

No. 134, Original

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

STATE OF NEW JERSEY,
Plaintiff,
v.

STATE OF DELAWARE,
Defendant.

**Before the Special Master
the Hon. Ralph I. Lancaster, Jr.**

**BRIEF OF THE STATE OF NEW JERSEY
IN OPPOSITION TO DELAWARE'S MOTION FOR SUMMARY JUDGMENT**

STUART RABNER
Attorney General

RACHEL J. HOROWITZ*
BARBARA L. CONKLIN*
Deputy Attorneys General

Of Counsel
GERARD BURKE
Assistant Attorney General
JOHN R. RENELLA
Deputy Attorney General

* *Counsel of Record*

On the Brief
WILLIAM E. ANDERSEN
AMY C. DONLON
DEAN JABLONSKI
EILEEN P. KELLY
Deputy Attorneys General

Richard J. Hughes Justice
Complex
25 West Market Street
P.O. Box 112
Trenton, New Jersey 08625
(609) 984-6811

TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
RESPONSE TO DELAWARE’S STATEMENT OF FACTS	2
ARGUMENT	
I. THE COMPACT AFFORDS NEW JERSEY COMPLETE JURISDICTION OVER THE CONSTRUCTION, MAINTENANCE AND USE OF IMPROVEMENTS EXTENDING FROM ITS SHORELINE INTO THE TWELVE MILE CIRCLE..	12
A. New Jersey’s “Own Side of the River” Extends Outshore of Low Water	14
B. “Riparian Jurisdiction of Every Kind and Nature” Includes Regulatory Jurisdiction. 	18
C. “Continue to Exercise Riparian Jurisdiction of Every Kind and Nature” Refers to Ongoing Regulatory Authority	20
II. THE PLAIN MEANING OF ARTICLE VII IS CONSISTENT WITH THE REMAINDER OF THE COMPACT, THE CONTEXT IN WHICH IT WAS WRITTEN, AND THE PARTIES’ CONDUCT.	
A. The Remainder of the Compact Supports New Jersey’s Position.	21
B. The Plain Meaning of Article VII is Consistent with the States’ Performance under the Compact Following its Enactment.	24
III. ARTICLE VII’S DELEGATION OF “RIPARIAN JURISDICTION OF EVERY KIND AND NATURE” TO EACH STATE ON ITS OWN SIDE OF THE RIVER INCLUDES THE JURISDICTION TO REGULATE THOSE USES FOR THE PROTECTION OF THE PUBLIC HEALTH, SAFETY AND WELFARE, PURSUANT TO THE STATE’S GENERAL POLICE POWERS	31
A. The Unmistakability Doctrine Does Not Apply to the Compact	31
B. Article VII Includes Police Power Regulatory Authority over Improvements Appurtenant to the New Jersey Shoreline.	33

1.	The Plain Language of Article VII Compels the Conclusion that New Jersey’s Exercise of the Police Power to Regulate Riparian Improvements Is Included within “Riparian Jurisdiction of Every Kind and Nature(.)”	35
2.	The History of New Jersey’s and Delaware’s Exercises of Jurisdiction over the Rights of Riparian Owners Shows That the Exercise of New Jersey’s Police Power Jurisdiction to Regulate and Limit Riparian Rights Was Well Established, and Would Not Have Been Surrendered Without the Inclusion of Express Language in the Compact Doing So.	38
3.	“Riparian Jurisdiction of Every Kind and Nature” Includes the Right to Regulate the Manner in Which that Right is Implemented.	43
4.	Delaware Does Not Have Authority Under the Compact to Interfere with New Jersey’s Jurisdiction to Authorize Riparian Uses by Prohibiting Activities on a Vessel Attached to a New Jersey Wharf or Pier.	46
5.	Delaware Cannot Use its Modern Environmental Laws to Nullify New Jersey’s Jurisdiction under the Compact.	48
IV.	INTERPRETING THE COMPACT AS DELAWARE URGES WOULD ALLOW DELAWARE TO CONTROL NEW JERSEY’S ACCESS TO THE DELAWARE RIVER AND DEVELOPMENT OF NEW JERSEY’S SHORELINE, IN CLEAR CONTRAVENTION OF THE COMPACT AND SOVEREIGN RIGHTS OF NEW JERSEY.	50
V.	THE COURT’S DECISION IN VIRGINIA V. MARYLAND SUPPORTS NEW JERSEY’S POSITION IN THIS CASE.	54
	CONCLUSION	56

TABLE OF AUTHORITIES

CASES

<i>Arnold v. Mundy</i> , 6 N.J.L. 1 (N.J. Sup. Ct. 1821)	39, 40
<i>Auger & Simon Silk Dyeing Company v. East Jersey Water Company</i> , 86 A. 60 (N.J. E. & A. 1915)	49
<i>Blum v. Stenson</i> , 465 U.S. 886 (1984)	13
<i>Bowen v. Public Agencies Opposed to Social Security Entrapment</i> , 477 U.S. 41 (1986)	31,32
<i>City of Milwaukee v. Illinois</i> , 451 U.S. 304 (1981)	49
<i>City of Passaic v. Paterson Bill Posting</i> , 58 A. 343 (N.J. Sup. Ct. 1904)	37
<i>Connecticut Nat'l Bank v. Germain</i> , 503 U.S. 249 (1992)	35
<i>Equal Employment Opportunity Comm'n v. Arabian American Oil Co.</i> , 499 U.S. 244 (1991)	13, 29
<i>Ex Parte Jennings</i> , 6 Cow. 537 (N.Y. Sup. Ct. 1826)	43
<i>Gibson v. United States</i> , 166 U.S. 269 (1897)	11
<i>Harlan & Hollingsworth Company v. Paschall</i> , 5 Del. Ch. 435 (Del. Ch. 1882)	40, 47
<i>Illinois v. Milwaukee</i> , 731 F. 2d 403 (7th Cir. 1984), <i>cert. denied</i> , 469 U.S. 1196 (1985)	51
<i>Kansas v. Colorado</i> , 514 U.S. 673 (1995)	35
<i>Keyport & Middletown Point Steamboat Co. v. Farmers Transp. Co.</i> , 18 N.J. Eq. 511 (N.J. E & A 1866)	44
<i>Mayor of Newark v. Sayre</i> , 45 A. 985 (N.J. E & A 1900)	47
<i>McCarter v. Hudson County Water Co.</i> , 209 U.S. 349 (1908)	41, 49
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130 (1982)	32
<i>New Jersey v. Delaware</i> , 291 U.S. 361 (1934)	33

<i>New Jersey v. New York</i> , 283 U.S. 336 (1931)	51
<i>New Jersey v. New York</i> , 532 U.S. 767 (1998)	35
<i>New Jersey v. Sargent</i> , 269 U.S. 328 (1926)	11
<i>New York State Blue Cross Plans v. Travelers Ins.</i> , 514 U.S. 645 (1995)	12
<i>Newark and South Orange Horse Car Railway Company v. Hunt</i> , 12 A. 697 (N.J. Sup. Ct. 1888)	39
<i>Oklahoma v. New Mexico</i> , 501 U.S. 221 (1991)	12
<i>People v. Central Railroad Co. of New Jersey</i> , 42 N.Y. 283 (N.Y. Ct. App. 1870)	15, 18
<i>Power Reactor Dev. Co. v. Electrical Workers</i> , 367 U.S. 396 (1961)	13, 29
<i>South Carolina v. Georgia</i> , 93 U.S. 4 (1876)	11
<i>State of New Jersey v. Ventron Corp.</i> , 468 A.2d 150 (N.J. 1983)	49
<i>Texas v. New Mexico</i> , 462 U.S. 554 (1983)	51
<i>Texas v. New Mexico</i> , 482 U.S. 124 (1987)	12
<i>Toibb v. Radloff</i> , 501 U.S. 157 (1991)	21
<i>Tull v. United States</i> , 481 U.S. 412 (1987)	49
<i>Udall v. Tallman</i> , 380 U.S. 1 (1965)	13
<i>United States v. Cherokee Nation of Okla.</i> , 480 U.S. 700 (1987)	32
<i>United States v. Winstar Corp.</i> , 518 U.S. 839 (1996)	32
<i>New Jersey v. New York</i> , 523 U.S. 767 (1998)	12
<i>Virginia v. Maryland</i> , 540 U.S. 56 (2003)	12, 20, 22, 33, 44
<i>Washington ex rel. Seattle Title Trust Co. v. Roberge</i> , 278 U.S. 116 (1928)	34, 36
<i>Yates v. Milwaukee</i> , 77 U.S. 497 (1870)	38

STATUTES, SESSION LAWS, AND CODES

33 U.S.C. §1251	49
N.J. Stat. Ann. §12:5-1	25
N.J. Stat. Ann. §32:11D-4	10
N.J. Stat. Ann. §32:11D-7	10
N.J. Stat. Ann. §32:11D-8	10
N.J. Stat. Ann. §32:11D-105	7, 10
N.J. Stat. Ann. §32:11E-1	7
N.J. Stat. Ann. §58:10-23.11g	50
1903 N.J. Laws p. 39	23
1905 N.J. Laws ch. 42	24
1914 N.J. Laws ch. 123	25
1917 N.J. Laws ch. 189	26
Del. Code Ann. tit. 7 §7001	52
Del. Code Ann. tit. 7 §7002(f)	52
Del. Code Ann. tit. 7 §7003	52
23 Del. Laws ch. 5 (1905)	24

REGULATIONS

33 C.F.R. §105.120	11
33 C.F.R. §105.400	11
33 C.F.R. §127.019(b)	10
33 C.F.R. §127.307	11
N.J.Admin. Code §7:7E-7.7	52
N.J. Admin. Code §7:7E-7.9	52

OTHER AUTHORITIES

Crown Landing, LLC, Order and Issuing Certificate 115 FERC 61,348 (June 20, 2006)	11
Farnham, The Laws of Waters and Water Rights (1904)	38,40,44,47
Webster's Unabridged Dictionary (1898)	34
Webster's II New Riverside University Dictionary (1988)	36

PRELIMINARY STATEMENT

Under the Compact of 1905, New Jersey has exclusive State jurisdiction to regulate the construction, maintenance and use of riparian improvements extending from its shoreline into the Delaware River, and to convey, lease or license those interests in the bed of the River that are reasonably related to this exercise of jurisdiction. The Compact must be enforced to effectuate these rights, based on its plain language, the States' conduct surrounding enactment of the Compact, Delaware's litigating position in *New Jersey v. Delaware II*, and Delaware's failure for decades to exercise any jurisdiction over the construction, maintenance or use of riparian improvements extending from New Jersey's shoreline.

Delaware asserts that the Compact does not allow New Jersey to exercise any jurisdiction over the construction or use of any improvements within Delaware territory, even if those improvements extend from the New Jersey shoreline into the Delaware River or are part of a larger upland development primarily located in New Jersey. Delaware also argues that even if the Compact allows New Jersey some jurisdiction over such projects, that jurisdiction is subject and subservient to Delaware's authority.

Delaware's position conflicts with the Compact's plain language, established legal principles, and with basic, undisputed facts. In addition, Delaware relies on speculation about the drafters' intent that is not supported by any concrete evidence, and on events that occurred decades after the Compact was adopted or are not germane to the issues. Accordingly, New Jersey's motion for summary judgment must be granted; Delaware's motion must be denied; and the Court must enjoin Delaware from any further interference with New Jersey's Compact rights.

RESPONSE TO DELAWARE'S STATEMENT OF FACTS

The Compact of 1905 provided that New Jersey would continue to have riparian jurisdiction of every kind and nature on its own side of the Delaware River, and thus allowed New Jersey to continue its practice of determining whether riparian improvements extending from its shoreline could be constructed, and under what conditions, without interference from Delaware. During the proceedings in *New Jersey v. Delaware II*, Delaware expressly recognized that the Compact afforded New Jersey this right, and consented to a decree that expressly made the States' boundary within the Twelve Mile Circle "without prejudice" to the states' rights under the Compact.

Based on the Compact and decree, after the boundary was settled in 1934, New Jersey continued to determine whether riparian improvements could be extended from its shoreline on the basis of its own laws until 2005, when Delaware decided to preemptively deny a project that New Jersey was reviewing. To enforce its Compact rights and prevent any additional interference with them, New Jersey filed this original action.

Delaware asserts that New Jersey cannot exercise jurisdiction over riparian improvements that extend into Delaware, or, in the alternative, that New Jersey's jurisdiction over such projects is subservient to Delaware's authority. Nevertheless, Delaware's motion for summary judgment does not present any evidence that supports this interpretation of the Compact, or explains the motion's conflict with the Compact's plain language and the parties' conduct from 1854 to 1971, a period of over one hundred years.

