No. 134, Original

IN THE
Supreme Court of the United States

STATE OF NEW JERSEY,
Plaintiff,
v.

STATE OF DELAWARE,
Defendant.

DELAWARE'S BRIEF IN OPPOSITION TO NEW JERSEY'S MOTION FOR SUMMARY JUDGMENT

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February 1, 2007

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GLOSSARY

1783 Compact	N.J. Stat. Ann. §§ 52:28-23 to 52:28-32; 71 Pa. Cons. Stat. §§ 1801-1817 (1783 New Jersey-Pennsylvania Compact)
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)
1905 Compact	Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1905 New Jersey-Delaware Compact) (DE App. 11-14)
1961 Compact	Del. Code Ann. tit. 17, § 1701; N.J. Stat. Ann. § 32:11E-1 (1961 Delaware-New Jersey Compact (as amended in 1989))
BP	B.P. p.l.c.
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))
Castagna Rep.	Richard Castagna, *New Jersey's Exercise of Regulatory Authority Over Waterfront Improvements in the Twelve Mile Circle Outshore of Low Water* (filed Nov. 9, 2006) (NJ App. 1193a-1223a)
CMP	Coastal Management Program
CZMA	Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 *et seq.*
CZMP	Coastal Zone Management Plan
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 Br.	Delaware's Motion for Summary Judgment and Supporting Brief, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006)
DE Reopen Opp.	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
DRBA	Delaware River and Bay Authority
Farnham	1 Henry P. Farnham, *The Law of Waters and Water Rights* (1904)
FERC	Federal Energy Regulatory Commission
Hoffecker Rep.	Expert Report of Carol E. Hoffecker, Ph.D. (dated Nov. 9, 2006) (DE App. 4213-77)
LNG	Liquefied Natural Gas
MOA	Memorandum of Agreement
NJ 1978 CMP	State of New Jersey Coastal Management Program – Bay and Ocean Shore Segment and Final Environmental Impact Statement (Aug. 1978) (DE App. 2307-30) (excerpt)
NJ 1978 Draft CMP	State of New Jersey Coastal Management Program – Bay and Ocean Shore Segment: Draft Environmental Impact Statement (Aug. 1978) (DE App. 2281-2306) (excerpt)
NJ 1979 Options Report	Options for New Jersey's Developed Coast (Mar. 1979) (DE App. 2383-2517) (excerpt)
NJ 1980 CMP	New Jersey Coastal Management Program: Final Environmental Impact Statement (Aug. 1980) (DE App. 2627-3170)
NJ 1980 Draft CMP	Proposed New Jersey Coastal Management Program and Draft Environmental Impact Statement (May 1980) (DE App. 2607-25) (excerpt)
NJ App.	Appendix of the State of New Jersey on Motion for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006)

NJ Br.	New Jersey's Brief in Support of Its Motion for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006)
NJDOE	New Jersey Department of Energy
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)
NJ Reply Br., No. 120, Orig.	Reply Brief of the State of New Jersey in Opposition to the Exceptions of the State of New York, *New Jersey v. New York*, No. 120, Orig. (U.S. filed Aug. 29, 1997)
NJDEP	New Jersey Department of Environmental Protection
NOAA	National Oceanic & Atmospheric Administration
NOAA-OCZM	National Oceanic & Atmospheric Administration – Federal Office of Coastal Zone Management
Sax Rep.	Expert Report of Professor Joseph L. Sax (dated Nov. 7, 2006) (DE App. 4279-4302)

INTRODUCTION

Article VII of the 1905 Compact permits each State to "continue to exercise" "riparian jurisdiction" on its "own side" of the Delaware River. By longstanding precedent, a State may exercise full sovereignty within its own boundary unless it gives up that power through unmistakably clear terms, which Delaware has never done with respect to its territory in the twelve-mile circle.

To evade the clear language and context of the 1905 Compact, New Jersey resorts to a series of linguistic gymnastics, inserting the word "exclusive" in Article VII where it does not exist, seeking to transform the word "jurisdiction" to "sovereignty," and asserting that "riparian jurisdiction" in fact means all power to regulate activities on a wharf. Those efforts should be rejected as unfaithful to the plain language of Article VII's text, the structure and context of Article VII within the rest of the 1905 Compact, the longstanding meaning of "riparian," and the history of New Jersey's compacts with other States, which demonstrate that New Jersey knew how to obtain "exclusive jurisdiction" over wharves and other benefits when that was its objective.

Nor does New Jersey's assertion of jurisdiction through prescription and acquiescence have any merit. New Jersey never contests that, for decades, Delaware common law permissively allowed riparian landowners to wharf out, so that the practical consequences on New Jersey riparian owners were minimal under the 1905 Compact. New Jersey further concedes that the common law may be trumped by statute, which is precisely what Delaware did in enacting coastal zone management laws beginning in the 1960s. Moreover, until 2005, when intense lobbying pressure by BP caused New Jersey state officials to change their position, New Jersey routinely recognized Delaware's right to exercise veto power over structural additions emanating from New Jersey into Delaware. Its change of heart leading to this litigation is flatly inconsistent with decades of regulatory practice recognizing Delaware's sovereign rights over its lands.

COUNTERSTATEMENT OF THE CASE[1]

A. New Jersey's Prior Experience With Drafting Interstate Compacts Provides A Context For Understanding New Jersey's New Arguments About The 1905 Compact

1. The 1783 Compact between New Jersey and Pennsylvania

A 1783 Compact expressly gave New Jersey and Pennsylvania "concurrent" jurisdiction over the waters of the Delaware River between their shores, and "exclusive" jurisdiction over certain vessels. *See* DE App. 4403 (Article II: "each state shall enjoy and exercise a *concurrent* jurisdiction within and upon the water, and not upon the dry land, between the shores of said river," and vessels "riding at anchor" or "fastened to or aground on the shore of either state" "shall be considered *exclusively* within the jurisdiction of such state") (emphasis added). The 1783 Compact provides generally that "the river Delaware . . . is and shall continue to be and remain a common highway," and that "said states *shall hold and exercise* the right of regulating and guarding the fisheries . . . annexed to their respective shores." *Id.* at 4402 (Article I) (emphasis added).[2]

2. The 1834 Compact between New Jersey and New York

In their 1834 Compact, New Jersey and New York resolved a centuries-old boundary dispute. *See* DE App. 885-88. In Article 1, they agreed generally that the water boundary between them "shall be the middle of the said [Hudson] river [with specified exceptions]." *Id.* at 886 (Article 1). The 1834 Compact then provides that each State "shall have" certain forms of "exclusive jurisdiction" and "exclusive rights." Article 3 thus states (*id.* at 886-87 (emphases added)):

> The state of New York shall have and enjoy *exclusive jurisdiction* of and over all the waters of the bay of New York; and of and over all the waters of [the] Hudson river lying west of Manhattan Island and to the south of the mouth of

[1] Delaware incorporates here the Statement of the Case set forth in its opening brief, and sets out the following additional facts in response to New Jersey's opening brief.

[2] *See Kean v. Rice*, 1824 WL 2446, at *3 (Pa. Dec. 27, 1824) ("[T]he general rule is, that states divided by water boundaries have jurisdiction *ad filum aquae*; to the middle of the river which separates them. The compact of 1783, between Pennsylvania and New Jersey, adopts this rule, but improves upon it, by a reciprocal concession of concurrent jurisdiction over all the Delaware, in each state, for certain purposes.").

> Spuytenduyvel creek; and of and over the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof; subject to the following rights of property and of jurisdiction of the state of New Jersey, that is to say:
>
> 1. The state of New Jersey shall have the *exclusive right of property* in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey.
>
> 2. The state of 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; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers of, the state of New York, which now exist or which may hereafter be passed.
>
> 3. The state of New Jersey shall have the *exclusive right of regulating* the fisheries on the westerly side of the middle of the said waters, *Provided*, That the navigation be not obstructed or hindered.

The 1834 Compact was the subject of much litigation in the 19th and early 20th centuries. A New Jersey court held that a nuisance suit for obstructing navigation from intentionally sunken vessels below the low-water mark on the New Jersey shore would have to be brought in the courts of New York rather than New Jersey, based on New York's exclusive jurisdiction over the waters under the 1834 Compact. *See State v. Babcock*, 30 N.J.L. 29, 1862 WL 2775 (N.J. Sup. Ct. 1862). The court found that "[t]here is no reason to doubt that the tribunals of [New York], which have a common interest in preventing all obstructions to the navigation of the waters surrounding their most important city, will not only punish all crimes against our citizens or their own, while in or upon those waters, but will also adequately punish all interference with the navigation." *Id*. at *3.[3]

In 1870, New York's highest court rejected a suit brought by that State's Attorney General to abate alleged nuisances in the form of wharves, piers, and bulkheads extending into the river

[3] The court reasoned that "[t]he case does not materially differ from a line between two states on the land which happens to be the scene of a busy population, where a manufactory near to that line, in one state, may be a nuisance to the citizens of the other, whose redress will have to be obtained from the tribunals of the state in which the nuisance is situate[d]." *Babcock*, 1862 WL 2775, at *3.

from the New Jersey shore. *See New York v. Central R.R. Co. of New Jersey*, 42 N.Y. 283 (1870). The court held that New Jersey's "exclusive jurisdiction" over wharves precluded New York from asserting jurisdiction over such structures to declare them a nuisance to navigation. *Id.* at 304.

In 1903, a New Jersey court held that the 1834 Compact gave New Jersey the right to tax the submerged lands on the western half of the river, despite the proviso that New York had "exclusive jurisdiction of and over all the waters . . . and of and over the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof." DE App. 886-87 (Article 3); *see Central R.R. of New Jersey v. Mayor of Jersey City*, 56 A. 239 (N.J. Sup. Ct. 1903), *aff'd mem.*, 61 A. 1118 (N.J. 1905), *aff'd*, 209 U.S. 473 (1908). The court held that the right to tax was a function of sovereignty, and because Article 1 of the 1834 Compact declared New Jersey to be the sovereign owner of the western half of the waters and submerged lands at issue, it retained the right to tax those lands. *Id.* at 243-44. This Court affirmed in an opinion by Justice Holmes, holding "that the exclusive jurisdiction given to the state of New York does not exclude the right of the sovereign power to tax." *Central R.R.*, 209 U.S. at 480; *see id.* at 478 ("It appears to us plain on the face of the agreement that the dominant fact is the establishment of the boundary line.").

More recently, this Court interpreted Article 2, which provides that "[t]he state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands." DE App. 886; *see New Jersey v. New York*, 523 U.S. 767, 773 (1998). In 1891, the United States began using Ellis Island to receive immigrants and over time added 24.5 acres of fill to the original three-acre island. *See id.* at 770-71. This Court held that, although New York retained jurisdiction over the original island, New Jersey owned the filled portions because, *inter alia*, under Article I of the 1834 Compact, it was the owner of the submerged lands before they were filled. *See id.* at 771.

The Court did so notwithstanding "the difficulties of a boundary line that divides not just an island but some of the buildings on it." *Id.* at 811. New Jersey had argued that "the prospect of

dual jurisdiction" over the island causes no concern because it and New York "already share jurisdiction over the waters between the States under Articles III, IV and V of the Compact," and the "record contains no indication whatsoever that this situation has created any . . . insurmountable difficulties." *Id.* at 4416 (NJ Reply Br., No. 120, Orig.). New Jersey explained that, "[o]ver the years, New York and New Jersey have been able to harmoniously address issues of joint interest. For example, since 1921 the States have collaborated on transportation and other port-related projects through the Port Authority of New York and New Jersey, a bistate entity. As another example, both States are members of the Delaware River Basin Commission, which was established in 1961." *Id.*

B. For More Than 30 Years, New Jersey Has Consistently Acknowledged Delaware's Regulatory Authority Within The Twelve-Mile Circle

Unlike the various provisions in the 1834 Compact providing for "exclusive jurisdiction" or "exclusive rights," the 1905 Compact does not contain such language in Article VII. New Jersey concedes that, since this Court's 1934 boundary decision, it has never claimed that Delaware lacked any authority over wharves within the twelve-mile circle. *See* DE App. 4727 (NJ Interrogatory Response No. 10). Since at least 1972, New Jersey has repeatedly and without exception recognized Delaware's regulatory authority over boundary-straddling projects.

In 1972, Delaware denied permission under its recently enacted Delaware Coastal Zone Act ("DCZA") for El Paso Eastern Company to construct and operate a proposed LNG terminal (similar to Crown Landing) extending from New Jersey into Delaware. *See* DE Br. 17-18; DE App. 4201. Delaware notified the Commissioner of NJDEP of El Paso's application and solicited his comments regarding New Jersey's view of the project. *See* DE App. 3481.[4] NJDEP's Commissioner raised no objection to Delaware's exercise of a veto power over LNG terminals or other

[4] NJDEP is headed by a single Commissioner. *See, e.g.*, DE App. 798 (Whitney Tr. 106-07).

boundary-straddling projects extending from the New Jersey shore. The Commissioner stated that "it would be useful to communicate on matters of joint interest" and promised that NJDEP would likewise notify Delaware "whenever an application appears to effect [*sic*] the statutes of both of our States." *Id*. at 3485. For the next 33 years, New Jersey continued to acknowledge Delaware's regulatory authority and to cooperate with Delaware in reviewing permit applications for boundary-straddling projects.

1. New Jersey's Coastal Management Program

In 1972, Congress passed the Coastal Zone Management Act ("CZMA"), which provides federal funding for developing and implementing state CMPs. *See* DE Br. 18; 16 U.S.C. §§ 1454-1455. In 1973, New Jersey embarked on an eight-year CMP development process for the purpose of receiving federal approval and the corresponding right to federal grant monies. *See* DE App. 3000-07 (NJ 1980 CMP, setting out "The Coastal Planning Process: 1973-1979"). The CZMA requires a State to set out the boundaries for the application of its CMP and to ensure coordination with adjacent States. It thus mandates that New Jersey "identif[y] . . . the boundaries of the coastal zone subject to the management program," 16 U.S.C. § 1455(d)(2)(A); "coordinate[] its program with local, areawide, and interstate plans," *id.* § 1455(d)(3)(A); "establish[] an effective mechanism for continuing consultation and coordination . . . with local governments, interstate agencies, regional agencies, and areawide agencies within the coastal zone," *id.* § 1455(d)(3)(B); and "document that there has been consultation and coordination with adjoining coastal States regarding delineation of any adjacent inland and lateral seaward boundary," 15 C.F.R. § 923.34.

The promise of federal grant monies was a principal motivator for New Jersey to obtain federal approval for its CMP. *See, e.g.*, DE App. 2311 (NJ 1978 CMP) ("[a]n immediate effect of approval is the qualification of the State for Federal matching funds for use in administering the

[CMP]").[5] As NJDEP officials confirmed in depositions, New Jersey understood the importance of accuracy and honesty in making representations to the federal government to receive federal grant monies. *See id.* at 453, 455, 456 (Broderick Tr. 32-33, 40, 43), 781 (Whitney Tr. 40-41). New Jersey developed its CMP in two stages, receiving federal approval in 1978 and 1980.

a. NJ 1978 CMP

New Jersey's 1978 CMP specifically addressed the boundary within the twelve-mile circle and concluded that "[r]esolution of potential conflicts between the coastal policies of Delaware and New Jersey will require continued coordination and work in the first year of Program approval, toward appropriate agreements between the coastal management programs of both states, Salem County[6] and the affected municipalities." DE App. 2327 (NJ 1978 CMP); *id.* at 2302 (NJ 1978 Draft CMP). New Jersey also noted the need for "next steps" forward that would "add increasingly greater specificity to the Coastal Resource and Development Policies, as well as improved coastal awareness and monitoring of coastal decisions." *Id.* at 4630.

