

IN THE  
**Supreme Court of the United States**

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STATE OF NEW JERSEY,  
*Plaintiff,*

v.

STATE OF DELAWARE,  
*Defendant.*

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**On Motion To Reopen and for a Supplemental Decree**

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**BRIEF OF THE STATE OF DELAWARE IN OPPOSITION  
TO THE STATE OF NEW JERSEY'S MOTION TO  
REOPEN AND FOR A SUPPLEMENTAL DECREE**

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether New Jersey has suffered any injury by Delaware's denial of a permit to B.P. p.l.c. ("BP") sufficient to warrant the exercise of this Court's original jurisdiction, when administrative reviews of BP's Crown Landing project are still pending before New Jersey and United States administrative agencies.

2. Whether original jurisdiction exists where BP, not New Jersey, is the real party in interest, and New Jersey could obtain all the benefits of the project by permitting it to be located at another site that does not encroach on Delaware's sovereign territory.

3. Whether a 1905 Compact between Delaware and New Jersey that authorizes each State "on its own side of" the Delaware River to "continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States," gives New Jersey "exclusive" riparian jurisdiction that prohibits Delaware from applying its coastal zone management laws to deny BP's proposal to construct a massive bulk transfer facility on Delaware's subaqueous lands.

**TABLE OF CONTENTS**

|  | Page |
|--|------|
| QUESTIONS PRESENTED FOR REVIEW .....   | i    |
| TABLE OF AUTHORITIES .....   | vii  |
| INTRODUCTION .....   | 1    |
| JURISDICTION .....   | 2    |
| CONSTITUTIONAL AND STATUTORY<br>PROVISIONS INVOLVED .....                                  | 3    |
| STATEMENT OF THE CASE .....  | 4    |
| A. Delaware’s Sovereignty Over The Dela-<br>ware River Within The Twelve-Mile Circle ..... | 4    |
| B. The 1905 Compact .....  | 5    |
| C. The Current Dispute Between BP And<br>Delaware .....                                    | 9    |
| 1. Delaware’s Permitting Process .....   | 14   |
| 2. New Jersey’s Permitting Process .....   | 16   |
| 3. The FERC Process for Approval of the<br>Crown Landing Project .....                     | 17   |
| SUMMARY OF ARGUMENT .....  | 21   |
| ARGUMENT .....   | 22   |
| I. THE COURT SHOULD DENY NEW<br>JERSEY’S MOTION FOR LACK OF<br>JURISDICTION .....          | 22   |

- A. New Jersey’s Motion Does Not Invoke This Court’s Retained Jurisdiction To Enforce The 1935 Decree .....23
- B. This Court Lacks Original Jurisdiction Over New Jersey’s Motion, Even If Treated As A Motion For Leave To File A New Original Action.....25
  - 1. New Jersey cannot demonstrate any “injury” caused by Delaware .....25
  - 2. BP, not New Jersey, is the real party in interest.....30
- C. Even If This Court Has Original Jurisdiction Over New Jersey’s Motion, It Should Decline To Exercise That Jurisdiction.....32

II. DELAWARE HAS THE AUTHORITY UNDER THE 1905 COMPACT TO REGULATE RIPARIAN STRUCTURES ERECTED ON DELAWARE’S SUBMERGED LANDS.....35

- A. Prior To The 1905 Compact, Delaware Unquestionably Had The Authority To Regulate Or To Exclude Altogether On Delaware Submerged Lands A Structure Such As BP’s LNG Bulk Transfer Facility .....36
  - 1. As owner of the tidal lands in question, Delaware holds the lands in a public trust for the people .....36

|   |    |
|---|----|
| 2. Even without a public trust relationship, Delaware has police authority to regulate uses of its submerged lands .....  | 40 |
| 3. Under New Jersey law, the owner of riparian lands could not build structures on navigable waters on submerged lands the landowner did not own .....  | 41 |
| 4. Nothing in pre-1905 riparian rights law would have led the States to think that Delaware lacked authority to regulate a massive 2,000-foot-long structure extending onto its sovereign lands ..... | 42 |
| B. The 1905 Compact Did Not Alter Delaware’s Authority To Regulate Structures Built On Its Subaqueous Lands.....  | 45 |
| 1. Use of “continue” indicates that the States intended to maintain the status quo.....   | 47 |
| 2. Use of “on its own side” indicates that the States intended to preserve existing rights pending the outcome of the boundary dispute.....   | 49 |
| 3. Nothing in the 1905 Compact diminished Delaware’s pre-existing authority over its subaqueous lands.....  | 53 |
| C. New Jersey’s Arguments For “Exclusive” Riparian Jurisdiction Are Unpersuasive .....  | 56 |

|  |    |
|--|----|
| 1. The States intentionally did not confer “exclusive” authority with respect to riparian rights .....   | 56 |
| 2. The meaning of “riparian jurisdiction” cannot extend beyond the State’s boundary .....  | 58 |
| 3. New Jersey’s invocation of other miscellaneous Compact provisions is unpersuasive .....   | 60 |
| 4. New Jersey’s argument that the States’ “contemporaneous construction” of the Compact supports its exclusive jurisdiction has no merit.....                        | 61 |
| 5. New Jersey’s reliance on Delaware’s alleged “concessions” in the 1934 boundary is misplaced.....  | 68 |
| D. <i>Virginia v. Maryland</i> Does Not Deny Delaware The Right To Exercise Its Coastal Zone Laws And To Reject A Structure Built On Delaware Subaqueous Lands ..... | 72 |
| III. APPOINTMENT OF A SPECIAL MASTER IS WARRANTED IF THE COURT TAKES JURISDICTION OVER THIS CASE BUT CANNOT RESOLVE IT SUMMARILY AGAINST NEW JERSEY .....            | 75 |
| CONCLUSION.....  | 78 |
| APPENDIX   |    |

**TABLE OF AUTHORITIES**

|   | Page           |
|---|----------------|
| <b>CASES</b>  |                |
| <i>Alabama v. Arizona</i> , 291 U.S. 286 (1934) .....   | 25, 26         |
| <i>Ampro Fisheries, Inc. v. Yaskin</i> , 588 A.2d 879<br>(N.J. Super. Ct. App. Div. 1991), <i>aff'd in part</i><br><i>and rev'd in part</i> , 606 A.2d 1099 (N.J. 1992) ..... | 7              |
| <i>Arizona v. New Mexico</i> , 425 U.S. 794 (1976) .....  | 34             |
| <i>Axline v. Shaw</i> , 17 So. 411 (Fla. 1895) .....  | 42             |
| <i>Bailey v. Driscoll</i> , 112 A.2d 3 (N.J. Super. Ct.<br>App. Div.), <i>aff'd in part and rev'd in part</i> , 117<br>A.2d 265 (N.J. 1955) .....                             | 42, 43, 44, 45 |
| <i>Bennis v. Michigan</i> , 516 U.S. 442 (1996) .....   | 71             |
| <i>Bouquet v. Hackensack Water Co.</i> , 101 A. 379<br>(N.J. 1917) .....  | 44             |
| <i>California v. Texas</i> , 457 U.S. 164 (1982) .....  | 32             |
| <i>California v. United States</i> , 457 U.S. 273 (1982) .....  | 77             |
| <i>City of Wilmington v. Parcel of Land Known as</i><br><i>Tax Parcel No. 26.067.00.004</i> , 607 A.2d 1163<br>(Del. 1992) .....  | 8              |
| <i>Coastal Barge Corp. v. Coastal Zone Indus.</i><br><i>Control Bd.</i> , 492 A.2d 1242 (Del. 1985) .....   | 55             |
| <i>Cuyler v. Adams</i> , 449 U.S. 433 (1981) .....  | 45             |
| <i>Delaney v. Boston</i> , 2 Harr. 489, 1839 WL 165<br>(Del. Super. Ct. 1839) .....   | 8              |
| <i>Dutton v. Strong</i> , 66 U.S. (1 Black) 23 (1861) .....   | 44             |

|   |            |
|---|------------|
| <i>Florida v. Mellon</i> , 273 U.S. 12 (1927) .....   | 29         |
| <i>Georgia v. Pennsylvania R.R. Co.</i> , 324 U.S. 439<br>(1945) .....                                    | 28         |
| <i>Georgia v. Tennessee Copper Co.</i> , 206 U.S. 230<br>(1907) .....                                     | 40         |
| <i>Green v. Biddle</i> , 21 U.S. (8 Wheat.) 1 (1823) .....  | 45         |
| <i>Harlan &amp; Hollingsworth Co. v. Paschall</i> , 5 Del.<br>Ch. 435, 1882 WL 2713 (Del. Ch. 1882) ..... | 8          |
| <i>Harris v. Elliott</i> , 35 U.S. (10 Pet.) 25 (1836).....   | 46         |
| <i>Heckler v. Community Health Servs. of Crawford<br/>County, Inc.</i> , 467 U.S. 51 (1984) .....         | 72         |
| <i>Henderson Bridge Co. v. Henderson City</i> , 173<br>U.S. 592 (1899) .....                              | 39         |
| <i>Hoboken v. Pennsylvania R.R. Co.</i> , 124 U.S. 656<br>(1888) .....                                    | 43         |
| <i>Hudson County Water Co. v. McCarter</i> , 209 U.S.<br>349 (1908) .....                                 | 40         |
| <i>Idaho v. Coeur d'Alene Tribe of Idaho</i> , 521 U.S.<br>261 (1997) .....                               | 38, 53     |
| <i>Idaho ex rel. Evans v. Oregon</i> , 462 U.S. 1017<br>(1983) .....                                      | 74         |
| <i>Illinois v. Michigan</i> , 409 U.S. 36 (1972).....   | 27, 30, 34 |
| <i>Illinois Central R.R. Co. v. Illinois</i> , 146 U.S. 387<br>(1892) .....                               | 37, 38, 53 |
| <i>Kansas v. Colorado</i> , 543 U.S. 86 (2004).....   | 75         |

|   |                    |
|---|--------------------|
| <i>Karam v. New Jersey Dep't of Env'tl. Protection</i> ,<br>705 A.2d 1221 (N.J. Super. Ct. App. Div.<br>1998), <i>aff'd</i> , 723 A.2d 943 (N.J. 1999)..... | 38                 |
| <i>Lee v. Munroe</i> , 11 U.S. (7 Cranch) 366 (1813) .....  | 67                 |
| <i>Louisiana v. Mississippi</i> , 488 U.S. 990 (1988).....  | 32                 |
| <i>Louisiana v. Texas</i> , 176 U.S. 1 (1900).....  | 22, 27, 30         |
| <i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555<br>(1992) .....  | 28                 |
| <i>Main Assocs., Inc. v. B. &amp; R. Enters., Inc.</i> ,<br>181 A.2d 541 (N.J. Super. Ct. Ch. Div. 1962) .....  | 67                 |
| <i>Martin v. Lessee of Waddell</i> , 41 U.S. (16 Pet.) 367<br>(1842) .....  | 37                 |
| <i>Maryland v. Louisiana</i> , 451 U.S. 725 (1981).....   | 31                 |
| <i>Massachusetts v. Missouri</i> , 308 U.S. 1 (1939).....   | 25, 29, 30         |
| <i>McGowan v. Columbia River Packers' Ass'n</i> ,<br>45 U.S. 352 (1917) .....   | 70                 |
| <i>Metropolitan Stevedore Co. v. Rambo</i> , 515 U.S.<br>291 (1995) .....   | 71                 |
| <i>Mississippi v. Louisiana</i> , 506 U.S. 73 (1992).....   | 32                 |
| <i>Missouri v. Illinois</i> , 200 U.S. 496 (1906).....  | 22                 |
| <i>Montana v. United States</i> , 450 U.S. 544 (1981).....  | 36, 37             |
| <i>Nebraska v. Wyoming</i> , 515 U.S. 1 (1995).....   | 75                 |
| <i>New Hampshire v. Maine</i> , 532 U.S. 742<br>(2001) .....  | 70, 71, 72, 77, 78 |

*New Jersey v. Delaware:*

|  |                                 |
|--|---------------------------------|
| 205 U.S. 550 (1907) .....  | 6                               |
| 291 U.S. 361 (1934) .....  | 4, 5, 6, 23, 24, 49, 50, 63, 68 |
| 295 U.S. 694 (1935) .....  | 1, 5, 23, 24, 70                |
| <i>New Jersey v. New York</i> , 523 U.S. 767 (1998) .....  | 45, 75                          |
| <i>New York v. Illinois</i> , 274 U.S. 488 (1927) .....  | 29                              |
| <i>New York v. New Jersey</i> , 256 U.S. 296 (1921) .....  | 23, 29                          |
| <i>Newark Plank Road &amp; Ferry Co. v. Elmer</i> , 9 N.J.<br>Eq. 754, 1855 WL 122 (N.J. 1855) ..... | 43-44                           |
| <i>Norfolk &amp; N.B. Hosiery Co. v. Arnold</i> , 45 A. 608<br>(N.J. 1900) .....                     | 57                              |
| <i>Norfolk Southern Corp. v. Oberly</i> , 822 F.2d 388<br>(3d Cir. 1987) .....                       | 55                              |
| <i>North Dakota v. Minnesota</i> , 263 U.S. 365<br>(1923) .....                                      | 25, 30, 31                      |
| <i>Northern Pine-Land Co. v. Bigelow</i> , 54 N.W. 496<br>(Wis. 1893) .....                          | 41                              |
| <i>O'Connor v. United States</i> , 479 U.S. 27 (1986) .....  | 46                              |
| <i>Oklahoma v. New Mexico</i> , 501 U.S. 221 (1991) .....  | 46, 75                          |
| <i>Oklahoma ex rel. Johnson v. Cook</i> , 304 U.S. 387<br>(1938) .....                               | 30                              |
| <i>Pea Patch Island, In re</i> , 30 F. Cas. 1123 (Arb. Ct.<br>1848) (No. 18,311) .....               | 4                               |
| <i>Pennsylvania v. New Jersey</i> , 426 U.S. 660 (1976) .....  | 25                              |

|  |        |
|--|--------|
| <i>Pennsylvania v. West Virginia</i> , 262 U.S. 553<br>(1923) .....  | 27     |
| <i>Phillips Petroleum Co. v. Mississippi</i> , 484 U.S.<br>469 (1988) .....  | 37     |
| <i>Proprietors of Charles River Bridge v. Proprietors<br/>of Warren Bridge</i> , 36 U.S. (11 Pet.) 420 (1837)..... | 46     |
| <i>Rhode Island v. Massachusetts</i> , 37 U.S. (12 Pet.)<br>657 (1838) .....                                       | 37     |
| <i>Russello v. United States</i> , 464 U.S. 16 (1983).....   | 57     |
| <i>Shields v. Keystone Cogeneration Sys., Inc.</i> ,<br>611 A.2d 502 (Del. Super. Ct. 1991) .....                  | 33     |
| <i>Shively v. Bowlby</i> , 152 U.S. 1 (1894).....  | 37, 43 |
| <i>Sporhase v. Nebraska ex rel. Douglas</i> , 458 U.S.<br>941 (1982) .....   | 74     |
| <i>State v. Federanko</i> , 139 A.2d 20 (N.J. 1958).....   | 66     |
| <i>State v. Reybold</i> , 5 Harr. 484, 1854 WL 847<br>(Del. 1854).....   | 8      |
| <i>Stevens v. Paterson &amp; Newark R.R. Co.</i> , 34 N.J.L.<br>532, 1870 WL 5140 (N.J. 1870) .....                | 44, 46 |
| <i>Texas v. New Mexico</i> , 482 U.S. 124 (1987).....  | 75     |
| <i>TRW Inc. v. Andrews</i> , 534 U.S. 19 (2002).....   | 56     |
| <i>United States v. Alaska</i> , 521 U.S. 1 (1997) .....   | 36, 37 |
| <i>United States v. Cherokee Nation</i> , 480 U.S. 700<br>(1987) .....   | 46     |

*Virginia v. Maryland*, 540 U.S. 56 (2003).....31, 32, 36, 47,  
50, 51, 61, 72, 73, 74, 75, 77

*Weber v. Board of Harbor Comm’rs*, 85 U.S.  
(18 Wall.) 57 (1873) .....39

*West 205th Street in City of New York, In re*,  
147 N.E. 361 (N.Y. 1925) .....41

*Wyoming v. Oklahoma*, 502 U.S. 437 (1992) .....29, 30, 34

*Yates v. City of Milwaukee*, 77 U.S. (10 Wall.) 497  
(1871) .....40, 59

ADMINISTRATIVE DECISIONS

Decision and Order, *In re Coastal Zone Status  
Decision on the Application of Crown Landing  
LLC*, Appeal No. CZ 2005-01 (Del. Coastal  
Zone Indus. Control Bd. Apr. 14, 2005) .....15, 64

