delaware passed its first statute regulating submerged lands in 1961, wharfing out was governed by the common law, and Delaware had never required a riparian grant or lease for any wharf extending from either side of the river. *See supra* pp. 15-16. Once Delaware began regulating by statute, however, it regulated every project of a more than *de minimis* nature within the twelve-mile circle. *See supra* pp. 16-21. Delaware's implementation of its Underwater Lands Act regulations enacted in 1969 recognized existing structures by grandfathering them (including those extending from New Jersey). *See supra* p. 16. That regulatory action accorded with Delaware's generally permissive common law giving riparian landowners the opportunity to wharf out into the Delaware River. *See supra* pp. 15-16.

After grandfathering existing structures in 1969, however, Delaware regulated every single structure emanating from New Jersey that crossed the boundary into Delaware. *See supra* pp. 16-21. In particular, Delaware rejected a 1971 request by El Paso to build an LNG unloading facility in Delaware waters that would – just like Crown Landing – extend from New Jersey and be built on Delaware lands. *See supra* pp. 17-18. Following that decision, Delaware's CMP made clear that LNG facilities are prohibited in its coastal zone. *See supra* p. 18. Delaware also required subaqueous lands leases for structures extending from New Jersey into Delaware by DuPont (1971), Keystone (1991), Fort Mott (1996), and Fenwick Commons (2005). *See supra* pp. 19-21. New Jersey itself requested Delaware's permission for the Fort Mott structure, and in 2006 – during the pendency of this action – sought Delaware's approval to renew the Fort Mott permit. *See supra* p. 20.

New Jersey makes much of its "riparian grants," 2005 Compl. ¶¶ 15-18, but the reliance is misplaced. New Jersey has issued 41 riparian grants in 155 years, but the record contains evidence of only 14 structures within the twelve-mile circle in that time period capable of receiving a vessel (most could receive only small vessels), and the significant wharves have all been regulated by Delaware since it began regulating submerged lands by statute. *See* DE App. 4332-37 (Herr Aff. ¶¶ 26-30). Moreover, a structure emanating from the New Jersey shore would obviously need New Jersey's approval as to the lands between high-water and low-water and thus entirely within New Jersey, so Delaware could not have objected to New Jersey's regulation altogether. Indeed, without New Jersey's approval to build a structure from its shore to the boundary, Delaware's permission to do so would be irrelevant because a wharf beginning in the water as opposed to the shore would be useless. Even the significance of New Jersey making riparian grants is overstated, because there is no evidence that New Jersey ever notified Delaware in advance that it was purporting to grant additional lands extending into Delaware, and it would be unreasonable to have expected Delaware to monitor New Jersey's administrative processes. *See id.* at 529 (Castagna Tr. 190-91). And, as for the 11 pre-1969 structures, to the extent they were built on a small number of New Jersey grants, there is no reason to think that they violated Delaware's common law of wharfing out such that Delaware would have been expected to challenge them as unlawful. The steady course of performance evidence therefore supports Delaware's consistent exercise of its sovereignty within its border on the Delaware River within the twelve-mile circle.

* * * * *

By the plain language, structure, and history of the 1905 Compact, and the subsequent course of performance, Delaware retains and has exercised its full sovereign authority to regulate riparian structures on its own side of the border, even when those structures straddle the New Jersey-Delaware boundary.

II. EVEN IF NEW JERSEY HAS "RIPARIAN JURISDICTION" BEYOND ITS BOUNDARY, DELAWARE MAY STILL EXERCISE ITS POLICE POWER TO PROHIBIT OR REGULATE ACTIVITIES ON RIPARIAN STRUCTURES ON DELAWARE LAND

Even assuming that Article VII may be read to give New Jersey certain authority within Delaware's state boundary, the scope of that power is limited by the express terms of Article VII: "to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States."[53] That "jurisdiction" is quite limited under a proper understanding of "riparian."

Riparian rights are held uniquely by owners of the land abutting the shore, and are thus incidents of private property. In contrast, the rights protected by the police power of the State or Nation are not associated with property but rather are held by the general public. Accordingly, the scope of riparian authority in Article VII could only be read to give New Jersey limited jurisdiction to establish the rules of the private rights associated with property that are held uniquely by riparian proprietors, but it does not preclude Delaware from exercising its police power in an appropriate case to protect the rights of the general public within its borders in the river. Thus, even if New Jersey could authorize the Crown Landing wharf to be built, Delaware could still regulate or prohibit entirely the activities proposed to be conducted on that wharf.

A. "Riparian Jurisdiction" In Article VII Is Limited To Property Rights And Does Not Apply To Specific Activities On A Wharf

"Riparian" derives from the Latin "ripa," meaning "shore of the river," and means "[o]f or pertaining to the bank of a river; as, riparian rights." DE App. 4198 (*Webster's 1898*). "Jurisdiction" is the "authority of a sovereign power to govern or legislate." *Webster's 1898,* at 806. The term "riparian jurisdiction" is limited on its face to jurisdiction over *riparian* rights. Importantly,

[53] For ease of discussion, this section will hereafter assume (without conceding) that the Compact could be read (contrary to its text) to give New Jersey "riparian jurisdiction" beyond the low-water mark on the New Jersey side of the Delaware River within the twelve-mile circle.