As an initial matter, Delaware has not presented any evidence that it exercised jurisdiction over the construction or use of riparian improvements extending from the New Jersey shoreline, either before the States adopted the Compact in 1905, or before the boundary was settled, "subject

to the Compact of 1905,” in 1934. In fact, Delaware has conceded that New Jersey’s actions concerning such construction and use were not controversial when the Compact was adopted (Del. Bf. At 12)¹; has acknowledged that its first attempt to regulate the construction of a dock or pier extending from New Jersey’s shoreline did not occur until 1971 (Del Bf. at 17); and has further acknowledged that it did not start regularly requiring leases for use of its underwater lands until 1969 (Del. Bf. at 16). Thus, Delaware cannot show that, by providing that each State would “continue” to exercise riparian jurisdiction “of every kind and nature” “on its own side of the river,” the drafters of the Compact had any factual basis to contemplate that New Jersey’s ongoing practices related to construction of riparian improvements appurtenant to its shoreline would, at some later date, be subject to review or override by Delaware.

Similarly, Delaware cannot support its current claim that the Compact’s drafters ever intended or contemplated in 1905 that New Jersey’s “side of the river” would end at the boundary that was established in 1934. As Delaware has acknowledged, both when the Compact was adopted and when the boundary was settled, New Jersey’s practice of asserting jurisdiction over the construction of riparian improvements included jurisdiction over improvements that extended outshore of low water in the Twelve Mile Circle (Del. Bf. at 19), even though both in 1905 and 1934 Delaware claimed a boundary at the low water mark. Moreover, Delaware was expressly on notice of this New Jersey practice, since New Jersey presented evidence of it in both *New Jersey v. Delaware I* and *New Jersey v. Delaware II* (See NJ Bf. at 6-7)². In addition, before adoption of the Compact, Delaware established pierhead and bulkhead lines outshore of low water within the

¹“Del. Bf.” refers to Delaware’s brief in support of its motion for summary judgment.

²“NJ Bf.” refers to New Jersey’s brief in support of its motion for summary judgment.

western, or Delaware side of the river; New Jersey established pierhead and bulkhead lines outshore of low water within the eastern, or New Jersey side of the river; and neither State ever established such lines on the other State's side of the river (NJ Bf. at 7; Del. Bf. at 16). Thus, the Compact's drafters had no basis to conclude that New Jersey's ability to continue to exercise riparian jurisdiction on "its own side of the river" would, at some later date, be confined to the narrow area between high and low water.

To support its motion, Delaware makes a series of factual allegations that are at odds both with the Compact's plain language and with the evidence. In addition, Delaware relies on a series of side issues that simply are not germane to the interpretation of Article VII of the Compact. These allegations do not entitle Delaware to judgment in this case.

First, Delaware asserts that the Compact was intended to operate as a "temporary truce" until the boundary was established (Del. Bf. at 1). However, that contention does not find any credible support in the record, from which it is undisputed that the Compact was ratified by Congress in 1907; that Article IX of the Compact provides that it shall be "binding in perpetuity;" that the Compact was described as "of binding force" when published by Delaware's Secretary of State in 1905 (NJ App. 7a); that Delaware counsel in *New Jersey v. Delaware II* agreed that the Compact was in effect and protected the rights of New Jersey's riparian owners (DE App. 2224-2225); that the Court's decision in *New Jersey v. Delaware II* made the boundary "subject to the Compact of 1905;" and that the Court's decree in that case established the boundary "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."

Next, Delaware asserts that the Compact reserved to Delaware its police power within the

Twelve Mile Circle, and thus now enables it to apply its modern environmental laws, enacted decades after adoption of the Compact or establishment of the boundary, to determine whether proposed riparian improvements extending from New Jersey's shoreline can be built (Del. Bf. Point II). Again, Delaware has not identified any facts that demonstrate that this is what the Compact drafters contemplated, or that explain why the Compact nevertheless refers to "riparian jurisdiction of every kind and nature."

To support its allegation, Delaware argues that it always contested New Jersey's boundary claim within the Twelve Mile Circle, and never gave up its sovereignty in that area. In addition, Delaware alleges that the Compact's overriding purpose was to settle a fishing dispute, thereby implying that the Compact cannot have definitively addressed any other issue.

These factual assertions by Delaware do not pass muster, or provide any basis for ignoring the Compact's plain language. While it is undisputed that New Jersey and Delaware did not settle their boundary in 1905, it is equally clear that the Compact addressed more than fishing, and created certain exceptions to the full sovereignty each State might otherwise have exercised within its own boundary after it was established in 1934 (*See* NJ Bf. Point III).³ Moreover, it is equally clear that

³Professor Hoffecker's argument that the Compact was really only about fishing rights, and that everything else was intended to be left to the status quo (Report at 51, DE App. 4263), is both demonstrably incorrect and legally inadmissible. Articles I and II addressed criminal and civil process. Article VII addressed riparian rights and grants. Thus, the Compact clearly was not limited to fishing. Moreover, the fact that the Compact arose out of a fishing dispute does not mean that it addressed only fishing or that Articles I, II and VII are somehow without force. In fact, Hoffecker effectively concedes that the fishing dispute that spawned *New Jersey v. Delaware I* had broader implications, as she acknowledges that "the protection of fish and fishermen morphed into a full-scale, recurring judicial argument on state boundaries." (Report at 15, DE App. 4227). In *Virginia v. Maryland*, the Special Master rejected a similar argument by Maryland that the 1785 Compact between it and Virginia was intended to apply only to the tidal portion of the Potomac River, reasoning that even if it were accepted that the Compact's drafters were principally concerned with tidal waters, that would not prove that the Compact was

the Delaware River has for decades served not only as a fishing grounds, but also as a key navigational route for interstate and international commerce (NJ App. 924a-925a, 1229a-1234a, 1380a, 1387a, 1422a, 1424a, 1465a-1469a). Further, New Jersey's evidence presented in *New Jersey v. Delaware I* made it clear that New Jersey fishermen, among others, used the riparian improvements extending from the New Jersey shoreline at that time to unload boats (NJ App. 54a). Delaware has not presented any evidence that the Compact's drafters intended to enable Delaware, at some later date, to apply its laws to limit the type of commerce, or types of products, that could be transported by vessel to and from the New Jersey shoreline.

Consistent with these facts, Delaware counsel represented to the Court in *New Jersey v. Delaware II* that New Jersey's complaint in *New Jersey v. Delaware I* raised issues of title and jurisdiction, and was not confined to fishing (DE App. 2221). In addition, Delaware counsel represented that the Compact protected the rights of New Jersey's riparian owners to use the Delaware River "as a highway for commerce" (DE App. 2225), and not just as a fishing grounds.⁴ Following these representations, the special master determined that Delaware had not acquiesced in New Jersey's territorial claims, "except as modified by the said compact of 1905" (NJ App. 131a), and the Supreme Court established the boundary subject to the Compact.⁵

intended to apply only to such waters (Report of the Special Master at 22, *Virginia v. Maryland*, No. 129 (Dec. 9, 2002).

⁴Delaware suggests that in 1929, New Jersey's Attorney General took the position that the Compact settled only fishing issues (Del Bf. at 14). However, examination of the complete document cited by Delaware (DE App. 2081-2092) shows that the Attorney General advised New Jersey's Governor that the Compact settled the common right of fishery but not the boundary, and did not otherwise analyze the Compact (DE App. 2084, 2086).

⁵Delaware refers to Commissioners appointed by the States in April, 1935, to suggest that both States agreed that Article VII of the Compact was unclear (Del. Bf. at 15). However, the

Similarly, Delaware's reliance on actions postdating 1971, on actions related to pipelines or river crossings, and on recent law enforcement or emergency response activity within the Delaware River, do not support its motion for judgment in this matter.

Delaware attempts to dodge its failure to review proposed riparian improvements to New Jersey's shoreline before 1971, by emphasizing its activities related to "significant" projects proposed since then (*See* Del. Bf. at 46). That emphasis is misguided, since actions not taken until years after adoption of the Compact cannot possibly shed any light on what the drafters of the Compact intended (*see* Point II, *infra*). Moreover, the record makes it clear that Delaware's actions typically were taken without any reference to the Compact, and that where the Compact was brought to Delaware's attention as a concern, Delaware failed to press its claim. For example, in 1957, after Dupont cited the Compact to assert that Delaware's approval was not required for facilities on the New Jersey side of the Delaware River, and that "New Jersey is the proper authority with which the DuPont Company should deal" (NJ App. 639a), the Delaware officials handling the project concurred with Dupont's position (*See* NJ Bf. at 18). Then, after Dupont complained to Delaware in 1971 and 1981 that the Compact precluded Delaware from leasing underwater lands previously granted to Dupont by New Jersey, Delaware refrained from collecting lease payments from Dupont

documents cited by Delaware show that Delaware's special counsel was principally concerned with taxation of the riparian improvements on New Jersey's shoreline (DE App. 2189-2190; DE App. 2105; DE App. 2121-2127), while New Jersey's Attorney General believed that the Compact clearly allowed New Jersey to tax those structures (DE App. 2101). The Commissioners appointed by the States discussed a tunnel between New Jersey and Delaware and then stopped meeting (DE App. 2202-2203). In 1961, Delaware and New Jersey entered into a compact addressing crossings such as a tunnel or bridge, *see* N.J. Stat. Ann. §32:11E-1, and also entered into a compact with other States within the Delaware River Basin. The latter compact expressly did not interfere with any State laws related to riparian rights. *See* N.J. Stat. Ann. §32:11D-105.

(NJ App. 1161a, ¶¶192-195). In addition, the record clearly shows that Delaware did not attempt to use its alleged authority to deny a project New Jersey was reviewing until 2005.⁶

Similarly, Delaware attempts to undermine New Jersey's ongoing, longstanding exercise of jurisdiction over riparian improvements in the Twelve Mile Circle, by quibbling over the number of improvements constructed outshore of low water on the New Jersey side of the river, and their condition (*See Del Bf. at 19, DE App. 4332-4337*). That effort also should be rejected. Regardless of the number of improvements built, it is undisputed that New Jersey exercised jurisdiction over the construction of such improvements in the years surrounding 1905 and 1934, while Delaware did not. Further, Delaware cannot dispute that it was on notice of this New Jersey practice, based on both the proceedings in *New Jersey v. Delaware I* that preceded adoption of the Compact, and the proceedings in *New Jersey v. Delaware II* that preceded the establishment of the boundary subject to the Compact.⁷

Delaware's actions related to pipelines and river crossings also cannot support its entitlement to judgment. As an initial matter, Delaware has acknowledged that these actions did not start until 1961 (*Del. Bf. at 16, 21, 45*), decades after adoption of the Compact and establishment of the boundary. Thus, the actions cannot illuminate what was intended when the Compact was adopted in 1905 (*See Point II, infra*). In addition, the purpose of a pipeline under the Delaware River or a crossing over the River is to connect the two sides of the river, generally as part of an overall

⁶As discussed in New Jersey's motion in support of summary judgment, El Paso Eastern never formally applied to either Delaware or New Jersey in 1972 (NJ Bf. at 19).

⁷The record also shows that Salem County, New Jersey is one of the poorest counties in New Jersey and has experienced relatively little development (DE App. 2966, 2600). That level of development is not relevant to a determination of the parties' rights under the Compact.

roadway or utility system.⁸ Thus, such structures are not riparian improvements, as they are not related to a riverbank or to access to or use of the river, but are part of systems that typically exist on or under land.

Delaware's law enforcement and emergency response activities within the Twelve Mile Circle (*see* Del. Bf. at 21) also do not establish entitlement to judgment in its favor. First, as an initial matter, Delaware has not shown that any of these activities actually occurred on a dock, pier or other riparian improvement extending from the New Jersey shoreline. Instead, Delaware has shown, at best, that the activities occurred on the water (*See* DE App. 4340, ¶7; 4363-4364, ¶¶17-52; 4385, ¶16; 435-437; 401; 413-414), and that New Jersey and Delaware emergency responders have a cooperative working relationship in such matters (*See* DE App. 405, 673). Accordingly, the activities cannot be associated with riparian jurisdiction over riparian improvements, but only with jurisdiction on the water.

Next, while Delaware suggests that its law enforcement and emergency response procedures and protocols make it solely responsible for activities on improvements extending from the New Jersey shoreline, that is not the case. Rather, as evidenced by the affidavits of Carl Wentzell and other New Jersey emergency responders (NJ App.1322a-1333a), New Jersey also has State and local emergency response personnel to respond to situations arising on riparian improvements as well as

⁸For example, an underwater cable approved by Delaware in the 1960s was part of a utility system extending from Boston, Massachusetts to Miami, Florida (NJ App. 1349a, 1357a), while another Delaware approval relates to maintenance dredging proposed by Sunoco for a refinery located in Pennsylvania, which included a temporary pipeline running from Pennsylvania, through Delaware, to New Jersey (NJ App. 1362a-1366a). Similarly, the Delaware Memorial Bridge, which runs between Pennsville, New Jersey and Delaware, is a part of the Boston-Washington corridor within the interstate highway system that extends along the entire East Coast.

on the water, as necessary. In addition, New Jersey's regulatory program addressing onshore facilities that handle hazardous materials covers the entire facility, including any riparian portion (NJ App. 1334a-1339a).