CONSTITUTION, STATUTES, REGULATIONS,  
AND RULES

Federal

U.S. Const. art. I, § 8, cl. 3 (Commerce Clause) .....55, 74

Act of June 28, 1834, ch. 126, 4 Stat. 708  
(1834 New Jersey-New York Compact).....57

4 Stat. 709-10 .....57

Act of Jan. 24, 1907, ch. 394, 34 Stat. 858  
(1905 Delaware-New Jersey Compact) .....*passim*

Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* .....19, 26

|  |        |
|--|--------|
| Clean Water Act of 1977, § 404, 33 U.S.C. § 1344.....                                | 11, 20 |
| Coastal Zone Management Act of 1972, 16 U.S.C.<br>§§ 1451 <i>et seq.</i> .....       | 11     |
| 16 U.S.C. § 1456(c)(3)(A).....   | 11, 26 |
| Energy Policy Act of 2005, Pub. L. No. 109-58,<br>119 Stat. 594.....                 | 13     |
| § 311(c)(2), 119 Stat. 686 .....   | 13     |
| National Environmental Policy Act of 1969,<br>42 U.S.C. §§ 4321 <i>et seq.</i> ..... | 13     |
| 42 U.S.C. § 4332 .....   | 13, 17 |
| Natural Gas Act, 15 U.S.C. §§ 717 <i>et seq.</i> :                                   |        |
| § 3(a), 15 U.S.C. § 717b(a).....   | 11, 17 |
| § 3(d), 15 U.S.C. § 717b(d) .....  | 13     |
| § 3(e)(1), 15 U.S.C. § 717b(e)(1) .....  | 13     |
| River and Harbor Act of 1899, § 10, 33 U.S.C.<br>§ 403.....                          | 11, 20 |
| 33 C.F.R.:   |        |
| Pt. 66.....  | 11     |
| Pt. 127.....   | 11, 20 |
| Pt. 325:   |        |
| § 325.2(b)(2)(ii).....   | 13     |
| 40 C.F.R. § 1501.6 .....   | 17     |

Delaware

|  |        |
|--|--------|
| Del. Const. art. IV, § 11(1)(a).....   | 34     |
| Coastal Zone Act, Del. Code Ann. tit. 7,<br>§§ 7001 <i>et seq.</i> .....           | 12     |
| § 7001 .....   | 1, 55  |
| § 7002(f) .....  | 12, 14 |
| § 7003 .....   | 12, 55 |
| § 7008 .....   | 33, 34 |
| Subaqueous Lands Act, Del. Code Ann. tit. 7,<br>ch. 72 .....                       | 61     |
| Underwater Lands Act, Del. Code Ann. tit. 7,<br>§§ 6151-6159 (repealed 1986) ..... | 61, 68 |
| Del. Code Ann. tit. 7:   |        |
| § 4520 (repealed 1966) .....   | 61, 68 |
| § 6501 (Art. 10, § 10.1) .....   | 66     |
| 23 Del. Laws ch. 5 (1905) .....  | 6      |
| 53 Del. Laws ch. 34 (1961) .....   | 61, 68 |
| 55 Del. Laws ch. 442 (1966) .....  | 61     |
| 65 Del. Laws ch. 508 (1986) .....  | 61     |

New Jersey

4 N.J. Comp. St., Riparian Rights (1911):

§ 21 .....9  
 § 36 .....54  
 § 37 .....9

1851 N.J. Laws 335 (Wharf Act) .....44

1871 N.J. Laws ch. 307, § 1 .....54

1905 N.J. Laws ch. 42 .....6

N.J. Stat. Ann.:

§§ 12:3-1 – 12:3-25 .....44  
 § 12:3-9 .....49  
 § 12:3-10 .....9  
 § 12:3-18 .....49  
 § 12:3-21 .....49  
 § 12:3-22 .....9, 49  
 § 12:3-23 .....49  
 § 12:3-24 .....49  
 § 12:3-25 .....49

Tidelands Act, N.J. Stat. Ann. §§ 12:3-1 *et seq.* .....13

Waterfront Development Act, N.J. Stat. Ann.

§ 12:5-3 ..... 12-13

Wetlands Act of 1970, N.J. Stat. Ann. §§ 13:9A-1  
*et seq.* .....13

N.J. Admin. Code §§ 7:7E *et seq.* .....16

    § 7:7E-3.5 .....16

    § 7:7E-3.7 .....16

    § 7:7E-3.15 .....16

    § 7:7E-3.23 .....16

    § 7:7E-3.27 .....16

    § 7:7E-3.38 .....16

ADMINISTRATIVE MATERIALS

Application of Crown Landing LLC for Section 3  
 Authorization To Construct Liquefied Natural  
 Gas Import Facility, *Crown Landing LLC*,  
 Docket No. CP04-411-000 (FERC filed Sept.  
 16, 2004) .....17, 31

Crown Landing Response to FERC May 16, 2005  
 Additional Information Request, Docket No.  
 CP04-411-000 (FERC filed May 26, 2005) .....15

Federal Energy Regulatory Commission:

*Draft Environmental Impact Statement:  
 Crown Landing LNG and Logan Lateral  
 Projects* (Feb. 2005) .....10, 11, 17, 18, 19

*Draft General Conformity Determination,  
 Crown Landing LNG and Logan Lateral  
 Projects*, Docket Nos. CP04-411-000 & CP04-  
 416-000 (Aug. 26, 2005) .....19

|  |            |
|--|------------|
| <i>LNG – Laws and Regulations: States’ Rights in Authorization of LNG Facilities</i> (updated Aug. 17, 2005), available at <a href="http://www.ferc.gov/industries/lng/gen-info/laws-regs/state-rights.asp">http://www.ferc.gov/industries/lng/gen-info/laws-regs/state-rights.asp</a> ..... | 13         |
| Findings of Robert W. Knecht, Assistant Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration, Approval of the Delaware Coastal Management Program (Aug. 21, 1979) .....  | 12         |
| Formal Opinion 1954 – No. 3, 1954 N.J. Op. Atty. Gen. 6 (Feb. 2, 1954) .....   | 53, 58, 67 |
| Letter from Michael Chezik, U.S. Dep’t of Interior, to Magalie Salas, Federal Energy Regulatory Commission (Apr. 13, 2005).....  | 18         |
| Letter from Clifford Day, U.S. Dep’t of Interior, to LTC Robert J. Ruch, U.S. Army Corps of Engineers (Apr. 29, 2005) .....  | 20         |
| Letter from John Filippelli, U.S. Environmental Protection Agency, to Magalie Salas, Federal Energy Regulatory Commission (Apr. 14, 2005) .....  | 18         |
| Letter from John Hughes, Delaware Dep’t of Natural Resources and Environmental Control, to Magalie Salas, Federal Energy Regulatory Commission (Apr. 13, 2005).....  | 19         |
| Letter from Susan Kennedy, National Oceanic and Atmospheric Administration, to Magalie Salas, Federal Energy Regulatory Commission (Apr. 18, 2005) .....   | 18         |

Letter from Kenneth Koschek, New Jersey Dep't of Environmental Protection, to Magalie Salas, Federal Energy Regulatory Commission (Apr. 19, 2005) .....19

Letter from David Q. Risilia, Office of Dredging and Sediment Technology, to David Blaha, Environmental Resources Management (Feb. 4, 2005) .....16, 65

Letter from David Q. Risilia, Office of Dredging and Sediment Technology, to David Blaha, Environmental Resources Management (July 15, 2005) ..... 16-17

Letter from John Sherman, Planner III, Delaware Planning Office, to Richard Sullivan, Commissioner, New Jersey Dep't of Environmental Protection (Feb. 23, 1972).....63

Letter from Herbert Ward, Attorney General of Delaware, to John Hunn, Governor of Delaware (Jan. 31, 1903)..... 5-6

Memorandum from David S. Swayze and Michael W. Teichman, Parkowski, Guerke & Swayze (counsel for Crown Landing), to John A. Hughes, Secretary, Delaware Dep't of Natural Resources and Environmental Control (Dec. 7, 2004) .....14

Memorandum of Law of Appellant Crown Landing, LLC, *Coastal Zone Act Status Decision published February 3, 2005 in Respect of the Application of the Crown Landing LLC*, Docket No. 2005-1 (Del. Coastal Zone Indus. Control Bd. filed Mar. 23, 2005) .....15

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Notice of Applications, Crown Landing LLC, 69 Fed. Reg. 59,906 (Oct. 6, 2004).....17

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OTHER MATERIALS

Joseph K. Angell, *A Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof* (1847).....39

Robert E. Beck, *Waters and Water Rights* (2001 Replacement Volume) ..... 8-9, 42

|  |                    |
|--|--------------------|
| Charles S. Boyer, <i>Waterways of New Jersey: History of Riparian Ownership and Control Over the Navigable Waters of New Jersey</i> (1915) .....   | 8                  |
| BP Press Release, <i>BP Announces Plans for US East Coast LNG Import Terminal</i> (Dec. 4, 2003), available at <a href="http://www.bp.com/genericarticle.do?categoryId=2012968&amp;contentId=2015800">http://www.bp.com/genericarticle.do?categoryId=2012968&amp;contentId=2015800</a> ..... | 10                 |
| Crown Landing Informational Website, “What is the current status of the project?,” at <a href="http://www.bpcrownlanding.com/go/doc/569/83864/">http://www.bpcrownlanding.com/go/doc/569/83864/</a> (last visited Oct. 21, 2005) .....   | 20                 |
| 1 Henry P. Farnham, <i>The Law of Waters and Water Rights</i> (1904).....  | 35, 36, 38, 39, 41 |
| Oral Arg. Tr., <i>Virginia v. Maryland</i> , No. 129, Orig., 2003 WL 22335915 (U.S. Oct. 7, 2003) .....  | 74                 |
| Robert L. Stern, <i>et al.</i> , <i>Supreme Court Practice</i> (2002) .....  | 76                 |
| A. Dan Tarlock, <i>Law of Water Rights and Resources</i> (2005) .....  | 9                  |
| <i>Webster’s International Dictionary</i> (1898) .....   | 48                 |
| 18 Charles A. Wright, <i>et al.</i> , <i>Federal Practice and Procedure</i> (1981).....  | 71                 |

## INTRODUCTION

New Jersey brings this action so that a subsidiary of B.P. p.l.c. (“BP”) can build a massive liquefied natural gas (“LNG”) processing terminal on lands within Delaware’s border, in a coastal area determined by Delaware’s General Assembly to be among “the most critical areas for the future of the State in terms of the quality of life.” Del. Code Ann. tit. 7, § 7001. The lands are submerged lands owned by Delaware in trust for the people of the State. New Jersey, however, claims that Delaware cannot discharge its responsibilities as a sovereign and trustee because under a 1905 interstate compact Delaware ceded all jurisdiction over these lands for any structure originating on the New Jersey shore. At both the procedural and substantive levels, New Jersey’s action is flawed and should be rejected by this Court.

Procedurally, New Jersey improperly invokes this Court’s original jurisdiction. New Jersey styles its action as a “Motion to Reopen and for a Supplemental Decree” ostensibly to modify a decree issued by this Court in 1935 that settled a longstanding boundary dispute between the two States. *See New Jersey v. Delaware*, 295 U.S. 694 (1935). This case does not concern the boundary at all, however, but rather the interpretation of a provision concerning the exercise of riparian rights in a 1905 Compact entered into between the two States. The 1935 Decree addressed only the boundary, not the exercise of riparian rights. Even if this Court were to accept New Jersey’s alternative form of pleading by treating this case as a complaint proceeding, New Jersey’s invocation of the Court’s jurisdiction should be rejected. Neither New Jersey itself nor various agencies of the United States government have completed their administrative reviews vetting BP’s proposed LNG bulk transfer facility. Given that any of those reviews could result in a rejection of BP’s proposal, it is completely speculative at this time that Delaware’s decision to reject the proposal is the cause of any injury that BP might suffer. The “injury” to New Jersey is also

speculative, given that alternative sites exist where the facility could be located that would not encroach on Delaware's lands and yet would produce the very same financial benefits to New Jersey and its citizens. In short, this case is being invoked by New Jersey for the commercial convenience of a large corporation that is not even a citizen of that State.

Substantively, New Jersey's action is flawed because the 1905 Compact cannot be read fairly as denying Delaware the authority to regulate the dredging and construction of a massive bulk product transfer facility within its fragile coastal zone. As the law stood prior to 1905, Delaware unquestionably could deny BP permission to build this facility. Nothing in the 1905 Compact changed that result. Rather, Article VII confirmed that each State would "continue to exercise" riparian jurisdiction "on its own side of the river." NJ App. 5a. That language provided that the status quo would remain in place and that, whenever the boundary between the two States was finally resolved, each State would "continue to exercise" jurisdiction within its own border. Nothing in the Compact confers on New Jersey the extraordinary right it seeks here — to approve unilaterally a project that would displace 800,000 cubic yards of Delaware soil on a plot 27 acres large and to bar Delaware from having any say in the matter. The fact that this land borders New Jersey does not warrant a departure from the longstanding principle that each State has sovereign control and public trust obligations over its own lands within its boundary.

### **JURISDICTION**

This Court lacks jurisdiction over New Jersey's Motion to Reopen and for a Supplemental Decree in No. 11, Original. New Jersey does not seek to enforce any provision of this Court's 1935 Decree, which pertained exclusively to the boundary dispute between the States and did not adjudicate their respective powers to define and regulate the exercise of riparian rights. Its Motion therefore does not properly invoke this Court's retained jurisdiction

over that decree. Nor does New Jersey's Motion properly invoke this Court's original jurisdiction, if the Motion is viewed as a request for leave to file a new complaint. New Jersey has not identified any cognizable injury to itself or its citizenry caused by Delaware. Indeed, neither New Jersey nor the United States government has issued all of the permits necessary for federal and state approval of BP's proposed LNG terminal. New Jersey's allegation that Delaware's action has caused injury to New Jersey is therefore premature. Absent a definitive conclusion that the BP project will in fact be approved by the other necessary federal and New Jersey authorities, New Jersey's claim that Delaware's refusal to approve BP's Crown Landing project is causing New Jersey's injury is purely speculative. This Court also lacks jurisdiction because New Jersey is suing to further the interests of a private party — BP — that is not even a New Jersey citizen. But, even if this Court has original jurisdiction over the instant dispute, it should decline to exercise that jurisdiction, because BP, the real party in interest, had (but purposefully declined to pursue) an adequate alternative forum in which to resolve the claims New Jersey presents here and that forum could have produced an appeal ultimately to this Court upon a petition for writ of certiorari. *See infra* pp. 32-35.

#### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

In addition to the constitutional and statutory provisions cited by New Jersey, this case involves Article VIII of the 1905 Compact, which states:

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

## STATEMENT OF THE CASE

### A. Delaware's Sovereignty Over The Delaware River Within The Twelve-Mile Circle

Delaware traces its sovereign title to lands within the State's boundary to a 1682 grant to William Penn from the Duke of York. *See New Jersey v. Delaware*, 291 U.S. 361, 365 (1934). That grant embraced the lands within a twelve-mile circle of the New Castle, Delaware courthouse, a description that extended across the Delaware River to points at the low-water mark of the New Jersey shoreline. From the outset, Penn insisted on his ownership of the subaqueous soil of the Delaware River, while acknowledging common rights, such as to navigation on the river. For example, Penn instructed one of his commissioners involved in boundary negotiations with the Province of New Jersey as follows: "Insist upon my Title to ye River, Soyl and Islands thereof according to Grant. . . . They have ye Liberty of ye River, but not ye Propriety." *See id.* at 374.

Between the time of the Duke of York's grant to Penn and this Court's 1934 decision in *New Jersey v. Delaware*, Delaware's sovereignty over the subaqueous land within the twelve-mile circle was upheld in several lawsuits. In a 1732 case, the Lord Chancellor Hardwicke upheld Penn's title against a challenge from Lord Baltimore. *See id.* at 367-68. More than a century later, *In re Pea Patch Island*, 30 F. Cas. 1123 (Arb. Ct. 1848) (No. 18,311), affirmed Delaware's sovereignty, in an analysis that this Court later praised as a "careful and able statement of the conflicting claims of right." 291 U.S. at 373, 377.