Article VII does *not* provide for "exclusive" or "general" jurisdiction "of every kind and nature." The phrase "riparian jurisdiction" was not (and never has been) a term of art describing the scope of a State's jurisdiction.[54] As concluded in the Expert Report of Professor Joseph L. Sax, who has been a preeminent expert on water law for more than 40 years,[55] the term was "devised for use in Article VII of the 1905 Compact as a *limitation* on the term 'jurisdiction'" and plainly was used to denote something less than full, general, or exclusive jurisdiction over all activities and structures extending from the New Jersey shore. Sax Rep. ¶ 11 (emphasis added).[56]

After examining the historical context of riparian rights that would have been known to the drafters – many of whom were attorneys, including the respective Attorneys General and lead counsel in *New Jersey v. Delaware I* for each State – Professor Sax concludes:

> [I]nsofar as the 1905 Compact may be construed as a transfer of any permanent authority by Delaware to New Jersey over waters within its boundaries, that authority would have been limited to administration of the property aspects of riparian landownership on the New Jersey shore, and not to the far more extensive and significant administration of public rights and the general police power over the Delaware River and its environs as affected by activities related to use of wharves constructed, or to be constructed, from the New Jersey shore into the river.

Id. ¶ 30.

---

[54] In modern times, the phrase "a riparian jurisdiction" or "traditional riparian jurisdiction" is sometimes used to denote a State that adheres generally to the law of riparian rights as developed in the common law (even if administered by statute), as distinguished from States that have moved toward a different regime such as many water-deficient western States have done; but that distinction is not at issue in this case. *See, e.g.*, Christine A. Klein, *On Integrity: Some Considerations for Water Law*, 56 Ala. L. Rev. 1009, 1044 (2005) (contrasting "riparian doctrine" with "the western doctrine of prior appropriation"); *id.* at 1043 n.255 (describing both New Jersey and Delaware as "statutory riparian states").

[55] Mr. Sax is the James H. House & Hiram H. Hurd Professor Emeritus at the University of California at Berkeley's Boalt Hall School of Law. His report is reproduced at DE App. 4279-302.

[56] New Jersey itself has admitted that it lacks jurisdiction to regulate at least some appurtenances to the New Jersey shore to the extent that they extend into Delaware, explaining that "[a] pipeline or cable that crosses from one side of the River to the other is not a riparian improvement, and, like a bridge, obviously cannot be constructed without permission from both States." NJ Reopen Reply 13 n.6. New Jersey's concession confirms that Article VII must be limited to jurisdiction over the nature and scope of riparian rights, and that other forms of jurisdiction, such as the general police power, are not included within the scope of "riparian jurisdiction" or "riparian lands and rights."

B. "Riparian Jurisdiction" Under Article VII Is Limited To The Nature And Scope Of The Private Rights Held Uniquely By Riparian Proprietors And Does Not Affect Delaware's Continuing Police Power Over Public Rights

1. Riparian rights are private rights associated with property, and are therefore different from the rights enjoyed by the public at large

"Riparian law is a distinctive sub-category of the law of property. It deals with the incidents specific to ownership of riparian land." Sax Rep. ¶ 12. It is thus fundamental that riparian rights are private rights or privileges associated with property. *See, e.g.*, 1 *Farnham* at 302 ("the riparian right of access to the water was property").[57] Thus, "the owners of land abutting on bodies of water are accorded certain rights by reason of their adjacency which are *different from those belonging to the public generally*." *Id.* at 278 (emphasis added). In general terms, "riparian" rights refer to the cluster of rights an owner of land adjacent to waterways had of "access" to the waterway; "preference in case the land under water is to be sold"; "accretion and the preferential right to fill out into the water, if such filling is permitted by the public"; and "free use of the water space immediately adjoining his property for the transaction of such business as may be necessary in connection with wharves or structures erected by him." *Id.* at 279-80; *see* Sax Rep. ¶¶ 13-14.

The riparian right to wharf out, on which New Jersey relies, has long been deemed a private right uniquely associated with shoreline property. *See* Sax Rep. ¶ 14. Thus, as this Court has held, "among those [riparian] rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be." *Yates v. City of Milwaukee*, 77 U.S. (10 Wall.) 497, 504 (1871); *see id.* ("[t]his riparian right is property, and is valuable, and . . . must

[57] *See also* James H. Davenport & Craig Bell, *Governmental Interference with the Use of Water: When Do Unconstitutional "Takings" Occur*, 9 U. Denv. Water L. Rev. 1, 23 (2005) ("Riparian rights are appurtenant to that land and within the 'bundle of sticks' which composes the real property right of riparian landowners.").

be enjoyed in due subjection to the rights of the public"). In New Jersey, it was likewise held, "from a very early period in the history of the state, the riparian proprietors upon navigable streams have enjoyed the privilege or exercised the right of appropriating the shore in front of their lands between high and low water mark to their own use, by the erection of docks and wharves." *Gough v. Bell*, 22 N.J.L. 441, 1850 WL 4394, *17 (N.J. Sup. Ct. 1850) (Green, C.J.), *aff'd*, 23 N.J.L. 624, 1852 WL 3448 (N.J. 1852).[58] In 1867, New Jersey's Attorney General,