Identifying a need for more specificity with regard to boundary issues, the 1978 CMP stated that "[NJDEP] will also work with the NJDOE, the *Attorney General of New Jersey* and NOAA-OCZM in the next year to resolve boundary issues between New Jersey, Delaware and New York. To resolve the New Jersey-Delaware issues, [NJDEP] will work particularly closely with Salem County officials and representatives of affected municipalities." *Id.* (emphasis added); *see also id.* at 4622-23 (NJ 1978 Draft CMP) (requesting comments from the "Department of Law and Public Safety," headed by the Attorney General (*see* N.J. Stat. Ann. § 52:17B-2)).

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[5] *See also* DE App. 2285 (NJ 1978 Draft CMP) ("Federal approval of the Coastal Program will permit NOAA-OCZM to award New Jersey annual program administration grants to implement the program"); *id.* at 2286 (listing 10 specific things that "[t]he award of federal funds will allow New Jersey to [do]," including to "increase coordination on coastal decision making between state and local governments").

[6] Salem County in New Jersey runs nearly the full length of the twelve-mile circle. Gloucester County then runs north for approximately two miles to the northern edge of the twelve-mile circle.

b. NJ 1979 Options Report

New Jersey soon followed through on its promise to examine the boundary issue more carefully following consultation with its Attorney General. In a March 1979 report entitled "Options for New Jersey's Developed Coast" ("NJ 1979 Options Report"), New Jersey extensively analyzed Delaware's coastal zone laws. New Jersey concluded that Delaware law fully applies to boundary-straddling projects within the twelve-mile circle and that Delaware may thereby regulate or entirely prohibit a proposed project extending into Delaware. *See* DE App. 2383-2517.[7]

In a separate appendix entitled, "The Delaware-New Jersey Boundary and Interstate Coastal Management Along the Salem County Shoreline," the report noted *New Jersey v. Delaware II* and concluded that "major development extending into the Delaware River could require approval from the State of Delaware, in addition to approvals from the State of New Jersey." *Id.* at 2509. The report found that the DCZA applies to boundary-straddling projects:

> In 1971, the State of Delaware enacted a stringent Coastal Zone Act, which prohibited heavy industrial development in a defined coastal zone. Since the boundary between New Jersey and Delaware extends to the New Jersey shoreline, the restrictive provisions of this coastal management law applied to development that would be proposed for sites involving land and water along the Salem County Waterfront. . . . The law also prohibits offshore "bulk product transfer facilities" which include port or dock facilities for the transfer of bulk quantities of any substance, such as oil. . . . Consequently, under Delaware law, some types of activities would be *prohibited* from locating along the Delaware River in Salem County, while other facilities desiring to locate along the river would need to *obtain permit approval* from the State of Delaware.

Id. (emphases added). The NJ 1979 Options Report concluded that, "[s]ince the [DCZA] took effect in 1971, no activity has taken place along the Salem County shoreline which would come under the jurisdiction of the Act." *Id.* at 2511.

[7] The Options Report included a letter from the NJDEP Commissioner requesting extensive public comment. *See* DE App. 2386 ("Options for New Jersey's Developed Coast is a preview of the second part of the State's coastal management program being prepared under the [CZMA]" and "provides alternatives which require public discussion and debate").

The NJ 1979 Options Report likewise analyzed Delaware's submerged lands statute and concluded that it fully applies to boundary straddling projects:

> Because the State of Delaware exercises jurisdiction along the Salem County shoreline from the mean low water line waterward, projects involving the use of public submerged lands would require approval under Delaware's Underwater Lands Act. This Act authorizes Delaware to exercise authority over state lands lying below Delaware's mean high waterline. Projects requiring approval include: (1) erection of any structure on such lands, (2) dredging or filling of such land, (3) the excavation of any channel, lagoon, turning basin, or ditch on public or private lands which will make connection with public submerged lands, (4) the filling of lands adjacent to public submerged lands and (5) laying of any pipeline, transmission line or telephone line in, on, over or under the beds of public submerged lands.

Id. The report also stated that "[t]he only experience with the Delaware Underwater Lands Act and development in New Jersey was in 1971 when Delaware granted a lease to the Dupont Chamber[ ] Works in Deepwater to use subaqueous lands in the Delaware River. Dupont received the lease to dredge, fill and bulkhead the area to locate an oil tank." *Id.* at 2511-12; *see also* DE Br. 20 (discussing Delaware permits issued to DuPont starting in 1971). The report concluded that New Jersey's own jurisdiction is limited to "a narrow strip of tidelands between the mean high water line and the mean low water line in Salem County." DE App. 2511; *see also id.* at 789-90 (Whitney Tr. 73-75). Accordingly, the report stressed the need for interstate cooperation regarding review of boundary-straddling projects, concluding that such cooperation "can be achieved by sharing information concerning any proposed development in Salem County which could fall under the jurisdiction of [the DCZA]." *Id.* at 2511.

The report noted that the States had already discussed their respective spheres of regulatory authority and that "Delaware has agreed to notify Salem County of any proposed activity along the Delaware or Salem County shoreline which is subject to [the DCZA]." *Id.* "In return, Delaware has asked Salem County to notify Delaware of any proposed development in Salem County which would fall under [DCZA] jurisdiction." *Id.*

In reaching these conclusions, the NJ 1979 Options Report relied on a formal Delaware Attorney General Opinion concluding that the DCZA would prohibit bulk transfer facilities located in Delaware on a pier originating on the New Jersey shore. *See id.* at 2512 (citing Del. Op. Att'y Gen. 78-018, 1978 WL 22485 (1978) (DE App. 3882-84)); *see also* DE Br. 18-19. The report likewise relied on the 1978 draft of Delaware's CMP, in which Delaware had noted that "Salem County officials contend that Delaware law, particularly the [DCZA], unduly precludes development along the Delaware River in New Jersey." *Id.* at 2375. New Jersey thus was aware that Delaware maintained that, "[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 impair development in Salem County." *Id.* at 2380; *see also id.* at 2337-43; *id.* at 2600, 2605 (nearly identical final report language); DE Br. 18-19.

c. NJ 1980 CMP

Geographically, the 1980 CMP covered the same areas as the 1978 CMP but added the more developed Hudson River area adjacent to New York. Substantively, it added numerous provisions and more specific detail, including with respect to the boundary. For example, whereas New Jersey's 1978 CMP had acknowledged the need for interstate cooperation with Delaware, its 1980 CMP explicitly acknowledged Delaware's authority to apply its coastal zone laws to boundary-straddling projects. After New Jersey's 1978 CMP requested the advice of its Attorney General on its boundary issues with Delaware and the subsequent detailed analysis in the 1979 Options Report, which the 1980 CMP described as a "major coastal planning report[]" (DE App. 3000), both the 1980 Draft and Final CMPs concluded:

> In most of Salem County, the Delaware-New Jersey State boundary is the mean low water line on the eastern (New Jersey) shore of the Delaware River. The New Jersey and Delaware Coastal Management agencies have discussed this issue and have concluded that any New Jersey project extending beyond mean low water *must obtain coastal permits from both states*. New Jersey and Delaware, therefore,

> will coordinate reviews of any proposed development that would span the interstate boundary to ensure that no development is constructed unless it would be consistent with both state coastal management programs.

Id. at 2619, 2657 (emphasis added).

That important conclusion defined the geographic scope of New Jersey's CMP. It is found in the first substantive section (and within the first 20 pages) of the 1980 Draft and Final CMPs. The statement also received substantial public scrutiny: the 1980 Draft CMP was widely distributed to thousands of interested parties, including numerous persons and entities within the New Jersey state government.[8] As it had done in 1978, NJDEP requested that the Attorney General review the 1980 Draft CMP. *See id.* at 4636-37 ("Department of Law and Public Safety"). The final NJ 1980 CMP accordingly shows substantial interaction with and review by the New Jersey Attorney General.[9] NJDEP likewise requested comments from the New Jersey Governor, "All State Senators and Members of the Assembly," 15 New Jersey state agencies, and three New Jersey state commissions. *Id.* None of those New Jersey officials or entities disputed the 1980 Draft CMP's conclusion that Delaware has regulatory authority over boundary-straddling projects.

Salem County, however, did challenge the statement. Echoing the same concerns rejected in Delaware's CMP (*see supra* p. 10), Salem County said it was "strongly opposed to the statement in this revision that any project in the area must be consistent with both Delaware's and New Jersey's coastal programs and obtain permits from two states." DE App. 3135. In the final 1980

[8] *See, e.g.*, DE App. 3001 (NJ 1980 CMP) ("Three thousand copies of that draft program were distributed and four public hearings were jointly convened by NOAA and [NJDEP]."); *id.* ("This [1980 CMP] represents the culmination of the coastal planning process, incorporating written and oral comments received throughout the past five years.").

[9] *See* DE App. 3169 (NJ 1980 CMP) ("Special thanks" to "Deputy Attorney General John Van Dalen"); *id.* at 3016-26 ("Waterfront Development Rules and Attorney General's Opinion"); *see also id.* at 787 (Whitney Tr. 65) ("I'm pretty sure it was reviewed probably by the Attorney General's Office."); *id.* at 781 (Whitney Tr. 41) ("I'm pretty sure New Jersey did because the document was widely distributed throughout the state government for review both as a final draft document as well as sections that were circulated"); *id.* at 637-38 (Johnson Tr. 73-74).

CMP, New Jersey rejected Salem County's protest – presumably after consultation with its Attorney General's office, with which NJDEP had promised to consult in 1978 regarding boundary-straddling projects and had specifically requested to review the 1980 Draft CMP. New Jersey's rejection stated that "[t]his disagreement is noted, but [NJDEP] has found no other solution available by administrative action to address the peculiar N.J.-Delaware boundary in Salem County, where the Delaware State line reaches to low tide on the New Jersey shore." *Id.*

In addition, New Jersey's 1980 CMP addressed LNG facilities and concluded that New Jersey "considers decisions concerning the siting of LNG terminals to be an *interstate* matter." *Id.* at 2891 (emphasis added); *see also id.* at 2622 (NJ 1980 Draft CMP). Despite having amended its CMP on multiple occasions, New Jersey has never sought to revise its CMP acknowledgements that Delaware has regulatory authority over projects emanating from New Jersey.[10]

In the 1980 CMP, New Jersey's Governor "designated [NJDEP] as the single State agency to receive and administer implementation grants under Section 306 of the [CZMA]." *Id.* at 2653.[11] According to NOAA, "the New Jersey [CMP] has received $70,684,500 total federal funding under the [CZMA] since 1980." *Id.* at 3171 (11/29/06 letter from NOAA).

2. The 1961 Compact between New Jersey and Delaware, as amended in 1989

In 1961, New Jersey likewise entered into a congressionally approved compact concerning public "crossings" between the two States, *i.e.*, bridges, tunnels, and ferries established by a bi-state entity called the "Delaware River and Bay Authority." *See* DE App. 4433-43. That compact requires that any "project," defined to include "transportation facilit[ies]" including "docks,

[10] *See* DE App. 4178 (NJ Admissions Response No. 63: "[the 1980 CMP] has not been amended to remove or revise the statement"); 15 C.F.R. § 923.80(d)(3) (requiring CMP "amendments" for "substantial changes in . . . [b]oundaries"); *see also* DE App. 598-99 (Ehinger Tr. 85-88), 795-96 (Whitney Tr. 97-100).

[11] *See* 16 U.S.C. § 1455(d)(6) ("Before approving a management program submitted by a coastal state, the Secretary shall find . . . [that] . . . [t]he Governor of the State has designated a single State agency to receive and administer grants for implementing the management program.").

wharves, piers, slips," and other boundary-straddling structures associated with a "crossing," *id.* at 4434 (Art. II (definitions)), "shall comply with all environmental protection laws, regulations, directives and orders, including, without limitation, any coastal zone laws, wetlands laws, or subaqueous land laws or natural resources laws, now or hereinafter enacted, or promulgated by the state in which the project, *or any part thereof*, is located." *Id.* at 4442 (Art. XXII(a) (1989 amendment)) (emphasis added). Thus, the States mutually agreed that boundary-straddling projects established by the DRBA are subject to the same laws that Delaware applied to Crown Landing.[12]

3. New Jersey's cooperation with Delaware in permitting matters

a. Draft Memorandum of Agreement

In 1991, New Jersey received a federal coastal management grant to improve its coastal zone cooperation with Delaware. *See* DE App. 3203, 3234. Steven Whitney, Assistant Director of the Coastal Resources Division and by then a 21-year veteran at NJDEP, led development of those cooperative measures. Whitney testified in his affidavit submitted with New Jersey's initial filing to this Court that "[t]he 1978 and 1980 CMPs and the discussions which followed led my office to develop between 1991 and 1994 a draft Memorandum of Agreement ["MOA"] between New Jersey and Delaware." NJ App. 938a (Whitney Aff. ¶ 6).[13]

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[12] *See* Article XXII(c) ("The planning, development, construction and operation of any project, other than a crossing, located in the coastal zone of Delaware . . . shall be subject to the same limitations, requirements, procedures and appeals as apply to any other person under the [DCZA] . . . . Nothing in this compact shall be deemed to pre-empt, modify or supersede any provision of the [DCZA] . . . . The interpretation and application of this paragraph shall be governed by the laws of the State of Delaware and be determined by the courts of the State of Delaware."). In ratifying the 1989 amendment, Congress likewise understood that "[a] new article [XXII] in the revised Compact provides that the planning and implementation of any project, other than a crossing, must comply with the environmental protection laws of the State in which the project, *or any part thereof*, is located: if located in the coastal zone of Delaware, it is subject to the [DCZA]; and if located in New Jersey, it is subject to applicable New Jersey law, including the Wetlands Act of 1970 and the Coastal Area Facility Review Act." H.R. Rep. No. 101-905, at 2-3 (1990).

[13] *See also* DE App. 800 (Whitney Tr. 117) ("we had applied for permission to get funding from the federal government to work on a memorandum of agreement with the State of Delaware to come up with an agreement that would basically look at the Delaware as a whole resource and try to coordinate our efforts so we would better protect the national interest and our interstate interest").

In particular, "the boundary itself was a major issue because . . . projects that would straddle this boundary . . . would require closer coordination." DE App. 801 (Whitney Tr. 118-19). Whitney and his staff prepared a detailed 17-page analysis comparing and contrasting Delaware's and New Jersey's coastal zone laws, which Whitney shared with his counterparts in Delaware. *See id.* at 3209-27 (11/8/91 letter from NJDEP to DNREC attaching analysis).[14] Whitney's letter to DNREC stated that "[t]hese documents, once finalized, should identify consistencies and inconsistencies between our programs, and form the basis for discussing potential mechanisms for coordinating program activities and resolving conflicts." *Id.* at 3210. An internal NJDEP memorandum had proposed that "[o]ptions to improve consistency between the states include: a memorandum of agreement between the states to effect a joint review of those projects which affect both states," and "requiring that projects also demonstrate consistency with Delaware's [CMP]." *Id.* at 3207-08 (10/29/91 memorandum from Lawrence J. Baier to Steven Whitney).