The part of New Jersey that borders Delaware at the Twelve Mile Circle includes three facilities that handle hazardous materials. Those facilities report to New Jersey, not to Delaware (NJ App. 1334a-1339a; DE App. 4369, ¶71). Similarly, and as Delaware has acknowledged, New Jersey issues permits for effluent discharges into the river from its onshore facilities, while Delaware does not (Del. Bf. at 21).⁹ Thus, notwithstanding Delaware's suggestion to the contrary, Delaware's police, fire and emergency response activities within the Delaware River do not encompass facilities extending from New Jersey into the river offshore of low water.

Delaware links its emergency response protocols to its claims of jurisdiction over riparian improvements on the presumption that Delaware is primarily responsible for the vessel transport of materials to those facilities, which may include facilities handling hazardous materials such as the proposed Crown Landing project. Delaware's suggestion should be rejected, both because it is inaccurate and because it is irrelevant to an interpretation of the Compact. As the federal regulations and approval of the Crown Landing proposed facility make clear, emergency responses related to the proposed Crown Landing facility would be handled by a panoply of officials, headed by the United

⁹Delaware attempts to explain its failure to regulate such discharges by asserting that the discharges are subject to review by the Delaware River Basin Commission ("DRBC"), and must meet Delaware standards (Del. Bf. at 21). The DRBC is an interstate agency comprised of representatives from New York, New Jersey, Delaware and Pennsylvania. N.J. Stat. Ann. §§32:11D-7; 8 . The Compact under which the DRBC operates provides that it shall not relinquish any federal powers to control navigable waters or to regulate interstate commerce. N.J. Stat. Ann. §32:11D-4. The DRBC Compact further provides that nothing within it "shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective signatory parties relating to riparian rights." N.J. Stat. Ann. §32:11D-105.

States Coast Guard. *See* 33 C.F.R. §127.019(b); 33 C.F.R. §127.307; 33 C.F.R. §105.120; 33 C.F.R. §§105.400-410. *See also* *Crown Landing, LLC, Order Granting Authority under Section 3 of the Natural Gas Act and Issuing Certificate*, 115 FERC 61,348 at 40, App. A §32 (Docket No.s CP04-411, CPO4-416 (June 20, 2006).) Moreover, since the Delaware River is an interstate waterbody used for both interstate and international commerce (NJ App. 1386a-1387a), clearly neither Delaware nor New Jersey is solely responsible for navigation on it. *See New Jersey v. Sargent*, 269 U.S. 328, 337 (1926); *Gibson v. United States*, 166 U.S. 269, 271-72 (1897); *South Carolina v. Georgia*, 93 U.S. 4, 10 (1876). Based on these facts and those stated in New Jersey's summary judgment motion, New Jersey's motion for summary judgment should be granted; Delaware's motion should be denied; and New Jersey should be adjudged to have exclusive State jurisdiction over the construction, maintenance and use of riparian improvements extending from its shoreline into the Twelve Mile Circle.

ARGUMENT

I. THE COMPACT AFFORDS NEW JERSEY COMPLETE JURISDICTION OVER THE CONSTRUCTION, MAINTENANCE AND USE OF IMPROVEMENTS EXTENDING FROM ITS SHORELINE INTO THE TWELVE MILE CIRCLE.

A compact is “a contract It remains a legal document that must be construed and applied in accordance with its terms.” *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (internal quotations and citations omitted). In addition, “congressional consent ‘transforms an interstate compact . . . into a law of the United States’” *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (quoting *Cuyler v. Adams*, 449 U.S. 433, 438 (1981)). “Once a compact between States has been approved [by Congress], ‘it settles the line or original right; it is the law of the case binding on the states and its citizens, as fully as if it had never been contested.’” *New Jersey v. New York*, 523 U.S. at 810 (quoting *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 727 (1838)). Thus, if the text of a compact is clear and unambiguous, the plain language is conclusive and binding, and there is no need to resort to extrinsic evidence. See *Virginia v. Maryland*, 540 U.S. 56, 66-70 (2003); *New Jersey v. New York*, *supra*, 523 U.S. at 811; *Oklahoma v. New Mexico*, 501 U.S. 221, 245 (1991) (Rehnquist, C.J., concurring in part and dissenting in part).

If the meaning of a compact cannot be determined from its plain language, a court may then look to other articles of the Compact to construe it, and then to legislative history or historical context. See, e.g., *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) (relying on prior drafts and negotiating history of an interstate compact to interpret an ambiguous term); see also *New York State Blue Cross Plans v. Travelers Ins.*, 514 U.S. 645, 655 (1995) (“[W]e begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need

be, to the structure and purpose of the Act in which it occurs.”) (citations omitted); *Blum v. Stenson*, 465 U.S. 886, 896 (1984) (“Where, as here, the resolution of a question of federal law turns on a statute and the intentions of Congress, we first look to the statutory language and then to legislative history if the statutory language is unclear.”).

If necessary, a court may also look to the States’ performance under a Compact to interpret its terms. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965) (“When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.”). If such evidence is to be considered, much greater weight is given to the “contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.” *Power Reactor Dev. Co. v. Electrical Workers*, 367 U.S. 396, 408 (1961). Later actions are given less weight, particularly where they are inconsistent with a state’s more contemporaneous actions under a compact. *See Equal Employment Opportunity Comm’n v. Arabian American Oil Co.*, 499 U.S. 244, 288 (1991) (disregarding the agency’s later statutory interpretation because it “contradicts the position which [it] had enunciated at an earlier date, closer to the enactment of the governing statute”) (*quoting General Elec. Co. v. Gilbert*, 429 U.S. 125,142 (1976)).

As New Jersey explained in its opening brief, the Compact provides New Jersey with comprehensive jurisdiction over improvements extending from its shoreline outshore of mean low water within the Twelve Mile Circle (*See NJ Bf. at 23-35.*) Specifically, Article VII provides that each State shall “on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature,” and make grants, leases and conveyances of riparian lands and rights. This language

must be read and understood in light of the established scope of allowable riparian uses, which include the right to wharf out below mean low water to reach the channel. Consequently, the Compact's allocation of "riparian jurisdiction of very kind and nature," which is made "binding in perpetuity" by Article IX, clearly includes continuing jurisdiction to regulate all aspects of the exercise of riparian rights in this area of the River.

In its motion for summary judgment, Delaware argues for a reading of Article VII that is simply at odds with its plain language (*e.g.*, "own side of the river"), and ignores other text that does not support its position (*e.g.*, "*every* kind and nature"). Contrary to Delaware's assertions, when Article VII is read as a whole, and its terms interpreted in accordance with their plain meaning, it is clear that New Jersey's interpretation of the Article is correct.

A. New Jersey's "own side of the river" Extends Outshore of Low Water.

Delaware argues in point I.B.1 of its brief that the phrase "on its own side of the river" limits New Jersey to the area within the boundary line that was established by this Court some thirty years after the Compact of 1905. According to Delaware, the phrase was used in the Compact in place of a geographical description, to preserve Delaware's rights pending the ultimate boundary determination, and is a "less precise" term that fails to effect a surrender of Delaware's jurisdiction over the construction and use of riparian improvements in plain language.

As New Jersey previously argued (*see* NJ Bf. at 33-35), Delaware's characterization of the phrase "on its own side of the river" conflicts with the stated intent of the Compact to effect a practical resolution of the boundary dispute without the need to resolve the actual location of the boundary line. *See* Preamble to Compact. Specifically, Delaware's characterization would result in a Compact that provides no guidance to the states pending a boundary determination; that

conflicts with the stated intent in Article IX that the Compact be binding in perpetuity; and that nullifies that portion of this Court's 1935 Decree, negotiated by the parties, that made the boundary ruling subject to the Compact of 1905.

Moreover, as stated in New Jersey's moving brief, the term "own side of the river" identifies a workable and practical area where each state may exercise jurisdiction. The term "ripa" refers to the shore, and riparian rights are unique incidents of ownership belonging to owners of the land abutting the shore. *See* NJ Bf. at 24, 27-28. Since riparian rights are incidents of the ownership of such lands, New Jersey's own "side of the river" clearly refers to riparian interests related to the shore of New Jersey that abuts the Delaware River, and Delaware's "own side of the river" refers to the shore of Delaware that abuts the river. *Cf. People v. Central Railroad Co. of New Jersey*, 42 N.Y. 283, 298 (N.Y. Ct. App. 1870)(equating a reference to the New Jersey "shore" in an 1834 Compact between New York and New Jersey with the "*side or margin of the river or bay*, and not in the strict sense as applicable to the particular space between the high and low water mark...")(emphasis added). The geographical extent of this jurisdiction is properly defined by reference to the limitations placed on the rights of the riparian landowners by established common law and contemporary statutes. This authority provides a riparian right or interest in the ability to wharf out below mean low water to reach navigable channels, subject to the public's interest in maintaining a free and accessible channel. By the time of the Compact, New Jersey had adopted pierhead and bulkhead lines related to the exercise of this riparian right for navigable waters abutting its shores, including those in the Twelve Mile Circle. *See* NJ Bf. at 7.

The use of the scope of the riparian right to define the extent of New Jersey's jurisdiction in Article VII does not conflict with the use of fixed geographical points of reference in other Articles,

as Delaware asserts. Rather, establishing the scope of riparian jurisdiction in this manner reflects a more targeted approach than if the Compact had provided this jurisdiction to the middle of the river or to another fixed point, and more clearly reserves to Delaware jurisdiction over other property rights between the New Jersey low water mark and the middle of the river, such as mineral rights that are not related to access to the channel.

By allowing New Jersey “riparian jurisdiction of every kind and nature” on “its own side of the river,” Article VII clearly identifies a right to regulate the construction and use of riparian structures extending below the mean low water mark, as far as is necessary and appropriate to the exercise of the riparian right.¹⁰ When the Compact was adopted, New Jersey had set specific pierhead and bulkhead lines on the New Jersey side of the river, between the mean low water mark and the middle of the river. However, such lines may change as needs and technology change. Article VII, therefore, effectively protects the full range of both states’ riparian jurisdiction by framing it in the context of the riparian rights of shoreline property owners, instead of fixing a permanent line for jurisdiction over activities that are not adequately defined by such a line.

Delaware asserts that the use of the term “middle of the river,” and references to specific geographical divisions within other Articles, supports its view that “own side of the river” means the boundary set in 1934. That argument is meritless. Unlike Article VII, Articles I through IV identify areas of shared jurisdiction that do not depend on the rights regulated. Moreover, the arrangement established by Articles I to IV differs from that of Article VII, by providing New Jersey with the

¹⁰It is interesting to note that Delaware’s riparian jurisdiction over property conveyances on its own side of the river is apparently exercised entirely outshore of its own mean low water line, since Delaware recognizes title in the riparian owner to low water. *New Jersey v. Delaware II, supra*, 295 U.S. at 375. Thus, Delaware’s reciprocal delegation of riparian jurisdiction under the Compact refers only to the area outshore of low water.

ability to exercise jurisdiction in areas of the river over which it had never claimed ownership. For example, Article III identifies a common right of fishery in the entire river, to be enjoyed by both New Jersey and Delaware, despite the fact that New Jersey never claimed ownership of any of the land between the middle of the river and the low water mark on the Delaware side. The same is true of the service of process, which may be effected by either state up to the low water mark on the other side, with certain exceptions. Because New Jersey never claimed lands beyond the middle of the river, the arrangements effected by these provisions arguably did involve some concession of settled jurisdiction by Delaware. In contrast, Article VII resolved a jurisdictional question that arose because both states disputed ownership of the area up to the middle of the river, which would have included the areas abutting each state's shore subject to riparian uses.¹¹ Therefore, Article VII did not involve a concession of settled jurisdiction by Delaware, but a practical accommodation of both states' claims.

Delaware also argues that "pre-1905" references to the "middle of the river" when referring to the boundary between the states support the conclusion that the term "own side" refers only to the area within each state's boundary (Del. Bf. at 31). However, these references are taken from New Jersey's pleadings in *New Jersey v. Delaware I*, which stated the entirety of New Jersey's boundary claim over the eastern half of the river. Consequently, they shed no light on the meaning of the language used in Article VII to effectuate a limited and practical settlement of this claim as it related to riparian jurisdiction.

The statutory and judicial references to the "middle of the river" cited by Delaware similarly

¹¹Although Delaware claimed a boundary line at low water on the New Jersey side of the river, Delaware has conceded that in 1905 it did not consider the wharfage rights of New Jersey's riparian owners controversial. (Del Bf. at 12).

do not support Delaware's interpretation of Article VII. These references were used to identify actual boundaries, not to effect a reservation of "riparian jurisdiction of every kind and nature" expressly designed to be implemented without the need to identify the boundary (*See* Preamble to Compact; Article VII).