[58] *See also Bell v. Gough*, 23 N.J.L. 624, 1852 WL 3448, at *23 (N.J. 1852) (Elmer, J.) ("That it has been the common understanding, as well in West as in East Jersey, that the owners of land bounding on navigable waters had an absolute right to wharf out and otherwise reclaim the land down to and even below low water, provided they did not thereby impede the paramount right of navigation, is undoubted."); *id.* at *33 (Potts, J.) ("These rights [of shore owners] are as sacred and inviolable as any others. They are appurtenances to the estate, constitute part of its intrinsic value, and can no more be taken from him contrary to law than any other portion of his property. He has a right, though his strict legal title is bounded by the high water line, to the water, as appurtenant to the upland; a right of towing on the banks; of landing, lading, and unlading; a right of way to the shore; a right to draw seines upon the upland, and of erecting fishing huts. He cannot be cut off from the water against his consent by any extraneous addition to his upland.") (citation omitted); *id.* at *38 (Nevius, J.) ("the owner of a freehold estate on the margin of tide water navigation has rights appurtenant to his freehold in the adjoining shore (if not exclusive and private) paramount to those of any other citizen; that he has the legal common law right of ferry at all times of tide, which brings him to the water's edge, wherever it may for the time be, the right of drawing seines, of passing at pleasure from his soil to the water, or from the water to his soil or freehold, of landing from or embarking in his boats or vessels at the water's edge at all times of tide; and finally, as appurtenant to his riparian ownership, the right to exclude the influx of the tide by the erection of embankments, docks, or wharves, provided he does not impair or interfere with the common right of navigation or fishery or any other common right; that he cannot be deprived of these rights either by the prerogative of the crown or by parliamentary or legislative power, except it be upon the doctrine of eminent domain"); *Keyport & Middletown Point Steamboat Co. v. Farmers Transp. Co.*, 18 N.J. Eq. 13, 1866 WL 88, at *7 (N.J. Ch.) ("Of eight judges who delivered opinions [in *Bell v. Gough*], only one is silent; all the others, more or less strongly, maintain that in New Jersey the shore owner has vested rights in the waters in front of him that cannot be taken away."), *aff'd*, 18 N.J. Eq. 511, 1866 WL 89 (N.J. 1866); *Morris & E.R.R. Co. v. Mayor of Jersey City*, 51 A. 387, 395 (N.J. Ch. 1902) ("By the riparian grant of 1871 the docks and wharves and piers were undoubtedly private property, to which no person had a right of access or use except by the consent of the owner."), *aff'd*, 71 A. 1135 (N.J. 1904) (per curiam); *Panetta v. Equity One, Inc.*, 875 A.2d 991, 992 (N.J. Super. Ct. App. Div. 2005) (a "riparian grant" conveys "property rights"). *Cf.* 1 *Farnham* at 294 ("[Under English law,] unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *qua* owner or occupier of any lands on the bank, nor is it a right which *per se* he enjoys in a manner different from any other member of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf it assumes a very different character. It ceases to be a right held in common with the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land and of the river in connection with the land, the disturbance of which may be vindicated by an action or restrained by injunction.").

George M. Robeson, examined in detail that line of New Jersey precedents and concluded that there was a fundamental distinction between the *private* rights of riparian owners and the *common* rights of the general public:

> [T]hese rights of the "riparian owner" are not *common* rights, for they do not belong to his neighbor, who lies behind him on the main land, nor are they mere rights of adjacency to land belonging to the State, for mere adjacency to a mud flat belonging to the State lying inland would give no right in or over it; they are therefore *private* rights of the "riparian owner" in the lands of the State lying in front of him beyond the "shore;" which rights are his by the local common law of the State by reason of his adjacency.[59]

In view of that history of riparian rights, "riparian jurisdiction" means the State's jurisdiction to define the scope of and to grant the special private rights that are unique to riparian proprietors and that are not shared by the public at large. The public's rights have never been considered to be riparian rights. Accordingly, the scope of riparian jurisdiction in Article VII is defined by the scope of those private riparian rights – such as the right to wharf out to navigable waters – and does not alter in any respect the public's rights in those waters or submerged lands.

2. The riparian right to wharf out is a right of *access* to navigable waters, not a right to load or unload any particular cargo of the wharf owner's choosing

The riparian right on which New Jersey relies is the right to wharf out to navigable waters and to use it for the purpose of loading and unloading ships. Importantly, however, the riparian right of property to wharf out does *not* include any right to carry on any particular commercial activities on the wharf, such as the unloading of LNG. Rather, the riparian right is one of *access* to navigable waters. *See, e.g.*, *New Jersey v. Delaware II*, 291 U.S. at 375 ("[R]iparian proprietors

[59] DE App. 909 (1867 Robeson Report at 8); *see* Sax Rep. ¶ 27 n.43. New Jersey courts have likewise held that other riparian rights (while not directly at issue here) are rights associated with property. *See, e.g.*, *Borough of Westville v. Whitney Home Builders, Inc.*, 122 A.2d 233, 244 (N.J. Super. Ct. App. Div. 1956) ("unquestionable property right of a riparian owner in the flow of a watercourse"); *Leonard v. State Highway Dep't*, 102 A.2d 97, 101 (N.J. Super. Ct. App. Div. 1954) ("Normally, a riparian owner has the pre-emptive right to a grant or lease of lands in front of his uplands, as a property right.") (citing *Shamberg v. Board of Riparian Comm'rs*, 60 A. 43 (N.J. Sup. Ct. 1905)).