When the question of Delaware's sovereignty over the Delaware River subaqueous lands came before this Court in the 1930s, after a similar 1877 suit was dismissed in 1907 prior to resolution of the issue, the Court conclusively resolved the long-festering boundary dispute between the two States. The Court held that Delaware has sovereignty over the Delaware River within a circle of 12 miles about the town of New Castle, up to the low-water

mark on the east, or New Jersey, side of the river (the “twelve-mile circle”). *See id.* at 365. The Court rejected each of the bases on which New Jersey claimed title to the subaqueous soil of the Delaware River within the twelve-mile circle. *See id.* at 370-78. Of particular relevance here, the Court rejected New Jersey’s claim that a compact entered into between the two States in 1905 caused Delaware to relinquish ownership of the land to New Jersey. *See id.* at 377-78.

On June 3, 1935, the Court entered a decree confirming its determination of the boundary between the States. *See New Jersey v. Delaware*, 295 U.S. 694 (1935). In the decree, the Court retained jurisdiction to issue “any supplemental decree, which it may at any time deem to be proper in order to carry into effect any of the provisions of this decree, and for the purpose of a resurvey of said boundary line in case of physical changes in the mean low water line within said circle, or in the middle of the main ship channel below said circle, which may, under established rules of law, alter the location of such boundary line.” *Id.* at 698. The decree stated that it was “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.” *Id.* at 699.

#### **B. The 1905 Compact**

New Jersey and Delaware entered into the 1905 Compact after a long dispute between the States over fishing rights. In the spring of 1872, Delaware officials enforcing a Delaware fishing statute arrested New Jersey fishermen on the Delaware River within the twelve-mile circle. New Jersey protested that action and in 1877 filed a complaint in this Court challenging Delaware’s exercise of such authority. *See* Lodging, Tab 1, at 6-50 (Rec. I, No. 1 Orig., Oct. Term, 1884). That case remained dormant for many years until, in 1901, the Clerk of this Court directed that the case should be “forthwith proceeded with.” *See id.*, Tab 3, at 4 (Letter from Herbert Ward, Attorney General of Delaware, to John Hunn, Governor of Delaware, at

4 (Jan. 31, 1903)); see *New Jersey v. Delaware*, 291 U.S. at 377.

Concurrent with the litigation in this Court, Delaware and New Jersey appointed commissioners to negotiate a settlement of the case. In 1905, the Delaware and New Jersey legislatures approved the Compact as proposed by the commissioners to resolve the fishing rights dispute within the twelve-mile circle. See Lodging, Tab 6 (23 Del. Laws ch. 5; 1905 N.J. Laws ch. 42, p. 67). Congress approved the Compact in January 1907. See NJ App. 1a-7a. In April 1907, New Jersey dismissed its complaint. See *New Jersey v. Delaware*, 205 U.S. 550 (1907).

As this Court explained in 1934 when adjudicating the States' boundary dispute, the 1905 Compact "provides for the enjoyment of riparian rights, for concurrent jurisdiction in respect of civil and criminal process, and for concurrent rights of fishery," but "[b]eyond that it does not go." 291 U.S. at 377-78. Indeed, this Court found New Jersey's assertion that the 1905 Compact cedes Delaware's ownership of the subaqueous lands within the twelve-mile circle to be "wholly without force." *Id.* at 377. In reaching that determination, the Court made special note of Article VIII of the 1905 Compact, see *id.* at 377-78, which expressly states that "[n]othing" in the Compact "shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth." NJ App. 5a. This Court's 1935 Decree concerned only title to the Delaware River subaqueous land, and not any rights or authorities of the States that are the subject of the 1905 Compact.

The 1905 Compact contains nine articles. As Delaware's counsel explained in submitting the Compact to the Court as grounds for dismissing the 1877 original action filed by New Jersey, the "main purpose" of the Compact is "to provide for enacting and enforcing a joint code of laws regulating the business of fishing in the Delaware

River and Bay.” Lodging, Tab 7, at 10 (Statement of Reasons).

Articles I and II resolve the issue that precipitated the filing of New Jersey’s complaint in 1877: the arrest, by officials of one State, of citizens of the other State while on the Delaware River within the twelve-mile circle. Those articles set forth each State’s jurisdiction to serve criminal process on the river. *See* NJ App. 2a-3a. Delaware and New Jersey can serve process based on crimes committed on, respectively, the western and eastern halves of the river. *See id.* Because the 1905 Compact does not resolve the boundary line within the twelve-mile circle, those Articles also give each State the right to serve process based on “an offense committed upon the soil of said State.” *Id.*

Articles III through V create a framework for resolving the other portion of the controversy that had led to New Jersey’s complaint: fishing rights. Article III declares the general principle that the inhabitants of both States “shall have and enjoy a common right of fishery” between the low-water marks on the river. *Id.* at 3a-4a. Article IV commits each State to the appointment of commissioners to draft uniform laws to regulate the catching and taking of fish in the Delaware River and Bay. *See id.* at 4a. Those uniform laws, upon adoption, were to become the sole laws regulating fishing in the river and bay. *See id.* Article IV also provides each State, in language that appears only in this article, with “exclusive jurisdiction within said river to arrest, try, and punish its own inhabitants for violation of the concurrent legislation relating to fishery.” *Id.* at 5a.<sup>1</sup> Article V permits laws not inconsistent with the common right to fish to continue in force

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<sup>1</sup> The States never effectuated the terms of Article IV. *See, e.g., Ampro Fisheries, Inc. v. Yaskin*, 588 A.2d 879, 883 (N.J. Super. Ct. App. Div. 1991) (describing New Jersey’s contention that “the 1905 Compact has been mutually abandoned by reason of the fact that the two states have never enacted complementary fishing laws”), *aff’d in part and rev’d in part on other grounds*, 606 A.2d 1099 (N.J. 1992).

until the enactment of the concurrent legislation regarding fishery. *See id.*

Article VI provides that Articles III through V do not apply to the oyster and shellfish industries. *See id.* The States agreed to defer resolution of any disagreements regarding those industries. As Delaware’s counsel stated to the Court, the Compact is “not a settlement of the disputed boundary, but a truce or *modus vivendi*.” Lodging, Tab 7, at 10 (Statement of Reasons). A dispute over oyster beds in the Delaware Bay caused New Jersey to file the complaint in this Court that ultimately resolved Delaware’s sovereignty over the lands within the twelve-mile circle.

Article VII addresses each State’s power to define and to regulate the exercise of riparian rights, providing that each, “on its own side of the river, [may] continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.” NJ App. 5a. At the time of the Compact, New Jersey exercised jurisdiction over riparian lands by statute rather than by common law. *See id.* at 26a-27a (Castagna Aff. ¶ 3).<sup>2</sup> Under the statutory regime in effect at the time, an owner of riparian lands<sup>3</sup> could obtain a “lease, grant or

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<sup>2</sup> At the time of the Compact, Delaware exercised jurisdiction over riparian rights by application of common law. *See, e.g., Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435, 1882 WL 2713, at \*10 (Del. Ch. 1882); *State v. Reybold*, 5 Harr. 484, 1854 WL 847 (Del. 1854); *Delaney v. Boston*, 2 Harr. 489, 1839 WL 165 (Del. Super. Ct. 1839). Delaware continues to recognize riparian rights at common law, subject to the State’s “power to regulate or restrict private riparian property rights for public purposes.” *City of Wilmington v. Parcel of Land Known as Tax Parcel No. 26.067.00.004*, 607 A.2d 1163, 1168-69 (Del. 1992).

<sup>3</sup> New Jersey appears to refer to “riparian lands” as submerged lands, *see* Charles S. Boyer, *Waterways of New Jersey: History of Riparian Ownership and Control Over the Navigable Waters of New Jersey* 75 (1915), whereas most States use that term to describe the lands from the shore to the high-water mark or the low-water mark, *see* Robert E. Beck, *Waters and Water Rights* § 7.02(a) (2001 Replacement

conveyance” from New Jersey “of any lands under water in front of his lands,” including the right to dredge out to navigable waters, but only on “lands of the state.” DE App. 159a, 168a (4 N.J. Comp. St., Riparian Rights §§ 21, 37 (1911) (currently codified at N.J. Stat. Ann. §§ 12:3-10, 12:3-22)).<sup>4</sup> The Compact thus preserves New Jersey’s ability to enforce, on “its own side of the river,” NJ App. 5a, these statutes governing the use of riparian lands.

Article VIII generally reserved the States’ rights, providing that “[n]othing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.” *Id.*

Finally, Article IX sets forth a process for execution by the commissioners and ratification by Congress, stating that upon ratification the Compact would become “binding in perpetuity” upon both States and that the suit then pending would be “discontinued” without prejudice. *Id.* at 6a.

### C. The Current Dispute Between BP And Delaware

In 2002, BP contacted the Delaware Department of Natural Resources and Environmental Control (“DNREC”) regarding a proposal to construct a new LNG terminal on the Delaware River within Delaware’s coastal zone, with associated onshore structures in New Jersey. *See* DE App. 4a (Cherry Aff. ¶ 8).<sup>5</sup> Despite the availability of other New Jersey sites outside Delaware’s coastal zone, BP preferred the site within Delaware largely because of its proximity to natural gas pipelines.

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Volume) (“*Beck’s Waters and Water Rights*”); A. Dan Tarlock, *Law of Water Rights and Resources* § 3.35 (2005).

<sup>4</sup> These statutes are largely still in place and are compiled under Title 12 of the New Jersey Statutes entitled, “Commerce and Navigation.”

<sup>5</sup> “Cherry Aff.” refers to the Affidavit of Philip Cherry, which can be found at DE App. 1a-61a.

*Id.* On December 4, 2003, BP formally announced its plans to construct the new LNG terminal. See BP Press Release, *BP Announces Plans for US East Coast LNG Import Terminal* (Dec. 4, 2003), available at <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=2015800>. BP expected the terminal to transmit up to 1.2 billion cubic feet of natural gas daily, and to connect to major pipeline systems serving the Northeast. See *id.*

BP's proposed terminal, named the Crown Landing project, would consist of an offshore unloading facility located in New Castle County, Delaware, in the Delaware River, as well as onshore LNG storage and processing tanks and buildings located in Gloucester County, New Jersey. The unloading facility would be designed to handle supertankers with cargo capacities of up to 200,000 cubic meters (more than 40 percent larger than the largest LNG ships in today's world fleet). BP expects that a ship would off-load LNG at the facility every two to three days. See FERC, *Draft Environmental Impact Statement: Crown Landing LNG and Logan Lateral Projects* at 2-1 (Feb. 2005) ("Draft EIS"). The unloading facility would consist of a structure with a 2,000-foot-long trestle and a 6,000-square-foot unloading platform. See DE App. 5a (Cherry Aff. ¶ 14). An LNG transfer system would be installed on the unloading platform to transfer the LNG from the ship to three 150,000-cubic-meter storage tanks located onshore. The transfer system located on a structure built on Delaware's subaqueous lands would consist of three "unloading arms" for transfer of liquid to the storage tanks, an arm for the return of vapor to the ship, a "cryogenic transfer line" connecting the liquid unloading arms to the onshore tanks, a "vapor return line" connecting those tanks to the vapor return arm, and an additional cryogenic line.

Both the unloading structure and the transfer system are within Delaware's coastal zone. See Draft EIS at 4-92 ("Because the Crown Landing LNG Project would involve

construction of a new pier *and other facilities* within Delaware’s coastal zone . . . , a determination on whether the facilities would be a permissible use under the DSCZA [Delaware State Coastal Zone Act] is required.”) (emphasis added). The unloading facility would require the dredging of 800,000 cubic yards of Delaware subaqueous soil,<sup>6</sup> covering an area larger than 27 acres. See NJ App. 135a (Segal Aff. ¶ 4); Draft EIS at 2-15; DE App. 5a (Cherry Aff. ¶ 13).

Before it can construct its proposed project, BP must obtain approval from the Federal Energy Regulatory Commission (“FERC”) under § 3(a) of the Natural Gas Act, 15 U.S.C. § 717b(a); from the U.S. Army Corps of Engineers (“Corps”) under § 10 of the River and Harbor Act of 1899, 33 U.S.C. § 403, and § 404 of the Clean Water Act of 1977, 33 U.S.C. § 1344; from the U.S. Coast Guard pursuant to Coast Guard regulations, 33 C.F.R. Pts. 66 and 127; and from New Jersey and Delaware under the Coastal Zone Management Act of 1972 (“CZMA”), 16 U.S.C. §§ 1451 *et seq.* See Draft EIS at 1-4 to 1-10 (listing major permits, approvals, and consultations required for the Crown Landing project).

The CZMA prevents FERC from granting a permit for an activity that affects a State’s coastal zone unless the State agrees with the applicant that the activity complies with the State’s federally approved coastal management plan, or the Secretary of Commerce specifically finds that the activity is consistent with the objectives of the CZMA or necessary for national security. See 16 U.S.C. § 1456(c)(3)(A); *see also* Draft EIS at 4-91 (“any federal action (e.g., a project requiring federally issued licenses or permits) that takes place within a state’s coastal zone

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<sup>6</sup> For comparison, 800,000 cubic yards is the rough equivalent of 67,000 to 80,000 dump trucks worth of soil. See, e.g., State of Alaska, Department of Natural Resources, *Fact Sheet: Material Sale in Alaska* (Feb. 2004) (“A standard dump truck has a capacity of 10-12 cubic yards.”), at [http://www.dnr.state.ak.us/mlw/factsht/material\\_sites.pdf](http://www.dnr.state.ak.us/mlw/factsht/material_sites.pdf).

must be found to be consistent with state coastal policies before federal action can take place”).

Both Delaware and New Jersey have federally approved coastal management programs. Delaware’s program includes the Delaware Coastal Zone Act, Del. Code Ann. tit. 7, §§ 7001 *et seq.* (“DCZA”), which prohibits “[h]eavy industry uses of any kind” and “offshore gas, liquid or solid bulk product transfer facilities” within the coastal zone, *id.* § 7003. The Act defines “bulk product transfer facilities” as

any port or dock facility, whether an artificial island or attached to shore by any means, for the transfer of bulk quantities of any substance from vessel to onshore facility or vice versa. Not included in this definition is a docking facility or pier for a single industrial or manufacturing facility for which a permit is granted or which is a nonconforming use. Likewise, docking facilities for the Port of Wilmington are not included in this definition.

*Id.* § 7002(f). In 1979, the National Oceanic and Atmospheric Administration (“NOAA”) concluded that Delaware’s coastal management program fulfilled the requirements of the CZMA. *See* Findings of Robert W. Knecht, Assistant Administrator for Coastal Zone Management, NOAA, Approval of the Delaware Coastal Management Program (Aug. 21, 1979) (“Findings”).<sup>7</sup> The prior year, 1978, New Jersey’s coastal management program had similarly received approval from NOAA. New Jersey’s program includes its Waterfront Development Act,

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<sup>7</sup> In its findings on Delaware’s program, NOAA noted that some commentators had questioned whether the program “adequately considers the national interest,” Findings at 7, and that FERC specifically had expressed concern about the prohibition of bulk transfer facilities, *id.* at 25. However, NOAA concluded that “Delaware recognizes its role in satisfying the national interest,” and that the prohibition of certain facilities in a limited area was “justified on the ground of balancing the national need for facilities with the national interest in recreation and preservation of natural resources.” *Id.* at 26.

N.J. Stat. Ann. § 12:5-3; Wetlands Act of 1970, N.J. Stat. Ann. §§ 13:9A-1 *et seq.*; and Tidelands Act, N.J. Stat. Ann. §§ 12:3-1 *et seq.*<sup>8</sup>

Just as FERC may not approve the Crown Landing project without prior certifications from New Jersey and Delaware, the Army Corps of Engineers similarly may not grant a permit until the applicant demonstrates compliance with state law. *See* 33 C.F.R. § 325.2(b)(2)(ii).