NJDEP officials scheduled a meeting with DNREC officials for November 15, 1991. An internal memorandum shows that NJDEP officials were to discuss the subjects of "Delaware permitting of facilities on New Jersey Shore" and "Joint Coastal Zone Consistency Reviews" were "John Weingart/Steve Whitney." *Id.* at 3229 (11/1/91 memorandum from Rick Sinding to "Management Team" Re: "Meeting with Delaware Officials"). Weingart was an Assistant Commissioner and therefore reported directly to the NJDEP Commissioner, and so apparently was Sinding at that time.[15] A decade earlier, Weingart had a key role in preparing New Jersey's 1980 CMP as Chief of the Bureau of Coastal Planning and Development. *See id.* at 3169.

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[14] *See also* DE App. 3209 ("New Jersey received a grant from NOAA, pursuant to section 309 of the [CZMA], to assess the compatibility of our respective states' [CMPs] as they affect the shared boundary of the states in the Delaware River and Bay."); *id.* at 3234.

[15] *See* DE App. 802 (Whitney Tr. 124); *see also id.* at 485 (Castagna Tr. 16); *id.* at 642 (Johnson Tr. 90); *id.* at 798 (Whitney Tr. 106-07). Sinding was the Assistant Commissioner for Policy and Planning as of 1993 and apparently held that title at the time he wrote the cited November 1, 1991 memorandum. *See*

A New Jersey analysis attached to Assistant Commissioner Sinding's memorandum, entitled "Program Narrative State of Delaware and State of New Jersey Section 309 Federal Grant," noted the location of the boundary within the twelve-mile circle and concluded that "the State of Delaware's [CMP] may directly and significantly affect activities within New Jersey that are inconsistent with New Jersey's [CMP]." *Id.* at 3234. After additional internal meetings, *see id.* at 3229, 3278, New Jersey prepared numerous drafts of its proposed MOA. At least five iterations, including those shared with Delaware, provided that "[b]oth [State] agencies recognize that each agency has the independent authority to approve or deny applications pursuant to its own regulations." *Id.* at 3267-68, 3273-74 (8/3/93 draft); 3175 (10/18/93 draft); 3182, 3253, 3261 (10/28/93 draft); 3192, 3198 (11/5/93 draft); 3203, 3239, 3245 (6/16/94 draft, shared with Delaware).[16] The various drafts proposed ways for the States to share relevant information to assist their respective permitting programs. The draft MOA was circulated widely within NJDEP. *See id.* at 3201; *id.* at 802-03 (Whitney Tr. 123-26). From 1991 to 1994, Whitney's staff had extensive discussions and performed detailed comparative analyses of both States' coastal zone laws. *See id.* at 3207-3317;[17] NJ App. 938a (Whitney Aff. ¶ 5).

Those analyses were all predicated on the understanding that Delaware had full authority over boundary-straddling projects to the extent they were in Delaware. Throughout his 27-year tenure at NJDEP, Whitney understood "that New Jersey had regulatory authority on the New Jersey side of the boundary and Delaware had regulatory authority on the Delaware side of the

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Business Dateline, Business for Central New Jersey, *Is the DEPE's Green Fist Crushing Business?* (Oct. 16, 1991) (describing Sinding's background); *see also* 27 N.J. Reg. 2752(a) (July 17, 1995) (stating that, in 1993, Sinding was "Assistant Commissioner of Policy and Planning").

[16] Those drafts contain numerous handwritten comments by NJDEP personnel, but no commenter disagreed with the statement that Delaware has authority to regulate boundary-straddling projects.

[17] Each of these cited documents, which bear the designation "NJPRIVLOG," was initially withheld by New Jersey under a deliberative process privilege claim, but New Jersey voluntarily produced them after Delaware moved to compel their production.

boundary and any project that would cross over that boundary would need to get approvals from both states in order for the project to go forward."[18] No one ever disputed that view. *See* DE App. 786, 802, 803, 805 (Whitney Tr. 59, 122-23, 127, 134-35).[19] New Jersey presented Whitney as its authoritative witness on the "past policy and practice of New Jersey's Coastal Management Program . . . within the Twelve Mile Circle." *Id.* at 4720 (NJ Interrogatory Response No. 2(J)).

The draft MOA was never executed. Whitney's affidavit stated that "there were concerns about becoming involved in an overly cumbersome approval process, and about giving a veto to Delaware as to projects that otherwise would have met New Jersey standards." NJ App. 939a (Whitney Aff. ¶ 8). Although that language apparently was drafted to suggest that New Jersey objected to Delaware's ability to veto a project by denying a *Delaware* permit, Whitney clarified that New Jersey's concern was limited to preventing Delaware from encroaching on *New Jersey's* permitting process. *See* DE App. 804 (Whitney Tr. 130-31). NJDEP's uniform understanding, consistent with its CMP, was that a boundary-straddling project "could not go forward until an applicant has secured approvals both from Delaware and New Jersey." *Id.*; *see generally id.* at 803-05 (Whitney Tr. 127-34).

b. Keystone

In 1991, just as NJDEP was beginning the three-year process to develop its draft MOA, Keystone Cogeneration Systems applied to NJDEP to build a coal unloading pier extending into Delaware and used to supply an onshore electric plant in New Jersey. On March 14, 1991, Whitney informed DNREC of the application, stating that, "[c]onsidering our federal Coastal Zone Management Grant task to produce a better coordination effort for development of this kind, I am

[18] DE App. 778 (Whitney Tr. 27); *see also id.* at 782, 786, 790, 791, 792, 794-95, 800, 807 (Whitney Tr. 44-45, 59, 74-75, 79, 82-85, 91-96, 114-15, 142-43, 145).

[19] *See also* DE App. 635 (Johnson Tr. 64) ("Q. Would you have said that [applicants for boundary-straddling projects] needed to check with the appropriate officials in Delaware? A. I believe I would have, yes.").

forwarding to you this application for your review. This application might be a good prototype for us to scope out some [of] the details we will need to address." DE App. 3511. Six months later, New Jersey approved Keystone's permit on the express condition that Keystone first secure *Delaware* permits.[20] NJDEP officials developed an internal, detailed 31-page "Summary Analysis" recommending approval of the Keystone permit and addressing the impact of the 1905 Compact on Delaware's authority to regulate the Delaware portion of the project. *See id.* at 3517-48; NJ App. 837a-867a. Although that analysis concluded that Article VII permitted New Jersey to issue a "riparian instrument for the barge unloading facility," DE App. 3519, it acknowledged that "Delaware has also assumed jurisdiction and required a Coastal Zone Permit and a Subaqueous Lands Permit," *id.* at 3519-20. The analysis recommended the precise language that appeared in the final permit requiring Delaware permits. *See id.* at 3546; DE Br. 20.

c. Fort Mott

In 1996, NJDEP's Division of Parks and Forestry applied for an NJDEP permit to refurbish a pier extending into Delaware from Fort Mott State Park in New Jersey. *See* DE App. 3631-47. As with Keystone, New Jersey's permit was conditioned on issuance of a Delaware permit. *See id.* at 3724 (NJ Permit: "The following project aspects are subject to approval of the State of Delaware: a) installation of floating ferry mooring associated pilings, and b) removal of rip-rap against the crib structure below mean low water."). Delaware issued the required permit and a 10-year lease in 1997. *See* DE Br. 20. NJDEP subsequently reported that it would seek renewal of the Delaware lease in 2007, *see* DE App. 3729-30, which it did in August 2006 during the pendency of this original action, *see id.* at 3731-34.

[20] *See* DE App. 3554 ("Prior to construction the permittee must submit copies of all the permits or approvals listed below . . . . 4. Subaqueous Land and Coastal Zone Mgmt. (Delaware)"); *cf. id.* at 3307 (internal email proposing that "[w]e could condition our permits on people getting applicable DE permits").

C. New Jersey's Acknowledgement That The Delaware Portion Of BP's Proposed Crown Landing Project Falls Under Delaware's Exclusive Jurisdiction

NJDEP filed comments dated February 4, 2005 with FERC regarding BP's Crown Landing application that (1) expressly acknowledged Delaware's regulatory authority over the environmental impacts of the portion of the project located in Delaware and (2) expressly disclaimed any such New Jersey regulatory authority within Delaware:

> The project site is located in the States of Delaware and New Jersey. Accordingly, activities taking place from the mean low water line (MLWL) outshore are located in the State of Delaware and therefore are subject to Delaware Coastal Zone Management Regulations. Activities or associated impacts to New Jersey's coastal resources occurring from the MLWL landward are the subject of this application [to NJDEP].

DE App. 4641.[21] BP representatives then met with New Jersey representatives and induced them to change New Jersey's consistent, decades-long policy of cooperating with Delaware in reviewing boundary-straddling projects and acknowledging Delaware's authority over them. *See id.* at 4685-4711 (BP Privilege Log).[22]

In its comments to FERC, New Jersey also expressed substantial environmental and safety concerns, concluding for example that the proposed design "does not address the real possibility of a deliberate attack to the LNG ship via smaller boats and watercraft that could navigate shallow waters." *Id.* at 4678. A 2004 U.S. Department of Energy Report studying LNG spills also reported that "spilled LNG could . . . disperse as a vapor cloud" and that the "thermal radiation from the ignition of a vapor cloud can be very high within the ignited cloud and, therefore, particularly hazardous to people." *Id.* at 3835. Decades before, New Jersey's CMP documents had likewise

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[21] *See also* DE App. 4674 (NJDEP 4/19/05 FERC Comments) ("At the present time, the State of Delaware has characterized this project as not being in compliance with Delaware's Coastal Regulations. Since the State of Delaware has not relinquished review of this phase of the project, we will not comment further except to say that the [Department of Fish and Wildlife] is concerned about [harm to fish and wildlife].")..

[22] NJDEP Assistant Commissioner Joseph Seebode, who subsequently attempted to retract the February 4, 2005 acknowledgement before FERC that Delaware has regulatory authority over the project, had commented on other issues addressed in the February 4 letter before it was filed but raised no concerns about Delaware's regulatory authority. *See* DE App. 727 (Risilia Tr. 78-79); *id.* at 4683-84 (5/24/05 letter).

raised the concern that "[a]n ignition of the dispersing vapor plume could set off a fire several miles downwind of the source and create a hazard to life and property anywhere in the path of the plume." *Id.* at 4608; *see also id.* at 4307-08 (Cherry Aff. ¶¶ 16-17).[23]

ARGUMENT

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

The 1905 Compact must be interpreted in light of the fundamental rule that a State has full and exclusive jurisdiction (subject to federal law) within its territory, absent some express relinquishment. *See* DE Br. 25. That rule provides the backdrop for the Court to determine whether Delaware gave up any rights to New Jersey within the territory then under dispute between the middle of the river and the low-water line on the New Jersey shore. In Articles I through IV, the States put in place a process for the final resolution of the practical disputes that had caused the litigation. Through uniform fishing laws to be enacted by the respective state legislatures, each State would have "exclusive jurisdiction" to arrest its own inhabitants. In so doing, they carefully specified that certain state actions apply irrespective of where the boundary line would ultimately be determined, by referencing clearly delineated geographic marks such as "between low-water marks on each side of said river" (Article III), "within said river" (Article IV), "eastern half of said Delaware River" (Article I), "western half of said Delaware River" (Article II), and "from low-water mark on the New Jersey [or Delaware] shore to low-water mark on the Delaware [or

[23] New Jersey's comments also identified interference with fish migratory pathways from the proposed massive dredging and other activities (*see* DE App. 4642, 4675-76), and adverse effects on vital "ichthyoplankton, early life stage finfish, and other aquatic biota from the Delaware River ecosystem" from the use of "8,000,000 gallons of ballast water per ship in berth within a 24 hour turnaround, 1,440,000,000 gallons of ballast water yearly" (*id.* at 4674-75). Moreover, the 2,000-foot pier would require "an additional 1,500 foot Homeland Security Buffer." *Id.* at 4674. As a result, New Jersey concluded that "as much as 50% of the river will be blocked to commercial and recreational boating while ships are at dock, thereby forcing all boaters to enter the Federal Navigation Channel to proceed up or down river." *Id.*; *see also id.* at 670-71 (McHugh Tr. 76-81).

New Jersey] shore" (Articles I and II). *See* DE Br. 27-28. Those four articles resolved the issues raised in *New Jersey v. Delaware I*. *See id*. at 30.

In Articles V through VIII, the drafters took a very different approach. Those articles address issues that the drafters were unable to resolve and therefore left for another day pending ultimate resolution of the boundary dispute. Thus, in Article V the States agreed that, until they both enacted the uniform fishing laws, each State's fishing laws "not inconsistent with the right of common fishery hereinabove mentioned [in Article III] shall continue in force *in said respective States*." (Emphasis added.) The phrase, "in said respective States," was plainly intended to refer to the territorial limits of each State. Likewise, Article VI indisputably leaves the resolution of each State's ownership and control of oyster beds to the later adjudication of the boundary. And Article VIII makes clear that the long-simmering boundary dispute could not be resolved.

The "own side of the river" language in Article VII likewise preserves Delaware's riparian jurisdiction to the full extent of its territory. *See* DE Br. 28. The drafters did not use the same type of geography-specific language that they employed in Articles I through IV. *See id.* at 29-30. Nor were any disputes over oysters or riparian matters at issue in *New Jersey v. Delaware I*, so it was unnecessary for the parties to address those issues to dismiss the pending litigation. *See id.* at 30-31. And New Jersey's reading would result in the anomalous situation that Article VII was a one-way street giving New Jersey rights in the disputed territory from the middle of the river to low-water on the New Jersey shore but giving Delaware nothing in exchange – in stark contrast to Articles I through IV, which contain clearly identifiable trades by the States. *See id.* at 34-35.

A. "Continue To Exercise" Does Not Confer New Jurisdictional Rights

New Jersey contends that the term "continue" in Article VII indicates that the States were to "continue to exercise their riparian sovereignty as they had in the past." NJ Br. 25.[24] New Jersey claims that, because by 1905 it had issued all of eight riparian grants, it should be able to "continue" issuing grants for all time even if the lands were later adjudged to belong to Delaware. New Jersey's factual predicate is as faulty as its legal premise.

First, New Jersey's brief identifies only three structures built on those eight pre-1905 grants – hardly an indication of a pressing problem over wharfage rights within the twelve-mile circle. *See* NJ Br. 4-5 & n.4. And the available evidence shows that two of those wharves were inconsequential: both were very short and one of them fell into disuse not long after it was built.[25] In addition, Castagna's report cites no evidence that those wharves extended past the low-water mark in 1905, so New Jersey cannot prove conclusively that they even extended into Delaware.

Whatever actions taken by New Jersey in the disputed territory between the middle of the river and the low-water mark on the New Jersey shore were done without knowledge of whether it had the right to do so. Nor were those exercises of "riparian sovereignty," as New Jersey puts it, done with the actual sovereign power required to sanction them. "It is obvious that one nation cannot grant away the territory of another." *Coffee v. Groover*, 123 U.S. 1, 27 (1887); *see also Poole v. Lessee of Fleeger*, 36 U.S. (11 Pet.) 185, 210 (1837) (Story, J.) (grant by a sovereign of lands "beyond her territorial boundary" is void). To "continue" in that mode, therefore, necessarily means that New Jersey could "continue" its actions only subject to Delaware's territorial claim

[24] Even assuming that the 1905 Compact permits New Jersey to exercise "riparian jurisdiction" within Delaware, that jurisdiction can in no way be considered to be "sovereignty." *See infra* pp. 41-43.