have very commonly enjoyed the privilege of gaining *access* to a stream by building wharves and piers, and this though the title to the foreshore or the bed may have been vested in the state.") (emphasis added); *Mayor of Newark v. Sayre*, 45 A. 985, 990 (N.J. 1900) (Depue, J., concurring); *see id.* at 991 ("Property in a wharf or dock on a navigable stream consists in the ability of the owner to use the structure in connection with the navigable water."); DE App. 909 (1867 Robeson Report at 9) ("These rights . . . are confined to uses naturally incidental to the right to occupy the shore, such as the right of passage and landing, of egress and ingress to and from, and the general use of the docks and wharves which the 'riparian owner' may have constructed."); Sax Rep. ¶¶ 13-14. Numerous other cases explain that the right to wharf out is one of access to navigable waters for the general purpose of loading and unloading cargo.[60]

While the riparian right to wharf out to navigable waters includes the general right to use a wharf, there is no riparian right to carry on any particular or specific activity, which "are matters

[60] *See, e.g.*, *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 418 (1926) ("It is well settled that in the absence of a controlling local law otherwise limiting the rights of a riparian owner upon a navigable river, *Shively v. Bowlby*, 152 U. S. 1, 40, he has, in addition to the rights common to the public a property right, incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and when not forbidden by public law may construct landings, wharves or piers for this purpose.") (parallel citations omitted); *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U.S. 251, 262 (1915) ("one of the rights of a riparian owner [is] that of access to a navigable river and of constructing a landing wharf or pier for his own use and that of the public"); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 70 (1913) ("[R]iparian owners" have "the right of access to deep water, and when not forbidden by public law may construct for this purpose, wharves, docks, and piers in the shallow water of the shore. But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress, in the assertion of its power over navigation, shall determine that their continuance is detrimental to the public interest in the navigation of the river."); *Shively*, 152 U.S. at 40 (" 'a riparian proprietor, whose land is bounded by a navigable stream, has the right of access to the navigable part of the stream in front of his land, and to construct a wharf or pier projecting into the stream, for his own use, or the use of others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public' ") (quoting *Weber*, 85 U.S. (18 Wall.) at 64-65); *Illinois Central*, 146 U.S. at 445-46 ("The riparian proprietor is entitled, among other rights, as held in *Yates v. Milwaukee*, 10 Wall. 497, 504, to access to the navigable part of the water on the front of which lies his land, and for that purpose to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public."); *City of St. Louis v. Rutz*, 138 U.S. 226, 246 (1891) ("Among his rights as a riparian owner are access to the navigable part of the river from the front of his land, and the right to make a landing, wharf, or pier for his own use or the use of the public.").

left to the general police power." Sax Rep. ¶ 14. As New Jersey has admitted, none of its riparian grants authorizing the construction of a wharf authorized any specific activities or any specific cargo to be handled on those wharves. *See* DE App. 4147-61 (NJ Admissions Responses 1-3, 5-32); Sax Rep. ¶ 24 ("The distinction between that which is authorized under these exercises of riparian jurisdiction, and that which is within the scope of the general police power jurisdiction, is manifest in [New Jersey's admissions].").

Restrictions on or regulation of the line of business engaged in on wharves are thus found in other, non-riparian sources of law. For example, the offloading of drugs, alcohol, cigarettes, pesticides, and, relevant here, natural gas may be regulated and restricted as to time, place, and manner, just as those activities may be regulated on land when the cargo is carried by trucks rather than ships. *See* Sax Rep. ¶¶ 13-15, 23-25. Analogously, while a driver's license gives one the right generally to use the roads for the purpose of transporting people and things, it does not entitle anyone to drive an unregistered or unlicensed vehicle, to transport dangerous cargo without proper training and permits, or to transport illegal cargo. And, while the ownership of non-riparian property gives one the right generally to use that property, there is no right to violate zoning laws or to carry on particular business activities without complying with other regulatory and permitting requirements. Likewise, there is no riparian right to drill for oil or valuable minerals from a wharf, or to engage in gaming activities or prostitution thereon, merely because one has the general right to use the wharf.[61] Nor is there a riparian right to harvest oysters and other shellfish merely because one has built a wharf adjacent to or over shellfish beds. *Cf.* 1905 Compact Art. VI. Thus, as Professor Sax concludes, the "riparian" language in Article VII is "consistent with

[61] Delaware's counsel in *New Jersey v. Delaware II*, Clarence Southerland, made a similar point. *See* DE App. 2214 (Def.'s Reply Brief on Exceptions to Special Master's Report at 9) ("Let us suppose . . . that a valuable mineral deposit is found in the subaqueous soil of the river within the area circumscribed by the piling of the wharf erected by the owner of the upland. Could it be contended for a moment that the owner of the upland, by virtue of his having erected a wharf, would have any title to such deposit? Clearly not.").

descriptions in the then-existing treatises . . . , and the laws of New Jersey and Delaware, as to what was comprised within the category of riparian rights: e.g., the right of access to navigable depths via a wharf, the right to own accretions, or the right to divert from the river for use on riparian land." Sax Rep. ¶ 22.[62]