Nor does the 1834 compact between New Jersey and New York, to which Delaware refers, support Delaware's interpretation of the Compact. The 1834 Compact used the term "middle of the river" to establish the actual boundary between New York and New Jersey in the Hudson River, *People v. Central Railroad Co. of New Jersey*, 42 N.Y. 283, 292 (N.Y. Ct. App. 1870), which was separate and distinct from the division of jurisdiction between the states. *Id.* at 294. The 1834 Compact granted "exclusive jurisdiction" to New York over certain waters within the Hudson River up to the New Jersey low water mark, so as to grant to New York jurisdiction over the entire port of New York, including areas within New Jersey's actual, established boundary. Thus, it was necessary for New Jersey to expressly except out those things within its border over which it sought to retain control, which included exclusive jurisdiction of the State of New Jersey over "the wharves, docks, and improvements on its shore, and all vessels aground on that shore or fastened to such wharves or docks..." In contrast, in 1905 New Jersey did not concede that Delaware owned the river to the low water mark. Therefore, the parties did not frame reciprocal allocations of jurisdiction within the Compact in terms of an exception to Delaware's acknowledged boundary or jurisdiction. Rather, Article VII was drafted to divide rights under a disputed boundary in a practical manner.

B. "Riparian Jurisdiction of Every Kind and Nature" Includes Regulatory Jurisdiction.

Delaware contends that Article VII was not intended to resolve any jurisdictional issues, even though the Article refers to "riparian jurisdiction of every kind and nature." Specifically, Delaware

points out that while Articles I through IV resolved issues of jurisdiction, Article VII is placed away from those Articles and after Articles V and VI, which are not jurisdiction-conferring provisions. Delaware concludes on that basis that Article VII limits New Jersey's riparian jurisdiction to the areas within its boundaries.

The arrangement of the Articles follows a different logic than that cited by Delaware. Article V logically follows Article IV, which directs the adoption of uniform fishing laws, because Article V contains the proviso that, pending the adoption of uniform fishing laws, laws relating to the regulation of fisheries "not inconsistent with the right of common fishery *herein above mentioned* shall continue in force..." (Emphasis added). Article VI then logically follows Articles IV and V, because its purpose is to distinguish the oyster and clam industries from the fishing rights referred to in Articles IV and V. This arrangement leaves Article VII, which addresses the separate issue of riparian jurisdiction, to follow. The inference Delaware seeks to draw from the order in which the Articles appear simply is not supported.

Delaware next attempts to read "jurisdiction" out of Article VII, on the basis that there was no real dispute over riparian jurisdiction requiring resolution at the time of the Compact. Thus, Delaware contends that "Article VII should be construed as a provision whose ultimate scope and effect would depend on the ultimate resolution of the boundary." (Del. Bf. at 30-31).

Delaware fails to explain why the Compact drafters would have included a provision that, on its face, provides an allocation of substantive jurisdiction, if they wished to reserve the issue for another day and to have Article VII function as an implicit savings clause. Delaware's speculation that the Commissioners were not interested in allocating jurisdiction must give way to the plain language of the Compact. Moreover, New Jersey put riparian rights at issue in *New Jersey v.*

Delaware I, by referring to those rights in its pleadings and presenting evidence of wharves outshore of low water and that New Jersey fishermen used those wharves. It is further clear from the record in that case and from historical data that commerce and navigation were important issues to New Jersey (NJ App. 220a-236a), and that New Jersey never would have wanted to endanger jurisdiction related to those concerns, which it had exercised to that point.

C. “Continue to exercise riparian jurisdiction of every kind and nature” Refers to Ongoing Regulatory Authority.

Delaware’s final attack on the plain language of Article VII relates to the word “continue.” Delaware asserts that New Jersey’s right to “*continue to exercise* riparian jurisdiction of every kind and nature” on its own side of the river cannot have provided the jurisdiction that New Jersey now claims (Del Bf., Point I.C.1 and I.C.2.) Delaware argues that, since New Jersey was ultimately adjudged in 1934 not to own the area below its mean low water line, it could not “continue” to exercise jurisdiction which it never properly possessed. Delaware therefore contends that this language provides further support for its conclusion that New Jersey and Delaware “agreed to disagree” by permitting the states to exercise jurisdiction only until the boundary could be determined.

Notwithstanding Delaware’s claims, and as demonstrated by the 1834 Compact between New York and New Jersey, a state has the authority to settle a boundary dispute by dividing jurisdiction along lines different from the boundary between the states. *See* Point IA, *supra*. In addition, as demonstrated by *Virginia v. Maryland*, a state also has authority to settle such a dispute without setting a boundary. *See Virginia v. Maryland*, 540 U.S. 56, 62-63 (2003) .

Moreover, by stating that New Jersey could “continue” to “exercise” jurisdiction, Article VII unambiguously refers to what the States had done before. Up to the time of the Compact, New

Jersey had exercised riparian jurisdiction on the New Jersey side of the river, and Delaware had not. Instead, Delaware had adopted pierhead and bulkhead lines applicable to areas on its side of the river, but had not adopted such lines for piers and wharves on the New Jersey shore, despite its claim of jurisdiction. Since only New Jersey had exercised such jurisdiction on its side of the river, only New Jersey could “continue” to do so.

**II. THE PLAIN MEANING OF ARTICLE VII IS
CONSISTENT WITH THE REMAINDER OF
THE COMPACT, THE CONTEXT IN WHICH
IT WAS WRITTEN, AND THE PARTIES’
CONDUCT.**

A. The Remainder of the Compact Supports New Jersey’s Position.

Because Article VII is clear and unambiguous, it is unnecessary to go beyond the plain language and look to the structure or history of the Compact. *See Toibb v. Radloff*, 501 U.S. 157, 162 (1991) (“Thus, although a court appropriately may refer to a statute’s legislative history to resolve statutory ambiguity, there is no need to do so here.”). However, even if this court were to look to such evidence, it would simply confirm the plain meaning of Article VII.

For example, other articles of the Compact reinforce the plain meaning of Article VII. Articles I and II limit the States from asserting jurisdiction over wharves or docks attached to the other State by prohibiting the service of process by one State aboard a vessel attached to a pier or wharf on the banks of the other. This language recognizes a unique status for such riparian structures under the Compact and underscores the intent of the drafters to ensure that wharves and piers were subject solely to the jurisdiction of the State to whose riverbank they were attached. Similarly, Article IV called for the enactment of concurrent fishing laws, and Article V provided for each

State's fishing laws to continue in effect until such concurrent laws were passed. Just as in *Virginia v. Maryland*, "the drafters carefully delineated the instances in which the citizens of one State would be subject to the regulatory authority of the other." 540 U.S. at 67. If the drafters of Article VII had intended that Delaware have either exclusive or concurrent authority to regulate New Jersey's riparian improvements or the rights of its riparian owners, they would have said so.

A review of other Articles of the Compact also is useful to dismiss Delaware's contention that the Compact was intended as a "temporary truce" until the boundary was established. While nothing in Article VII supports Delaware's contention, Article IX, which provides that the Compact shall be "binding in perpetuity" definitely refutes Delaware's argument. Further, the other articles of the Compact demonstrate that the drafters were clear when they intended to leave issues unresolved, as they did through Article VI's clear language that the Compact did not affect the "planting, catching or taking" of shellfish or "interfere with the oyster industry," and Article VIII's clear language preserving the States' dispute over the location of the boundary. No such language appears in Article VII, so there can be no dispute that its protection of each State's riparian jurisdiction was intended to continue, even if and when the boundary dispute ultimately was resolved.

A review of the history of the Compact's drafting and adoption further refutes Delaware's contention that the Compact was intended as a "temporary truce" until the boundary was established. For example, it is clear that both States appointed their respective Commissioners in an effort to reach a broad settlement on the various jurisdictional disputes between them. Delaware explained the Commissioners' task as "equitably determine[ing] and settl[ing] the rights of Delaware and New Jersey," and "if possible to adjust all differences between the two states arising out of Delaware's

territorial claim, in a manner satisfactory to both states.” ((NJ App. 1312a) (Letter of Delaware Attorney General to Delaware Governor, January 31, 1903).) Similarly, New Jersey described their mission as an “amicable termination of the suit” and “the final adjustment of all controversies relating to the boundary line between said States and to their respective rights in the Delaware river.” ((NJ App. 254a-255a) (1903 N.J. Laws p. 39).)

After reaching agreement on what eventually became the Compact of 1905, the New Jersey Commissioners reported to the New Jersey Legislature that, while the exact geographical boundary remained unsettled, “nevertheless every interest of the State of New Jersey has been protected, all its riparian, fishery and other rights and jurisdiction thoroughly safeguarded and every question of practical difficulty between the two States settled for all time” ((NJ App. 102a-104a.) (Record, No.11, P. Exh. 161 at 29).) However, the Delaware Legislature initially did not adopt the Compact. In a letter to the New Jersey Commissioners, the Delaware Commissioners explained that the legislation had failed based on the view in Delaware that it would “surrender directly or indirectly . . . the title and jurisdiction which the State of Delaware claims to and over the soil and waters of the Delaware River within the twelve mile circle.” (NJ App. 105a-106a.)

In January 1905, the Delaware Legislature took up the matter again, and passed a joint resolution on February 13, 1905 “of precisely similar terms to that of two years ago, with the addition of the words “and bay” at the end . . . to frame a compact settling the boundary dispute.” (NJ App. 1a; 108a.) A Joint Resolution of the New Jersey Legislature followed on February 14, 1905 (NJ App.1315a.) Both resolutions described the Commissioners’ mission as an “amicable termination of the suit” 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.” (NJ App. 1a;

1315a.) Commissioners from both States again met and agreed once more on the Compact of 1905 (DE App.1-8.) The Delaware Legislature then ratified the Compact on March 20, 1905, and the New Jersey Legislature did so on March 21, 1905. 23 Del. Laws ch. 5 (1905) (NJ App.6a-13a); 1905 N.J. Laws ch. 42 (NJ App. 262a-267a.) Ratification by the Delaware Legislature followed significant public debate on the Compact. (NJ App. 1081a-1108a.) When the Delaware Secretary of State printed the Compact in the Laws of the State of Delaware of 1905, the Secretary included this explanation:

The compact printed in this appendix is a State Document of such extraordinary character and binding force upon the high contracting parties, as well also of great importance to the citizens of this State, that I deem it my imperative duty to give it permanent form in this volume. Laws of Delaware 1905, Appendix P. 1 (NJ App.7a).

As such statements make clear, the Commissioners and Legislatures of both States intended that the Compact would leave the boundary unsettled, while permanently settling other jurisdictional issues. A review of this legislative history, as well as the other Articles of the Compact, thus confirms New Jersey's plain-language reading of Article VII and refutes Delaware's contention that the Compact was intended as a "temporary truce" until the boundary was established.

B. The Plain Meaning of Article VII is Consistent with the States' Performance Under the Compact Following its Enactment.

As with extrinsic evidence concerning the legislative history or historical context of the

Compact, it is not necessary to look to the States' actions following the Compact's enactment to interpret Article VII. Nevertheless, a review of such materials confirms New Jersey's position that Article VII protected New Jersey's comprehensive and exclusive jurisdiction over improvements extending from its shoreline outshore of mean low water within the Twelve-Mile Circle. This review also is useful to further refute a number of Delaware's arguments that conflict with the plain language of Article VII.

Following the Compact's enactment, New Jersey continued to exercise regulatory, police power jurisdiction over improvements appurtenant to its shoreline within the Twelve-Mile Circle, without interference by Delaware. For example, in 1914, the New Jersey Legislature adopted the Waterfront Development Law, N.J. Stat. Ann. §§12:5-1 *et seq.*, (1914 N.J. Laws ch. 123), which established the New Jersey Harbor Commission and empowered it to prevent waterfront encroachments that would impair navigation or improvement of commerce, and required any person proposing a waterfront development such as a dock, wharf, pier, bulkhead, bridge, pipeline or cable, to first obtain the Commission's approval. (NJ App. 283a-289a.) In 1916, New Jersey's Board of Commerce and Navigation (the successors to the Board of Riparian Commissioners) adopted new pierhead and bulkhead lines for the easterly shore of the Delaware River, between Pennsgrove and Cedar Point, New Jersey, within the Twelve-Mile Circle and outshore of the mean low water line. ((NJ App. 376a)(Castagna Aff.)); (NJ App. 1133a, ¶¶59-60.)¹² In 1917 and 1925, the Board of Commerce and Navigation issued permits to Dupont and William Acton for structures extending into the Delaware River (NJ App. 633a; 290a).

¹² In some areas, the lines established were located more than 3,000 feet outshore of mean high water. (NJ App. 376a.)