[25] *See* DE App. 4452, 4453 ("The Henry Barber wharf was a short wharf, did not extend very far in the river . . . . [The Joseph Guest wharf, built between 1872 and 1874,] was used for a very short time, the ice carried it away, and then there was not much traffic to that wharf. . . . . Q. Was it ever rebuilt? A. No, sir."); NJ App. 1201a (Castagna Rep. ¶ 4) (relying on sketch showing that the Guest wharf "extends 100 feet outshore of the high water line" but without identifying how far it extends past the low-water line).

to the low-water mark, as provided for in Article VIII. *See* DE Br. 35-39. That principle was well-established before 1905:

> [E]xcept as restrained and limited by [the Constitution], [the several States of the Union] possess and exercise the authority of independent States, and the principles of public law [respecting the jurisdiction of an independent state over persons and property] are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. Laws, c. 2; Wheat. Int. Law, pt. 2, c. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding such persons or property in any other tribunals." Story, Confl. Laws, sect. 539.

Pennoyer v. Neff, 95 U.S. 714, 722-23 (1878).

Article VII therefore gives New Jersey no new rights. To the extent Article VII could even arguably be read to give rights (*e.g.*, to convey riparian lands in dispute), at most it would permit New Jersey to continue to act during the period between ratification of the Compact and this Court's resolution of the boundary question. Such a license, as a "safeguard[]" (*see* DE App. 1110) against invalidation of grants made or structures approved prior to resolution of the boundary, is the most that could be read from the phrase "may . . . continue to exercise." *See* DE Br. 39-40. Absent from Article VII is any language providing that New Jersey "shall have" riparian jurisdiction for all time in the disputed territory and without regard to the boundary. In contrast, when the drafters intended to convey such rights, they used language providing, for example, that each State "*shall have and exercise* exclusive jurisdiction within said river." Article IV (emphasis added); *see also* DE Br. 36-37; DE App. 887 (1834 Compact, Art. 3(2)) ("New Jersey *shall have* the exclusive jurisdiction of and over the wharves, docks, and improvements") (emphasis added).

B. "Own Side Of The River" Refers To The Boundary

1. New Jersey wrongly claims that the 1905 Compact resolves all jurisdictional issues regardless of the boundary

New Jersey's reliance on the Preamble is misplaced. New Jersey repeatedly bases its arguments on the premise that the Compact must be read to have resolved *all* boundary-related disputes in a way that makes the boundary line irrelevant. It asserts that Delaware's interpretation "is directly contrary to the Compact's express language stating that it provides a final resolution of all controversies arising from the disputed boundary." NJ Br. 33. But no "express language" states that the Compact resolves "all controversies arising from the disputed boundary." *Id.*

New Jersey's argument improperly takes the Preamble's language, which sets out what the commissioners were appointed to *attempt* to negotiate, and concludes that the substantive articles of the Compact must be construed as leaving no issues unresolved (notwithstanding the ongoing boundary dispute). The "express language" on which New Jersey relies comes from the Preamble's fourth paragraph, which states in full (emphasizing the language on which New Jersey relies, and repeatedly quotes out of context):

> 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*.

1905 Compact, Preamble ¶ 4.

That paragraph speaks to the purposes the commissioners were "looking to" achieve and incorporates the language defining the scope of their negotiating authority.[26] It does *not* purport to state what the commissioners were able to achieve in the subsequent negotiations. The substantive Articles of the Compact that follow the Preamble constitute the agreement between the States. Beginning with the first sentence of its brief, however, New Jersey repeatedly mischaracterizes the Preamble as showing that the *Compact itself* was intended to – and in fact does – provide "the final adjustment of all controversies relating to the boundary line." NJ Br. 1.[27]

Contrary to New Jersey's representation, the 1905 Compact's "express language" does not "stat[e] that it provides a final resolution of all controversies arising from the disputed boundary." NJ Br. 33. As New Jersey elsewhere admits, that cannot be so because the "dispute over the ownership of an oyster bed" that led to *New Jersey v. Delaware II* "had been left open by Article VI of the Compact of 1905." NJ Reopen Br. 10; *see also* NJ Br. 11 (*New Jersey v. Delaware II* concerned "a dispute over oyster beds"). Article V's proviso that each State's fishing laws not inconsistent with the right of common fishery will apply "in said respective States until the enactment

[26] The portion of the Preamble language quoted by New Jersey was taken *verbatim* by the Compact drafters from the joint resolutions approved by the legislatures of the respective States appointing the commissioners and therefore expressing the pre-drafting aspirations of the Legislatures, as opposed to the post-drafting realities of what the commissioners were able to achieve. *Compare* Preamble ¶ 4 *with* DE App. 1170 (DE Joint Resolution of Feb. 13, 1905) *and id.* at 1171 (NJ Joint Resolution of Feb. 14, 1905). New Jersey implicitly acknowledges this. *See* NJ Br. 7, 8, 39 (citing and quoting the joint resolutions); *see also* Joint Statement ¶¶ 38-39, 42 (1903 joint resolutions) and ¶¶ 43-44 (1905 joint resolutions).

[27] *See* NJ Br. 1 ("In 1905, New Jersey and Delaware resolved a longstanding dispute over their mutual boundary within an area known as the Twelve Mile Circle, by entering into a Compact that intended to effectuate '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(.)") (quoting Preamble ¶ 4); *see also id.* at 2 (Compact was "adopted to resolve a jurisdictional conflict between New Jersey and Delaware, to amicably terminate longstanding litigation between the States, and to finally adjust 'all controversies relating to the boundary between said States, and to their respective rights in the Delaware river and bay.'") (quoting Preamble ¶ 4); *id.* at 26-27 (Compact "was intended to effectuate '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' ") (quoting Preamble ¶ 4); *id.* at 32 ("stated purpose of the Compact [was] to achieve a 'final adjustment' of the disputes between New Jersey and Delaware"); *id.* at 33 ("The Preamble to the 1905 Compact stated that the intent of the Compact was to achieve 'the final adjustment of all controversies relating to the boundary between said states, and to their respective rights in the Delaware River and Bay.' ").

of said concurrent [fishing] legislation" likewise can only mean that each State may enforce such fishing laws within its territory until the enactment of uniform fishing laws (which has never happened). Thus, Article V did not resolve the issue of where geographically each State's conforming fishing laws would apply; absent uniform fishing laws, that was a function of the boundary. And Article VIII, of course, left open the boundary issue and thus ownership of the subaqueous soil itself, which this Court did not resolve until 1934. An article (VII) surrounded by other articles (V, VI, and VIII) expressly deferring resolution of issues is most logically read in context the same way. New Jersey's underlying premise for its interpretive arguments – that Article VII necessarily must be read to surrender riparian jurisdiction to New Jersey within Delaware's territory because the Compact purportedly resolved all boundary-related disputes – is therefore untenable.[28]

New Jersey also ignores the Preamble statement that the commissioners were appointed to negotiate a compact "looking to the amicable termination of said suit between said States now pending in the Supreme Court of the United States." It thus glosses over the fact that only Articles I through IV addressed the disputes over fishing and arrests on the water actually at issue in *New Jersey v. Delaware I*. *See* Hoffecker Rep. 2-3, 12-22, 31-33, 42-47, 51-52 (DE App. 4213-77). Those four Articles permitted dismissal of the case, and agreement on matters concerning ownership of oyster beds and riparian lands was both unattainable and unnecessary for "the amicable termination of [*New Jersey v. Delaware I*]." Preamble ¶ 4. *See United States v. Union Pac.*

[28] Even if New Jersey's reading of the Preamble were correct (and it is not), it could not be used to contravene the text of the substantive articles of the Compact. *See Price v. Forrest*, 173 U.S. 410, 427 (1899) ("[W]e must not be understood as adjudging that a statute, clear and unambiguous in its enacting parts, may be so controlled by its preamble as to justify a construction plainly inconsistent with the words used in the body of the statute."). That canon of construction was also followed in both New Jersey and Delaware at the time the 1905 Compact was drafted. *See, e.g., Quackenbush v. State*, 29 A. 431, 432-33 (N.J. Sup. Ct. 1894); *Stockwell v. Robinson*, 32 A. 528, 530 (Del. Super. Ct. 1892); *Sutherland Statutory Construction* § 341, at 652 (2d ed. 1904) ("[The preamble] is not part of the law, in the legislative sense, and hence can never enlarge the scope of a statute; it cannot of itself confer any power. Its true office is to expound powers conferred, not substantially to create them.").

R.R. Co., 91 U.S. 72, 79 (1875) ("The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it.").

Article IX provides no support for New Jersey. New Jersey also relies on Article IX's proviso that the Compact, upon ratification, would "become binding in perpetuity upon both of said states." It claims (at 33) that this "make[s] clear that the Compact's allocation of jurisdiction was not dependent on the subsequent establishment of the actual boundary line or territorial limits of either State." Article IX, however, neither increases nor decreases the scope of the provisions in the eight substantive articles of the Compact; it merely provides that those articles will be binding in perpetuity by their terms, whatever they may be. In the same sentence, Article IX also states that, upon ratification, the litigation between the States "shall be discontinued . . . without prejudice." Taken together, the two clauses mean that the Compact as a whole shall be binding, and that the rights reserved therein shall be preserved for litigation at a later date if necessary. What is binding in perpetuity is the Compact as a whole, whereby certain arrangements were agreed to, subject to a broad reservation of rights in Article VIII for issues that were not resolved in a way that took them outside the boundary dispute. Although this Court's resolution of the boundary in *New Jersey v. Delaware II* does not affect the geographic scope of the arrangements set out in Articles I through IV, the geographic scope of Articles V through VIII was affected by adjudication of the boundary. But that result flows from the language used in those articles and not any change in the binding nature of the Compact.

New Jersey misunderstands Article VII. New Jersey's next objection is that Delaware's reading of "own side of the river" "simply fails to make practical sense" because "Article VII would have provided no guidance to the two states regarding the allocation of riparian jurisdiction

during the thirty year period between the ratification of the Compact and the decision in *New Jersey v. Delaware II*, during which that boundary remained in dispute." NJ Br. 33. But New Jersey cannot deny that the drafters could not agree on a geographic scope for Article VII that would survive any subsequent adjudication of the boundary. Likewise, the issues addressed in Articles V (absent adoption of uniform fishing laws), VI, and VIII indisputably turn on the location of the boundary, wherever it may be. That those provisions likewise provided no guidance on their geographic scope until the boundary question was resolved by this Court in 1934 is no reason to rewrite them to take them out of the shadow of the boundary dispute, as the logic of New Jersey's argument would require. New Jersey again builds its argument atop the false premise that every Article in the 1905 Compact resolved the issue at hand in a way that made the boundary irrelevant. But that simply is not the case – the Compact in significant respects was an "agreement to disagree." DE Br. 1. With respect to Article VII as with Article VI, the drafters had a compelling reason to defer the matters addressed to the resolution of the boundary, because the conveyance of riparian lands, like the planting of oyster beds, inevitably implicated the issues of boundary and "ownership of the subaqueous soil" that they agreed to reserve in Article VIII. *See* DE App. 1105 (Delaware commissioners' report submitting "a draft of the compact . . . covering the subject submitted to their consideration, *so far as any agreement could be reached*") (emphasis added).

2. "Riparian jurisdiction" does not extend beyond the border

New Jersey seeks to avoid the express "own side of the river" limitation in Article VII by relying instead on the phrase "riparian jurisdiction." New Jersey reasons that, because the riparian right to wharf out commonly permitted wharves to be built beyond the low-water mark, Article VII must be read to give New Jersey riparian jurisdiction on the eastern half to the middle of the river. *See* NJ Br. 26-29; *id.* at 24-25. Again premising its argument on the false assumption that the Compact must be read to have resolved every issue in a way that made the then-unresolved

boundary irrelevant, New Jersey asserts that, "in order for the Compact to provide an effective solution to this dispute, it was necessary to identify the scope of each state's authority within the Twelve Mile Circle in practical terms that did not depend on resolution of the boundary question." *Id.* at 27 (citing and quoting Preamble ¶ 4). New Jersey claims that "Article VII accomplishes this by establishing the scope of each state's jurisdiction by reference to the rights to be regulated, rather than by establishing a physical dividing line." *Id.* Those arguments are unpersuasive.

New Jersey blurs the geographical and regulatory scope of Article VII. Article VII provides that each State, subject to the rights reserved in Article VIII, may continue to exercise "riparian jurisdiction" and "to make grants, leases, and conveyances of riparian lands and rights"; the geographic scope within which each State can continue such actions comes in the phrase "own side of the river." Articles I through IV likewise denote conduct to be permitted (fishing and service of process) and then provide precise geographic boundaries applicable to such conduct (*e.g.*, "low-water mark," "eastern half"). Article VII addresses geography with the phrase "own side of the river," leaving the boundary unresolved. In contrast to articles intended to resolve the fishing dispute, however, Article VII does not address geography in a way that makes the boundary irrelevant. Had the drafters intended to give New Jersey riparian rights, and the ability to convey riparian lands, to the middle of the river regardless of the boundary, they could easily have done so by using the type of geographic language carefully selected in Articles I through IV. Indeed, in numerous contexts, New Jersey's pleadings, statutes, case law, and 1834 Compact said "middle of the river" or something very similar when that is what it meant to say. *See* DE Br. 31-34.[29]

[29] New Jersey's brief abandons the theory advanced in discovery that "own side" means "at the center of the channel" under the "common law," "in the absence of another provision." DE App 4739 (NJ Interrogatory Response 24). Plainly, the "own side of the river" is just such "another provision," as is Article VIII's reservation of rights. To the extent New Jersey's brief may be read to claim that the phrase "of every kind and nature" extends New Jersey's "riparian jurisdiction" beyond its boundary, *see* NJ Br. 25, it should likewise be rejected as contrary to the relevant geographic phrase "on its own side of the river."

The 1785 Compact does not support New Jersey. New Jersey next relies on the language in the Compact of 1785 between Virginia and Maryland, which states that Virginians "'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.'" NJ Br. 28 (quoting Article Seventh). That provision, however, did not contain any geographic limitation on the authorized wharves and is thus very different from the 1905 Compact. *See* DE Br. 44-45 ("'own side of the river'" provides "the crucial boundary reference that was lacking in the 1785 Compact").

This Court's analysis of the 1785 Compact also supports Delaware's construction of the 1905 Compact – not New Jersey's. The 1785 Compact used specific language to denote which provisions were subject to mutual regulation, but it did not do so in Article Seventh. *See id.* at 37. The Court took that to mean that the article in question was not subject to mutual state regulation as to authorization for water withdrawal and construction of wharves. *See Virginia v. Maryland*, 540 U.S. 56, 67 (2003). Likewise, in the 1905 Compact, the drafters selected precise geographic terms that would survive the subsequent boundary determination only in Articles I through IV. *See* DE Br. 43-44.

New Jersey's reliance on its 1834 Compact with New York is likewise misplaced. New Jersey notes the New York court's holding that New Jersey's jurisdiction over wharves extended beyond the low-water mark on its shore, but declines to discuss the very different language in that compact. *See* NJ Br. 28 (citing *Central R.R.*, 42 N.Y. at 298-99). The 1834 Compact provided that New Jersey "shall have exclusive jurisdiction" not only over wharves but also over the vessels fastened to them, subject to New York's jurisdiction to enforce its health and quarantine laws on ships fastened to a New Jersey wharf. DE App. 887 (Article 3(2)); *see supra* pp. 2-3. In that context, the court found that New Jersey's jurisdiction over wharves extended beyond the low-

water mark, for only then could it exercise its exclusive jurisdiction over the vessels fastened to the wharves. *See Central R.R.*, 42 N.Y. at 299-300 ("[t]he moment they became thus affixed to the land of New Jersey in the bed of the river or on the shore, the jurisdiction of New York over them was to cease, except in the language of [the health and quarantine] proviso"). Here, by contrast, the 1905 Compact does not state that New Jersey "shall have exclusive jurisdiction" over wharves or ships, but is limited to "riparian jurisdiction" on New Jersey's "own side of the river."