3. In any case, riparian rights do not apply to activities on a ship fastened to a wharf

Even if Delaware could somehow be restricted in enforcing its police powers on a pier extending into its sovereign territory, Delaware conceded nothing in the 1905 Compact with respect to its regulation of ships. Delaware plainly has the right (subject to applicable federal laws) to impose pilotage requirements for vessels passing through its waters and to impose regulations on vessels tied to wharves on Delaware territory. *See Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960) (holding that local smokestack ordinance applied to ships in port).[63]

The denial of Crown Landing's permit extended not only to the bulk transfer facility located on the proposed wharf, but also to the portion of the bulk transfer facility piping located on the supertankers from which the LNG would be offloaded. *See* DE App. 3804 (BP Status Decision App.) ("The LNG will be transferred from the ship to the Manufacturing Facility LNG storage tanks by using the ship's pumps."). Such a denial comports with the 1905 Compact, because the regulation of activities on a ship, as contrasted with wharfing out, is in no way an exercise of "riparian jurisdiction." Although there is a riparian right to wharf out to navigable water, there is no riparian right to operate a bulk transfer facility from on board a ship, and the DCZA prohibits

[62] The Article VII phrase that each State's riparian jurisdiction is "of every kind and nature" means only that all riparian jurisdiction is included, but that phrase does not encompass non-riparian jurisdiction. *See also* Sax Rep. ¶ 21.

[63] *See generally* Del. Code Ann. tit. 23, entitled "Navigation and Waters"; *see, e.g., id.*. tit. 23, § 121(a) ("Except vessels of less than 100 gross tons, every foreign vessel and every vessel engaged in foreign commerce or trade entering, departing or underway upon the Delaware Bay or River . . . shall be obliged to receive and employ a pilot licensed under this chapter or by the Commonwealth of Pennsylvania.").

bulk transfers from ships as well as wharves. *See Coastal Barge*, 492 A.2d at 1246 (holding that the DCZA applies to vessel-to-vessel transfers as well as to vessel-to-shore transfers, and noting that "[t]he danger of pollution and industrialization to the Delaware Coast is the same").

The 1834 NJ-NY Compact likewise recognizes the important distinction between jurisdiction over wharves and jurisdiction over ships fastened to them, as it provides that "New Jersey shall have the exclusive jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said state; *and of and over all vessels aground on said shore, or fastened to any such wharf or dock*." DE App. 887 (Art. 3(2)) (emphasis added). Article I of the 1905 Compact permits New Jersey to serve process on a ship fastened to a wharf emanating from New Jersey, but the drafters did not permit New Jersey to exercise other forms of jurisdiction over ships. That is further evidence that the 1905 Compact did not diminish Delaware's power to regulate ship activities within its waters even if they are fastened to a wharf in Delaware that extends from the New Jersey shore.

C. Private Riparian Rights Are Subject To Limitation By Delaware In The Exercise Of Its Police Power Jurisdiction To Safeguard The Rights Of The Public In The Delaware River

Even assuming that there is a private riparian right to unload a particular cargo, such as LNG via pipelines from ship to wharf to shore, it has long been held that the State may use its police power in ways that might limit the exercise of riparian rights. Riparian rights have always been "subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be." *Yates*, 77 U.S. (10 Wall.) at 504; *see also Weber*, 85 U.S. (18 Wall.) at 64-65; Restatement (Second) of Torts § 856 cmt. e (1977) ("In the absence of conflict with federal action or policy," "a state may exercise its police power by controlling the initiation and conduct of riparian and nonriparian uses of water."). Thus, after the exercise of legitimate rights by the riparian owner, "there remains a residuum of common

or public ownership that, under our system, rests in the state as a trustee for all the people." *McCarter v. Hudson County Water Co.*, 65 A. 489, 496 (N.J. 1906), *aff'd*, 209 U.S. 349 (1908) (Holmes, J.); *see also Harlan & Hollingsworth*, 1882 WL 2713, at *10 ("[R]iparian rights are always subject to the state regulation."); *Great Cove Boat Club v. Bureau of Pub. Lands*, 672 A.2d 91, 95 (Me. 1991) ("[W]hile a riparian land owner has certain rights which inhere in his ownership of land adjacent to a body of water, these rights are subject to reasonable regulation by the State in the exercise of its public trust rights.").

1. In *Hudson County*, a water company with the rights of a riparian proprietor sought to take water from the Passaic River in New Jersey and deliver it via pipelines to Staten Island in New York, but a New Jersey statute specifically prohibited transporting the fresh waters of New Jersey to another State. *See* 209 U.S. at 353-54. Justice Holmes for the Court recognized that the case pitted "the private right of property" against "the police power," and held that the State, as "representative of the interests of the public," may regulate on a "principle of public interest and the police power" in ways that limit the permissible activities of riparian proprietors in order "to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned." *Id.* at 355-56.

That Delaware's exercise of its police power might implicate the particular use sought to be made by a riparian owner does not turn Delaware's exercise of police power into an exercise of "riparian jurisdiction." As the Court explained:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state.

Id. at 355; *see also Cummings v. City of Chicago*, 188 U.S. 410, 427-31 (1903) (holding state police powers not precluded by federal regulation of riparian structures); *Obrecht v. National Gypsum Co.*, 105 N.W.2d 143, 149-51 (Mich. 1960) (relying on *Hudson County* to hold that State could exercise its police power over the use made of a wharf, unloading gypsum rock in a way that affected the public health, despite the fact that the operator had received permits from the State and the Army to construct its riparian structure); Sax Rep. ¶¶ 26-30 (discussing *Hudson County*, *Cummings*, and *Obrecht*).