Following the Compact's enactment, New Jersey also continued its practice of conveying underwater lands outshore of mean low water within the Twelve-Mile Circle, without interference from Delaware. For example, in 1917, the New Jersey Legislature granted to the United States jurisdiction and title over lands in the Delaware River, but retained sovereignty and jurisdiction to serve civil and criminal process (NJ App. 298a-301a) (1917 N.J. Laws ch. 189). In addition, from 1905 to 1933, New Jersey conveyed or leased underwater lands outshore of low water within the Twelve-Mile Circle on at least nineteen occasions. (NJ App.404a-553a).¹³ Thus, New Jersey's actions contemporaneous with and shortly after the Compact's enactment confirm that Article VII continued New Jersey's practice of exercising regulatory, police power jurisdiction over improvements appurtenant to its shoreline within the Twelve-Mile Circle, without interference by Delaware.

Delaware's actions (and inactions) during this time period also confirm the plain language of Article VII. Throughout the early- to mid- 1900s, Delaware made no effort to regulate improvements on the New Jersey side of the River, and thus continued its pre-Compact practice. In fact, rather than object to New Jersey's exercise of jurisdiction during this time period, Delaware routinely recognized New Jersey's right to control the construction of improvements on its side of the Delaware River within the Twelve-Mile Circle, without interference by Delaware.

For example, before adoption of the Compact, Delaware established pierhead and bulkhead lines outshore of low water within the western, or Delaware side of the river, while New Jersey established pierhead and bulkhead lines outshore of low water within the eastern, or New Jersey side

¹³ Many of the grants extended hundreds of feet outshore of low water within the Twelve-Mile Circle. (See, e.g., NJ App. 404a-411a (500 feet); NJ App. 427a-438a (over 4,200 feet); NJ App. 457a-462a (almost 1,300 feet).)

of the river. Following the Compact's enactment, Delaware never established such lines on the New Jersey side of the river. Nor did Delaware take any other legislative or administrative actions to exert regulatory jurisdiction over improvements on the New Jersey side of the River.

Then, in *New Jersey v. Delaware II*, Delaware repeatedly conceded that the Compact both protected the right of New Jersey citizens to wharf out to navigable water and ceded to New Jersey the jurisdiction to regulate the exercise of such rights. For example, New Jersey argued that since 1854, it had conveyed underwater lands extending from its shoreline on the Delaware River to outshore of the mean low water line without objection from Delaware. New Jersey further contended that the granted underwater lands now contained valuable improvements, and that many of the granted lands had been purchased by Delaware citizens. (NJ App. 136a.) In response, Delaware did not deny that the grants or improvements existed, or argue that the Compact should be ignored. Instead, Delaware contended that the grants and improvements did not conflict with the boundary claimed by Delaware, and that "the Compact in no way affected the boundary line between the States but merely protected the rights of riparian owners on the Jersey shore" (NJ App. 142a.) Delaware also explained its interpretation of Article VII as "obviously merely a recognition of 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." (NJ App. 123a (emphasis added); see also NJ Bf. at 36-37).

Delaware's acquiescence to New Jersey's jurisdiction over riparian improvements extending from New Jersey into the Delaware River within the Twelve-Mile Circle is further illustrated by Delaware's decision not to assert its authority to levy property taxes on such improvements. Shortly after Delaware prevailed on the boundary issue in *New Jersey v. Delaware II*, Delaware enacted a

law defining the boundary of the City of Wilmington as reaching the “low water mark upon the easterly side of the Delaware River.” (NJ App. 317a (40 Del. Laws ch. 179 (1935))). But the Legislature specifically barred the City from taxing property on the New Jersey side of the River “until the final determination of the effect of an agreement or compact entered into in the year 1905 between the States of New Jersey and Delaware, known as the compact of 1905” (NJ App. 318a.) Later that year, Delaware Special Counsel Clarence Southerland reported to the Delaware Attorney General that numerous valuable wharves had been constructed on the New Jersey side of the river, but never had been taxed by Delaware. Although the possibility of taxing such improvements was raised by Delaware’s Attorney General to its Governor in 1938, the charter of the City of Wilmington continues to limit taxation of property on the easterly side of the Delaware River.

Two decades later, in 1957, the Delaware Highway Department’s attorney, S. Samuel Arsht, recommended that the Delaware Highway Department advise the United States Army Corps of Engineers that “the State of Delaware has no jurisdiction over grants that may be made in and to the lands lying under the Delaware River on the New Jersey side thereof and within the twelve-mile circle, and that the prior approval of the State of Delaware in such matters is not required.” (NJ App. 639a.) These statements are consistent with Delaware’s statements and actions for the half century following the Compact’s enactment.

In its motion for summary judgment, Delaware cites to a number of actions taken by Delaware and New Jersey that purportedly support Delaware’s interpretation of Article VII. (*See* DE Brief at 16-21, 45 (asserting that, since 1969, “Delaware regulated every single structure emanating from New Jersey that crossed the boundary into Delaware.”).) However, these actions are of limited relevance because they are neither contemporaneous nor consistent with the States’

interpretation of Article VII in the years following the Compact's enactment. *See Arabian American Oil Co.*, *supra*, 499 U.S. at 288; *Power Reactor*, *supra*, 367 U.S. at 408. In addition, many of the cited actions do not relate to construction, maintenance, or use of riparian improvements such as docks and piers, but to boating and fishing on the water, which are not at issue. (*See, e.g.*, DE Brief at 21 ("Delaware regularly responds to police, fire and other 911 requests on the eastern half of the river."))

Further, Delaware's reliance on actions related to pipelines and river crossings is completely irrelevant to the meaning of Article VII. Not only are these actions relatively recent (entirely post-dating 1961), they are simply not relevant to any issue concerning riparian jurisdiction. The purpose of a pipeline under a river or a crossing over a river is to connect the two sides of the river, generally as part of an overall roadway or utility system. Thus, such structures are not riparian improvements, as they are not related to a riverbank or to access to or use of the river by owners of riverfront property, but are part of systems that typically exist on or under land.

Moreover, the record shows that Delaware's actions typically were taken without any reference to the Compact, and that where the Compact was brought to Delaware's attention as a concern, Delaware declined to enforce its alleged authority. (*See, e.g.*, NJ App. 1161a ¶¶ 192-195) (Delaware refrained from collecting lease payments from Dupont in 1971 and 1981 after Dupont noted that the Compact precluded Delaware from leasing underwater lands previously granted to Dupont by New Jersey). In addition, the record clearly shows that Delaware did not attempt to use its alleged authority to deny a project New Jersey was reviewing until 2005, one hundred years after the Compact was adopted.

Also of no relevance are the numerous affidavits included in Delaware's Appendix to its

summary judgment motion. (See DE App 4303-4310; DE App. 4311-4318; DE App. 4319-4400.) These affidavits are responsive to various New Jersey discovery requests,¹⁴ but were produced for the first time in Delaware's Appendix to its summary judgment motion. For that reason alone, they should not be afforded any weight. Further, these statements, prepared in 2006 in an apparent effort to explain away Delaware's actions and inactions throughout the pre- and post-Compact period, are meaningless because the persons who prepared the statements obviously were not the officials first charged with implementing the 1905 Compact.

Thus, were it necessary for the Court to consider the States' implementation of Article VII, that record would confirm the plain language of Article VII, which provides that New Jersey retained exclusive riparian jurisdiction on its own side of the Delaware River within the Twelve Mile Circle, free from regulation by Delaware.

¹⁴*See, e.g.*, NJ Interrogatories 5, 27, 29, 35; NJ Document Requests 2, 20, 21 (NJ App. 1473a, 1488a, 1489a, 1492a, 1504a, 1509a, 1510a).

III. ARTICLE VII'S DELEGATION OF "RIPARIAN JURISDICTION OF EVERY KIND AND NATURE" TO EACH STATE ON ITS OWN SIDE OF THE RIVER INCLUDES THE JURISDICTION TO REGULATE THOSE USES FOR THE PROTECTION OF THE PUBLIC HEALTH, SAFETY AND WELFARE, PURSUANT TO THE STATE'S GENERAL POLICE POWERS.

New Jersey has already addressed the fact that the Compact of 1905 reserves to it the right to regulate the nature and use of riparian improvements appurtenant to its shores in Point I.A.2 and I.A.3 of its Brief in Support of its Motion for Summary Judgment, and relies on and incorporates those same arguments here. This Brief responds more particularly to the arguments raised by Delaware in Point II of its Brief.

A. The Unmistakability Doctrine Does Not Apply to the Compact.

Delaware posits that its Commissioners cannot have intended to cede police power jurisdiction to New Jersey within the Twelve Mile Circle with respect to construction or use of improvements extending from the New Jersey shoreline, because the police power is an element of sovereignty that resides with a State unless expressly ceded. This assumption ignores two critical facts, however. First, Article VII did not transfer jurisdiction to a private entity, but to another sovereign. Second, Article VII did not take acknowledged jurisdiction from Delaware and grant it to New Jersey, because in 1905 the boundary was disputed and thus neither state's jurisdiction was established in the Twelve Mile Circle.

The unmistakability doctrine, upon which Delaware relies for these assertions, stands for the proposition that "(s)overeign power . . . governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Bowen v. Public Agencies*

Opposed to Social Security Entrapment, 477 U.S. 41, 52 (1986), quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). However, the doctrine does not apply here, where two sovereign states resolved a dispute concerning the extent of their respective sovereign powers by entering an interstate compact. Therefore, contrary to Delaware's assertion in Point I.D of its Brief, this canon of interpretation is inapplicable to Article VII of the Compact of 1905.

The unmistakability doctrine applies when there is a cession or grant of sovereign authority to a lesser sovereign or private entity. *United States v. Winstar Corp.*, 518 U.S. 839, 874-75 (1996) (citing *Fletcher v. Peck*, 10 U.S. 87 (1810)); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982); *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986); *United States v. Cherokee Nation of Okla.*, 480 U.S. 700 (1987). The premise of the doctrine is that it would be unreasonable for private citizens or lesser sovereigns that enter into contracts with the government to assume that the contract terms will disable the sovereign from performing sovereign functions. *Winstar, supra*, 518 U.S. at 920-21 (Scalia, J., concurring) ("Governments do not ordinarily agree to curtail their sovereign or legislative powers, and contracts must be interpreted in a commonsense way against that background understanding.")

Delaware is not entitled to the presumption underlying the unmistakability doctrine - that it did not relinquish authority unless it agreed to do so in unmistakable language in the Compact- because Delaware and New Jersey are equal sovereigns. Moreover, the Compact of 1905 did not involve a relinquishment by Delaware of acknowledged jurisdiction. The Commissioners who negotiated the Compact of 1905 did not know where the boundary between the states would ultimately be set.

This Court has accorded different treatment to agreements between equal sovereigns who

seek to settle disputed boundaries by agreeing to a particular allocation of jurisdiction. For example, in *Virginia v. Maryland*, 540 U.S. 56 (2003), Maryland asserted that Article Seven of the Compact of 1785 should be read to provide it with regulatory jurisdiction over riparian uses emanating from the Virginia side of the river into Maryland territory because Maryland's sovereignty was well established at the time. *Id.* at 67. The Court "reject[ed] Maryland's historical premise" noting that "while the 1785 Compact resolved certain jurisdictional issues, it did not determine the boundary between the States." *Id.* at 68. The Court therefore read the Compact "in light of the ongoing dispute over sovereignty" and rejected Maryland's argument that a later arbitration award that settled the boundary "simply confirmed [Maryland's] well-settled ownership over the Potomac" since the Court "fail[ed] to see why Maryland and Virginia would have [subsequently] submitted to binding arbitration [to establish the boundary] if that boundary was already well settled." *Id.* at 70. Similarly, the parties to the Compact of 1905 expressly recognized that the location of the boundary between New Jersey and Delaware within the Twelve Mile Circle was unsettled, and was in fact the subject of litigation. Indeed, despite this settlement, the boundary dispute erupted again nearly thirty years later, resulting in the litigation that finally located the boundary in the Twelve Mile Circle. *New Jersey v. Delaware II*, 291 U.S. 361 (1934).

B. Article VII Includes Police Power Regulatory Authority over Improvements Appurtenant to the New Jersey Shoreline.

Article VII of the Compact provides both New Jersey and Delaware with identical allocations of "riparian jurisdiction of every kind and nature," and authorizes each state to "continue to exercise" this jurisdiction "on its own side of the river(.)" Delaware, however, contends that this "riparian

jurisdiction” expressly excludes each state’s authority to regulate the nature and use of riparian improvements pursuant to its police powers. Neither the Compact itself, nor the distinction that Delaware advances to interpret it, provides any basis for including, within “riparian jurisdiction of every kind and nature,” jurisdiction exercised to determine the property rights of the riparian owner, while excluding jurisdiction exercised to prevent or limit the exercise of those same private rights for the purpose of protecting the public. Both are aspects of the entirety of the state’s jurisdiction over riparian rights, and both are part of the means by which the state delineates the scope of that right. The plain language of the Compact therefore requires the conclusion that jurisdiction for both purposes is included within “riparian jurisdiction of every kind and nature(.)”