Pre-1905 grants are irrelevant. New Jersey claims that, because it had issued "eight grants in the Twelve Mile Circle prior to 1905," "the drafters of Article VII foresaw that an exercise of this jurisdiction would require New Jersey to regulate uses extending beyond its mean low water line, regardless of which State was ultimately determined to own that area." Br. 28-29. New Jersey identifies only three structures built on those eight pre-1905 grants – two of which were very short *and* short-lived, and none of which was inconsistent with Delaware common law. *See supra* p. 21. That meager history hardly calls for interpreting the Compact to give New Jersey exclusive rights over all aspects of wharves for all time.

Moreover, the drafters did *not* select the same type of precise geographic language that they used in Articles I through IV to remove Article VII from the boundary dispute. New Jersey's claim that it had a real need to get Delaware to give up riparian jurisdiction within the disputed territory is belied by its inability to show what it gave up in return for Delaware's supposed concession. Delaware's boundary claim to low-water on the New Jersey shore had been repeatedly upheld in prior lawsuits (*see* DE Br. 34-35) and was well-known to New Jersey. Yet New Jersey asks this Court to construe Article VII as a major concession of sovereignty over Delaware lands that is inconsistent with Delaware's centuries-old boundary claim and that is given up for absolutely nothing in return. *See id.* at 30-31. New Jersey's interpretation defies common sense.

***This Court's decree in* NJ v. DE II *does not support New Jersey*.** New Jersey also relies on paragraph seven of the Court's decree in *New Jersey v. Delaware II*, which provides: "This decree is made without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states." 295 U.S. at 699.[30]

New Jersey first claims that Delaware's reading of "own side of the river" "would also nullify that portion of the 1935 Decree implementing the Supreme Court's ruling in *New Jersey v. Delaware II*, which expressly made the Court's identification of the boundary within the Twelve Mile Circle subject to the Compact of 1905." NJ Br. 34. That is incorrect. Whether any rights arise from the Compact depends on the specific language in that document, not the decree. With respect to the issues that the drafters were unable (or chose not) to remove from the boundary dispute (Articles V through VIII), because they had not caused practical disputes and/or were intrinsically intertwined with the boundary dispute itself, the boundary decision provides the necessary clarification for the two States to know where they can implement the duties and responsibilities in those Articles. But those conclusions follow from the language of the 1905 Compact itself.

New Jersey next relies on correspondence between the parties in negotiating the decree. According to a 1935 letter from New Jersey Attorney General Duane Minard to Delaware Counsel Clarence Southerland, an earlier draft of paragraph seven limited those eligible to assert claims under the Compact to "inhabitants" or "citizens" of either State. DE App. 2112. Minard proposed to refer instead to "'the rights of those claiming under either of said states.'" *Id.*; *see also* 295 U.S. at 699 (Decree ¶ 7). He pointed out that Delaware companies that owned wharves extending from New Jersey "are neither 'citizens' nor 'inhabitants' of the state in the sense that those words were used in our draft," and that "it is the intention not to interfere with them or other similarly situated." DE App. 2112. Southerland agreed to the change to protect "Delaware corporations who

[30] *See also New Jersey v. Delaware II*, 291 U.S. at 385 (boundary "subject to the Compact of 1905").

have acquired wharfage rights in New Jersey." *Id.* at 2111. Thus, this change merely avoided inadvertently limiting wharfage rights in New Jersey to citizens or inhabitants of that State.

3. Articles I and II support Delaware's reading, not New Jersey's

To support its reading of the Article VII phrase "own side of the river" as meaning "to the middle of the river," New Jersey next relies on the "eastern half" and "western half" language used in Articles I and II. According to New Jersey, that language "provides a clear, and mutually exclusive, allocation to each State of jurisdiction to exercise its criminal police powers over offenses committed on the 'half' of the river appurtenant to its shores." NJ Br. 26.

Articles I and II, however, support Delaware's reading because Article VII contains very different language: it does *not* say that New Jersey may continue to exercise riparian jurisdiction on the "eastern half" of the river, but only on its "own side." New Jersey's attempt to replace "own side" in Article VII with "eastern half" from Article I is impermissible.[31] In any case, Articles I and II do not say which State's substantive criminal law applies; they only mention service of process for crimes committed on the "eastern half" or "western half" of the river.[32] And, even if New Jersey were correct in its reading of Articles I and II regarding criminal laws, it would not

[31] *See* DE Br. 27-28; *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where 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.") (internal quotation marks and brackets omitted); *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.").

[32] *See* DE App. 2102 (7/20/34 letter from NJ Attorney General Duane Minard to NJ Senator Rusling Leap) ("While the compact does not expressly confer criminal jurisdiction on New Jersey, the words of Article I, giving it the right to issue criminal process for any offense committed upon the eastern half of [the] Delaware river, seem to fairly imply the right to try and punish such offenses. However, the language is not as clear as it might be, and, admittedly, there is room for controversy."). Immediately after this Court's decision in *New Jersey v. Delaware II*, the States disputed whether any substantive criminal laws were incorporated in the service-of-process provisions in Articles I and II (as well as whether Delaware could tax the wharves extending from the New Jersey shore into Delaware). Although both States appointed commissioners to negotiate over several years to resolve those differences in a supplemental compact, they were unable to reach agreement. *See* DE Br. 15.

matter because the dispute here concerns only civil laws. No language in Articles I and II even arguably provides that New Jersey civil laws apply on the "eastern half" of the river.

New Jersey next relies (at 26) on the language in Articles I and II permitting service of process by each State between low-water marks, "unless said person or property shall be on board a vessel aground upon or fastened to the shore of the [other] State . . . , or fastened to a wharf adjoining thereto." New Jersey claims by that language that "Articles I and II further recognize the jurisdiction of each State over wharves and piers appurtenant to their shores." The fact that Articles I and II give each State the right to serve process over wharves and piers appurtenant to their shores without limiting their location to either State's "own side of the river," however, shows that Article VII cannot be read to incorporate the very different language concerning wharves and piers in Articles I and II. Indeed, the drafters' specific carve-out of wharves and piers for certain purposes in Articles I and II *without* reference to the boundary confirms that they chose *not* to do so in Article VII. In further contrast, in its 1834 Compact with New York, New Jersey obtained exclusive jurisdiction over vessels fastened to a wharf extending from New Jersey. The 1905 Compact does not provide that power to New Jersey. *See* DE Br. 54-55.

New Jersey's analogy also fails because Articles I and II in fact *permit* Delaware to serve process on a ship fastened to a wharf attached to New Jersey in certain circumstances. Article I prohibits New Jersey from serving process *anywhere* in the river if "such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the State of Delaware." Thus, if a person or vessel fastened to a New Jersey wharf were already under arrest or seizure in Delaware, the fact of subsequent docking at a wharf extending from New Jersey would neither deny Delaware the right to serve process nor permit New Jersey to do so.[33] Con-

[33] *Cf. Central R.R.*, 42 N.Y. at 300 ("By this exception [in Article 3(2) of the 1834 Compact], it was designed that vessels afloat upon said bay and river should not escape or evade the quarantine laws, and the

trary to New Jersey's mistaken premise, Articles I and II do not make wharves appurtenant to one State's shore completely off-limits to the other State for serving process or making arrests.

C. The Applicable Interpretive Principles Confirm Delaware's Reading

Even if there was any doubt how to interpret the 1905 Compact, in light of its text, structure, history, and purposes, the applicable interpretive principles would nevertheless require a ruling for Delaware. *See* DE Br. 40-43. Article VIII provides that any relinquishment of rights in the Compact itself must be "expressly set forth." Because the States negotiated the 1905 Compact in light of the boundary dispute, they chose geographically precise language that would apply regardless of the location of the boundary in certain articles (I-IV) but not others (V-VIII).

As this Court's cases likewise hold, the surrender of jurisdiction will not be found 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); *see* DE Br. 40-43 (citing and discussing cases). New Jersey asks this Court to adopt the highly unlikely view that Delaware would at once take firm measures to reserve its right of "ownership of the subaqueous soil" within the twelve-mile circle, in Article VIII, while at the same time surrendering to New Jersey the right of "full sovereignty" over that same subaqueous soil, including the right to convey such soil, whenever Delaware's lands could be linked to structures extending from the New Jersey shore.[34]

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laws relating to passengers of New York, by coming to anchor on or near the New Jersey shore, or by becoming attached to the wharves or docks on said shore").

[34] New Jersey has relied on *Virginia v. Maryland* to claim that these rules are inapplicable "because the boundary between the States was disputed at the time of the Compact." NJ Reopen Reply 17. That claim is meritless and ignores the different language of the two compacts. Examining the 1785 Compact, the Court noted that a number of provisions expressly provided for concurrent jurisdiction but that the language providing each State's citizens " 'the privilege of making and carrying out wharves and other improvements' " did not. 540 U.S. at 66 (quoting 1785 Compact, Article Seventh). It was in that context that the Court declined to apply a presumption against a surrender of jurisdiction because the Court inferred from the "silence on the subject of regulatory authority . . . that each State was left to regulate the activities

New Jersey's reading thus goes against every applicable interpretive rule. And, as discussed above, New Jersey compounds its error with its false and overarching premise that the language of the Preamble requires the Compact to be read to have resolved all boundary-related issues in ways that make the boundary irrelevant. Under the plain language of the agreement, Article VII cannot be read to give New Jersey the power to regulate proposed or existing improvements on Delaware lands, regardless of whether they originate in New Jersey; or to grant, lease, or convey Delaware lands. A State cannot grant or convey land that it does not own. Accordingly, New Jersey lacks authority to regulate riparian structures beyond its border, and BP's proposed Crown Landing facility is subject to Delaware regulations.

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

A. "Riparian Jurisdiction Of Every Kind And Nature" Does Not Mean Full Police Power Over Every Activity On A Wharf

Even if Article VII could be read to allow New Jersey to exercise within Delaware "riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands" that belong to Delaware, it would not give New Jersey exclusive authority over all aspects of, or activities occurring on, wharves or piers extending from New Jersey into Delaware.

1. "Riparian" rights are private property rights

Riparian law is a distinctive sub-category of the law of property and concerns the rights incident to private property abutting the shore of a body of water. *See* DE Br. 47-51; DE App.

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of her own citizens." *Id.* at 67. (The same type of comparative textual analysis supports Delaware's construction here. *See supra* p. 29; DE Br. 43-44.) The 1785 Compact, moreover, did not limit "the privilege of making and carrying out wharves and other improvements" to each State's "own side" of the river, as does the 1905 Compact, in contrast with other articles using geographic terms removing those issues from the boundary decision. Nor did the 1785 Compact contain a reservation of rights requiring any surrender of jurisdiction to be "expressly set forth," as does Article VIII of the 1905 Compact. Accordingly, the unique language in the 1905 Compact must be read against the background principles disfavoring a surrender of jurisdiction except in clear and express terms. *See* DE Br. 40-45.

4279-4302 (Sax Report). The rights of the public are protected by *non-riparian* laws, the application of which may in some cases limit the riparian rights of private landowners. "Riparian jurisdiction of every kind and nature" therefore embraces jurisdiction only over the incidents of riparian land-ownership, such as authorization to build a wharf to access navigable waters far enough to permit the loading and unloading of ships, the right to withdraw water, and preference in case the land under the water outshore of riparian lands is to be sold by the State. Authority to make "grants, leases, and conveyances of riparian lands and rights" is the concomitant power to make available state-owned lands beneath navigable waters needed to implement incidents of riparian landownership, such as construction of a wharf. Such authority is jurisdiction over the definition and scope of property rights, that is, the rights and privileges that attach to riparian lands. It does not include the full scope of police power to determine the legality of activities on, or in connection with the use of, riparian property such as a wharf. Nor does it include jurisdiction to determine the scope or content of public rights in navigable waters, which can limit the exercise of riparian rights. *See* Sax Rep. ¶¶ 10-31; Farnham at 278-80.

The riparian right to wharf out, moreover, does not include the right to carry on any particular activity on a riparian structure. *See* DE Br. 51-60. It is a right only of general *access* to the navigable portion of a stream. Thus, permission to handle particular forms of cargo or to engage in particular kinds of business from a wharf – as well as from a vessel fastened to a wharf – is granted or denied by other, *non-riparian* laws. *See id*. at 51-55; Sax Rep. ¶¶ 13-15, 23-25. "Riparian jurisdiction of every kind and nature" must therefore be construed in accord with this background law. Both an 1867 report by the New Jersey Attorney General and the arguments made to this Court by one of New Jersey's commissioners, in his capacity as New Jersey's Attorney General, confirm that riparian laws govern private property rights and are distinct from the laws that protect the public generally. *See* DE Br. 50-51, 55-59. As New Jersey has admitted in its discov-

ery responses, moreover, none of its laws or grants permitting riparian owners to wharf out sanctions any particular business or activity on those wharves – just as a building permit does not authorize one to offload refined gasoline from tankers into underground tanks and then pump it into the cars of consumers. *See id.* at 52-53. Rather, just like the laws of private property that permit one to occupy property, to exclude others from it, and generally to use it, the law of riparian rights is limited to private property rights. But other laws designed to protect the public generally that may incidentally limit riparian rights have never been deemed riparian laws. *See id.* at 53-54; Sax Rep. ¶¶ 13-15, 23-25.

2. New Jersey's examples of wharf regulation do not concern police powers

New Jersey claims that the Compact should be read to grant it the full scope of the police power over all aspects of, and activities on, a riparian structure.[35] But New Jersey cannot credibly maintain that its or Delaware's "environmental laws" are riparian laws. Those laws are "non-riparian," which under no reading of the Compact could be deemed surrendered to New Jersey. *See* DE Br. 47-60; Sax Rep. ¶¶ 10-31. New Jersey may not seek by fiat to expand or redefine the nature of "riparian jurisdiction" beyond what it reasonably included as of 1905: Article VII provides authority only to "continue" such jurisdiction – not to remake it.