As this Court later put it in holding that States may regulate smoke emissions from federally licensed ships, "[l]egislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power." *Huron*, 362 U.S. at 442. A State's protection of the rights of the general public by exercising its police power thus cannot be viewed as an exercise of riparian jurisdiction, because public rights are not uniquely held by private riparian proprietors. *Cf. Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (Holmes, J.) ("[T]he State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.").

2. At the time of the 1905 Compact, New Jersey's commissioners would have been aware of the distinction between riparian rights and police power. The named plaintiff in the trial court in *Hudson County* was Robert H. McCarter, New Jersey's Attorney General at that time. McCarter was also one of the three New Jersey commissioners appointed to negotiate the 1905 Compact, and he served as lead counsel in *New Jersey v. Delaware I.*[64] McCarter's brief before

[64] *See supra* note 15; DE App. 197 (McCarter Aff.) ("Immediately upon my qualification as Attorney General I took up the conduct of this suit and had presented all the evidence on behalf of the complainant,

the Supreme Court in *Hudson County* recognized the crucial difference between the rights of a riparian proprietor and the rights of the public. In his first argument, McCarter asserted that the State of New Jersey had its own *riparian rights*, as a lower riparian owner of title to the bed of the river, to prevent the upper riparian owner from diminishing the flow of the water in the river – a classic riparian right.[65] In his second argument, McCarter took the position that the State could exercise its "police power" to protect the rights of the public in the waters.[66] In that argument, McCarter made a crucial distinction between exercising private riparian rights and exercising the State's police power to protect the rights of the public, claiming that: "The State, *Without Regard to its Lower Proprietorship*, is Entitled to an Injunction as Successor to the Crown and as Representative of the Public."[67]

It is thus plain that McCarter, a New Jersey commissioner and its Attorney General, well understood the important distinction between private riparian rights belonging to riparian property holders and public rights that the State has long protected under its police power. Yet New Jersey's commissioners did not insist on – or, if they did, they failed to obtain – "exclusive jurisdiction" over wharves, as New Jersey had received in its 1834 Compact with New York. Instead, Article VII limits New Jersey's rights to "riparian jurisdiction." Thus, even if the phrase "riparian jurisdiction, of every kind and nature" were read to give New Jersey the right to establish the rules of property rights by which the competing claims of two riparian owners are adjudicated, such ju-

---

and attended at the taking of the proofs on the part of the defendant."). Likewise, George Bates was counsel for one of the parties in the seminal Delaware riparian rights case of *Harlan & Hollingsworth*, 5 Del. Ch. 435; *see* 1882 WL 2713, at *1.

[65] *See* DE App. 1841-46 (*Hudson County* Informant-Resp. Brief) ("The State, As a Lower Owner, is Entitled to Preserve the Integrity of the Stream So That It will Come to It Unimpaired in Quantity"); *id.* at 1844 ("The damage or injury to a lower private riparian owner seeking an injunction in cases of this character need not be great.").

[66] DE App. 1868; *see generally id.* at 1846-69.

[67] DE App. 1846 (emphasis added); *see id.* at 1868 ("[T]he court will never interfere with legislation of this character designed to preserve the health, prosperity, comfort and safety of its citizens, without the greatest hesitation, and then only when it is very plainly not an exercise of that power.").

risdiction does not extend to establishing the rules for exercising the police power that Delaware retained to protect the public rights in the Delaware River.

3. In this case, Delaware likewise has exercised its police power via the DCZA "to protect the atmosphere, the water, and the forests within its territory," *Hudson County*, 209 U.S. at 355, by prohibiting the installation of additional bulk transfer facilities in its coastal zone. In accord with *Hudson County*'s holding concerning the permissible scope of the police power, the legislative purpose of the DCZA is as follows:

> It is hereby determined that the coastal areas of Delaware are the most critical areas for the future of the State in terms of the quality of life in the State. It is, therefore, the declared public policy of the State to control the location, extent and type of industrial development in Delaware's coastal areas. In so doing, the State can better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism.

Del. Code Ann. tit. 7, § 7001. If waste were to be deposited in the waters from the wharf or ship fastened thereto, it is inconceivable that Delaware would lack jurisdiction to exercise its police powers to protect its waters. In this case, Delaware under the DCZA simply seeks to prevent that from happening to begin with. As the Delaware Supreme Court has explained, "[t]he legislation seeks to strike the correct balance between the public policy of the State of encouraging the introduction of new industry and the competing interest of protecting the environment, natural beauty, and recreational potential of the State. As a result, 'heavy industrial' uses and bulk product transfer facilities not operating in the coastal zone prior to June 29, 1971 are absolutely prohibited." *City of Wilmington*, 607 A.2d at 1166 (citation and footnote omitted); *see id.* ("Given this broad statement of purpose and sweeping use of legislative authority, we conclude that the Act should be liberally construed in order to fully achieve the legislative goal of environmental protection.").