State approval, however, does not dictate the outcome of the federal regulatory process. As the lead agency with respect to the Crown Landing project, FERC is obligated under the National Environmental Policy Act of 1969 (“NEPA”) to conduct a detailed review of the project’s environmental impact and to consult with other federal agencies. *See* 42 U.S.C. § 4332. The Corps is similarly

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<sup>8</sup> There currently appears to be a disagreement among federal agencies as to whether the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (“EPA05”), preempts States’ regulation of LNG facilities under coastal management plans. *Compare* EPA05 § 311(c)(2), 119 Stat. 686, to be codified at 15 U.S.C. § 717b(d) (“Except as specifically provided in this Act, nothing in this Act affects the rights of States under . . . the Coastal Zone Management Act of 1972”), *with id.* § 311(c)(2), 119 Stat. 686, to be codified at 15 U.S.C. § 717b(e)(1) (“The Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.”). FERC has stated publicly that EPA05 does not alter States’ rights under the CZMA to enforce their coastal management plans with respect to LNG projects. *See* FERC, *LNG – Laws and Regulations: States’ Rights in Authorization of LNG Facilities* (updated Aug. 17, 2005), *available at* <http://www.ferc.gov/industries/lng/gen-info/laws-regrs/state-rights.asp>. NOAA, however, has stated that, because of the “‘exclusive authority’ language [in the EPA05], some State CZMA enforceable policies that NOAA previously approved that would specifically apply to LNG or LNG-type facilities would likely no longer be enforceable for purposes of CZMA [federal] consistency reviews.” Office of Ocean and Coastal Resource Management, NOAA, *Summary of Provisions of the Energy Policy Act of 2005 (Pub. L. No. 109-58) Relating to the Coastal Zone Management Act* at 1 (Sept. 23, 2005). Although Delaware believes that FERC’s stated position correctly interprets EPA05, it is unclear when this dispute will ultimately be resolved.

obliged to determine whether the project is in the public interest. See Notice of Availability of the Draft Environmental Impact Statement, Crown Landing LLC, 70 Fed. Reg. 9297, 9298 (Feb. 25, 2005) (“Notice of Draft EIS”) (“Department of the Army permit(s) will be granted by the [Corps] unless it is determined that the proposed work would be contrary to the public interest.”). As explained below, neither FERC nor the Corps has completed the necessary review or made the necessary determinations with respect to the Crown Landing project. Moreover, New Jersey itself has not authorized the project under its coastal management program.

1. *Delaware’s Permitting Process*

On December 7, 2004, BP formally applied to DNREC for a status determination under the DCZA for its proposal to construct an LNG supertanker terminal partially within the twelve-mile circle. See DE App. 5a (Cherry Aff. ¶ 11). In its application, BP claimed that its proposed offshore bulk product transfer facility was permissible under the DCZA. BP argued that its proposed facility fell within the exception from the prohibition on bulk product transfer facilities for “a docking facility or pier for a single industrial or manufacturing facility for which a permit is granted or which is a nonconforming use.” Del. Code Ann. tit. 7, § 7002(f). BP, however, expressly elected not to raise any claims that, as a result of the 1905 Compact, Delaware lacked jurisdiction to enforce the DCZA with respect to BP’s proposed facility.<sup>9</sup>

On February 3, 2005, DNREC issued a status decision determining that BP’s proposed project was prohibited

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<sup>9</sup> See Memorandum from David S. Swayze and Michael W. Teichman, Parkowski, Guerke & Swayze (counsel for Crown Landing), to John A. Hughes, Secretary, DNREC, at 1 n.3 (Dec. 7, 2004) (accompanying Request for a Coastal Zone Status Decision (Nov. 30, 2004)) (stating that “Crown Landing and BP reserve any and all rights with respect to the relative ability of the State of Delaware to regulate within the riparian jurisdiction granted under the Compact to the state of New Jersey”).

under the DCZA. *See* DE App. 6a (Cherry Aff. ¶ 18). On behalf of DNREC, Secretary Hughes found that the “proposed facility represents a prohibited offshore bulk product transfer facility and does not meet the exemption under the bulk product transfer facility definition in that the facility cannot be considered a ‘manufacturing use’ under the Act.” *Id.* at 33a (Cherry Aff. Ex. G (DNREC Feb. 3, 2005 Legal Notice)).

On February 15, 2005, BP filed an administrative appeal to the Delaware Coastal Zone Industrial Control Board (“CZICB” or “Board”). Before the Board, BP again claimed only that its proposed facility was permitted under the DCZA and declined to raise any claims it might have based on the 1905 Compact.<sup>10</sup> On April 14, 2005, the Board unanimously affirmed DNREC’s status decision. The Board found that the onshore component of the proposed facility was not a manufacturing facility, that the onshore component existed solely to support the offshore component, and that “[t]he real sole purpose of the proposed facility is to serve as a bulk product transfer facility.” *Id.* at 57a (Cherry Aff. Ex. H at 7 (CZICB Decision and Order)); *id.* at 6a-7a (Cherry Aff. ¶ 19). The Board therefore concluded that “the proposed construction is absolutely prohibited by the Act.” *Id.* at 61a (Cherry Aff. Ex. H at 10 (CZICB Decision and Order)).

BP chose not to exercise its right to appeal the decision of the CZICB to state court. Despite the fact that Delaware’s denial of a permit under the DCZA was sufficient to require FERC to deny BP’s permit, BP urged FERC to approve the Crown Landing project conditionally. *See* Crown Landing Response to FERC May 16, 2005 Additional Information Request at 3, Docket No. CP04-411-000 (FERC filed May 26, 2005). BP advised FERC that “New

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<sup>10</sup> *See* Memorandum of Law of Appellant Crown Landing, LLC at 1 n.1, *Coastal Zone Act Status Decision published February 3, 2005 in Respect of the Application of the Crown Landing LLC*, Docket No. 2005-1 (CZICB filed Mar. 23, 2005).

Jersey would undertake whatever appropriate action is necessary to confirm that Delaware lacks the authority to require any Delaware permits” for the Crown Landing project. NJ App. 141a (Segal Decl. ¶ 21).

## 2. *New Jersey’s Permitting Process*

On January 7, 2005, pursuant to New Jersey’s Coastal Zone Management Rules,<sup>11</sup> which implement New Jersey’s federally approved coastal management plan, BP filed a Waterfront Development Application with the New Jersey Department of Environmental Protection’s Office of Dredging and Sediment Technology (“ODST”). Like the permit BP sought under the DCZA, approval of BP’s Waterfront Development Application is a necessary precondition to FERC authorization of the Crown Landing project. New Jersey, however, has yet to approve BP’s application.

On February 4, 2005, ODST notified BP that its application was deficient. *See* DE App. 84a-138a (Letter from David Q. Risilia, ODST, to David Blaha, Environmental Resources Management (Feb. 4, 2005)). ODST explained that the Crown Landing application lacked sufficient information to demonstrate compliance with numerous New Jersey rules, including, for example § 7:7E-3.5, regarding finfish migratory pathways; § 7:7E-3.7, regarding navigation channels; § 7:7E-3.15, regarding intertidal and subtidal shallows; § 7:7E-3.23, regarding filled water’s edge; § 7:7E-3.27, regarding wetlands; and § 7:7E-3.38, regarding endangered or threatened wildlife or plant species habitats.

BP submitted a response to ODST’s deficiency letter on May 16, 2005. On July 15, 2005, ODST sent BP a second deficiency letter, stating that its application was still inadequate under the Coastal Zone Management Rules, and accordingly “is not deemed complete for final review at this time, or for a public hearing pursuant to N.J.A.C. 4.4(b)(2).” Letter from David Q. Risilia, ODST, to David

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<sup>11</sup> *See* N.J. Admin. Code §§ 7:7E *et seq.*

Blaha, Environmental Resources Management, at 1 (July 15, 2005).

3. *The FERC Process for Approval of the Crown Landing Project*

On September 16, 2004, BP filed with FERC an application under § 3(a) of the Natural Gas Act, 15 U.S.C. § 717b(a), requesting that FERC authorize construction of the Crown Landing LNG facility in Delaware's coastal zone. *See* Application of Crown Landing LLC for Section 3 Authorization To Construct Liquefied Natural Gas Import Facility, *Crown Landing LLC*, Docket No. CP04-411-000 (FERC filed Sept. 16, 2004) ("BP September 16, 2004 FERC Application"). On September 29, 2004, FERC issued a "Notice of Applications" and invited comments in support of or in opposition to the project. *See* Notice of Applications, *Crown Landing LLC*, 69 Fed. Reg. 59,906 (Oct. 6, 2004).

FERC is serving as the lead agency in conducting the environmental review of the Crown Landing proposal required by NEPA. FERC is cooperating with the other agencies whose regulatory responsibilities encompass the project, such as NOAA, the Fish and Wildlife Service ("FWS"), and the Environmental Protection Agency ("EPA"). *See* 42 U.S.C. § 4332 (requiring "the responsible Federal official" to "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved"); 40 C.F.R. § 1501.6 ("the lead agency shall . . . [u]se the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency").

On February 18, 2005, FERC released a draft Environmental Impact Statement ("EIS") for the Crown Landing project. The Draft EIS concluded that the adverse environmental impacts of the project would be limited *if* Crown Landing were to adopt FERC's recommended mitigation measures. *See* Draft EIS at ES-9. As part of its

analysis, FERC examined seven alternative sites for an LNG import facility in the mid-Atlantic region. Two of the alternative sites are south of the twelve-mile circle but within Delaware's coastal zone, whereas five are north of the twelve-mile circle and thus outside Delaware's coastal zone (because Delaware borders Pennsylvania at the north end of the twelve-mile circle). *See id.* at 3-32 to 3-41. FERC determined that the various alternatives were not preferable to the Crown Landing site because they did not offer "significant environmental advantages." *Id.* at 3-29; *see also id.* at 3-47 (rejecting pipeline system alternatives because they "would not offer any significant environmental benefits over the proposed facilities").

Several of the cooperating agencies have expressed reservations about the Draft EIS. For example, the Department of the Interior ("DOI") requested that FERC reconsider alternatives such as relocating the facility downriver or offshore in the Atlantic Ocean. *See* Letter from Michael Chezik, DOI, to Magalie Salas, FERC, at 5 (Apr. 13, 2005). DOI concluded that "fish and wildlife issues have not been adequately addressed" by FERC and that "new information is needed to adequately address those issues." *See id.* at 8-9. NOAA recommended that FERC more thoroughly investigate alternatives, *see* Letter from Susan Kennedy, NOAA, to Magalie Salas, FERC, at 5 (Apr. 18, 2005), and that it develop a mitigation plan for the loss of habitat, *see id.* at 4. EPA similarly indicated that it had "environmental concerns and that further information as described above is necessary," because the Draft EIS "does not include detailed mitigation plans, a discussion of general conformity, or thoroughly analyze the cumulative effects on navigation and the environment." Letter from John Filippelli, EPA, to Magalie Salas, FERC, at 3 (Apr. 14, 2005).

Both the New Jersey Department of Environmental Protection ("NJDEP") and DNREC have voiced concerns about the Crown Landing project and the Draft EIS.

NJDEP suggested that FERC consider the alternative of locating the facility offshore and noted that the proposed facility would block as much as 50 percent of the navigable portion of the river to commercial and recreational boating. *See* Letter from Kenneth Koschek, NJDEP, to Magalie Salas, FERC (Apr. 19, 2005).<sup>12</sup> DNREC, in addition to observing that the project is prohibited under the Delaware Coastal Zone Act, pointed out various deficiencies in the Draft EIS's analysis of alternatives. *See* Letter from John Hughes, DNREC, to Magalie Salas, FERC, at 2 (Apr. 13, 2005) (“[t]he Alternatives Analysis section of the [Draft] EIS was broad in scope but lacked specificity . . . [e]nvironmental impacts were not quantified”). DNREC further observed that it was “premature to evaluate this project” from the perspective of marine safety “due to gaps in information pertaining to safety and security issues”: “The U.S. Coast Guard has not weighed in on the feasibility of this project. . . . [I]t seems that the Coast Guard would be far from issuing a letter of recommendation.” *Id.* at 4.

Not only has FERC yet to address these and other comments on the Draft EIS and to release a final EIS, it also has yet to complete its analysis of the Crown Landing project with respect to air quality. As required by the Clean Air Act, FERC prepared a Draft General Conformity Determination to assess the Crown Landing project's impact on air quality. *See Draft General Conformity Determination, Crown Landing LNG and Logan Lateral Projects*, Docket Nos. CP04-411-000 & CP04-416-000 (Aug. 26, 2005). FERC specifically noted that, because documentation supporting conformity with the applicable state plans for implementation of the Clean Air Act had not been filed with FERC, FERC's analysis was incomplete and it could not make a determination of conformity. *See id.* at 13.

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<sup>12</sup> The Delaware River is approximately one mile wide at the Crown Landing site. *See* DE App. 142a (Draft EIS at 3-28, Figure 3.3.3-1).

Moreover, the Corps has not yet evaluated whether the Crown Landing project is in the public interest, and therefore has not issued the necessary permits to BP under § 404 of the Clean Water Act, 33 U.S.C. § 1344, and § 10 of the River and Harbor Act of 1899, 33 U.S.C. § 403. *See* Notice of Draft EIS, 70 Fed. Reg. at 9298 (explaining that the Corps' decision on whether to issue a permit "will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed projects on the public interest," and that factors considered include "conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply, . . . property ownership, and in general, the needs and welfare of the people"). Just as they did before FERC, federal agencies have urged the Corps to withhold its approval pending further analysis of alternatives and mitigation plans. *See, e.g.*, Letter from Clifford Day, DOI, to LTC Robert J. Ruch, Corps of Engineers, at 1 (Apr. 29, 2005) (summarizing FWS concerns, recommending "that the Corps resolve the below issues prior to any issuance of a Department of the Army (DA) permit," and enclosing copies of the NOAA and DOI comments on the Draft EIS).

Finally, the Coast Guard has yet to approve the Crown Landing project. *See* Crown Landing Informational Website, "What is the current status of the project?," at <http://www.bpcrownlanding.com/go/doc/569/83864/> (last visited Oct. 21, 2005) ("The US Coast Guard is continuing its review of the river transit issues, working with the Area Maritime Security Committee to review safety and security issues associated with the river transit."); *see also* 33 C.F.R. Pt. 127, "Waterfront Facilities Handling Liquefied Natural Gas and Liquefied Hazardous Gas" (establishing safety and security requirements regarding waterfront LNG facilities to be enforced by the Coast Guard).

The various federal agencies involved in considering the Crown Landing project have not issued a timetable for when a decision will be made on the project.

### **SUMMARY OF ARGUMENT**

**I.** This Court lacks jurisdiction over this dispute, which in reality is between BP and Delaware, not two States. Indeed, New Jersey cannot identify any concrete injury to itself or its citizenry directly caused by Delaware's denial of a permit under the DCZA. Unmentioned in New Jersey's filing is that BP has yet to secure a permit under New Jersey's equivalent Coastal Zone Management Rules, and that FERC and other federal agencies cannot approve the BP plant unless and until the New Jersey permit is issued.

In an attempt to avoid this plain jurisdictional defect, New Jersey claims that its filing merely invokes this Court's retained jurisdiction to enforce its 1935 Decree. But that claim fails because the Decree did not address, much less adjudicate, the nature and scope of each State's riparian rights under the 1905 Compact, which is the ruling New Jersey seeks here. In any event, even if New Jersey had properly invoked this Court's original jurisdiction, this Court should decline to exercise that jurisdiction because BP, the real party in interest, had an adequate, alternative forum in which the issues presented here could have been litigated.

**II.** If this Court reaches the merits, it should reject New Jersey's broad assertion that it has "exclusive riparian jurisdiction" to approve projects that encroach on Delaware submerged lands without any say by Delaware. The law as it existed prior to 1905 would have rejected that assertion, because States traditionally have sovereignty over lands within their boundaries. The 1905 Compact, which expressly provides that each State shall "continue to exercise" riparian jurisdiction "on its own side of the river," did not alter the background legal rules. Although the parties conferred "exclusive" power in a State in certain circumstances, they did not do so with

respect to riparian rights. Thus, even if New Jersey has jurisdiction to decide certain aspects of riparian projects that traverse both States, the Compact does not divest Delaware of its sovereign right to determine whether a massive bulk transfer facility resting primarily on Delaware lands is consistent with the public trust and state laws implementing that trust.

**III.** Assuming this Court accepts jurisdiction over this case and chooses not to resolve it against New Jersey on summary grounds in this preliminary round of briefing, the Court should appoint a Special Master, consistent with its practice in comparable cases. A Special Master would be best positioned to consider, in the first instance, evidence about the status of each State’s riparian rights within the twelve-mile circle prior to the 1905 Compact, the intent of each State in signing that Compact with respect to riparian rights, and the course of performance during the 100 years since the Compact was approved. A Special Master also would be best positioned to ensure that Delaware’s right to pursue discovery on these complex, historical issues is protected.

## **ARGUMENT**

### **I. THE COURT SHOULD DENY NEW JERSEY’S MOTION FOR LACK OF JURISDICTION**

This Court long ago held that its original jurisdiction “is of so delicate and grave a character” that it “was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable.” *Louisiana v. Texas*, 176 U.S. 1, 15 (1900); *see also Missouri v. Illinois*, 200 U.S. 496, 521 (1906) (“Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side.”).