In any case, New Jersey's "regulatory" actions as to the scope of permitted wharves only concern navigation. It is well-settled that effects on navigation define the scope of the riparian right itself. Wharfing out (as well as all other riparian rights) is not so much limited by navigation

[35] It reasons as follows: "New Jersey, like other states at the time, asserted its police powers over this right by including conditions within . . . its grants of tidally-flowed lands, which limited the exercise of wharfage rights in order to prevent them from interfering with the public right of navigation" and by "adopting pierhead lines and bulkhead lines to limit the length of piers, and the area within which the grantee of submerged lands could place fill" (Br. 29); "[t]he authority to prohibit piers and wharves that are nuisances because they interfere with the public right of navigation represents an exercise of the police power" (Br. 30); therefore "it follows that the Compact provided New Jersey with comprehensive authority to regulate all aspects of riparian activities" (Br. 31), "including the requirements imposed by New Jersey's environmental laws" (Br. 32).

as it is *defined* by it. It has long been held that the right to wharf out *does not exist* past the point where it inhibits navigation. Because the right to wharf out derives from the right of access to navigable water, "the right must be understood as *terminating* at the point of navigability, where the necessity for such erections ordinarily ceased." *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 446 (1892) (emphasis added). In other words, "as soon as the point of navigability is reached, the purpose of the pier is fulfilled, and the right to construct it *ceases* at that point." *Farnham* at 522 (emphasis added). Hence, "riparian owners" hold "subject to the *public easement* of navigation, and to such regulation by the legislature of the waters as the public right of navigation may require." *Attorney General v. Delaware & B.B.R.R. Co.*, 27 N.J. Eq. 1, 1876 WL 322, at *5 (N.J. Ch. 1876) (emphasis added) ("[t]he right of the riparian owners to the soil of the river is subordinate to the right and power of the state to use and appropriate the river to the public good in promotion of navigation").[36] As this Court has explained:

> The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent

[36] *See also New Jersey Zinc & Iron Co. v. Morris Canal & Banking Co.*, 15 A. 227, 228 (N.J. Ch. 1888) ("[a] grantee of lands abutting on a navigable stream acquires no peculiar rights, as incidents of his estate, in the land beyond the high-water line, lying in front of his land; but in virtue of a local custom long prevalent in this state, and now having the force of established law, the adjacency of his land to the stream invests him with a license to fill in and wharf out on the public domain to such an extent as does not interfere with the public rights of fishing and navigation"); *Bell v. Gough*, 23 N.J.L. 624, 1852 WL 3448, at *23 (N.J. 1852) ("[t]hat 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.") (Elmer, J.); *Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435, 1882 WL 2713, at *10 (1882) ("The lawmaking power of the State is the rightful authority to provide for the preservation and maintenance of the Christiana River as a public navigable stream, free and unobstructed, for all the citizens of the State, and if necessary it has authority to enact that even a riparian owner thereon shall not so use his own property rights as to destroy or obstruct the free navigation of the river.").

> with or demanded by the public right of navigation. . . . The riparian owner acquired the right of access to navigability subject to the contingency that such right might become valueless in consequence of the erection, under competent authority, of structures on the submerged lands in front of his property for the purpose of improving navigation.

Scranton v. Wheeler, 179 U.S. 141, 163-64 (1900). Thus, "[l]ands below [the high-water mark] are subject *always* to a dominant servitude in the interests of navigation and its exercise calls for no compensation." *United States v. Willow River Power Co.*, 324 U.S. 499, 509 (1945) (emphasis added); *see also United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950) ("When the Government exercises [the navigational] servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone.").

In sum, New Jersey's past actions to establish pierhead and bulkhead lines and to make grants of riparian lands subject to the proviso that navigation not be impeded, therefore, only involve exercises of riparian jurisdiction that serve to *define* the riparian proprietor's right to wharf out. Those actions do not establish a broad authority to regulate activities on piers and thus provide no support for New Jersey's assertion of "exclusive" jurisdiction over wharfing activities.

B. "Riparian Jurisdiction" Does Not Confer "Exclusive Jurisdiction" Over All Activities On A Wharf

States have always been able to exercise their general police powers in ways that limit private riparian rights to protect the countervailing rights of the public. As New Jersey notes, this Court has long held that the police power of a State "rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another," and the State may use it "to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals." *Northwestern Fertilizing Co. v. Village of Hyde Park*, 97 U.S. 659, 667 (1878) (internal quotation marks omitted); *see* NJ Br. 30. Thus, the private "rights of a riparian proprietor" are always "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* DE Br. 49-51.

New Jersey contends that, because those limitations on riparian rights were well-established, "riparian jurisdiction" should be interpreted to include not only jurisdiction to establish the private rights of riparian owners, but also to use the police power to limit those rights to protect the public. Its arguments have no merit.

1. New Jersey's arguments rest on adding words like "exclusive" to Article VII

New Jersey's various formulations of the term "riparian jurisdiction" rest on adding words (like "exclusive") not found in Article VII: "exclusive State jurisdiction" (Br. 3, 17, 41, 44), "exclusive authority" (Br. 17) "full jurisdiction" (Br. 24), "exclusive riparian jurisdiction" (Br. 25, 35), "full riparian jurisdiction" (Br. 35, 36), "the exclusive right of New Jersey to regulate" (Br. 36), "comprehensive jurisdiction" (Br. 1, 26), "comprehensive authority to regulate all aspects of riparian activities" (Br. 31), and "jurisdiction to regulate all aspects of riparian improvements appurtenant to its shores, free from interference by Delaware" (Br. 2). And, in its most expansive gambit, New Jersey claims that it has "exclusive State jurisdiction over the construction and use of improvements that extend from its shoreline into the Delaware River, within the Twelve-Mile Circle." Br. 3.

The omission of the word "exclusive" from Article VII's treatment of riparian rights is controlling. Elsewhere in the Compact the drafters *did* use the word "exclusive," and they did so when they wanted to confer such authority on the States. *See* Article IV (providing 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.)[37] If the drafters intended to declare that New Jersey "shall have and exercise exclusive jurisdiction" over wharves, then they would have used that phrase in Article VII, as they did in Article IV.

Indeed, New Jersey had prior drafting experience in its 1834 Compact with New York that gave New York "exclusive jurisdiction" over the waters while giving New Jersey "exclusive jurisdiction" over wharves (subject only to New York's health and quarantine laws). *See supra* pp. 2-3; DE App. 887 (Article 3(2)). New Jersey thus took care to ensure that the 1834 Compact established its "exclusive jurisdiction" over wharves, whereas the very different language in the 1905 Compact with Delaware speaks only of "riparian jurisdiction" without any mention of one State's exclusive authority at the expense of the other with respect to wharves. Thus, nowhere in the Compact does Delaware convey to New Jersey "exclusive" jurisdiction over all aspects of structures extending from New Jersey into Delaware, as New York conferred to New Jersey in the 1834 Compact. New Jersey's interpretation of Article VII would functionally rewrite the Compact by borrowing from another article the specific language that it needs to give New Jersey "exclusive jurisdiction" (Article IV) over *all* aspects of wharves (not just riparian jurisdiction).[38]

2. New Jersey confuses "jurisdiction" with "sovereignty"

To interpret "riparian jurisdiction" to mean exclusive jurisdiction over *all* aspects of wharves functionally (and implausibly) transforms the term "jurisdiction" to mean "sovereignty." *See* NJ Br. 24-25 (asserting that Article VII gave New Jersey "State sovereignty over riparian improvements" and "riparian sovereignty"). Article VIII, however, expressly reserved all questions

[37] Articles I and II also refer to a "vessel being under the exclusive jurisdiction of that State."

[38] Unlike the unprecedented phrase "riparian jurisdiction," the phrase "exclusive jurisdiction" was commonly used in judicial opinions in the 19th century. A search on Westlaw shows 123 occurrences of that term through 1905 in New Jersey cases (several of which discuss the 1834 Compact), 38 occurrences in Delaware cases, and 387 occurrences in this Court's cases. But there is not a single occurrence before 1905 of the phrase "riparian jurisdiction" in the jurisprudence of this Court, New Jersey, or Delaware. Plainly, "riparian" was used to limit the term "jurisdiction" in Article VII.

of territory – and therefore sovereignty – over the lands in the disputed territory between the middle of the river and the low-water mark on the New Jersey shore: "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." New Jersey's assertion that sovereignty is the result of a jurisdictional carve-out over another State's territory therefore goes against the plain text of the 1905 Compact, as well as the prevailing rule that "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); *see also Stevens v. Paterson & Newark R.R. Co.*, 34 N.J.L. 532, 1870 WL 5140, at *10 (N.J. 1870) ("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.").

New Jersey's claim that a jurisdictional carve-out connotes full sovereignty is also contrary to this Court's construction of the 1834 Compact. The Court held that the 1834 Compact's designation of the boundary as the middle of the Hudson River in Article 1 governed sovereignty by New Jersey over the western half of the Hudson River, and the Article 3 provision that "New York shall have and enjoy exclusive jurisdiction . . . of and over all the waters of [the] Hudson river . . . to the low water-mark on the westerly or New Jersey side thereof" meant "something less" than sovereignty. *Central R.R.*, 209 U.S. at 479 ("[T]he purpose [of Article 3] was to promote the interests of commerce and navigation, not to take back the sovereignty that otherwise was the consequence of article 1. . . . [T]he often-expressed purpose of the appointment of the commissioner and of the agreement to settle the territorial limits and jurisdiction must mean, by territorial limits, sovereignty, and by jurisdiction something less."). The same analysis applies here to the 1905 Compact. Although the commissioners were unable to agree on the territorial

boundary, they plainly reserved each State's sovereign claims in Article VIII and provided for something less whenever they used the word "jurisdiction." Contrary to the words used by New Jersey, the 1905 Compact did not give New Jersey "State sovereignty over riparian improvements." NJ Br. 24.

C. Concurrent Or Dual Jurisdiction Over Wharves Is Both Administrable And Rooted In The Historical Relations Of The Two States

New Jersey suggests that it would be impractical not to grant it exclusive jurisdiction over wharves extending into Delaware: "It is impossible to exercise 'riparian jurisdiction of every kind and nature' without the ability to identify the allowable size of riparian improvements, where they may be located, and the manner in which they may be constructed and used." NJ Br. 31. New Jersey also relies again on its false premise that giving it exclusive jurisdiction "is necessary in order to effectuate the stated purpose of the Compact to achieve a 'final adjustment' of the disputes between New Jersey and Delaware that can be 'binding in perpetuity.'" *Id.* at 32 (quoting Preamble ¶ 4). As discussed, the Compact did not achieve a final adjustment of all issues referenced in that document. *See supra* p. 20. And concurrent jurisdiction over structures and activities in the river has been far more the rule than the exception in the relations between the two States.

First, the 1905 Compact itself provides for concurrent jurisdiction over fishing in the river. Article IV directs the States to draft "concurrent legislation," and Article V continued in force each State's then-current laws until concurrent legislation could be drafted. Thus, there is no reason to suppose that the drafters meant to give New Jersey "exclusive jurisdiction" over all aspects of and activities on a wharf – especially given that the precedential 1834 New Jersey-New York Compact did use such language. Articles I and II of the 1905 Compact (with certain exceptions) also permitted each State to exercise concurrent jurisdiction throughout the river to serve process.

Second, New Jersey's previously executed compacts with both New York and Pennsylvania established rules whereby each State had jurisdiction over certain subjects within the same territory. Thus, as previously explained, in the 1834 Compact, New Jersey got exclusive jurisdiction over wharves and vessels fastened thereto with the exception that New York's health and quarantine laws would apply. And New Jersey's 1783 Compact with Pennsylvania provided "[t]hat each state shall enjoy and exercise a concurrent jurisdiction within and upon the water, and not upon the dry land, between the shores of said river." DE App. 4403 (Art. II); *see supra* p. 2.

Third, New Jersey agreed in 1989 that the DCZA fully applies to DRBA-established, boundary-straddling public wharves associated with river crossings between the States. *See supra* pp. 12-13. If New Jersey then thought that the 1905 Compact precluded Delaware's authority, it is hard to understand why it would agree to such a provision in an interstate compact. In any event, that recent legislative action both is consistent with New Jersey's long history of acknowledging Delaware's authority and makes clear that Delaware's environmental, police regulation of activities on wharves extending from New Jersey does no violence to administrability or common sense and, unlike New Jersey's position, is consistent with the history of the States' cooperation.

Fourth, it is black-letter law that structures crossing the river such as bridges, tunnels, and ferries, pipelines, and submarine cables must satisfy the laws of both States, so States work together frequently to authorize such structures for the benefit of both States.[39]

Fifth, New Jersey represented to this Court in *New Jersey v. New York* that concurrent jurisdiction over a building divided by the State boundary presented no problems of any practical concern. *See supra* pp. 4-5. New Jersey can hardly assert a different position where wharves are

[39] *See, e.g.*, DE Br. 25 (citing *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 622 (1899)); *Bridge over Delaware River v. Trenton City Bridge Co.*, 13 N.J. Eq. 46, 1860 WL 5184, at *3 (N.J. Ch. 1860); *Lehigh Valley R.R. Co. v. Mutchler*, 13 Vroom 461, 1880 WL 7765, at *2 (N.J. Sup. Ct. 1880); NJ Br. 45 n.24.

concerned. Indeed, New Jersey also pointed to other examples of multi-state cooperation, including since 1921 "through the Port Authority of New York and New Jersey" and since 1961 through "the Delaware River Basin Commission," of which Delaware is also a member. DE App. 4416; *see also* www.state.nj.us/drbc/ (Delaware River Basin Commission website listing members).

Sixth, this Court held that federal and State governments have concurrent jurisdiction over wharves.[40] The Court interpreted the Rivers and Harbors Appropriation Act of 1899 to permit the States to retain their power to authorize wharves, but also to confer federal authority to establish different bulkhead lines and thereby to veto certain wharves otherwise lawful under state law.

Even if New Jersey's riparian jurisdiction somehow extended beyond its boundary, it 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.[41] But Delaware would have the authority, where necessary, to exercise its general police power. That power is independent of the property holders' riparian rights, because it entails the protection of public

[40] *See Cummings v. City of Chicago*, 188 U.S. 410, 428-30 (1903) ("When [the state's] power is exercised so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the state and that of the Federal government come in conflict, the latter must control and the former yield."); Sax Rep. ¶ 26 (discussing *Cummings*); *see also Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) ("In the exercise of that [police] power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government.").

[41] *See, e.g.*, *Keyport & Middletown Point Steamboat Co. v. Farmers Transp. Co.*, 18 N.J. Eq. 13, 1866 WL 88, at *5 (N.J. Ch. 1866) (holding that wharf owner has 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."); *Castigan v. Pennsylvania Ry. 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."); *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.").

rights in the Delaware River, in this case through coastal zone laws that greatly reduce the risk of harm to the river and people nearby. *See 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.").[42]

III. NEW JERSEY'S ASSERTION OF JUDICIAL ESTOPPEL HAS NO MERIT

New Jersey claims that Delaware should be judicially estopped from regulating boundary-straddling projects based on statements by its counsel in *New Jersey v. Delaware II*. NJ Br. 35. New Jersey misreads the four statements it identifies (two to the Court, and two to the Special Master), and, in any case, neither the Court nor the Special Master relied on New Jersey's reading.

This Court applies the following factors to a claim of judicial estoppel:

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little risk to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001) (citations and internal quotation marks omitted). None of those factors favors New Jersey's assertion of judicial estoppel.

A. The Statements To The Court Cannot Support Judicial Estoppel

1. The statements to the Court are not "clearly inconsistent"

New Jersey relies on two passages from Delaware's reply brief on exceptions to the Special Master's report in *New Jersey v. Delaware II*. *See* NJ Br. 36-37. Neither refers to *New Jersey's* authority to exercise riparian jurisdiction; both concern *private parties*' right to wharf out:

[42] Delaware takes no position in this litigation on New Jersey's assertion (NJ Br. 38-40) that the 1905 Compact was not rendered unenforceable by the States' failure to adopt the uniform fishing laws that were the centerpiece of the Compact's resolution of the fishing dispute at issue in *New Jersey v. Delaware I*.

- "It should be further noted that the State of Delaware has never questioned the *right of citizens of New Jersey* to wharf out to navigable water nor can such a right be questioned now because it is clearly protected by the Compact of 1905 between the States." DE App. 2215 (emphasis added); NJ App. 139a.

- "The effect of Article VII of the Compact . . . was that the State of Delaware recognized the rights of *the inhabitants* on the east side of the river to wharf out to navigable water. This right had never been questioned and was undoubtedly inserted to put beyond question the *riparian rights* (as distinguished from *title*) of land owners in New Jersey." DE App. 2223 (first emphasis added); NJ App. 141a.