Article VII establishes completely inclusive riparian jurisdiction, which is to be “of every kind and nature(.)” Delaware’s attempt to divorce the exercise of police powers over the riparian right, on the basis that it represents jurisdiction over the public interest rather than over private riparian rights, defies any sensible understanding of what it means to exercise regulatory jurisdiction.

To have “jurisdiction” is to have the power to regulate. *See Webster’s Unabridged Dictionary (1898)* (N.J. App. 1317a (defining “jurisdiction” as “the authority of a sovereign power to govern or legislate”).) Both the exercise of the State’s authority to identify the riparian property owner’s right, and to determine the limits to which that right may be exercised consistent with the public good, constitute jurisdiction over the private property right.¹⁵ *See Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121-22 (1928). Consequently, there is no basis on which to conclude that the drafters’ use of the words “riparian jurisdiction of every kind and nature” was

¹⁵Delaware describes New Jersey’s authority under Article VII as “ ‘limited to administration of the property aspects of riparian land-ownership on the New Jersey shore(.)’ ” Del. Bf. at 48, citing Report of Joseph Sax, ¶30.

intended to exclude one aspect of the State's jurisdiction over riparian rights, on the basis that it is exercised to protect the public.

Since the plain language of Article VII puts the issue to rest, it is not necessary to consider extrinsic evidence as to whether the jurisdiction to regulate riparian uses is included within "riparian jurisdiction of every kind and nature." Nevertheless, both the ordinary, well established understanding of the nature and scope of state riparian jurisdiction at the time of the Compact, and the history of the regulatory activities of both states, fully support the conclusion that the jurisdiction that New Jersey would "continue to exercise" on its side of the river was full regulatory jurisdiction over riparian structures and activities, both within and without the Twelve Mile Circle.

1. The Plain Language of Article VII Compels the Conclusion that New Jersey's Exercise of the Police Power to Regulate Riparian Improvements Is Included within "Riparian Jurisdiction of Every Kind and Nature(.)"

Where possible, a Compact must be interpreted in light of the plain and commonly understood meaning of its terms. Because the text of Article VII of the Compact of 1905 clearly and unambiguously provides New Jersey with full jurisdiction over riparian rights, this plain language is conclusive and binding and there is no need to resort to extrinsic evidence. *See New Jersey v. New York*, 532 U.S. 767, 811 (1998); *Kansas v. Colorado*, 514 U.S. 673, 690 (1995); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The "riparian jurisdiction of every kind and nature" (emphasis supplied) provided in Article VII clearly identifies the full range of state regulatory interests over these riparian rights and activities, and the Compact itself identifies no

exceptions to, or limitations on, this grant.¹⁶

Moreover, while Delaware contends that Article VII's riparian jurisdiction excludes regulatory jurisdiction over riparian rights or activities, neither Delaware's brief nor its expert's report identifies any authority for that conclusion. Instead, Delaware appears to draw this odd distinction on the basis that, when the state exercises jurisdiction to limit the riparian right pursuant to its police power, its underlying purpose pertains to the protection of the public interest, rather than to the identification or establishment of the riparian owner's right.

Delaware's analysis fails to address the simple and inescapable fact that, when a State exercises its police power to limit the actions of a riparian landowner, it is necessarily exercising "jurisdiction" not only over the public interest, but also over the affected riparian landowner and his or her private right. This is a matter of such basic common sense that it, also, requires little explanation.

The rights of an owner of real property include the right "to devote its land to any legitimate use of property within the protection of the Constitution." *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928)(citations omitted). These private property rights may nevertheless be restricted by regulations adopted pursuant to a state's police power. For example, zoning ordinances represent "the governmental power to interfere with the general rights of the landowner by restricting the character of his use" for protection of the public health, safety and welfare, which represents an exercise of the police power, *Id.* at 121; and state regulations that are

¹⁶Although the word "every" would appear to be so commonly understood as not to warrant further definition, in light of Delaware's arguments it is worth noting that one of its definitions is "constituting each and all members of a class with no exception." *Websters II New Riverside University Dictionary* (1988).

overbroad may improperly deprive an owner of property rights. *See City of Passaic v. Paterson Bill Posting*, 58 A. 343 (N.J. Sup. Ct. 1904)(finding that where a land use ordinance prohibiting billboards is overbroad, “it deprives the owner of his property by circumscribing the use of it.”).

In light of this common-sense understanding that the state’s jurisdiction to regulate the use of private property involves an exercise of jurisdiction over that property interest, it is untenable to speculate that the Commissioners intended to exclude such an ordinary form of jurisdiction over private property when they allocated to each state “jurisdiction of every kind and nature” over riparian private property. It is similarly absurd to suppose that the word “riparian,” used to describe this jurisdiction, excludes by implication state control of riparian rights when that control is exercised for the benefit of the public rather than to identify a property interest in the context of claims made by a riparian owner.

Delaware’s interpretation is also at odds with the plain language of Article VII making the right to “continue to exercise riparian jurisdiction of every kind and nature” a reciprocal right to be enjoyed by both New Jersey and Delaware, each “on its own side of the river(.)” If one state has “every” kind of jurisdiction, no jurisdiction is left for the other. If, however, Delaware were to regulate the right to wharf out from New Jersey by regulating the nature or use of wharves or piers appurtenant to the New Jersey shore, it would clearly be exercising its jurisdiction over the New Jersey riparian owner’s property right. Clearly, then, Delaware’s interpretation would be inconsistent with New Jersey’s guaranteed ability to exercise “jurisdiction of every kind and nature” over those same rights, since it would mean that a portion of jurisdiction over these riparian interests would belong exclusively to Delaware. Conversely, it is impossible for New Jersey to exercise riparian jurisdiction that is “of every kind and nature,” without the jurisdiction to limit the exercise of riparian

rights in the public interest.

2. The History of New Jersey's and Delaware's Exercises of Jurisdiction over the Rights of Riparian Owners Shows That the Exercise of New Jersey's Police Power Jurisdiction to Regulate and Limit Riparian Rights Was Well Established, and Would Not Have Been Surrendered Without the Inclusion of Express Language in the Compact Doing So.

Because Article VII is clear and unambiguous on its face, it is unnecessary to resort to legislative history or historical context to dispose of Delaware's argument that its drafters intended to exclude police power to regulate riparian rights from the Article's broad and unqualified grant of "riparian jurisdiction." Nevertheless, a review of authorities predating and contemporary to the Compact fails to provide any support for Delaware's conclusion that jurisdiction to regulate riparian rights for the public interest, pursuant to what is commonly characterized as the police power, is necessarily excluded from "riparian jurisdiction of every kind and nature(.)" To the contrary, this history firmly establishes that this police power authority would have been considered an essential element of the State's jurisdiction over riparian rights.

As New Jersey noted in its Brief in support of its own motion for summary judgment, it was well established at the time of the Compact that the riparian owner's right was defined in part by limitations placed on it by the state in order to protect the interests of the public. See 1 Henry Phillip Farnham, *The Law of Waters and Water Rights*, § 113 (1904)(recognizing that the right to wharf out involves "several conflicting interests," including "the right of the public to be free from any encroachment upon the water way which shall constitute a nuisance..."(NJ App. 1284a). See also *Yates v. Milwaukee*, 77 U.S. 497, 501 (1870). New Jersey, like other states, routinely exercised such jurisdiction in the years leading up to the Compact of 1905 to protect the public interest by bringing

actions to abate nuisances, and by the adoption of legislation. This authority is the police power. *See* NJ Bf. at 29-32; *Newark and South Orange Horse Car Railway Company v. Hunt*, 12 A. 697, 699 (N.J. Sup. Ct. 1888)(holding that the State, “under the powers called police powers, may, by legislative action, define common nuisances and declare what condition of things shall constitute such nuisances.”)(emphasis supplied). The authority to enjoin public nuisances affecting the public right of navigation was the rationale underlying the adoption of pierhead and bulkhead lines by both New Jersey and Delaware. *See* NJ Bf. at Points I.A2 and I.A3.

Delaware attempts to distinguish between the state’s authority to grant riparian lands to uplands owners - which it concedes would have been included within New Jersey’s “riparian jurisdiction” under the Compact (Del. Bf. at 59-60) - from the police power, asserting that authority over riparian grants and property rights involves jurisdiction over pure property rights. However, the authority to grant submerged lands to upland owners inherently involves an exercise of the State’s police power to protect the public interest, because the authority to grant riparian lands also requires a determination that the proposed use is in the public interest. As the New Jersey Supreme Court concluded in *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. Sup. Ct. 1821), a sovereign state in the United States does not hold underwater lands as an ordinary proprietor, but instead holds such lands “for the sake of order and protection, and not for its own use, but for the use of the citizen(.)”¹⁷ *Id.* at 12. Other authorities similarly recognize that when the lands of America were transferred from the Crown to the States, they held these lands “not for private emolument of an individual as the King

¹⁷Although the authority to grant submerged lands normally arises from the sovereign’s ownership of those lands, Delaware does not seriously dispute the fact that the Compact expressly provides New Jersey with authority “to make grants, leases and conveyances of riparian land(s)” in addition to “riparian jurisdiction of every kind and nature[.]” *See* Del. Bf. at 59-60.

had held it, but as a right owned by all the people in common, the title to which was held by the State for their benefit. This title can be transferred to the riparian owner, or held by the State, *as the public good seems to require...*" Farnham, *supra*, *Law of Waters and Water Rights*, § 113, at 528 (Emphasis supplied) (NJ App.1287a). *See also Id.* (The riparian owner may "make such use of the common property as he can make for the advancement of the public rights of navigation, and can, therefore, place wharves and piers in the water so long as he advances the interests of commerce thereby.")(NJ App. 1287a); *Id* at § 114 ("If the title to the soil is not in the riparian owner [as was the case in New Jersey], his absolute right as an individual ceases, and, as has already been seen, his right to place a wharf on the soil comes from his right, because of advantageous location, to make such use of the common property *as the public good requires.*") (emphasis supplied)(NJ App. 1518a). In short, even the determination by a State to identify and establish the rights of a riparian proprietor by granting submerged lands, which Delaware characterizes as an exercise of jurisdiction over pure property rights, necessarily entails a determination as to whether the public interest is properly protected and advanced.

This was the case in New Jersey. In the years leading to the Compact of 1905, New Jersey consistently approved riparian grants that were made subject to the limitation that the riparian owner not exercise the right to wharf out so as to interfere with navigation or commerce. Delaware imposed similar limitations on piers and wharves extending below low waters from its own shores. *Harlan & Hollingsworth Company v. Paschall*, 5 Del. Ch. 435 (Del. Ch. 1882) . Consequently, it is clear that the distinction drawn by Delaware between jurisdiction exercised to identify riparian property rights, and jurisdiction to regulate the exercise of these riparian rights in the public interest, is illusory and without substance.

Delaware's reliance on *McCarter v. Hudson County Water Co.*, 209 U.S. 349 (1908), to support the proposition that this Court recognized the distinction between the private riparian rights and the right of the public to limit riparian uses for the general good, is misplaced. While these rights may indeed be competing interests underlying the government's exercise of its jurisdiction to regulate riparian rights, *McCarter* does not show that the public right to limit riparian uses for the public good somehow is not a form of riparian jurisdiction.

McCarter v. Hudson County Water Co. upheld New Jersey legislation that prohibited the removal of water from New Jersey waterways for sale in other states, against a claim that this interfered with the private rights of the riparian landowner. The Court assumed for purposes of its decision that the party challenging the statute possessed the rights of a riparian owner, but concluded that "(t)he private right" of the riparian landowner to appropriate water "is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health." *Id.* at 356. Although the Court noted that "(i)t is sometimes difficult to fix boundary stones between the private right of property and the police power," *Id.* at 356, it recognized the power of the State to protect the public interest from "interference in the name of property" by means of nuisance suit or statute. *Id.* at 355-56.

The opinion in *McCarter v. Hudson County Water Co.* does recognize the tension between the public right and the private right. It does not, however, establish a distinction that supports holding police power separate from riparian jurisdiction in those instances where the police power is exercised over riparian rights. Rather, it illustrates the fact that it was well established in New Jersey and elsewhere that the sovereign exercises jurisdiction over the private right in the public interest. The case simply illustrates what is otherwise evident as a matter of common sense: that

the scope of the private right is not defined in a vacuum where only the riparian owner's private interest right is considered, but must be defined in light of the interaction of that right and the public interest.¹⁸

Interestingly, Delaware relies on *McCarter v. Hudson County Water* for the proposition that "McCarter, a New Jersey commissioner and its attorney general, well understood the important distinction between private riparian rights belonging to riparian property holders and public rights that the State has long protected under its police power." Del. Bf. Point II.C.2. A review of Attorney General McCarter's brief in that matter, however, shows clearly that he recognized that the right to regulate riparian activities for the public good is an essential element of the State's "jurisdiction" over the exercise of private riparian rights.