New Jersey’s request for declaratory and injunctive relief against Delaware — in which it can identify no con-

crete injury to itself and, instead, seeks only to further the interests of a private party that is not even a New Jersey citizen — cannot satisfy the prerequisites for the exercise of this Court’s “extraordinary power under the Constitution to control the conduct of one state at the suit of another.” *New York v. New Jersey*, 256 U.S. 296, 309 (1921). Apparently recognizing this jurisdictional defect, New Jersey has captioned its request as one to re-open this Court’s 1935 Decree resolving a prior boundary dispute between these two States, asserting that the current case is within this Court’s retained jurisdiction over the 1935 Decree. New Jersey, however, has no serious argument that the supplemental decree it seeks here is one to “enforce” the 1935 Decree. Nor can New Jersey meet this Court’s standard for invoking its original jurisdiction if its petition is to be treated as equivalent to an original complaint.

**A. New Jersey’s Motion Does Not Invoke This Court’s Retained Jurisdiction To Enforce The 1935 Decree**

The dispute between Delaware and New Jersey that resulted in the 1935 Decree was exclusively about the *boundary* between the States. *See, e.g.*, 291 U.S. at 363 (explaining that New Jersey “prays for a determination of the boundary in Delaware Bay and river”). To the extent this Court discussed riparian rights in reaching the decision that gave rise to the Decree, such discussion was only in the context of New Jersey’s unsuccessful attempt to demonstrate its ownership of the land below the surface of the water. *See id.* at 376-78. Accordingly, this Court’s 1935 Decree is limited to establishing the “real, certain, and true boundary line separating the states of New Jersey and Delaware.” 295 U.S. at 694. This Court “retain[ed] jurisdiction” insofar as any future orders would be necessary for “the purpose of a resurvey of said boundary line” or “to carry into effect any of the provisions of this decree.” *Id.* at 698.

New Jersey's latest dispute with Delaware pertains to riparian rights on subaqueous lands indisputably owned by Delaware. It does not call into question any aspect of this Court's determination of the boundary line between the two States or any other provision of the 1935 Decree. Indeed, New Jersey's motion identifies only two provisions of that Decree, neither of which is relevant to the instant dispute.

First, New Jersey points (at 18) to paragraph 6 of the Decree, which sets forth that both States are respectively enjoined from "disputing the sovereignty, jurisdiction, and dominion" of the other State over property that this Court held is owned by that State. *See* 295 U.S. at 698. New Jersey, however, does not claim that Delaware is disputing New Jersey's dominion over property *owned by New Jersey*. Instead, it claims that Delaware is infringing on New Jersey's rights over property *owned by Delaware*. Because those rights were not at issue in the prior case, they were not "adjudged to the state of New Jersey by th[e] decree." *Id.* An order with respect to New Jersey's asserted right to approve BP's project on land owned by Delaware without a veto by Delaware, therefore, would not be an order enforcing paragraph 6 of the 1935 Decree.

Second, New Jersey (at 18) points to statements in the Decree and this Court's 1934 Order that the resolution of the earlier boundary dispute was made "without prejudice to the rights of either state . . . by virtue of the compact of 1905 between said states." 295 U.S. at 699; *see* 291 U.S. at 385 (noting that Delaware's rights of ownership "[w]ithin the twelve-mile circle" are "subject to the Compact of 1905"). Contrary to New Jersey's claims, those statements did not create riparian rights that this Court could enforce through a later decree. Instead, this Court noted only that the riparian rights under the 1905 Compact — whatever they were — remained unaffected by the resolution of the boundary dispute. Determining the

scope of New Jersey’s riparian rights, therefore, is not enforcing the 1935 Decree.<sup>13</sup>

For these reasons, New Jersey’s motion does not fall within this Court’s retained jurisdiction to enforce the 1935 Decree.

**B. This Court Lacks Original Jurisdiction Over New Jersey’s Motion, Even If Treated As A Motion For Leave To File A New Original Action**

When New Jersey’s motion is viewed as a request to initiate a new original action, it is clear that New Jersey has not satisfied its burden of demonstrating that a case or controversy exists between New Jersey and Delaware.

**1. New Jersey cannot demonstrate any “injury” caused by Delaware**

As this Court has repeatedly held, for a case to come within this Court’s original jurisdiction, the “complaining State” must allege that it “has suffered a wrong through the action of the other State,” *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939), and “must first demonstrate that the injury for which it seeks redress was directly caused by the actions of another State,” *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976) (per curiam). In making that showing, “the burden on the complainant state of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties.” *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); see also *Alabama v. Arizona*, 291 U.S. 286, 292 (1934) (“The burden upon the plaintiff state fully and clearly to establish all essential elements of its case is greater than that generally required to be borne

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<sup>13</sup> Nor is there reason for this Court “to confirm that the 1935 Decree protects New Jersey’s rights under the Compact.” NJ Br. 18. Delaware does not argue that the 1935 Decree altered or reduced New Jersey’s rights under the Compact, except insofar as this Court’s clarification of the proper boundary between the two States necessarily affected the States’ rights as addressed in the 1905 Compact.

by one seeking an injunction in a suit between private parties.”).

As an initial matter, New Jersey has not demonstrated that it has suffered any injury that was “directly caused” by Delaware. New Jersey cannot demonstrate injury from Delaware’s denial of the DCZA permit for the Crown Landing project because *New Jersey itself* has yet to approve BP’s application for approval under New Jersey’s Coastal Zone Management Rules. *See supra* pp. 16-17. Instead, the New Jersey agency has twice found BP’s application to be deficient, with the most recent notice of deficiency sent just two weeks before New Jersey filed the instant Motion. Under the federal CZMA, approval of BP’s New Jersey application is a necessary prerequisite to FERC’s approval of the Crown Landing project.

In addition, even aside from the Delaware and New Jersey coastal zone permits, FERC could well deny BP the necessary federal permit on other grounds. *See* 16 U.S.C. § 1456(c)(3)(A). As discussed above, FERC has not yet completed its review of the Crown Landing proposal and is still considering numerous comments — including from the NJDEP — in opposition to its Draft EIS. FERC also has not made determinations under the Clean Air Act that are necessary for the ultimate approval of the Crown Landing project. FERC, therefore, could refuse to authorize construction irrespective of Delaware’s denial of a permit. The same is true of the Corps and the Coast Guard, both of which have yet to complete their reviews of the project. *See supra* pp. 17-20.

Until the administrative processes before the New Jersey and federal agencies are completed, it is completely speculative whether Delaware’s action is the conclusive event in causing BP’s permit application to be denied. Therefore, New Jersey has not suffered any injury at this time, let alone one directly caused by Delaware. *See, e.g., Alabama v. Arizona*, 291 U.S. at 292 (original jurisdiction will not be exercised unless the “threatened injury is

clearly shown to be of serious magnitude and imminent”).<sup>14</sup>

In addition, as discussed above, the record compiled before FERC shows that there are five other locations in close proximity to the Crown Landing site on the New Jersey coastline, all of which are outside the twelve-mile circle, where BP could have chosen to build its proposed LNG terminal. *See supra* pp. 17-18. Because those locations would not involve the use of Delaware’s lands, Delaware would not have authority to require BP to obtain the same types of permits under Delaware laws as are required for the Crown Landing site. BP’s selection of the Crown Landing site was based on its commercial reasons, *see supra* pp. 9-10, not because of any sovereign interest of New Jersey. Those alternate locations would provide the same economic benefits to New Jersey that the State claims it is being denied due to Delaware’s action, everything from jobs for its citizens to lost revenue for its school programs. *See* NJ Br. 21-22. But, because BP could construct the bulk product transfer facility at a location that would not implicate Delaware’s sovereign interests, the only conceivable injury sustained by Delaware’s action is to BP’s economic interest in obtaining the Crown Landing site. The invocation of this Court’s original jurisdiction, however, rests on the *State’s* injury, and not that of a private party. *See, e.g., Illinois v. Michigan*, 409 U.S. 36, 37 (1972) (per curiam); *Louisiana v. Texas*, 176 U.S. at 16; *infra* pp. 30-31.<sup>15</sup>

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<sup>14</sup> This is not a case like *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), in which the Court exercised original jurisdiction based on its finding that the threatened injury — from a West Virginia statute that placed a “direct and certain,” “positive duty” on pipelines in West Virginia, on pain of “penal” sanctions, to satisfy in-state demand before selling to out-of-state consumers — was “certainly impending.” *Id.* at 593. Here, in contrast, the DCZA permit that was denied is only one of a number of required approvals that BP has not yet obtained and may not obtain.

<sup>15</sup> The pendency of administrative actions in New Jersey and before the United States government that could cause the relocation of BP’s

Given that Delaware’s denial of permits required for the Crown Landing project does not foreclose the possibility that New Jersey could obtain the same benefits for its citizens if the LNG facility were located elsewhere, New Jersey cannot establish the injury requisite to an invocation of this Court’s original jurisdiction. In any event, any dispute that might ultimately arise if New Jersey were somehow injured concretely clearly is not ripe now.

New Jersey’s other claims of injury from Delaware’s exercise of its authority within the twelve-mile circle with respect to projects other than Crown Landing are plainly insufficient to support the exercise of this Court’s original jurisdiction.

Other than BP’s request for a permit, New Jersey points to only two instances in which Delaware has required a permit under either the DCZA or the DSLA for projects built out from New Jersey’s coastline and within the twelve-mile circle. As New Jersey concedes, Delaware *granted* those other permits. *See* Petition ¶¶ 23, 25 (Logan Generating was granted DCZA and DSLA permits); *id.* ¶ 25 (Fenwick Commons was granted a DSLA permit). Therefore, New Jersey suffered no cognizable injury with respect to those projects.

Left without any concrete injury, New Jersey falls back on the assertion that Delaware’s insistence on exercising its rights within the twelve-mile circle “threaten[s] the construction of projects by the State of New Jersey itself.” *Id.* ¶ 37. Tellingly, New Jersey does not identify a single such project, pending or contemplated. This Court has previously treated such allegations of “injury to the State as proprietor merely as a ‘makeweight.’” *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 450 (1945); *see also, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (“Such ‘some day’ intentions [to visit locations to observe animal species] — without any description of concrete

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proposed LNG facility amplify the speculative nature of New Jersey’s proffered injury at this time.

plans, or indeed even any specification of *when* the some day will be — do not support a finding of the ‘actual or imminent’ injury that our cases require”).

Similarly, New Jersey asserts that Delaware’s exercise of its permitting authority within the twelve-mile circle “may discourage economic development along this part of New Jersey’s shoreline,” which in turn may “diminish the income received by the State of New Jersey for conveyances and leases of riparian lands.” Petition ¶¶ 36, 38. This Court has previously rejected invocations of its original jurisdiction based on such “purely speculative, and, at most, only remote and indirect” allegations of injury. *Florida v. Mellon*, 273 U.S. 12, 18 (1927).

Thus, New Jersey seeks to use this Court’s original jurisdiction “to consider abstract questions,” such as “questions respecting the right of the plaintiff state . . . to use the waters . . . in the indefinite future.” *New York v. Illinois*, 274 U.S. 488, 489-90 (1927). As this Court has held, it is “not at liberty” to grant such requests. *Id.* at 490; see *Massachusetts v. Missouri*, 308 U.S. at 17 (“Nor does the nature of the suit as one to obtain a declaratory judgment aid the complainant. To support jurisdiction to give such relief, there must still be a controversy in the constitutional sense and as between the two States there is no such controversy here.”) (citation omitted). Indeed, in a comparable case, this Court agreed with New Jersey in a suit brought by New York. This Court held that New York had not yet suffered any injury and dismissed the suit “without prejudice to a renewal of the application for injunction if the operation of the sewer of [New Jersey] shall result in conditions which the state of New York may be advised requires the interposition of this court.” *New York v. New Jersey*, 256 U.S. at 314.<sup>16</sup>

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<sup>16</sup> This is not a case like *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), where the Court permitted Wyoming to bring suit to challenge an Oklahoma statute designed to limit importations of Wyoming coal. There, even though “Wyoming does not itself sell coal, it does impose a severance tax upon the privilege of severing or extracting coal from

## 2. BP, not New Jersey, is the real party in interest

Wholly apart from New Jersey’s lack of a concrete injury caused by Delaware, this Court also lacks original jurisdiction over New Jersey’s motion for an independent reason: BP, not New Jersey, is the real party in interest. As this Court has held, “it is not enough that a State is plaintiff” to invoke this Court’s original jurisdiction; rather, this Court “must look beyond the mere legal title of the complaining State to the cause of action asserted and to the nature of the State’s interest.” *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 392-93 (1938). Where a suit is brought “in the name of the State but in reality for the benefit of particular individuals” — and even where “the State asserts an economic interest in the claims and declares their enforcement to be a matter of state policy” — this Court has refused “resort to [its] original jurisdiction.” *Id.* at 394; see *Illinois v. Michigan*, 409 U.S. at 37 (finding that it lacked original jurisdiction where a State, “though nominally a party, is here ‘in vindication of the grievances of particular individuals’”); *Massachusetts v. Missouri*, 308 U.S. at 17 (“Massachusetts may not invoke our jurisdiction for the benefit of such individuals.”); *North Dakota v. Minnesota*, 263 U.S. at 375-76 (explaining that a State cannot invoke the Court’s original jurisdiction “to present and enforce individual claims of its citizens as their trustee against a sister state”); *Louisiana v. Texas*, 176 U.S. at 16 (holding that “to maintain [original] jurisdiction . . . it must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in the vindication of grievances of particular individuals”).<sup>17</sup>

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land within its boundaries,” and Oklahoma’s statute had “directly affect[ed] Wyoming’s ability to collect severance tax revenues,” by depriving it of actual revenues. *Id.* at 442, 445, 451, 452 & n.10.

<sup>17</sup> Although this Court has exercised jurisdiction in cases where a State acts “as the representative of its citizens in original actions

Here, there can be no serious dispute that the real party in interest with respect to the construction of the Crown Landing facility is BP — which is not even a New Jersey citizen.<sup>18</sup> As shown above, it is for BP’s commercial reasons, and not for New Jersey’s government interests, that BP prefers the Crown Landing location to other possible locations on the New Jersey coastline that would not be subject to Delaware’s permitting authority.<sup>19</sup>

Contrary to New Jersey’s assertion (at 19-20), this case is not like *Virginia v. Maryland*, 540 U.S. 56 (2003). In that case, Virginia sued on behalf of a governmental entity, the Fairfax County Water Authority (“FCWA”), rather than a private corporation. *See id.* at 63-64. In addition, the FCWA sought a permit from Maryland to construct a water-intake structure to provide water specifically for the benefit of residents of Fairfax County, *see*

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where the injury alleged affects the general population of a State in a substantial way,” *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981), that is not the case here, where New Jersey is acting for the specific benefit of a single corporation. *Cf. North Dakota v. Minnesota*, 263 U.S. at 375-76 (recognizing the “right of a state as *parens patriae* to bring suit to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continued action of another state”).

<sup>18</sup> Neither BP nor Crown Landing, LLC is incorporated in New Jersey or has its principal place of business there. Crown Landing, LLC is a Delaware LLC formed on November 20, 2003, and its only member is BP America Production Company, a Delaware corporation that is a fifth-tier subsidiary of BP p.l.c., which is organized under the laws of England and Wales with its principal place of business in London, England. BP formed Crown Landing, LLC specifically to manage the LNG Terminal site. Crown Landing’s principal place of business is 501 Westlake Park, Houston, Texas. Crown Landing, LLC does not have any customers, so the proposed LNG project does not have any impact on current customers’ transportation rates or service. *See* BP September 16, 2004 FERC Application.

<sup>19</sup> It would be no answer for New Jersey to argue on reply that it has a sovereign interest in where BP’s facility is situated, and that the assertion of interest is sufficient to create original jurisdiction in this Court. Such an interest surely must give way when reasonable alternatives exist to the encroachment on a neighboring State’s lands.

*id.*, and not for the benefit of a corporation’s private shareholders. Virginia had no alternative sites along the river that were outside of Maryland’s authority. Finally, Maryland took more than five years to reach a final decision on the FCWA’s permit application, which it eventually granted subject to a condition — uniquely imposed on that one project — that severely reduced the utility of the water-intake structure and that was imposed pursuant to special legislation directed at this project. *See id.*

**C. Even If This Court Has Original Jurisdiction Over New Jersey’s Motion, It Should Decline To Exercise That Jurisdiction**

Even in instances in which the Court has both original and exclusive jurisdiction, it may “exercise[] [its] discretion not to accept original actions.” *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992); *see also Louisiana v. Mississippi*, 488 U.S. 990 (1988) (declining to exercise its exclusive jurisdiction over a boundary dispute between two States). If this Court were to find that New Jersey’s motion is within its original jurisdiction, the Court should exercise its discretion and decline to accept jurisdiction over that motion.