Neither statement addresses New Jersey's authority at all, much less says it would be "exclusive." They merely accept that riparian landowners may wharf out and that the 1905 Compact acknowledges those private property rights. Both statements are perfectly consistent with Delaware's position here. New Jersey erroneously asserts (at 37) that Delaware told the Court that *New Jersey* could regulate the riparian rights of those wharfing out from New Jersey.

A third statement (not mentioned by New Jersey here) further undermines New Jersey's position by making clear that Delaware was *not* conceding New Jersey's regulatory rights: " 'Even if the Compact of 1905 be construed as ceding to the State of New Jersey *the right to determine* to whom riparian rights (i.e., wharf rights appurtenant to riparian lands) shall be granted, it would still not affect the boundary between the States in any conceivable way.' " DE App. 2224 (underlined emphasis added). That argument in the alternative made clear that Delaware conceded nothing about any New Jersey authority (or whether it might be exclusive or concurrent with Delaware's), and New Jersey's failure to mention that statement in its brief is telling.[43] *Cf.* Fed. R. Civ. P. 8(e)(2) ("A party may set forth two or more statements of a claim or defense alternately or hypothetically . . . . A party may also state as many separate claims or defenses as the party has regardless of consistency[.]").

[43] New Jersey, however, had relied on the "even if" passage in its initial briefing, which Delaware fully rebutted. *See* NJ Reopen Br. 30; DE Reopen Opp. 69.

2. The Court did not rely on the statements highlighted by New Jersey

The Court did not read those statements as conceding *any* jurisdiction to New Jersey. New Jersey claims that "the Court accepted Delaware's argument, as [it] determined that the boundary within the Twelve-Mile circle be established at the mean low-water mark on the New Jersey shore," Br. 37, but it cites only the Court's conclusion that, "[w]ithin the twelve-mile circle, the river and the subaqueous soil thereof up to low water mark on the easterly or New Jersey side will be adjudged to belong to the state of Delaware, subject to the Compact of 1905." *New Jersey v. Delaware II*, 291 U.S. at 385. That sentence does not suggest that the Court understood Delaware to concede that the Compact gave New Jersey regulatory rights in the disputed territory.

The Court's opinion makes clear that it did not understand or rely on Delaware's statements to mean that New Jersey had the right (exclusive or otherwise) to regulate the riparian rights of those wharfing out from New Jersey into Delaware – an argument that Delaware never made to the Court to begin with. The Court rejected in one short paragraph New Jersey's assertion that "by this compact the [boundary] controversy was set at rest and the claim of Delaware abandoned." *Id.* at 377. The Court held that "[i]t is an argument wholly without force. The compact of 1905 provides for the enjoyment of riparian rights, for concurrent jurisdiction in respect of civil and criminal process, and for concurrent rights of fishery. Beyond that it does not go." *Id.* at 377-78. In mentioning "the enjoyment of riparian rights," the Court in no way interpreted the scope of Article VII and thus did not hold that it gave New Jersey any authority to regulate those rights within the territory claimed by Delaware. Indeed, as New Jersey's Attorney General and lead counsel in the case informed a New Jersey Senator three months after the decision was issued, "*[t]he court did not undertake to construe the compact* but contented itself of deciding the boundary subject to that compact." DE App. 2098 (emphasis added).

New Jersey also omits the context in which Delaware counsel's statements were made. Delaware observed that New Jersey's opening brief had claimed "that the use of the subaqueous soil of the river by the citizens of New Jersey for the purpose of erecting wharves giving them access to the river is a use of the soil inconsistent with the title of the State of Delaware." *Id.* at 2212. Delaware responded that, under common law, a riparian landowner's right to wharf out

> is not based on any theory of title to the foreshore [*i.e.*, the area between high- and low-water marks] or to the subaqueous soil of the river. It is a right which is in the nature of a burden upon the ownership of the foreshore and subaqueous soil. It is a right which is recognized at least as fully, if not more fully, by the laws of the State of Delaware. *The holder of such a right does not hold it adversely to the State as the owner of the subaqueous soil but in effect derives it from the State*.
>
> It follows, therefore, that the existence of this right and its use by the erection of a wharf is not an act which is hostile to the State as owner and can not be made the foundation for a claim of adverse possession. . . .
>
> . . . [T]he recognition of such riparian rights in colonial times never had the effect of passing *title to the soil* to the riparian owner. *Much less did it have the effect of vesting title in the province of New Jersey to the bed of the river east of the main ship channel*. . . .
>
> Plaintiff is here seeking to establish *title* to the subaqueous soil of the Delaware River east of the main ship channel. Such title can not be established by pointing to the exercise of riparian rights by the inhabitants of the Province of New Jersey. Even if it could be argued that the riparian owner acquired title by adverse possession to the subaqueous soil underneath the wharf erected by him, such adverse possession would not inure to the benefit of New Jersey and would not shift the boundary line between the States.[44]

Delaware counsel's statements to the Court did not concede that New Jersey had any authority to regulate wharves extending into Delaware. He merely pointed out that a riparian landowner's exercise of the riparian right to wharf out was not adverse to the State's ownership of the subaqueous soil on which those wharves were erected, and that the 1905 Compact was consistent with that longstanding legal principle. Indeed, the Court agreed with Delaware that, "[f]rom ac-

[44] DE App. 2213-14; *see also id.* at 2223-25. New Jersey also relies on Delaware's Answer, but the cited pages do not even mention the Compact. *See* NJ Br. 37 (citing DE App. 234-35).

quiescence 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." 291 U.S. at 375-76. Delaware's counsel thus made no statements that could even arguably be read as conceding *any* New Jersey authority over wharves extending past the Delaware boundary, and the Court did not so hold.

3. There is no "unfair advantage"

The third element of judicial estoppel is not satisfied either. Whether New Jersey or Delaware (or both) had authority to regulate the riparian rights of wharfers out from the New Jersey shore had no bearing on the prescription issue before the Court. Delaware had no need to show that New Jersey rather than Delaware had the authority to regulate the riparian rights of landowners. As Delaware argued, it was well-established that wharfing out pursuant to applicable law (whether Delaware's common law or New Jersey statutory grant laws) was never done adversely to the State's title to submerged lands. *See* DE App. 2213-14.[45]

B. The Statements To The Special Master Cannot Support Judicial Estoppel

New Jersey also relies on two statements made by Delaware's counsel to the Special Master and purportedly relied on in his report. The Special Master, however, "can only recommend, not decide." Robert L. Stern *et al*., *Supreme Court Practice* 562 (8th ed. 2002). "The Court itself determines all critical motions and grants or denies the ultimate relief sought." *Id.* at 577; *see* Order Appointing Special Master, No. 134, Orig. (Jan. 23, 2006) ("The Special Master is directed to submit Reports as he may deem appropriate."). Judicial estoppel is therefore inapplicable because

[45] Indeed, the Court's rejection of New Jersey's motion to reopen No. 11, Original, and its direction to treat it as a new complaint, strongly suggest that the Court found no merit in New Jersey's prior effort to treat representations made in No. 11, Original, as dispositive here. *Cf.* Order on New Jersey's Motion to Strike at 2, No. 134, Orig. (June 13, 2006) ("[b]y granting New Jersey leave to file its Bill of Complaint, the Court has already – at least implicitly – determined that New Jersey is a real party in interest").

Delaware could not have obtained any relief from the Special Master's recommendations to this Court. *See, e.g.*, *New Hampshire v. Maine*, 532 U.S. at 750 (requiring that a "*court* . . . accept that party's earlier position") (emphasis added).[46] Even if the doctrine could be applied based on non-binding recommendations in a special master's report, it would still be inappropriate here.

1. The statements to the Special Master are not "clearly inconsistent"

New Jersey's 1929 Complaint based its claim of jurisdiction by prescription on its acts of dominion in the eastern half of the Delaware River, not on the terms of the 1905 Compact, which the Complaint mentioned only to emphasize that the Compact had not resolved the boundary. *See* DE App. 210-11. Delaware's Answer likewise cited the Compact only to acknowledge that it did not resolve the boundary dispute. *See id.* at 232-33. Of the nearly 1,000 exhibits offered into evidence, only two appear to have concerned the Compact, and they merely set out certain of the legislative actions taken by the respective States in appointing commissioners and adopting it. *See id.* at 4456-4511 (list of exhibits from *New Jersey v. Delaware II*); *id.* at 811-56, 863-84 (reproducing Plaintiffs' Exs. 161 and 162). The voluminous evidentiary production in that case focused on the 1682 deed to William Penn from the Duke of York and hundreds of related documents created over the following two centuries, many of which were even then ancient documents and/or had to be obtained in England at great cost of time and expense by the parties.

On August 15, 1932, New Jersey filed its 749-page opening brief before the special master, asserting for the first time that the Compact confirmed New Jersey's claim to the bed of the river east of the ship channel. *See id.* at 4527. In its reply brief filed approximately four weeks later in conjunction with the hearing on September 12, 1932, Delaware noted:

[46] Judicial estoppel has been found by lower courts on the basis of administrative decisions in which a party prevailed on an argument later contradicted in a judicial proceeding. But, unlike special masters directed by this Court to make a report and recommendations, administrative agencies typically have the power to grant binding relief to a party.

> It may be safely said that this contention is one that did not occur to Plaintiff's counsel until after the suit was filed. The Bill of Complaint in this case . . . sets forth with great particularity the source of Plaintiff's claim of title to the eastern half of the Delaware River and nowhere mentions the Compact of 1905 as the source of that claim. . . . It is safe to say that the contention made in Plaintiff's brief in this case is the first time that the idea has ever been advanced that the Compact of 1905 settled the boundary dispute within the twelve-mile circle.

Id. at 4536-37. Addressing New Jersey's claim of prescription at the hearing, Delaware's counsel argued that the actions of those wharfing out from the New Jersey shore could in no way divest Delaware of its title to all of the subaqueous soil to low-water mark on the New Jersey shore. *See id.* at 4588-89. Counsel further stated that "[w]e say moreover that the Compact of 1905 expressly acknowledged the rights of the citizens of New Jersey, at least, by implication to wharf out." *Id.* at 4589; *see* NJ Br. 36 (quoting same passage at NJ App. 126a-1). He added that "*in my view* the Compact of 1905 ceded to the State of New Jersey all the right to control the erection of those wharves and to say who shall erect them, and it was a very sensible thing to do." DE App. 4589 (emphasis added); *see also* NJ Br. 36 (quoting NJ App. 123a (DE Reply Brief before Special Master) (Article VII merely recognizes "the rights of the riparian owners of New Jersey and a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights.")).

Both the reference to "in my view" and the fact that New Jersey's argument was raised after the presentation of evidence explain the tentative statement. And that was the end of the matter: Delaware made no statements to the Court concerning New Jersey's authority to regulate riparian rights. Given this Court's cases holding that States cannot confer property rights outside their boundaries, *see Coffee*, 123 U.S. at 9-10, 27-30, Southerland's statements could at most be taken to mean that riparian rights granted by New Jersey would be grandfathered, but not to confer rights *after* the boundary question was resolved. There is nothing "clearly inconsistent" with Delaware's position that New Jersey today lacks jurisdiction over wharves on Delaware lands.

Moreover, Delaware counsel's statements did *not* suggest that New Jersey had *exclusive* authority over all aspects of wharves. They concerned only regulating "the erection of those wharves and to say who shall erect them" and thus did not go into areas of non-riparian jurisdiction. *See* DE Br. 49-54; Sax Rep. ¶¶ 13-15, 23-25. Indeed, immediately after the Court's decision in *New Jersey v. Delaware II*, Delaware's counsel exchanged letters with New Jersey's Attorney General asserting the right by Delaware to tax those wharves, which further undermines any claim by New Jersey that counsel's statements to the Special Master conceded the "exclusive" jurisdiction over all aspects of wharves that New Jersey claims. *See* DE Br. 15; DE App. 2098.

2. The Special Master did not rely on New Jersey's reading

Nor did the Special Master rely on the reading New Jersey now suggests. Just as the Court subsequently did, the Special Master considered only the effect of the wharves built by *private landowners* and said nothing about whether the Compact gave *New Jersey or Delaware* the right to regulate landowners' riparian rights. The Special Master's report thus found that "[t]he number of grants and improvements thereunder made upon the plaintiff's shore [i.e., New Jersey] were few, . . . and in no view of the matter could the exercise of riparian rights change the title to the river or affect the boundary between the plaintiff and the defendant." NJ App. 129a-130a. It then quoted Articles VII and VIII and concluded that "[u]nder this Compact clearly all improvements made by riparian owners upon the shore of either State are protected, and any decree fixing the boundary between the plaintiff and the defendant must so provide." *Id.* at 130a. New Jersey points to the Special Master's proposed finding of fact No. 23 (*see* NJ Br. 37, citing NJ App. 131a), but that finding states only that "[b]y the Compact of 1905 . . . Delaware recognized the rights of riparian owners to wharf out." NJ App. 131a.[47] Nothing in the report addresses which

[47] In full, it reads: "By the Compact of 1905 between the States of New Jersey and Delaware the State of Delaware recognized the rights of riparian owners to wharf out on the easterly side of the Delaware

State has authority to regulate those "improvements made by riparian owners," much less adopts New Jersey's reading.[48] New Jersey's judicial estoppel claim must therefore be rejected.

IV. NEW JERSEY'S CLAIM OF PRESCRIPTION AND ACQUIESCENCE FAILS

New Jersey asserts that, even if the 1905 Compact does not award it "exclusive state jurisdiction to regulate riparian improvements emanating from the New Jersey shore into the Twelve-Mile Circle and to make riparian grants associated with such improvements," then it "would have obtained them through prescription and acquiescence." NJ Br. 41. It acknowledges, however, that "no case has held that prescription can alter a federally-approved compact," presumably because doing so "would amount to one state unilaterally altering a federal law." *Id.* at 40 n.23.

In any case, New Jersey's claims fail. If applicable, the doctrine would require New Jersey "to 'show by a preponderance of the evidence . . . a long and continuous possession of, and assertion of sovereignty over,' " the riparian lands claimed, "as well as [Delaware's] acquiescence in those acts of possession and jurisdiction." *New Jersey v. New York*, 523 U.S. at 786-87 (quoting *Illinois v. Kentucky*, 500 U.S. 380, 384 (1991)) (ellipsis in original). The rationale for prescription is "stability of order," *Arkansas v. Tennessee*, 310 U.S. 563, 570 (1940), as it is "[f]or the security of rights . . . [that] long possession under a claim of title is protected," *Rhode Island v. Massachusetts*, 45 U.S. (4 How.) 591, 639 (1846).[49] This Court has stressed that possession under a claim of right must be "uninterrupted," *Indiana v. Kentucky*, 136 U.S. at 511-12 (citation omitted), and rejected a prescription claim where Kentucky had recently acknowledged the validity of the very

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River within the twelve-mile circle. By said Compact the State of Delaware did not convey to the State of New Jersey title to any part of the Delaware River or to any part of the subaqueous soil thereof, and said Compact did not in anywise alter or affect the boundaries of the respective states." NJ App. 131a.

[48] For the reasons stated above, there is also no unfair advantage here. *See supra* p. 50.