As Attorney General McCarter framed the issue, the State, as sovereign, retains in tidally flowed lands and waters a "residue of interest" as "trustee of the public(,)" which allows it to protect the public health, safety and welfare by filing an action to abate public nuisances.¹⁹ He cites numerous authorities to establish this authority as an element of the State's "jurisdiction" to regulate the exercise of rights by riparian owners. For example, his brief refers to *Hargrave's Law Tracts*, chap. 2, for the proposition that among the interests of the sovereign "are an interest of *jurisdiction*, namely, in reference to common law nuisances in and by rivers, as when the sewers were not kept." (Emphasis added)(DE 1846).²⁰

¹⁸Delaware admits that "riparian jurisdiction" includes the right to decide the scope of the riparian rights (Del. Bf. at 51), but seeks to limit this to the administration of property rights.

¹⁹The Supreme Court described the State's jurisdiction more expansively.

²⁰New Jersey's brief further cites the same authority to state that: "Another part of the King's jurisdiction in reference to nuisances is there stated to be to reform and punish nuisances

Significantly, McCarter characterizes the right to restrain “nuisances” that may obstruct the right of common passage as a form of the State’s jurisdictional interest over riparian rights, citing *Ex Parte Jennings*, 6 Cow. 537 (N.Y. Sup. Ct. 1826), as follows:

3d. *An interest of jurisdiction.*

“And another part of the king’s jurisdiction in reformation of nuisances is to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage not only for ships and greater vessels, but also of smaller, as barges and boats, to reform the obstructions or annoyances that are therein to such common passage,” (DE App. 1848)(emphasis added)..

McCarter’s characterization of the State’s authority to protect the public from nuisances created by the exercise of various riparian rights as a form of state “jurisdiction” strongly supports New Jersey’s view of Article VII. It is simply untenable to suppose that, by reserving “riparian jurisdiction of every kind and nature,” New Jersey intended to effectuate a surrender of police power jurisdiction to regulate the exercise of riparian rights that it had fully exercised up to that time, and to concede Delaware’s jurisdiction to an as yet undetermined boundary.

3. “Riparian Jurisdiction of Every Kind and Nature” Includes the Right to Regulate the Manner in Which that Right is Implemented.

Delaware argues in Point II.B.2 that the nature of the riparian right further limits New Jersey’s authority to regulate particular riparian uses under the Compact, because the riparian right to wharf out “does not include any right to carry on any particular commercial activities on the wharf, such as the unloading of LNG.” (Del. Bf. at 51). Thus, Delaware contends that these uses are left to be separately regulated pursuant to the police power, which it claims is specifically excluded from riparian jurisdiction under Article VII. Under its theory of the case, Delaware could

in all rivers, whether fresh or salt, that are a common passage, and among the nuisances mentioned are ‘the polluting of the rivers by cuts or trenches.’”(DE App. 1846).

invoke its claimed police power to block the construction of riparian improvements altogether on the New Jersey side of the River. In fact, through its Coastal Zone Act, Delaware has purported to bar entire categories of such improvements. *See* Point IV, *infra*.

Delaware does recognize that the grant of a right carries with it the right to use it. (Report of Joseph Sax at 5 n.7)(*citing Keyport & Middletown Point Steamboat Co. v. Farmers Transp. Co.*, 18 N.J. Eq. 511 (N.J. E & A 1866))(DE App.4283).²¹ In particular, the right of the riparian owner to wharf out is identified as the right to access navigable waters for purposes of commerce. Indeed, the benefit to the public of promoting commerce is the primary public interest that is to be served by according the riparian owner this right. *See Law of Waters and Water Rights, supra*, at §113 (NJ

²¹For the reasons stated in New Jersey's motion to strike, Professor Sax's report should be disregarded because its legal conclusions are inadmissible. Indeed, Sax's statement that "riparian jurisdiction" was not a term of art in 1905 (¶11) means there is no need for an "expert" on this issue, much less a "legal" expert. In the event the Court considers it, however, Sax's opinion undermines Delaware's case in several respects. Sax effectively concedes that the Compact gave New Jersey exclusive *riparian* jurisdiction over shoreline improvements (*See* ¶30). He also concedes that the riparian right to wharf out is a right to reach navigable water, which is necessarily below the low water mark. (¶¶10 ("far enough to permit the loading and unloading of ships"); 13 ("right of access to a navigable depth of water").) His statement at ¶21 that the uncertainty over New Jersey's territorial rights in 1905 might have lead to the inclusion of the right "to make grants, leases and conveyances of riparian lands and rights" within Article VII further undercuts Delaware's argument, since inclusion of the language cured any defect that might have been asserted as to whether New Jersey had title over those rights and lands for purposes of exercising its riparian jurisdiction. Sax's legal conclusion also is flawed because he assumes that the ownership of the underwater land was established in Delaware at the time of the Compact. However, at that time title was hotly contested, and neither State knew where the line ultimately would be drawn. *Compare Virginia v. Maryland*, 540 U.S. 56, 67-69 " (2003) ("Maryland is doubtless correct that if her sovereignty over the River was well settled as of 1785, we would apply a strong presumption against reading the Compact as stripping her authority to regulate activities on the River...But we reject Maryland's historical premise...Accordingly, we read the 1785 Compact in light of the ongoing dispute over sovereignty. Article Seventh simply guaranteed that the citizens of each State would retain the right to build wharves and improvements regardless of which State ultimately was determined to be sovereign over the River.").

App. 1284a-1285a).

Since the right to wharf out envisions the right to make commercial use of this right, “riparian jurisdiction of every kind and nature” necessarily must include the authority to more precisely define the right to wharf out, by defining the actual activities that may be undertaken to effectuate access to the river for commercial purposes. Delaware, however, would allow New Jersey only the jurisdiction to declare the general outlines of this right, which would exist in a vacuum until Delaware identified its practical parameters. In this manner, Delaware accords itself the power to limit, or even totally prohibit, commerce on New Jersey’s wharves and piers. The plain language of Article VII did not parse New Jersey’s jurisdiction this way.

The examples cited by Delaware to illustrate how police power jurisdiction involves non-riparian activities similarly fail to support its point. Delaware identifies a number of activities, such as the unloading of drugs, alcohol, cigarettes, or the use of a dock for gambling or prostitution. However, to the extent that these examples represent criminal or non-riparian uses, they are not at issue here. Moreover, criminal activities are addressed by Article I of the Compact, which grants New Jersey the authority to issue criminal process for offenses committed “upon the eastern half of said Delaware river...” Delaware is prohibited from serving process for violations of its criminal law “upon a vessel aground upon or fastened to the State of New Jersey...,” although it may otherwise serve this process for offenses committed “upon the western half of the Delaware River...” Thus, Articles I and II effectuate a separate delegation of criminal authority to New Jersey addressing the area occupied by wharves, docks or piers.

This allocation of criminal jurisdiction to New Jersey undermines Delaware’s contention that it is implausible that Article VII would provide New Jersey with regulatory jurisdiction over piers

and wharves extending from the New Jersey shore into Delaware territory. Clearly, the Compact does not provide Delaware with exclusive jurisdiction over the area occupied by wharves and piers attached to the New Jersey shore. To the contrary, allocation to New Jersey of jurisdiction over piers and wharves is more consistent with New Jersey's criminal jurisdiction under Article I than with Delaware's jurisdiction; and allocating that jurisdiction to New Jersey provides uniform jurisdiction over these structures.

Delaware also notes that the right to wharf out does not carry with it a right to "drill for oil or valuable minerals from a wharf..." Del. Bf. at 53. Indeed, New Jersey recognizes that Delaware's ownership of the soil gives it authority to distribute mineral or oil rights. However, the distinction between these rights, and the rights at issue here, is that rights to mine or drill are not themselves riparian, nor are they undertaken as part of the riparian right to wharf out to navigable waters to load and unload goods. In this respect Delaware's examples are irrelevant to the question of New Jersey's jurisdiction under the Compact to regulate riparian rights. In contrast to the regulation of mining rights, the jurisdiction to regulate the construction of piers and wharves, the dredging needed for vessels to reach the navigable channel, the operation and maintenance of the riparian structure, the method of offloading, or the nature of the materials offloaded, is regulation of the manner in which the riparian wharfage rights are exercised.

4. Delaware Does Not Have Authority Under the Compact to Interfere with New Jersey's Jurisdiction to Authorize Riparian Uses by Prohibiting Activities on a Vessel Attached to a New Jersey Wharf or Pier.

Delaware contends in Point II.B.3 of its Brief that even if Delaware's police power jurisdiction over piers and wharves attached to New Jersey's shores is deemed to be restricted by

the Compact of 1905, it did not concede its authority to regulate ships by that agreement.²² Thus, Delaware contends that it retains the jurisdiction to review and deny a permit application that involves activities on board a ship.

Delaware offers no authority for its proposition that any portion of the process of offloading goods that occurs on a ship attached to a wharf or pier, rather than on the wharf or pier, is excluded from New Jersey's riparian jurisdiction. Indeed, this conclusion does not follow from the nature of the riparian right. The right to wharf out is not just the right to build a structure, but rather encompasses "the right of the navigator to land his goods(.)" *The Law of Waters and Water Rights*, *supra*, § 113 at 525 (NJ App. 1284a). *See also Id.*, § 114, at 547 (Stating that "(t)he most important use to which the space between the shore line and deep water in a locality where ships resort to load and unload can be devoted is for the erection of wharves and piers for the accommodation of such vessels.")(NJ App. 1517a); *The Harlan & Hollingsworth Company v. Paschall*, 5 Del. Ch. 435 (Del. Chan. 1882) (Trade and commerce are the chief objects of a right to build a wharf); *Mayor of Newark v. Sayre*, 45 A. 985, 991 (N.J. E & A 1900) (Depue, J., concurring) ("Property in a wharf or dock on a navigable stream consists in the ability to use the structure in connection with navigable waters.").

²²Delaware also claims that "Article I of the Compact permits New Jersey to serve process on a ship fastened to a wharf emanating from New Jersey, but the drafters *did not permit* New Jersey to exercise other forms of jurisdiction over ships." It is unclear why Delaware characterizes the effect of Article I in this way. That Article in fact prohibits Delaware from serving process on ships attached to New Jersey, and authorizes New Jersey to serve process anywhere on the river for offenses committed on the eastern half of the river. This service presumably may be effected on board a ship located in any of these areas. With exceptions not relevant here, a mirror image of this jurisdiction is provided to Delaware by Article II. Jurisdiction over ships otherwise is not expressly addressed by the Compact at all, except to the extent that it is necessarily implicated as part of the riparian right to wharf out for the purpose of loading and unloading goods.

To illustrate its contention that “riparian jurisdiction of every kind and nature” does not allow New Jersey to regulate activities on a ship attached to a wharf on its shore, Delaware points to on-ship piping, which the proposed Crown Landing facility would use to offload liquified natural gas to its proposed wharf or pier. However, given the purpose of the riparian wharfage right, “riparian jurisdiction of every kind and nature” clearly encompasses activities or equipment that, although located on a ship or boat, are necessary to the process of unloading cargo. Otherwise, Delaware could prohibit the commercial activity which is the object of the riparian right to wharf out, simply by prohibiting activities or equipment on a vessel that enable its unloading.

5. Delaware Cannot Use its Modern Environmental Laws to Nullify New Jersey’s Jurisdiction under the Compact.

For the reasons set forth earlier in this Brief and in New Jersey’s Brief in Support of its Motion for Summary Judgment, New Jersey’s “riparian jurisdiction of every kind and nature” carries with it the jurisdiction to regulate riparian uses pursuant to the state’s police power. Delaware, however, argues in Point II.C.3 of its Brief that it should be entitled to enforce its environmental laws, such as the Delaware Coastal Zone Act (“DCZA”), over New Jersey piers and wharves extending over the boundary because it has an interest in preventing environmental harm and maintaining environmental balance.

Delaware’s argument conflicts with New Jersey’s rights under the Compact, and should be rejected. Although the substance of modern environmental laws may be dictated by modern concerns, their application to riparian uses and activities represents an exercise of the very same jurisdiction that was allocated to New Jersey by Article VII. Consequently, New Jersey’s laws, and not those of Delaware, must apply to regulate the construction and use of piers and wharves appurtenant to New Jersey’s shoreline.

Because Article VII does not limit its allocation of jurisdiction to laws in existence at the time of its adoption, but is to be applied “in perpetuity,” it must be interpreted to apply to changes to the law that address the exercise of riparian rights. These laws, including the DCZA, are simply a continuation of the practice of limiting riparian uses by enjoining them if they became public nuisances. These limitations were established based on the assumption that the riparian owner had a right to use the resources of a stream, but only if that use was reasonable.