In “[d]etermining whether a case is ‘appropriate’ for [its] original jurisdiction,” this Court considers two factors: “the nature of the interest of the complaining State, focusing on the seriousness and dignity of the claim,” and “the availability of an alternative forum in which the issue tendered can be resolved.” *Mississippi v. Louisiana*, 506 U.S. at 77 (internal quotation marks and citation omitted); *see, e.g., California v. Texas*, 457 U.S. 164, 168 (1982) (per curiam) (same). Parts I.A and I.B above establish that New Jersey’s claims of injury based on the alleged infringement of its riparian rights are speculative and insubstantial, and that BP (and not New Jersey) is the real party in interest in this action.

In addition, an alternative forum existed for consideration of Delaware’s authority to require a DCZA permit for the Crown Landing facility — namely, an appeal to state

court of the CZICB’s decision to affirm the Secretary’s denial of the DCZA permit. New Jersey relies on BP’s claim that such an appeal would have been “futile,” in light of Delaware Code Annotated title 7, § 7008, which normally limits review of a Board decision to “whether the Board abused its discretion in applying standards set forth by [Chapter 70] and regulations issued pursuant thereto to the facts of the particular case.” *See* NJ App. 140a-141a (Segal Decl. ¶ 19).

But Delaware courts have made clear that the Superior Court, in an appeal from a decision under the DCZA, has jurisdiction to hear claims that the Board’s decision “on the subject of the . . . permit was not a valid decision of the Board.” *Shields v. Keystone Cogeneration Sys., Inc.*, 611 A.2d 502, 507 (Del. Super. Ct. 1991). In that case, a party challenged the grant of a DCZA permit on the ground that “there was no valid Board action in this matter,” because the decision was made by the “vote of four members of the nine member Board,” rather than the majority of a quorum. *Id.* at 505, 507. In holding that it had jurisdiction to hear such a claim, which goes beyond the specific matters listed in § 7008, the court explained that “the customary appeal standard could not be applied” where there was no valid decision of the Board. *Id.* at 505.

In this case, BP could have raised on appeal the contention New Jersey makes in this Court — that the Board (and the Secretary) had no legal basis to require a DCZA permit for the Crown Landing project because New Jersey’s alleged riparian rights prevent the application of Delaware’s DCZA to the Crown Landing project. Moreover, New Jersey itself could have appealed the Board’s decision on that ground, even after BP chose not to do so.<sup>20</sup> Final judgments of the Superior Court can be di-

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<sup>20</sup> *See* Del. Code Ann. tit. 7, § 7008 (“[a]ny person aggrieved by a final order of the State Coastal Zone Industrial Control Board . . . may appeal the Board’s decision to Superior Court”).

rectly appealed to the Supreme Court of Delaware. *See* Del. Const. art. IV, § 11(1)(a). BP or New Jersey could then have sought this Court’s review of the issue in the normal course, through a petition for a writ of certiorari.

This Court has previously refused, in a case alleging a violation of an interstate agreement with the “dignity of an interstate compact,” to exercise its original jurisdiction to hear a dispute between two States where, as here, review could have been sought by a petition for a writ of certiorari, even though it was by then “too late for any such petition for certiorari to be filed.” *Illinois v. Michigan*, 409 U.S. at 36-37. In that case, the Court explained that its “original jurisdiction . . . is not an alternative to the redress of grievances which could have been sought in the normal appellate process, if the remedy had been timely sought.” *Id.* at 37.<sup>21</sup>

Although New Jersey asserts (at 20) that “a Delaware venue clearly would not provide New Jersey an adequate forum” to raise the issue presented here, this Court has previously rejected such a claim. In *Arizona v. New Mexico*, 425 U.S. 794 (1976) (per curiam), the Court held that a “pending state-court action [in New Mexico] provide[d] an appropriate forum in which the *issues* tendered here [by Arizona] may be litigated.” *Id.* at 797; *see also id.* (explaining that, if Arizona did not prevail before the

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<sup>21</sup> New Jersey’s reliance (Br. 20) on *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), is misplaced. In that case, Wyoming had alleged a direct injury to itself, as sovereign, and this Court found that “Wyoming’s interests would not [have] be[en] directly represented” in a separate action that might have been brought by Wyoming companies more directly affected by the dispute. *Id.* at 442, 445, 451-53 & n.10. In those circumstances, this Court exercised its original jurisdiction over Wyoming’s challenge to an Oklahoma statute, finding that “no pending action exists to which we could defer adjudication on this issue.” *Id.* at 452. Here, by contrast, the Delaware courts would have permitted BP or New Jersey to raise on appeal the claim that the Delaware agency’s conclusion that Crown Landing was subject to the DCZA was *ultra vires* or otherwise improper because of the 1905 Compact.

“New Mexico Supreme Court, . . . the issues raised now may be brought to this Court by way of direct appeal”).

**II. DELAWARE HAS THE AUTHORITY UNDER THE 1905 COMPACT TO REGULATE RIPARIAN STRUCTURES ERECTED ON DELAWARE’S SUBMERGED LANDS**

If the Court reaches the merits of New Jersey’s request at this time, it should reject New Jersey’s motion to reopen or for supplemental decree.<sup>22</sup> At the time the 1905 Compact was drafted, there was widespread disagreement over the scope of “riparian” rights enjoyed by a landowner adjacent to navigable waters. Much depended on the legal context — whether a particular jurisdiction incorporated the English common law, changed that law by statute, or developed other principles through other sources of law. See generally 1 Henry P. Farnham, *The Law of Waters and Water Rights* 279 (1904) (“*Farnham’s Law of Waters*”). As Farnham explained in his 1904 treatise, “[t]he courts do not fully agree in their enumeration of these [riparian] rights.” *Id.* In general terms, “riparian” rights refer to the cluster of rights an owner of land adjacent to waterways had of “access” to the waterway; “preference in case the land under the water is to be sold”; “accretion and the preferential right to fill out into the water if such filling is permitted by the public”; and “free use of the water space immediately adjoining his property for the transaction of such business as may be necessary in connection with wharves or structures erected by him.” *Id.* at 279-80. But, as Farnham cautions, “all of the courts have not recognized some of the rights above enumerated,” *id.* at 280, and certain of those rights — such as the

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<sup>22</sup> Our submission here is that New Jersey’s motion to invoke this Court’s original jurisdiction should be denied because New Jersey’s reading of the 1905 Compact is untenable. We reserve the right to file an Answer to New Jersey’s petition and to address New Jersey’s theories and evidence more fully in the event this Court grants New Jersey’s motion and directs the parties to address the merits.

right to wharf out from the shore — are “subject to several limitations,” *id.* at 279.

Although at this preliminary stage in this proceeding it is not possible to define comprehensively all of the rights and duties — or the limitations thereon — a New Jersey landowner with riparian rights would have with respect to Delaware lands within the twelve-mile circle, the Court at this time may reject New Jersey’s principal submission: that New Jersey has “exclusive” jurisdiction to authorize a riparian landowner on New Jersey’s shore to build a bulk transfer facility on Delaware’s submerged lands.<sup>23</sup> No such right was recognized prior to 1905; the Compact did not change that result; New Jersey’s arguments to the contrary are unpersuasive; and this Court’s recent decision in *Virginia v. Maryland* does not support New Jersey’s assertion.

**A. Prior To The 1905 Compact, Delaware Unquestionably Had The Authority To Regulate Or To Exclude Altogether On Delaware Submerged Lands A Structure Such As BP’s LNG Bulk Transfer Facility**

**1. As owner of the tidal lands in question, Delaware holds the lands in a public trust for the people**

In numerous cases, this Court has recognized the bed-rock principle that “[o]wnership of submerged lands — which carries with it the power to control navigation, fishing, and other public uses of water — is an essential attribute of sovereignty.” *United States v. Alaska*, 521 U.S. 1, 5 (1997); *see also, e.g., Montana v. United States*, 450 U.S. 544, 551 (1981) (“[T]he ownership of land under

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<sup>23</sup> If the Court has any doubt on that score or believes that New Jersey’s questions presented require a more comprehensive treatment of the meaning of “riparian jurisdiction” outside the specific confines of the dispute over BP’s Crown Landing proposal, the appropriate disposition would be to appoint a Special Master so that the law of riparian rights, as reasonably understood by the parties and incorporated into the 1905 Compact, may be more fully explored.

navigable waters is an incident of sovereignty.”). Those attributes of sovereignty necessarily extend to the limits of the sovereign’s boundary, for, as this Court has long held, “when a place is within the boundary, it is a part of the territory of a state; title, jurisdiction, and sovereignty, are inseparable incidents, and remain so till the state makes some cession.” *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 733 (1838).

A state holds its lands in trust for the people, and that principle extends as well to submerged lands, which are treated with the same incidents of sovereignty as uplands. For that reason, a court considering the scope of an incursion on the “‘title to the bed of navigable water must . . . begin with a strong presumption’ against defeat of a State’s title.” *United States v. Alaska*, 521 U.S. at 34 (quoting *Montana v. United States*, 450 U.S. at 552) (ellipsis in original).

That presumption against any impairment to the title of a State’s submerged lands derives from the fact that a State’s “title to soils under tide water” “is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.” *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).<sup>24</sup> To be sure, a State may convey property for the purpose of erecting a wharf to aid navigation, “consistent[] with the trust to the public upon which such lands are held by the State.” *Id.* But “[t]he State can no more abdicate its trust over prop-

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<sup>24</sup> This rule had its origins in England, where, at “‘common law, the title and dominion in lands flowed by tide water were in the King for the benefit of the nation. . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution of the United States.’” *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473-74 (1988) (ellipsis in original) (quoting *Shively v. Bowlby*, 152 U.S. 1, 57 (1894)); see also *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410-12 (1842).

erty in which the whole people are interested, like navigable waters and the soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.” *Id.* at 453.

That incidence of public trust in submerged lands acts as a check against efforts by legislators and other government officials to relinquish the power and authority of a State over those lands. This Court found the public trust to be so strong in *Illinois Central*, for example, that it held the Illinois legislature’s transfer to a railroad of title to a large part of the Chicago harbor in Lake Michigan to be “beyond the authority of the legislature since it amounted to abdication of its obligation to regulate, improve, and secure submerged lands for the benefit of every individual.” *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 285 (1997) (citing *Illinois Central*, 146 U.S. at 455-60). While that holding “was necessarily a statement of Illinois law, it invoked the principle in American law recognizing the weighty public interests in submerged lands.” *Id.* (internal quotation marks and citation omitted). Indeed, New Jersey courts have interpreted *Illinois Central* to stand for the principle that, “[a]lthough the states have the inherent authority to convey riparian grants to private persons, the sovereign never waives its right to regulate the use of public trust property.” *Karam v. New Jersey Dep’t of Env’tl. Protection*, 705 A.2d 1221, 1229 (N.J. Super. Ct. App. Div. 1998) (citation omitted), *aff’d*, 723 A.2d 943 (N.J. 1999). Delaware could conceivably convey its submerged lands for use by private persons, but it would still retain its regulatory authority over those lands as part of its public trust responsibility.

That public trust principle does not, however, ordinarily extend beyond the boundaries of the State’s territory, even when the boundary is determined by a body of water. As Farnham explains, “[i]n the absence of an agreement or understanding between the opposite states, the jurisdiction of each is limited to its own side of the stream, and does not extend beyond its boundary.” 1 *Farnham’s Law*

of *Waters* at 31; see also *id.* at 39 (“Whatever acts involve title to the soil are exclusively under the jurisdiction of the owner of the soil. . . . [But a state] cannot pass a law to govern another state, or realty situated therein.”); see also *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 622 (1899) (“Whatever jurisdiction the State of Indiana may properly exercise over the Ohio River, it cannot tax this bridge structure south of low-water mark on that river, for the obvious reason that it is beyond the limits of that State and permanently within the limits of Kentucky.”).<sup>25</sup>

As the understanding of a sovereign’s ownership of submerged lands evolved, the courts came to recognize two distinct aspects of this sovereignty — the right of ownership and the right of conservation:

The right of the crown in navigable waters is twofold, the right of property, and the right of conservation; and these rights are perfectly distinct, and may be transferred and separated. The right of conservation of a river may be given to the corporation of a city as far as the tide flows, but they are not thus made owners of the soil or bed of such river. And the ownership of soil, and the license of conservation, are not sufficient to legalize an erection in tide river; for the question of nuisance or not, may still be raised.

Joseph K. Angell, *A Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof* 202-03 (1847).

In the late nineteenth century, therefore, a court addressing the issue raised here would have concluded that

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<sup>25</sup> While not at issue in this case, a state’s sovereign power over navigable waters is subject “to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the General government.” *Weber v. Board of Harbor Comm’rs*, 85 U.S. (18 Wall.) 57, 65-66 (1873).

Delaware holds its submerged lands in trust for the people of the State, that one of the incidents of sovereignty is “the right of conservation,” and that Delaware could not lightly be held to have relinquished its trust lands to another sovereign or a private party. For those reasons, the action taken by Delaware here — to deny a permit to BP to construct a massive bulk product transfer facility requiring the dredging of 800,000 cubic yards of soil over 27 acres of submerged lands — was perfectly consistent with its responsibility to hold those lands in trust for the people of Delaware.

**2. Even without a public trust relationship, Delaware has police authority to regulate uses of its submerged lands**

In addition to the established law that submerged lands owned by the sovereign are held in a public trust, riparian rights have always been deemed to be “subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be.” *Yates v. City of Milwaukee*, 77 U.S. (10 Wall.) 497, 504 (1871). That restriction is especially true of the right to wharf out, on which New Jersey relies.

The law appears never to have recognized an absolute right on the part of a riparian landowner to conduct whatever activities it wants simply because they occur on a wharf. Justice Holmes explained in 1908 that “it is recognized” that States may “by statute” pass laws “to protect the atmosphere, the water and the forests within its territory,” based on a “principle of public interest and the police power.” *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355-56 (1908). Thus, “the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.” *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). That same expansive police power necessarily operates to per-

mit a State to impose reasonable restrictions on the exercise of riparian rights.

Had the 1905 Compact never been executed, there could be no question that Delaware would have sovereign authority all the way to the boundary between the two States, which this Court held in 1934 extends to the low-water mark on the New Jersey shore within the twelve-mile circle. As a leading water rights treatise of the day explained, “[i]f one state owns the whole river, it may enact and enforce laws as far as the opposite shore, since the whole river is within its territorial jurisdiction.” 1 *Farnham’s Law of Waters* at 38-39. The territorial jurisdiction supports the exercise of police power, and that jurisdiction and power extend to the State’s boundary.

**3. Under New Jersey law, the owner of riparian lands could not build structures on navigable waters on submerged lands the landowner did not own**

Even if there were any doubt about the foregoing principles and how they would support a decision by Delaware not to permit its submerged lands to be used for a massive bulk product transfer facility, BP would have had no right to build its structures on those submerged lands under New Jersey law. In the nineteenth century, courts varied as to whether they recognized the right of owners of riparian lands to build on adjoining submerged lands that they did not own. In some States, for example, riparian rights “rest[ed] on title to the bank, and not upon title to the soil under the water.” *Northern Pine-Land Co. v. Bigelow*, 54 N.W. 496, 498 (Wis. 1893) (internal quotation marks omitted); see also, e.g., *In re West 205th Street in City of New York*, 147 N.E. 361, 362 (N.Y. 1925) (“Riparian rights . . . are not dependent upon ownership of the shore, and are the same, whether or not the riparian owner owns the soil under water.”). In Florida, however, the statutory rule was that a riparian landowner had to own property down to the ordinary low-water mark in order to be a

“riparian proprietor” for certain purposes. *Axline v. Shaw*, 17 So. 411, 414 (Fla. 1895).

In New Jersey, by contrast, a landowner has been required to acquire from the government a protectible property interest in the submerged land on which a structure is built to be able to enjoy that aspect of riparian rights. *See, e.g., Beck’s Waters and Water Rights* § 7.02(a)(1) (collecting cases); NJ App. 27a (Castagna Aff. ¶ 4) (“Riparian owners have a preemptive right to apply to the State of New Jersey to lease or purchase the State’s tidal land in front of their upland. N.J. Stat. Ann. § 12:3-7 (enacted in 1869.) A sale or lease to one who is not an upland owner must be with the consent of the upland owner or on six month’s notice to the upland owner. N.J. Stat. Ann. § 12:3-9 (enacted 1869.) Otherwise, the grant or lease will be void. *Shamberg v. Board of Riparian Commissioners*, 43 N.J.L. 132, 60 A. 43 (Sup. Ct. 1905.)”). Thus, had this issue arisen prior to execution of the 1905 Compact, BP would not have had a right under New Jersey law to build its facility beyond the limit of its own territorial ownership — and certainly not 2,000 feet beyond that boundary into Delaware’s sovereign-owned subaqueous lands — unless the landowner (Delaware) gave its permission.