[49] " 'The tranquility of the people, the safety of states, the happiness of the human race, do not allow that the possessions, empire, and other rights of nations should remain uncertain, subject to dispute, and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title." *Indiana v. Kentucky*, 136 U.S. 479, 511 (1890) (quoting 2 Emmerich de Vattel, *Law of Nations* Ch. 11, § 149 (1758)).

boundary it was seeking to change by prescription, *see Illinois v. Kentucky*, 500 U.S. at 386-87 ("we are concerned not only with what [a State's] officers have done, but with what they have said, as well"); *Ohio v. Kentucky*, 444 U.S. 335, 340-41 (1980) ("it is of no little interest that Kentucky sources themselves, in recent years, have made reference to the . . . [challenged] boundary").

Acceptance of New Jersey's claim would undermine the "stability of order" rationale on which prescription is based. New Jersey expressly concedes that any prescriptive acts on its part ended at least as of the 1970s, when New Jersey itself "attempted cooperation on review of projects extending from the New Jersey shore beyond the low-water mark" and repeatedly acknowledged Delaware's authority over boundary-straddling projects in numerous CMP and permit documents. NJ Br. 45; *see also id.* at 21-23 ("New Jersey's Efforts to Cooperate With Delaware"); *supra* pp. 5-17; *infra* pp. 57-60.[50] To sanction New Jersey's equivocal claims would not protect any rights that are now settled, so the doctrine of prescription has no application.

Even if New Jersey's prescription claim matured irrevocably by 1971 (and it could not[51]), it would fail. New Jersey seeks to rely on the 117-year period from 1854 to 1971 – specifically eight riparian grants between 1854 and 1905, and 29 riparian grants[52] between 1905 and 1971.

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[50] Delaware is aware of no case in which this Court has sustained such a claim of prescription and acquiescence in which the claim of right has not run continuously up to the time of suit. *See, e.g.*, *Arkansas v. Tennessee*, 310 U.S. at 567 ("1826 to the time of the bringing of the present suit"); *Rhode Island v. Massachusetts*, 45 U.S. (4 How.) at 638 ("More than two centuries" of "possession has ever since been steadily maintained"); *Indiana v. Kentucky*, 136 U.S. at 509-10; *Michigan v. Wisconsin*, 270 U.S. 295, 306 (1926); *Massachusetts v. New York*, 271 U.S. at 95; *Georgia v. South Carolina*, 497 U.S. 376, 391-92 (1990).

[51] In *New Jersey v. New York*, this Court entertained New York's (factually unsuccessful) claim that its "prescriptive acts ripened into sovereignty" between "1890 and 1954," although New York conceded New Jersey's subsequent non-acquiescence. 523 U.S. at 789. But nothing in the Court's opinion suggests that New York then acknowledged New Jersey's authority over the lands claimed to have been taken by adverse possession, in contrast to New Jersey's numerous express concessions over the last three decades.

[52] New Jersey's brief (at 42) refers to 33 riparian grants or leases from 1905 through the present day, but four of those conveyances occurred after 1971, the date on which New Jersey ends its claim of prescription. *See* NJ Reopen App. 49a-51a (Castagna Aff. ¶ 8(41)-(44)) (post-1971 acts); *see also* NJ Br. 42 (relying on New Jersey's "Statement of Facts at G and H," which largely catalog New Jersey's post-1971 actions). Delaware cites the Castagna Affidavit in New Jersey's Reopen Appendix because the version re-

See NJ Br. 41-42. In 1934, however, this Court specifically rejected New Jersey's prescription and acquiescence claim based on those very same grants through 1934. The Court found no reason to expect Delaware to complain about the then-existing wharves built from the New Jersey shore into Delaware given Delaware's "liberal" common-law of wharfing out. 291 U.S. at 375 (citing Delaware cases). Accordingly, "[f]rom 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." *Id.* at 375-76. The Court held that Delaware's non-interference with those wharves could not evince acquiescence in New Jersey's title claim because the "privilege or license was accorded to the owners individually and even as to them was bounded by the lines of their possession." *Id.* at 376. Thus, "[a]cquiescence is not compatible with a century of conflict. . . . If a record such as this makes out a title by acquiescence, one is somewhat at a loss to know how protest would be shown." *Id.* at 377.

This Court has relied on that discussion from *New Jersey v. Delaware II* to explain that "[i]naction, in and of itself, is of no great importance; what is legally significant is silence in the face of circumstances that warrant a response." *Georgia v. South Carolina*, 497 U.S. at 389 (citing 291 U.S. at 376-77). Given that the boundary within the twelve-mile circle was consistently disputed by the parties until the Court ruled in Delaware's favor in 1934, any grants up to that time could have turned out to be in New Jersey or Delaware. In any case, New Jersey identifies no evidence that the few structures erected violated Delaware law and offers no reason to treat "riparian jurisdiction" by "prescription" any differently. New Jersey's claim today therefore fails for the same reasons this Court unanimously rejected the variation on it in 1934.

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produced in its summary judgment appendix contains a numbering error in paragraph 8. *See* NJ App. 378a (containing two subparagraphs 22). In addition, Delaware's Herr Affidavit discusses Castagna's affidavit (as well as his expert report) and refers to the original, non-duplicative, subparagraph numbers in that affidavit. *See* DE App. 4328-37 (Herr Aff.).

The 36-year 1935-1971 period concededly is "wholly insufficient to establish jurisdiction by prescription and acquiescence." NJ Br. 45.[53] And Delaware applied its first subaqueous lands statute (enacted in 1961) to projects extending from New Jersey as early as 1962, which shortens the period further. *See id.* at 45 n.24; DE Br. 21 (pipelines). In any event, New Jersey identifies only five grants issued between 1934 and 1971, *see* NJ Reopen App. 47a-49a (Castagna Aff. ¶ 8(36)-(40)), only two of which arguably contained a structure during that time period, *see* NJ App. 1205a-1206a (Castagna Rep. ¶¶ 18-21[54]). New Jersey's prescription claim must fail.

V. NEW JERSEY'S COURSE OF PERFORMANCE SHOWS THAT IT HAS READ THE 1905 COMPACT TO GIVE DELAWARE JURISDICTION OVER PROJECTS EXTENDING INTO DELAWARE

Before and after the 1905 Compact, Delaware regulated wharfing rights throughout the State (including but not limited to wharves within the twelve-mile circle) through judge-made common law. Delaware did not lease or grant submerged lands until the 1960s, when it enacted its first statutes affecting riparian activities. After grandfathering structures and uses initiated before 1969, Delaware regulated every boundary-straddling structure emanating from New Jersey. *See* DE Br. 15-21, 45-46. Starting in 1972, New Jersey repeatedly conceded Delaware's regula-

[53] New Jersey's reliance (Br. 18, 43) on *State v. Federanko*, 139 A.2d 30 (N.J. 1958), is misplaced because that court simply purported to apply Article I of the Compact concerning "a sharing of the criminal jurisdiction over the river" and did not interpret (or even cite) Article VII. *Id*. at 33; *see Virginia v. Maryland*, 540 U.S. at 76 ("exercise[s of] exclusive criminal jurisdiction" by Maryland "ha[ve] little or no bearing on the narrower question whether Virginia acquiesced in Maryland's efforts to regulate her right to construct the improvements in the first instance and to withdraw water from the River"). Similarly, New Jersey's reliance on advice "recommended" by outside counsel to the Delaware Highway Department, NJ Br. 43, who purportedly "concurred" in the advice given him by a DuPont lawyer, *id.* at 18, is immaterial, especially in view of the assertions of jurisdiction over boundary-straddling projects made shortly thereafter by the Delaware legislature and DNREC, as next discussed. Finally, the issue of whether property taxes could lawfully be levied by New Jersey has been disputed by the parties since just after the 1934 boundary decision – as New Jersey admits. *See* NJ Br. 43-44; DE Br. 15; *New Jersey v. Delaware II*, 291 U.S. at 377 ("Acquiescence is not compatible with a century of conflict.").

[54] The Keystone structure discussed in the context of a 1957 grant to Sun Oil was not built until 1992 and was regulated by Delaware, as stated in the Castagna Report (¶ 19 (NJ App. 1205a)). The 1960 and 1967 grants to Dupont (Castagna Rep. ¶¶ 20-21 (NJ App. 1205a-1206a)) contain not two structures but one. *See* DE App. 4332 (Herr Aff. ¶ 25(c)).

tory authority over those projects. Thus, New Jersey's actions confirm its lack of exclusive jurisdiction over wharves extending from its shores into Delaware. *See supra* pp. 5-18.

In 1972, Delaware denied permission to El Paso for its proposed LNG facility, which was similar to the Crown Landing facility. The NJDEP Commissioner acknowledged that Delaware had the authority to regulate boundary-straddling LNG facilities by failing to object to Delaware's assertion of jurisdiction and, indeed, offering to share information with Delaware when NJDEP received applications for boundary-straddling projects. *See supra* pp. 5-6.[55]

New Jersey's CMP documents then painstakingly analyzed the New Jersey-Delaware boundary, concluding in 1978 and confirming in both 1979 and 1980 that Delaware may regulate or fully prohibit boundary-straddling projects that would otherwise satisfy New Jersey laws. *See supra* pp. 6-12. New Jersey reached those conclusions in the process of consulting with its Attorney General regarding its boundary with Delaware. *See supra* pp. 8-10. New Jersey also concurred with Delaware's Attorney General that the DCZA applies to boundary-straddling projects. *See supra* p. 8. And it squarely rejected the opposition of Salem County to the CMP requirement "that any project in the area must be consistent with both Delaware's and New Jersey's coastal programs and obtain permits from two states." DE App. 3135 (NJ 1980 CMP). After formally requesting its Attorney General's advice on the boundary issues, New Jersey advised Salem County that "[t]his disagreement is noted, but [NJDEP] has found no other solution available by administrative action to address the peculiar N.J.-Delaware boundary in Salem County, where the Delaware State line reaches to low tide on the New Jersey shore." *Id.* New Jersey also acknowledged Delaware's authority in a 1989 amendment to the 1961 Compact. *See supra* pp. 12-13.

[55] New Jersey erroneously claims significance from the El Paso ruling being a status decision rather than a "formal application." NJ Br. 19. Status decisions are fully binding and merely provide an expedited means for a necessary ruling. *See* DE Br. 17 & n.27. Indeed, the Crown Landing denial was a status decision, not a formal application. *See* DE App. 3793 (BP "Request for Coastal Zone Status Decision").

In the 1990s, New Jersey then initiated a three-year process, funded by federal CZMA monies, to develop and negotiate a draft MOA with Delaware to coordinate the respective States' regulatory reviews of boundary-straddling projects. *See supra* pp. 13-16. Numerous iterations of the draft MOA each provided that "[b]oth [State] agencies recognize that each agency has the independent authority to approve or deny applications pursuant to its own regulations." *Supra* p. 15. Although numerous NJDEP officials commented on those drafts, no one objected to Delaware's veto power over projects extending from New Jersey into Delaware. *See supra* pp. 15-16.

Consistent with that analysis, New Jersey has routinely recognized Delaware's regulatory authority within the twelve-mile circle. *See, e.g.*, *supra* p. 16 & n.18 (Whitney testimony acknowledging Delaware's authority). Not a single New Jersey witness in this case, including upper-level NJDEP officials, testified that they or anyone else ever understood that Delaware lacked such regulatory authority.[56] New Jersey's permits for Keystone and Fort Mott *expressly required* Delaware permits before construction could begin. DE App. 3554, 3724. The detailed analysis in the Keystone matter noted the 1905 Compact and Delaware's assertion of jurisdiction, and thus concluded that New Jersey's permit must be conditioned on issuance of the required Delaware permits. *See supra* pp. 16-17. And, while this case was pending, New Jersey itself applied to

[56] See, *e.g.*, DE App. 463-76 (Broderick testimony acknowledging that Delaware issued permits for DuPont, Keystone, and Fort Mott, Tr. 73-77, 79, 83-90, 103, 111-115, 124); *id.* at 504-17 (Castagna testimony that he has no idea about whether Delaware has authority to regulate boundary-straddling projects, Tr. 90-94, 135-36, 142); *id.* at 548, 567-73 (Dietrick testimony that Delaware has authorization to evaluate boundary-straddling projects (Tr. 35); and has regulated projects by DuPont (Tr. 111), Keystone (Tr. 120), Fort Mott (Tr. 123), Colonial Pipeline (Tr. 125-28), and Delmarva Power/Conectiv (Tr. 132-35)); *id.* at 584 (Ehinger testimony that she has no knowledge of anyone having contended that Delaware lacked regulatory authority over boundary-straddling projects, Tr. 26); *id.* at 672, 676 (McHugh testimony of New Jersey's working understanding that Delaware may regulate boundary-straddling projects and that the States would coordinate reviews, Tr. 84-85, 99-100); *id.* at 696-97, 703 (Reddy testimony that Delaware law applies to environmental spills beyond low water, and that New Jersey does not attempt to regulate any activity or have in place emergency response plans beyond its boundary, Tr. 67-68); *id.* at 717, 727-28 (Risilia testimony that, prior to this case, "[m]y understanding of the regulatory authority is limited to where the state boundaries are," Tr. 40-41, 80-83); *id.* at 761-65 (Wentzell testimony that Delaware has jurisdiction for police, fire, and emergency responses in the twelve-mile circle for piers, and that Salem County transfers emergency calls to New Castle County because the river is Delaware's jurisdiction, Tr. 46-49, 51).

Delaware for renewal of the Fort Mott permit that expires in 2007. *See supra* pp. 17-18. New Jersey's *actions* are thus inconsistent with its present litigation assertion of "exclusive" jurisdiction.

Those actions parallel Delaware's consistent assertion of authority under the 1905 Compact. With New Jersey's acquiescence, Delaware has claimed authority to veto projects that fail to meet its coastal zone regulatory requirements, as it did in its 1972 rejection of the El Paso LNG application and in requiring the numerous permits it has issued since it began regulating the environment of its coastal zone by statute. *See* DE Br. 19-21, 45-46. Just as no New Jersey witness testified to an understanding that Delaware lacked regulatory authority over boundary-straddling projects within the twelve-mile circle, Delaware witnesses uniformly testified that Delaware has repeatedly applied its coastal zone laws to those projects.[57] As this Court unanimously concluded in construing the 1834 Compact favorably for New Jersey against New York, "it would be a strange result if this court should be driven to a different conclusion from that reached by both the parties concerned." *Central R.R.*, 209 U.S. at 479.

CONCLUSION

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

[57] *See* DE App. 4325-28 (Herr Aff. ¶¶ 7-17); *id.* at 4340 (Hutchins Aff. ¶ 6) (for 32 years, Delaware police have patrolled the twelve-mile circle); *id.* at 4352-53 (Moyer Aff. ¶¶ 10-11); *id.* at 4366 (Reuther Aff. ¶ 52) (environmental incidents fall under the jurisdiction of Air and Waste Management; providing a list of environmental responses); *id.* at 4385-99 (Streets Aff. ¶¶ 17-169) (setting out numerous Delaware fire and emergency responses); *id.* at 279, 282, 283 (Blaash Tr. 24, 34, 38) (discussing Delaware patrols); *id.* at 4304-08 (Cherry Aff. ¶¶ 5-20) (DCZA submissions); *id.* at 4315 (Cooksey Aff. ¶ 14) (CZMP approvals).

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February 1, 2007

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 1st day of February 2007, counsel for the State of Delaware caused true and correct copies of (1) Delaware's Brief in Opposition to New Jersey's Motion for Summary Judgment; (2) Volume 8 of Delaware's Appendix on Cross-Motions for Summary Judgment; and (3) a courtesy CD containing Volume 8 of Delaware's appendix, to be served upon counsel for the State of New Jersey in the manner indicated below:

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