Thus, even if it were assumed that New Jersey's riparian jurisdiction extended beyond its boundary, New Jersey at most would only have the ability to authorize the erection, maintenance,

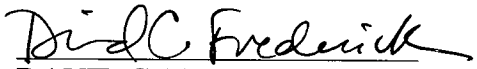
and repair of wharves, and to grant or lease the lands necessary to construct them. New Jersey would also have the authority to determine the rules for adjudicating the competing claims of upstream and downstream riparian owners on the New Jersey shore, and for accretion and erosion of riparian lands.[68] But Delaware would have the authority, where necessary, to exercise its police power. That exercise would not establish the rights of riparian property holders through riparian jurisdiction, but rather would protect the rights of the public in the Delaware River, in this case by applying its coastal zone laws greatly to reduce the risk of harm to the river and the people nearby. *Cf. Wedding v. Meyler*, 192 U.S. 573, 585 (1904) (Holmes, J.) ("The conveniences and inconveniences of concurrent jurisdiction both are obvious, and do not need to be stated. We have nothing to do with them when the law-making power has spoken.").

CONCLUSION

The Special Master should recommend that the Court grant Delaware's motion for summary judgment and dismiss New Jersey's complaint with prejudice.

[68] *See, e.g.*, *Keyport*, 1866 WL 89, at *5 (holding that wharf owner had no right to restrain adjacent riparian proprietor from constructing a wharf such that first occupier could no longer make wide turns in front of the adjoining property in order to dock more efficiently; "It is true, that a grant of a right to build and maintain a wharf bears with it, by implication, the right to use it; but then such use must be in the ordinary mode."); *Costigan v. Pennsylvania R.R. Co.*, 23 A. 810, 812 (N.J. Sup. Ct. 1892) (" 'To construct a mill-dam upon one's own property is a perfectly lawful act; but if, by means of such dam, the natural current of the water is obstructed and thrown back upon the lands of another, it becomes actionable as a nuisance.' ") (quoting *Delaware & Raritan Canal Co. v. Lee*, 22 N.J.L. 243, 1849 WL 3621, at *4 (N.J. Sup. Ct. 1849)); *East Jersey Water Co. v. Bigelow*, 38 A. 631, 633 (N.J. 1897) ("It is the right of every owner of land upon a stream to have the water come to him in its natural flow, undiminished in quantity, and unimpaired in quality, and, it may be added, with no increase of the volume except from natural causes.").

Respectfully submitted,



DAVID C. FREDERICK
Counsel of Record
SCOTT H. ANGSTREICH
SCOTT K. ATTAWAY
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
Special Counsel to the
State of Delaware

December 22, 2006

CARL C. DANBERG
Attorney General
KEVIN P. MALONEY
DELAWARE DEPARTMENT
OF JUSTICE
Carvel State Office Building
Wilmington, DE 19801
(302) 577-8338

COLLINS J. SEITZ, JR.
MATTHEW F. BOYER
KEVIN F. BRADY
MAX B. WALTON
CONNOLLY BOVE LODGE
& HUTZ LLP
The Nemours Building
1007 N. Orange Street
Suite 878
Wilmington, DE 19801
(302) 658-9141
Special Counsel to the
State of Delaware

In the
SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY, ***Plaintiff,*** **v.** **STATE OF DELAWARE,** ***Defendant.***	**No. 134, Original** **Before the Special Master** **The Hon. Ralph J. Lancaster**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of December 2006, counsel for the State of Delaware caused true and correct copies of (1) Delaware's Motion for Summary Judgment and Supporting Brief; (2) Delaware's Appendix on Cross-Motions for Summary Judgment; and (3) a courtesy CD containing Delaware's appendix, to be served upon counsel for the State of New Jersey in the manner indicated below:

BY ELECTRONIC MAIL AND THREE COPIES BY FIRST CLASS MAIL

Rachel J. Horowitz
(Rachel.Horowitz@law.col.lps.state.nj.us)
Deputy Attorney General
Richard J. Hughes Justice Complex
25 West Market Street
P.O. Box 112
Trenton, New Jersey 08625
(609) 984-6811

BY ELECTRONIC MAIL AND TWO COPIES BY FIRST CLASS MAIL

Barbara Conklin
(Barbara.conklin@law.col.lps.state.nj.us)
Deputy Attorney General
Richard J. Hughes Justice Complex
25 West Market Street
P.O. Box 112
Trenton, New Jersey 08625
(609) 633-8109

David C. Frederick
Special Counsel to Defendant
State of Delaware

ADDENDUM

THE COMPACT OF 1905, ACT OF JANUARY 24, 1907, CH. 394, 34 STAT. 858 (1907)

CHAP. 394.—An Act Giving the consent of Congress to an agreement or compact entered into between the State of New Jersey and the State of Delaware respecting the territorial limits and jurisdiction of said States.