**4. Nothing in pre-1905 riparian rights law would have led the States to think that Delaware lacked authority to regulate a massive 2,000-foot-long structure extending onto its sovereign lands**

Even under New Jersey common law, a riparian landowner did not enjoy an exclusive right to build on a sovereign’s submerged lands without being subject to any regulatory authority. *See, e.g., Bailey v. Driscoll*, 112 A.2d 3, 13 (N.J. Super. Ct. App. Div.), *aff’d in part and rev’d in part on other grounds*, 117 A.2d 265 (N.J. 1955). In *Bailey*, the court held that, “by the common law, the ownership of all lands under tidewater below high water mark within the territorial limits of the State belonged to the

Crown of England, did not pass to the proprietors of New Jersey under the grant from the Duke of York, and became vested by the Revolution in the sovereignty of the State under the guardianship of the Legislature.” *Id.* As this Court likewise observed, “[i]n the examination of the effect to be given to the riparian laws of the State of New Jersey, . . . ‘it is to be borne in mind that the lands below high water mark, constituting the shores and submerged lands of the navigable waters of the State, were, according to its laws, property of the State as sovereign.’” *Shively v. Bowlby*, 152 U.S. at 21-22 (quoting *Hoboken v. Pennsylvania R.R. Co.*, 124 U.S. 656, 688 (1888)). Thus, “all navigable waters within the territorial limits of the State, and the soil under such waters, belong in actual propriety to the public; that the riparian owner, by the common law, has no peculiar rights in this public domain as incidents of his estate; and that the privileges he possesses by the local custom or by force of the wharf act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature.” *Id.* at 22 (internal quotation marks omitted).

The *Bailey* court further recognized New Jersey’s law as holding that each State is free “to determine over what submerged lands its sovereign prerogative of ownership shall be exercised (56 Am.Jur. § 461) and that each state may similarly deal with such lands ‘according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public \* \* \*.’ 56 Am.Jur. § 471, p. 884.” 112 A.2d at 13.

Two limitations on wharfage were routinely recognized in nineteenth century cases: the common law of nuisance and the State’s police power to decide if the wharf was in the public interest. The first limitation provided that “every erection in a navigable river, which obstructs or hinders the navigation, is a nuisance.” *Newark Plank Road & Ferry Co. v. Elmer*, 9 N.J. Eq. 754, 1855 WL 122,

at \*20 (N.J. 1855); *see also* *Stevens v. Paterson & Newark R.R. Co.*, 34 N.J.L. 532, 1870 WL 5140, at \*8 (N.J. 1870) (“That any erection prejudicial to the common rights of navigation or fishery may be abated, is not denied.”); *Dutton v. Strong*, 66 U.S. (1 Black) 23, 30 (1861) (adjudicating claim “that the bridge pier was a nuisance, because . . . it was an obstruction to the public right of navigation”). The second limitation recognized the sovereign’s ability to impose restrictions on the building of wharves and other structures. *See, e.g., Bailey*, 112 A.2d at 13. That was New Jersey’s own public policy from the mid-nineteenth century onward, when it began through statutory law the process of limiting what wharves and other riparian structures a landowner could erect. *See* 1851 N.J. Laws 335 (Wharf Act); N.J. Stat. Ann. §§ 12:3-1 to 12:3-25 (1979) (cited sections originally enacted prior to 1905); NJ Br. 8.

It is axiomatic that, if New Jersey could exercise *its* sovereign prerogatives over the tidal shorelands from the boundary of the Crown Landing project to the Delaware border, Delaware too could exercise its sovereignty over those aspects of the industrial facility that BP seeks to place on Delaware’s submerged lands. As the New Jersey courts have recognized, “a riparian owner has no rights at common law, except alluvion and dereliction,<sup>[26]</sup> in such waters or the lands under them, beyond those of the public generally, even including unimpaired access thereto, merely by reason of his ownership of the ripa.” *Bailey*, 112 A.2d at 13 (citing *Bouquet v. Hackensack Water Co.*, 101 A. 379 (N.J. 1917)). Rather, by local common law, a riparian owner could “appropriate such lands between the high and low water marks in front of his property as his own by wharfing out and filling in,” but in doing so “[s]uch local custom was nothing more than a license, which,

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<sup>26</sup> “Alluvion” and “dereliction” refer to the gaining and losing of land as a result of the natural processes of tides, river flow, and sea movements. A riparian landowner would have certain rights to protect the land against such additions and subtractions.

when executed, became irrevocable.” *Id.* Therefore, the State as owner of the submerged lands “could do what it pleased with its lands under tidewater as far as the adjoining riparian owner was concerned unless the latter had already exercised his privilege of wharfing or reclamation.” *Id.* Because BP has not already erected its structure, it has no license to assert against either State.

Under the principles recognized in its own courts in the nineteenth century prior to enactment of the 1905 Compact, therefore, New Jersey plainly would have no claim that it has exclusive jurisdiction, to the exclusion of Delaware, to regulate any structures or activities on wharves that originate on the New Jersey shore but extend onto Delaware lands. Accordingly, the only question here is whether the 1905 Compact changed that baseline rule of sovereignty such that Delaware was ousted of jurisdiction to regulate hazardous activities occurring on those wharves in Delaware waters.

**B. The 1905 Compact Did Not Alter Delaware’s Authority To Regulate Structures Built On Its Subaqueous Lands**

A congressionally sanctioned interstate compact is a federal law subject to federal construction. “Just as if a court were addressing a federal statute, then, the first and last order of business of a court addressing an approved interstate compact is interpreting the compact.” *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (internal quotation marks omitted). “[W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded.” *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89-90 (1823). The Court will explore “textual reasons” for compact terms and examine the structure and the entirety of an agreement to evaluate the reasonableness of an interpretation of one portion. *Cuyler v. Adams*, 449 U.S. 433, 446-47 (1981).

Only if the text of the compact is ambiguous will the Court consider extrinsic evidence, including the course of

negotiations, course of performance, or other post-execution history. *See, e.g., Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991) (“[A] congressionally approved compact is both a contract and a statute, and we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous. . . . Thus, resort to extrinsic evidence of the compact negotiations in this case is entirely appropriate.”); *see also O’Connor v. United States*, 479 U.S. 27, 33 (1986) (“The course of conduct of parties to an international agreement, like the course of conduct of parties to any contract, is evidence of its meaning.”).

In evaluating a question of competing claims between sovereigns, moreover, the rule is that “a waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms.” *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987) (holding that grant of title by federal government of subaqueous lands to Indian tribe withheld federal government’s navigational easement).<sup>27</sup> New Jersey has likewise required “conclusive proof” of any purported relinquishment of property rights in lands owned by the State. *Stevens*, 1870 WL 5140, at \*10 (“The claim is, that the legislature

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<sup>27</sup> *See also Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837) (“[W]henver any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same.”); *id.* (Baldwin, J., concurring) (“[t]he rule that public grants pass nothing by implications, has been most rigidly enforced as to all grants of toll for ferries, bridges, wharves, quays, on navigable rivers and arms of the sea”), *reprinted in* WESTLAW, beginning at page 113 of the computer version of the Court’s opinion, with the following notation: “**West Editorial Note:** the source of the following opinion is Baldwin’s Constitutional Views, p. 134-169” (Justice Baldwin’s concurring opinion apparently was not printed in the Peters Reports of this Court’s decision in *Proprietors of Charles River Bridge* or subsequently in the U.S. Reports); *Harris v. Elliott*, 35 U.S. (10 Pet.) 25, 54 (1836) (giving a “strict, legal, technical interpretation” to purchase of land by United States for a navy yard in Charlestown, with the assent of Massachusetts).

has granted to these defendants the use of a part of the public domain. The state is never presumed to have parted with any part of its property, in the absence of conclusive proof of an intention to do so.”).

Furthermore, it is common ground that the 1905 Compact was negotiated in the shadow of the then-unresolved boundary dispute. See NJ Br. 6 (“[t]he Compact did not establish the boundary line”). An interstate compact reached in the context of an unresolved boundary dispute must be “read . . . in light of the ongoing dispute over sovereignty.” *Virginia v. Maryland*, 540 U.S. at 69. The drafters of the 1905 Compact would have understood that, absent some different provision, a subsequent adjudication of the boundary dispute would necessarily settle the boundary to which each State could exercise its “riparian jurisdiction.”<sup>28</sup> Thus, the Court should construe the plain language of the Compact in that light.

**1. Use of “continue” indicates that the States intended to maintain the status quo**

The dispute before the Court turns primarily on the proper interpretation of Articles VII and VIII of the 1905 Compact. Article VII provides:

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

NJ App. 5a. Article VIII then makes clear that nothing more than “riparian jurisdiction” was given in Article VII:

Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of

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<sup>28</sup> “Riparian jurisdiction” appears not to be a term of art with an understood meaning at common law or as defined in state statutes.

the subaqueous soil thereof, except as herein expressly set forth.

*Id.*

By its plain terms, Article VII provides in pertinent part that “[e]ach State may, on its own side of the river, *continue* to exercise riparian jurisdiction of every kind and nature.” *Id.* (emphasis added). “Continue” means “to remain in a given place or condition.” *Webster’s International Dictionary* 314 (1898). By use of this verb, therefore, the parties clearly intended to carry on exercising the same principles with respect to riparian rights as they had before.

New Jersey draws a different conclusion from this plain meaning, however. New Jersey finds “critical importance” in Article VII’s use of the word “continue,” claiming that “it shows that the States intended that their riparian *sovereignty* could carry on in the same manner as had been exercised in the past.” Br. 25 (emphasis added). In conjunction with that legal assertion, New Jersey adds the alleged fact that prior to 1905 it had on eight occasions authorized riparian structures extending beyond the low-water mark. *See* Br. 25-26 (citing NJ App. 29a-36a (Castagna Aff. ¶ 8)).

That “course-of-dealing” evidence, however, does not advance New Jersey’s argument in light of that State’s acknowledgment that the Compact was drafted against the backdrop of an ongoing boundary dispute. Whatever course of dealing had occurred before became irrelevant under the Compact’s express provision that, going forward, the States agreed that they would exercise jurisdiction only on their “own side of the river.” NJ App. 5a. As the drafters of the Compact well knew, the boundary between the States had long been in dispute. In fact, when this Court eventually adjudicated the boundary dispute in 1934, it rejected a similar argument by which New Jersey claimed title to the middle of the river by virtue of the very same riparian improvements on which it relies here, claiming that Delaware had acquiesced in those im-

provements. The Court concluded, however, that “almost from the beginning of statehood Delaware and New Jersey have been engaged in a dispute as to the boundary between them,” and held that “[a]cquiescence is not compatible with a century of conflict.” *New Jersey v. Delaware*, 291 U.S. at 376-77.

Article VII of the Compact simply provides that each State may “continue” to exercise riparian jurisdiction “on its own side of the river.” It does not say that either State can do so beyond that boundary line, wherever it might later be adjudicated to lie. Thus, even if prior to 1905 New Jersey might have regulated riparian improvements on certain sites appurtenant to its shores that proved to be beyond the boundary adjudicated by this Court nearly 30 years later, the Compact in no way confers jurisdiction on New Jersey to regulate exclusively any *new* riparian structures extending from New Jersey’s “own side of the river” into Delaware territory. New Jersey’s apparently contrary construction of “continue” conflicts with the plain meaning of the word and the intent of the parties in deferring resolution of the precise boundary line.

Indeed, then as now, New Jersey’s riparian laws expressly limited such transfers of rights to “lands of the state” — not lands of an adjacent State. N.J. Stat. Ann. §§ 12:3-9 (enacted 1877), 12:3-18 (enacted 1877), 12:3-21 (enacted 1891), 12:3-22 (enacted 1891), 12:3-23 (enacted 1891), 12:3-24 (enacted 1891), 12:3-25 (enacted 1891). Thus, New Jersey plainly could not “continue” to exercise the rights of a landowner with respect to land it has never owned. And no language in Article VII supports an argument that Delaware gave up its sovereign right to grant, lease, or convey its own titled lands.

**2. Use of “on its own side” indicates that the States intended to preserve existing rights pending the outcome of the boundary dispute**

Delaware’s position that the 1905 Compact did not result in a transfer of sovereign rights to New Jersey is for-

tified by the Compact's reference to each party's exercise of jurisdiction on its "own side of the river." NJ App. 5a. By deferring resolution of the precise boundary coordinates, the States adopted non-specific language in Article VII — "own side of the river" — as a means of ensuring that, whenever the boundary dispute ultimately was resolved, the two States would know their respective rights and powers on their own side of the boundary. In 1905, the parties knew that "almost from the beginning of statehood Delaware and New Jersey ha[d] been engaged in a dispute as to the boundary between them," *New Jersey v. Delaware*, 291 U.S. at 376, so it would be illogical to read Article VII as giving up Delaware's right to assert its jurisdiction, including riparian jurisdiction, over land within its borders, wherever the boundary may ultimately be defined.

This Court's ruling in *Virginia v. Maryland* is instructive here. Virginia and Maryland had entered into a 1785 Compact at a time when the boundary between those States was in dispute and would not be resolved until 1877, when a binding arbitration award set the boundary at the low-water mark on the Virginia shore of the Potomac River. *See* 540 U.S. at 60-62; *id.* at 62 ("Although the 1785 Compact resolved many important navigational and jurisdictional issues, it did not determine the boundary line between the States, an issue that was left open to long continued disputes.") (internal quotation marks and ellipsis omitted). The 1785 Compact provided that "[t]he citizens of each state respectively shall have full property in the shores of the Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river." *Id.* at 66 (quoting Article Seventh of the 1785 Compact). Examining the various provisions of that compact, the Court observed that the provision in Article Seventh of a "privilege of making" wharves by the "citizens of each state" "was not explicitly

subjected to any sovereign regulatory authority,” while the fishing right in Article Eighth “was subjected to mutually agreed-upon regulation.” *Id.* at 66-67. The Court found “that these differing approaches to rights” “indicate that the drafters carefully delineated the instances in which the citizens of one State would be subject to the regulatory authority of another.” *Id.* at 67.

By limiting each State’s jurisdiction to its “own side of the river,” the drafters of the Compact did not authorize one State, such as New Jersey, to determine how the other State’s submerged lands would be utilized. Sovereign jurisdiction stopped at the boundary line and went no further.

Buttressing this point is the fact that the drafters of the Compact resolved their fishing dispute by reference to specific geographic lines that would not change regardless of how the boundary dispute might someday be resolved:

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

NJ App. 3a-4a (emphasis added). The specific geography denoted by the phrase “between low-water marks” is in stark contrast to Article VII’s non-specific geographic phrase “own side of the river.” The parties thus knew how to take a dispute over the right to use the Delaware River out of the shadow of the underlying boundary dispute, yet they plainly did not do so in Article VII.

Articles I and II, which likewise specify precise geographic lines, further show that Article VII was dependent on the future resolution of the then-unresolved boundary dispute. First, similar to Article III, Articles I and II permit each State to serve criminal and civil proc-

ess “from low-water mark on the New Jersey shore to low-water mark on the Delaware shore.” NJ App. 2a-3a (Article I); *see also id.* at 3a (Article II). As with Article III, those precise geographic lines would apply regardless of the later resolution of the boundary dispute.

Second, Article I limits New Jersey’s service of criminal process to offenses committed, among other things, “upon the *eastern half* of said Delaware River”; Article II correspondingly limits the criminal process that may be served by Delaware to offenses committed “upon the *western half* of said Delaware River.” *Id.* at 2a-3a (emphases added). New Jersey’s interpretation of Article VII would functionally rewrite the Compact by borrowing from other articles the specific language that it needs to give New Jersey “exclusive jurisdiction” (*id.* at 5a (Article IV)) “upon the eastern half of said Delaware River” (*id.* at 2a (Article I)). But Article VII does not contain that language. All it says is that each State has certain riparian rights “on its own side of the river.” In view of the care with which the drafters expressly specified both exclusive jurisdiction and precise geographic boundary lines in other articles of the concise Compact (the substance of which spans less than four pages), it simply cannot be the case that Article VII grants New Jersey “exclusive riparian jurisdiction over improvements appurtenant to the New Jersey shoreline.” NJ Br. 22.