For example, while a riparian landowner in New Jersey traditionally enjoyed a right to the reasonable use of the water flowing by his lands, “when he returns that water to the stream in such a polluted condition as to appreciably deprive it of its natural qualities and render it unfit for the use of the public or other owners, thereby creating a nuisance, he is not making the reasonable use thereof to which he is entitled to as such owner,…” *The Auger & Simon Silk Dyeing Company v. East Jersey Water Company*, 86 A. 60, 61 (N.J. E. & A. 1915). Similarly, in *Hudson County Water Company v. McCarter*, 209 U.S. 349 (1908), this Court rejected a riparian owner’s claim that he was entitled to direct water from a New Jersey river to sell it in another state, and upheld a New Jersey statute prohibiting that practice. *Id.* at 354.

New Jersey and other states now regulate this subject matter through comprehensive environmental laws, which have largely replaced earlier common law prohibiting the maintenance of a public nuisance. *See Tull v. United States*, 481 U.S. 412, 420 (1987)(concluding that an action for fines and injunctive relief under the Clean Water Act, 33 U.S.C. §§1251 *et seq.*, is analogous to both an action to abate a public nuisance and an action in debt); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (concluding that the Water Pollution Control Act amendments of 1972 preempted nuisance claims under federal common law). *See also State of New Jersey v. Ventron Corp.*, 468

A.2d 150, 160 (N.J. 1983) (upholding retroactive liability under the Spill Compensation and Control Act, N.J.Stat. Ann. § 58:10-23.11g, because "...the Spill Act does not so much change the substantive liability as it establishes new remedies for activities recognized as tortious both under prior statutes and the common law.") (Citations omitted). Thus, much as legislative establishment of pierhead and bulkhead lines replaced the need to make individual determinations as to whether particular wharves and piers would constitute a nuisance, the adoption of comprehensive environmental laws has for the most part replaced the public nuisance as an action to protect the public. Consequently, the assertion of jurisdiction to limit riparian structures such as wharves or piers, in order to protect natural resources for the public benefit, would have been contemplated at the time of the Compact, and is an aspect of "riparian jurisdiction of every kind and nature."

IV. INTERPRETING THE COMPACT AS DELAWARE URGES WOULD ALLOW DELAWARE TO CONTROL NEW JERSEY'S ACCESS TO THE DELAWARE RIVER AND DEVELOPMENT OF NEW JERSEY'S SHORELINE, IN CLEAR CONTRAVENTION OF THE COMPACT AND SOVEREIGN RIGHTS OF NEW JERSEY.

Delaware acknowledges, as it must, that it has no authority to regulate proposed development or use of land inshore of New Jersey's boundary on the Delaware River (NJ App. 1168, ¶228; NJ App. 1485a-1486a). Nevertheless, Delaware insists that its Coastal Zone Act and other laws govern development and use of improvements extending from New Jersey's shoreline, to the extent that the improvements are located in Delaware.

Interpreting the Compact in the manner urged by Delaware would effectively allow Delaware to use its laws to control access to the Delaware River by New Jersey's riparian owners, and to

determine what uses may occur on the New Jersey's shoreline. Such a result clearly would contravene the rights afforded New Jersey by the Compact, as well as its sovereign rights with respect to access to the Delaware River and control over land use within New Jersey. For this reason as well as those previously stated, Delaware's motion for summary judgment should be denied, and New Jersey's motion granted.

By providing that New Jersey would have "riparian jurisdiction of every kind and nature" on its side of the River, and that New Jersey could continue to grant riparian lands and rights under its laws, the Compact clearly protected the right of New Jersey and its riparian owners to have access to the Delaware River for navigation and commerce. Those rights expressly were recognized by Delaware in *New Jersey v. Delaware II* (NJ Bf. at 12-13). In addition, the rights would exist even if the Compact did not, based on the legal principles that apply when several States share a river and its resources. Under those principles, no State can use its laws to prevent access to or use of a river by another State or its citizens. See *New Jersey v. New York*, 283 U.S. 336, 342-43 (1931); *Texas v. New Mexico*, 462 U.S. 554, 569 n. 15 (1983); *Illinois v. Milwaukee*, 731 F. 2d 403, 408 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985).

In *New Jersey v. Delaware II*, Delaware agreed that the Compact protected New Jersey's riparian rights, including the right to use the Delaware River for commerce and navigation (DE App. 2225). While Delaware has not expressly disavowed this prior representation, its more recent actions show that it will invoke its laws to deprive riparian owners of access to the Delaware River, where the owners seek to engage in commercial uses not allowed by Delaware law.

Delaware adopted its Coastal Zone Act in 1971 (Del. Bf. at 17), and now insists that the Act must be applied to riparian improvements that extend from New Jersey's shoreline into Delaware.

New Jersey's coastal laws are similar to Delaware's in some respects, but the laws contain clear differences. For example, while New Jersey regulates certain uses in its coastal zone, Delaware prohibits them entirely.²³ Delaware previously has invoked its Coastal Zone Act to impermissibly discourage projects on the New Jersey shoreline, and should not be allowed to continue to do so.

In 1972, in conjunction with a proposal by El Paso Eastern for a liquified natural gas plant in New Jersey with a docking facility in the Twelve Mile Circle, Delaware's Attorney General rendered advice to Delaware's Planning Director. Delaware's Attorney General agreed with the Planning Director that "this facility is an offshore bulk transfer facility," and not "the type of single industrial or manufacturing facility" that would qualify for a permit under Delaware law (DE App. 3477). The Attorney General then advised the Planning Director that Delaware's definition of "single industrial or manufacturing facility" should be revised, and that "[t]he definition I envision will permit your office to evaluate applications for construction on the New Jersey shore as if they were applications for construction on the Delaware shore." However, the Attorney General cautioned that "it must be clear that Delaware *is not attempting to regulate development beyond the State boundary*. Therefore, any reference to potential development in New Jersey should be avoided." (emphasis added) (DE App. 3478, 3501).

In 1989, Delaware denied an application by Sun Refining and Marketing Company to construct a power generation facility in Logan Township, Gloucester County, New Jersey, where the project included a pier that extended into Delaware (DE App. 3507), stating that the proposed pier

²³For example, Delaware's Coastal Zone Act does not allow "bulk transfer stations" or "heavy industry," except in the Port of Wilmington, but New Jersey's laws allow those uses along its shoreline, under specified conditions. *See* Del. Code Ann. tit. 7, §§7001, 7002(f), 7003; N.J. Code Ann. §§ 7:7E- 7.7 (industry use rule), 7:7E-7.9 (port rule).

was “a prohibited bulk product transfer facility.” (DE App. 3507). However, after Sun Refining filed an appeal, Delaware vacated its denial (DE App. 3507), finding that the pier did not constitute a “prohibited bulk transfer facility,” but that the applicant was required to receive a coastal zone permit for the plant located in New Jersey (DE App. 3508). Thereafter, Delaware issued a permit to Sun Refining’s successor, Keystone Cogeneration Systems, Inc. (DE App. 3513), for construction of both the power plant located in New Jersey and the pier that extended into Delaware (DE App. 3607).

In 2005, Delaware again used its Coastal Zone Act to regulate development proposed on the New Jersey shoreline, advising Crown Landing LLC that its proposed project was a prohibited “bulk transfer station” as well as “heavy industry,” and that “the on-shore storage tanks essential to the operation of the facility are prohibited structures.” (DE App. 3811). On appeal, the Delaware Coastal Zone Industrial Board affirmed this denial, finding that the project’s onshore component located in New Jersey was not a manufacturing facility (DE App. 3819).

Based on these actions by Delaware, it is clear that Delaware will not respect New Jersey’s right to use and access the Delaware River within the Twelve Mile Circle, but will instead invoke its laws to preclude use and access of the river by onshore facilities which Delaware determines would not meet Delaware’s regulatory standards if located on the Delaware shoreline. The Compact clearly does not allow such a result, because it gives New Jersey “riparian jurisdiction of every kind and nature” on the New Jersey side of the Delaware River, and gives Delaware no authority whatsoever inshore of low water in New Jersey. Further, accepting Delaware’s interpretation of the Compact to allow such a result would effectively allow Delaware to landlock facilities on the New Jersey shore, since access outshore of low water is required by commercial vessels of any appreciable size. Even if the Compact did not exist, Delaware would not have the right to control

access to and use of the river within the Twelve Mile Circle, and to thereby effectively apply its law to proposed uses of the shoreline within New Jersey.

V. THE COURT'S DECISION IN VIRGINIA V. MARYLAND SUPPORTS NEW JERSEY'S POSITION IN THIS CASE.

Contrary to Delaware's assertion, *Virginia v. Maryland*, which interpreted a 1785 Compact between those states, supports New Jersey's reading of the Compact. Article Seventh of that Compact, like Article VII of the Compact of 1905, states the extent of Virginia's rights to the riparian rights of upland owners along its shores, as follows:

The citizens of each state respectively shall have full property in the shores of 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. [*Id.* At 62]

The above language was silent as to which state would have regulatory jurisdiction over the riparian rights reserved to Virginia. Therefore, the Court found it necessary to refer to other Compact provisions to determine whether Virginia's exercise of these rights would be subject to regulation by Maryland. It concluded that, because a review of other sections of the compact "(i)ndicate that the drafters carefully delineated the instances in which the citizens of one State would be subject to the regulatory authority of the other(,)" it could be inferred that Article Seventh's silence on the subject reflected an intent that "each State was left to regulate the activities of her own citizens." *Id.* at 66-67. The Court therefore held that Virginia had exclusive jurisdiction over riparian improvements appurtenant to the Virginia shoreline, even though Article Seventh of the Compact did not use the word "exclusive" or even mention Virginia's jurisdiction over riparian structures.

In contrast, Article VII of the Compact of 1905 expressly addressed the question of jurisdictional authority by allocating "jurisdiction" over riparian rights to each state "on its own side

of the river.” Thus, it is not necessary to look beyond the clear language of Article VII to support New Jersey’s conclusion that the Compact provides it with riparian jurisdiction of every kind and nature on its side of the river.

Delaware nevertheless argues that the phrase “own side of the river” supplies the explicit reference to jurisdiction that the Compact in *Virginia v. Maryland* lacked, because its language makes the Article VII jurisdiction subject to any later boundary determination. However, a review of the other provisions of the Compact, which were designed to exclude certain rights from the settlement effected by the 1905 Compact, requires the opposite conclusion. For example, Article VI of the Compact provides that “(n)othing herein contained shall affect the planting, catching, or taking of oysters, clams or other shellfish, or interfere with the oyster industry as now or hereafter carried on under the laws of either state.” Article V similarly preserves the existing fishing laws of both states “not inconsistent with the right of common fishery” provided by the Compact, by expressly stating that they would “continue in force...until the enactment of said concurrent (fishing) legislation as herein provided.” Thus, where the drafters of the Compact wished to reserve rights that would not be subject to that agreement, they did so in express terms. Applying the logic of *Virginia v. Maryland*, the failure to include such express savings language in Article VII requires the conclusion that its allocation of jurisdiction was among those Compact terms that Article IX made “binding in perpetuity.”

CONCLUSION

For these reasons and those stated previously, the Special Master should deny Delaware's motion for summary judgment and grant New Jersey's motion for summary judgment.

STUART RABNER
Attorney General

RACHEL HOROWITZ
BARBARA CONKLIN
Deputy Attorneys General
Counsel of Record

Of Counsel
GERARD BURKE
Assistant Attorney General
JOHN R. RENELLA
Deputy Attorney General

On the Brief
WILLIAM E. ANDERSEN
AMY C. DONLON
DEAN JABLONSKI
EILEEN P. KELLY
Deputy Attorneys General

Richard J. Hughes Justice Complex
25 West Market Street
P.O. Box 112
Trenton, New Jersey 08625
(609) 984-6811

Dated: February 1, 2007

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

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

**Before the Special Master
the Hon. Ralph I. Lancaster, Jr.**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 1st day of February, 2007, counsel for the State of New Jersey caused New Jersey's Brief in Opposition to Delaware's Motion for Summary Judgment, and Volume VIII of New Jersey's Appendix on Motion for Summary Judgment to be served upon counsel for the State of Delaware in the manner indicated below:

**BY ELECTRONIC MAIL AND
THREE COPIES BY OVERNIGHT MAIL (Brief)
THREE COPIES BY OVERNIGHT MAIL (Appendix, Volume VIII)**

David C. Frederick, Esq.
Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC
1615 M Street, NW
Suite 400
Washington, DC 20036
Email: dfrederick@khhte.com

BY ELECTRONIC MAIL AND
TWO COPIES BY OVERNIGHT MAIL (Brief)
TWO COPIES BY OVERNIGHT MAIL (Appendix, Volume VIII)

Collins J. Seitz, Esq.
Connolly Bove Lodge & Hutz, LLP
The Nemours Building
1007 North Orange Street
Suite 878
Wilmington, DE 19801
Email: cseitz@cblh.com

STUART RABNER
Attorney General of New Jersey

/s/ _____
By: Rachel J. Horowitz
Barbara L. Conklin
Deputy Attorneys General

Richard J. Hughes Justice Complex
25 West Market Street
P.O. Box 112
Trenton, New Jersey 08625
(609)984-6811