Whereas commissioners duly appointed on the part of the State of New Jersey and commissioners duly appointed on the part of the State of Delaware, for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two States, have executed certain articles, which are contained in the words following, namely:

"First. Whereas a controversy hath heretofore existed between the States of New Jersey and Delaware relative to the jurisdiction of such portion of the Delaware River as is included within the circle of twelve-mile radius, an arc of which constitutes the northern boundary of the State of Delaware, and it is the mutual desire of said States to so settle and determine such controversy as to prevent future complications arising therefrom; and

"Whereas there is now pending in the Supreme Court of the United States a cause wherein the said State of New Jersey is the complainant and the said State of Delaware is the defendant, in which cause an injunction has been issued against the State of Delaware restraining the execution of certain statutes of the State of Delaware relating to fisheries in said river, which said litigation hath been pending for twenty-seven years and upward; and

"Whereas for the purpose of adjusting the differences between the said two States arising out of said conflict of jurisdiction, Edward C. Stokes, Robert H. McCarter, Franklin Murphy, and Chauncey G. Parker have been appointed commissioners on the part of the State of New Jersey by joint resolution of the legislature of said State, and Preston Lea, Robert H. Richards, Herbert H. Ward, and George H. Bates have been appointed commissioners on the part of the State of Delaware by joint resolution of the general assembly of said State, to frame a compact or agreement between the said States and legislation consequent thereon, to be submitted to the legislatures of said two States for action thereon, looking to the amicable termination of said suit between said States now pending in the Supreme Court of the United States, and the final adjustment of all controversies relating to the boundary line between said States, and to their respective rights in the Delaware River and Bay: Now therefore,

"The said State of New Jersey, by its commissioners above named, and the said State of Delaware, by its commissioners above named, do hereby make and enter into a compact or agreement between said States as follows:

"ARTICLE I. Criminal process issued under the authority of the State of New Jersey against any person accused of an offense committed upon the soil of said State, or upon the eastern half of said Delaware River, or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of New Jersey against any person domiciled in that State, or against property taken out of that State to evade the laws thereof, may he served upon any portion of the Delaware River between said States from low-water mark on the New Jersey shore to low-water mark on the Delaware

shore, except upon Reedy and Pea Patch islands, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of Delaware, or the shores of said islands, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the State of Delaware.

"ART. II. Criminal process issued under the authority of the State of Delaware against any person accused of an offense committed upon the soil of said State, or upon the western half of said Delaware River, or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of Delaware against any person domiciled in that State, or against property taken out of that State to evade the laws thereof, may be served upon any portion of the Delaware River between said States from low-water mark on the Delaware shore to low-water mark on the New Jersey shore, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the State of New Jersey.

"ART. III. The inhabitants of the said States of Delaware and New Jersey shall have and enjoy a common right of fishery throughout, in, and over the waters of said river between low-water marks on each side of said river between the said States, except so far as either State may have heretofore granted valid and subsisting private rights of fishery.

"ART. IV. Immediately upon the execution hereof the legislature of the State of New Jersey shall appoint three commissioners to confer with three commissioners to be immediately appointed by the general assembly of the State of Delaware for the purpose of drafting uniform laws to regulate the catching and taking of fish in the Delaware River and Bay between said two States, which said commissioners for each State, respectively, shall, within two years from the date of their appointment, report to the legislature of each of said States the proposed laws so framed and recommended by said joint commission. Upon the adoption and passage of said laws so recommended by the respective legislatures of said two States said laws shall constitute the sole laws for the regulation of the taking and catching of fish in the said river and bay between said States. Said laws shall remain in force until altered, amended, or repealed by concurrent legislation of the said two States. Said commissioners shall also ascertain the dividing line between said river and bay, and upon each of the shores of said two States where said dividing line extended shall intersect the same, shall, at the joint expense of said States, erect a suitable monument to mark the said dividing line. Said dividing line between said monuments shall be the division line between the said river and bay for the interpretation of and for all purposes of this compact, and of the concurrent legislation provided for therein.

"The faith of the said contracting States is hereby pledged to the enactment of said laws so recommended by said commissioners, or to such concurrent legislation as may seem judicious and proper in the premises to the respective legislatures thereof.

"Each State shall have and exercise exclusive jurisdiction within said river to arrest, try, and punish its own inhabitants for violation of the concurrent legislation relating to fishery herein provided for.

"ART. V. All laws of said States relating to the regulation of fisheries in the Delaware River not inconsistent with the right of common fishery hereinabove mentioned shall continue in

force in said respective States until the enactment of said concurrent legislation as herein provided.

"ART. VI. Nothing herein contained shall affect the planting, catching, or taking of oysters, clams, or other shell fish, or interfere with the oyster industry as now or hereafter carried on under the laws of either State.

"ART. VII. Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.

"ART. VIII. Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.

"ART. IX. This agreement shall be executed by the said commissioners when authorized to do so by the legislatures of the said States. It shall thereupon be submitted to Congress for its consent and approval. Upon the ratification thereof by Congress it shall be and become binding in perpetuity upon both of said States; and thereupon the suit now pending in the Supreme Court of the United States, in which the State of New Jersey is complainant and the State of Delaware is defendant, shall be discontinued without costs to either party and without prejudice. Pending the ratification hereof by Congress said suit shall remain in statu quo.

"Done in two parts (one of which is retained by the commissioners of Delaware, to be delivered to the governor of that State, and the other one of which is retained by the commissioners of New Jersey, to be delivered to the governor of that State) this twenty-first day of March, in the year of our Lord one thousand nine hundred and five."

EDWARD C. STOKES,	PRESTON LEA,
ROBERT H. MCCARTER,	ROBERT H. RICHARDS,
FRANKLIN MURPHY,	HERBERT H. WARD,
CHAUNCEY G. PARKER,	GEO. H. BATES.

And whereas the said agreement has been confirmed by the legislatures of the said States of New Jersey and Delaware, respectively: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States is hereby given to the said agreement and to each and every part and article thereof: *Provided,* That nothing therein contained shall be construed to impair or in any manner affect any right or jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

Approved, January 24, 1907.