Indeed, Article VIII of the Compact provides that “[n]othing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein *expressly* set forth.” NJ App. 5a (emphasis added). Delaware’s right to exercise its authority over structures on those lands can in no way be said to be “expressly” precluded by Article VII. The New Jersey Attorney General in 1954 recognized that basic point. In a Formal Opinion, he concluded that Article VIII leaves New Jersey powerless “to issue licenses for dredging within the twelve-mile Circle,” which the Attorney Gen-

eral noted “New Jersey has never undertaken to issue.” DE App. 72a (Formal Opinion 1954, No. 3, at 8 (“1954 Formal Opinion”). Moreover, he pointed out, “R. S. 1[2]:3-22 provides only for licenses to dredge or remove any deposits of sand or other material ‘from lands of the state’ under tide waters. The lands below low water mark within the twelve-mile Circle are not lands of this State, but lands of the State of Delaware.” *Id.*<sup>29</sup>

The dredging proposed by BP here, moreover, is no small or incidental matter. It is inconceivable that Delaware would have ceded the authority to regulate the use and dredging of its subaqueous soil 2,000 feet out into Delaware waters in an area spanning 27 acres and requiring removal of the equivalent of 67,000 to 80,000 dump trucks worth of soil.

### **3. Nothing in the 1905 Compact diminished Delaware’s pre-existing authority over its subaqueous lands**

The 1905 Compact does not contain any provision evincing the requisite intent to cede Delaware subaqueous lands to New Jersey or otherwise to impair Delaware’s public trust responsibility to manage those lands for the public good. Those omissions are fatal to New Jersey’s argument, because a strong presumption exists that even a grant of submerged lands does not terminate the public trust. *See, e.g., Illinois Central*, 146 U.S. at 453; *see also Coeur d’Alene Tribe*, 521 U.S. at 284 (noting the “strong presumption” that state ownership of navigable waters “uniquely implicate[s] sovereign interests”); *supra* p. 37.

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<sup>29</sup> The opinion also concluded that “New Jersey has by virtue of Article VII the complete and exclusive right to make grants and leases of riparian lands below low water mark on its side of the river.” DE App. 70a (1954 Formal Opinion at 7). That conclusion is incorrect for all the reasons stated in this brief, and is in serious if not irreconcilable tension with the Attorney General’s conclusion that New Jersey could not authorize dredging on Delaware’s subaqueous lands because they are not “lands of the state” of New Jersey. *Id.* at 72a-73a (1954 Formal Opinion at 8).

New Jersey itself acknowledges, moreover, that its exercise of “riparian jurisdiction” to regulate riparian rights is separate and apart from the State’s jurisdiction to regulate based on environmental or conservation concerns. As one of its affiants explains, “[r]iparian owners, once they have a grant or lease, may dredge out from the area of their grant in order to reach the navigable channel. N.J. Stat. Ann. § 12:3-21 (enacted 1891.) *The exercise of this right is subject to obtaining applicable State environmental permits and a tidelands license.*” NJ App. 28a (Castagna Aff. ¶ 4) (emphasis added).<sup>30</sup> Indeed, one of the riparian grants to build a wharf on which New Jersey relies (at 26) states that “nothing in this act shall affect the rights of the State to lands lying under water,” 1871 N.J. Laws ch. 307, § 1, thus making clear that a riparian grant does not obviate the exercise of other forms of jurisdiction.

Accordingly, New Jersey’s grant of the right to use lands pursuant to its riparian jurisdiction would not prevent that State from exercising other forms of jurisdiction under other bodies of law to regulate conservation and the environment. Thus, even if New Jersey were correct that Article VII gave it “exclusive riparian jurisdiction” to decide the placement of wharves extending from the New Jersey shore into Delaware waters, NJ Br. 1, that term cannot be read so expansively as to preclude Delaware from exercising jurisdiction under its coastal zone laws, just as New Jersey’s issuance of a riparian grant does not preclude it from enforcing its other generally applicable laws within that State.

In this case, Delaware strives to protect its fragile coastal zone. The purpose of the Delaware Coastal Zone Act is “to control the location, extent and type of industrial development in Delaware’s coastal areas,” because

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<sup>30</sup> The cited New Jersey statute was in place at the time the 1905 Compact was executed, and was codified under the heading of “Riparian Rights.” See DE App. 167a (4 N.J. Comp. St., Riparian Rights § 36 (1911)).

those “coastal areas of Delaware are the most critical areas for the future of the State in terms of the quality of life in the State.” Del. Code Ann. tit. 7, § 7001. In doing so, “the State can better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism.” *Id.* The Delaware legislature “further determined that offshore bulk product transfer facilities represent a significant danger of pollution to the coastal zone and generate pressure for the construction of industrial plants in the coastal zone, which construction is declared to be against public policy.” *Id.* Thus, the Delaware Coastal Zone Act provides that “offshore gas, liquid or solid bulk product transfer facilities which are not in operation on June 28, 1971, are prohibited in the coastal zone, and no permit may be issued therefor.” *Id.* § 7003. The purpose of the Act is to regulate the environment, not regulate riparian rights, and even its provisions restricting bulk product transfer facilities do not apply solely to riparian owners. *See Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 406-07 (3d Cir. 1987) (holding that the DCZA as applied to vessel-to-vessel transfers does not offend the dormant Commerce Clause); *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246-47 (Del. 1985) (holding that vessel-to-vessel transfers fell within the definition of “bulk product transfer facilities” to advance the purposes of the DCZA).

Nothing in the phrase “riparian jurisdiction” can be read to preclude Delaware from exercising jurisdiction over its coastal zone environment. Indeed, the text of the Compact itself makes clear that the term “riparian jurisdiction” does not encompass the regulation of all activities that occur on or are attached to a wharf. In Articles I and II, the Compact sets out the rules for service of process and provides that neither State may serve process on a vessel that is “fastened to a wharf adjoining” the other State. NJ App. 3a. Plainly, if “riparian jurisdiction” encompassed the regulation of all activities that happen to

take place on or in connection with a wharf, this language would be surplusage. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2002) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”) (internal quotation marks omitted). Such a reading is especially to be avoided here, where the applicable interpretive rules counsel that language claimed to accomplish the relinquishment of any element of sovereignty or a State’s public trust duties must be construed narrowly.

**C. New Jersey’s Arguments For “Exclusive” Riparian Jurisdiction Are Unpersuasive**

**1. The States intentionally did not confer “exclusive” authority with respect to riparian rights**

Notwithstanding New Jersey’s frequent assertion that the 1905 Compact conferred “exclusive State riparian jurisdiction” — including in the Question Presented (Br. i) — the word “exclusive” does not appear at all in Article VII’s treatment of riparian rights. That omission is noteworthy, because elsewhere in the Compact the drafters *did* use the word “exclusive,” and they did so when they wanted to confer such authority on the States.

Article III, for example, gives the inhabitants of Delaware and New Jersey “a common right of fishery.” NJ App. 3a. Article IV then provides for the future drafting of concurrent state fishing laws, and holds that “[e]ach State shall have and exercise *exclusive jurisdiction* within said river to arrest, try, and punish its own inhabitants for violation of the concurrent legislation relating to fishery herein provided for.” *Id.* at 5a (emphasis added). If, as New Jersey claims, the drafters intended in Article VII to give New Jersey “exclusive riparian jurisdiction over improvements appurtenant to the New Jersey shoreline” (Br. 22), then it is hard to understand why the drafters did not simply use the phrase “exclusive jurisdiction,” as they did in Article IV. Construing the Compact as a fed-

eral statute, the governing principle is that, “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted); *see also Norfolk & N.B. Hosiery Co. v. Arnold*, 45 A. 608, 609 (N.J. 1900) (“The express reservation of an election in the latter clause excludes the inference of such reservation in the former. If an option was to obtain in both instances, the parties knew how to express it, and would have used language appropriate to secure it.”).

The omission of “exclusive” in Article VII of the 1905 Compact is all the more striking because New Jersey had prior drafting experience with an interstate compact that gave it such rights with respect to certain riparian appurtenances. In the 1834 Compact between New Jersey and New York, the parties provided with respect to the Hudson River that “[t]he state of New York shall have and enjoy *exclusive* jurisdiction of and over all the waters . . . of [the] Hudson River . . . to the low water-mark on the westerly or New Jersey side thereof,” “subject to” a proviso that “[t]he state of New Jersey shall have the *exclusive* jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said state; and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the state of New York.” Act of June 28, 1834, ch. 126, 4 Stat. 708, 709-10 (Article Third) (emphasis added). In that compact — with which the drafters of the 1905 Compact surely were familiar<sup>31</sup> — New Jersey took care to establish its “exclusive

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<sup>31</sup> Articles I and II of the 1905 Compact at issue here, which concern service of process, are largely identical to Articles Sixth and Seventh of the 1834 Compact between New Jersey and New York.

jurisdiction” over wharves, while the 1905 Compact with Delaware speaks only of “riparian jurisdiction” without any mention of one State’s exclusive authority at the expense of the other. Thus, nowhere in the Compact does Delaware convey to New Jersey “exclusive” riparian jurisdiction over structures on Delaware soil.

**2. The meaning of “riparian jurisdiction” cannot extend beyond the State’s boundary**

New Jersey claims that the Article VII phrase “‘riparian jurisdiction’ connotes State sovereignty over riparian improvements.” Br. 24. The State seems to be arguing that, if a riparian owner builds a structure that begins on the New Jersey side of the boundary and extends past it into the Delaware side, New Jersey has “riparian jurisdiction” to decide the placement of wharves extending from the New Jersey shore into Delaware waters. There are numerous flaws in that position. First, it reads the words “on its own side of the river” out of Article VII. If a State could exercise “riparian jurisdiction” as to structures no matter where they lay, so long as they extend from its shore, there would be no point in adding the exclusionary language “on its own side of the river” to Article VII. Second, New Jersey acknowledges that it “is not disputing the location of the boundary between the States, which this Court decided in 1934.” NJ Br. 1. That concession is a tacit acknowledgment that the phrase “riparian jurisdiction” is not used in Article VII as a reference to a geographical place, but rather that “jurisdiction” denotes a reference to legal authority, *i.e.*, as a means of expressing New Jersey’s authority to continue to act with respect to a specific, limited body of law known as riparian rights in whatever place the Compact permits.<sup>32</sup>

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<sup>32</sup> Nor is there merit to New Jersey’s claim that Article VII would be meaningless if it did not give New Jersey riparian jurisdiction rights beyond the low-water mark. *See* NJ App. 29a (Castagna Aff. ¶ 6). That was fundamentally the position of the New Jersey Attorney General in a formal opinion on which the State here, curiously, does not rely. *See* DE App. 70a (1954 Formal Opinion at 7). Because the

New Jersey next argues that, because “a primary objective of riparian improvements is the ability to wharf out from the shore, beyond the low-water mark, as necessary to gain access to navigable waters,” it follows that Delaware gave New Jersey the right to bar Delaware from exercising any sovereign rights within the twelve-mile circle if such exercise would in any way impact or “interfere with” any structure over which New Jersey seeks to exercise riparian jurisdiction. NJ Br. 24-25. As New Jersey necessarily concedes, however, the land under the river up to the low-water mark on the New Jersey shore belongs to Delaware. Both States have long recognized their sovereign right, acting in the public trust, to regulate such riparian improvements, including wharves, piers, and bulkheads. *See, e.g., Yates*, 77 U.S. (10 Wall.) at 504 (riparian proprietor has a “right to make a landing, wharf or pier . . . subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be”); NJ Br. 24-25 (citing Delaware and New Jersey cases). The question here therefore concerns which State (either or both) has the right to regulate such riparian improvements appurtenant to the New Jersey shore but extending into Delaware territory, and whether their jurisdiction to do so is exclusive or concurrent. Thus, the simple fact that riparian landowners (*i.e.*, those owning land abutting the shore) have long enjoyed a right to wharf out to navi-

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boundary had long been in dispute, the parties knew it might later be adjudicated to be at the low-water mark on the New Jersey shore (Delaware’s position) or in the middle of the navigable channel (New Jersey’s position). It thus made sense for the parties to make clear that they could “continue” what they had been doing with respect to riparian jurisdiction on each State’s “own side of the river,” wherever that boundary might subsequently be held to lie. Indeed, if the parties really had meant for New Jersey to have riparian jurisdiction *beyond* the low-water mark, then they surely would have said that, just as they delineated other rights in the Compact based on the low-water mark or another specific geographic designation, such as the western and eastern halves of the river. *See* NJ App. 2a-3a (Articles I, II).

gable waters subject to regulation by a state sovereign does not resolve the question of *which* state sovereign has that right in waters and subaqueous soil that indisputably belong to Delaware.

New Jersey likewise erroneously relies (at 25) on the Article VII phrase that each State’s riparian jurisdiction is “of every kind and nature.” NJ App. 5a. That is only so on New Jersey’s “own side of the river,” and the phrase “of every kind and nature” does not speak to where New Jersey’s “own side of the river” might lie. To say that a State has full jurisdiction within its territory simply does not address whether it has any jurisdiction *outside* its territory. Moreover, “of every kind and nature” does not purport to extinguish pre-existing limitations on riparian rights, such as the inherent limit of a sovereign to regulate wharves or New Jersey’s limitation prohibiting a riparian landowner from building structures on lands unless the landowner owned the subaqueous lands on which the structure was to be built.

### **3. New Jersey’s invocation of other miscellaneous Compact provisions is unpersuasive**

New Jersey next claims that Articles I and II reinforce its reading of the Compact because they “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.” Br. 26. New Jersey reads those Articles to “underscore[] 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.” Br. 26-27. Articles I and II, however, concern service of process on persons found on a ship attached to a wharf, and not riparian rights to regulate the use of the wharf itself.

Indeed, the fact that the drafters were specific about certain rights on ships “fastened to a wharf adjoining” New Jersey (NJ App. 3a) shows that they knew how to be specific about wharves in the Compact — but in Article

VII they did not ground the respective States' riparian jurisdiction on a "wharf adjoining" New Jersey; instead, they limited jurisdiction to the States' "own side of the river." *Cf. Virginia v. Maryland*, 540 U.S. at 66 (compact expressly gave Virginia citizens "the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river").

**4. New Jersey's argument that the States' "contemporaneous construction" of the Compact supports its exclusive jurisdiction has no merit**

New Jersey's argument (at 30-33) that extrinsic evidence of the States' "contemporaneous construction" of the Compact since 1905 is also misplaced. Contrary to New Jersey's submission, since this Court resolved the boundary line within the twelve-mile circle, Delaware has consistently regulated structures that extend from the New Jersey side of the river into Delaware territory, under its statutes governing the use of subaqueous lands as well as the DCZA.

In 1961, Delaware adopted its first statute governing the leasing of subaqueous lands. *See* 53 Del. Laws ch. 34; Del. Code Ann. tit. 7, § 4520 (repealed 1966). In 1966, Delaware adopted a more comprehensive Underwater Lands Act containing provisions governing the lease of subaqueous lands by the State. *See* 55 Del. Laws ch. 442, § 1; Del. Code Ann. tit 7, §§ 6151-6159 (repealed 1986). In 1986, Delaware adopted its current Subaqueous Lands Act, 65 Del. Laws ch. 508, Del. Code Ann. tit. 7, ch. 72. Under these statutes, Delaware has exercised jurisdiction over subaqueous lands within the twelve-mile circle from 1961 to the present without objection from New Jersey, issuing at least 11 leases of Delaware subaqueous lands for projects that extend either from the New Jersey shore

or from the Delaware shore to the New Jersey shore. *See* DE App. 66a-68a (Maloney Aff. ¶¶ 3-14).<sup>33</sup>

For example, in 1962, Delaware executed a 20-year lease with the SunOlin Chemical Company for the construction and operation of underwater pipelines across the Delaware River. *See id.* at 66a (Maloney Aff. ¶ 4). On October 9, 1963, Delaware issued a 10-year subaqueous land lease to the Colonial Pipeline Company. *See id.* (Maloney Aff. ¶ 5). In 1971, Delaware granted a lease to E.I. du Pont de Nemours & Co. (“DuPont”) to dredge Delaware subaqueous soil, build a dock, and construct a fuel oil storage tank at the DuPont Chambers Works facility near the New Jersey shore. *See id.* at 67a (Maloney Aff. ¶ 6). In 1982, Delaware granted DuPont permission to repair and replace a 36-pile cluster near its Deepwater, New Jersey facility. *See id.* (Maloney Aff. ¶ 7). In 1987, Delaware issued leases to the Columbia Gas Transmission Corp. and the Colonial Pipeline Company for the construction of pipelines across the river. *See id.* (Maloney Aff. ¶¶ 8-9). In 1991, DNREC executed a 10-year subaqueous lands lease that allowed Keystone Cogeneration Systems to construct an unloading pier for a facility in Logan Township, New Jersey, and to dredge subaqueous soil within the twelve-mile circle; Delaware executed a 20-year renewal of that lease in 2001. *See id.* (Maloney Aff. ¶ 10).

In 1996, Delaware granted a lease to allow NJDEP to rehabilitate a pier and to construct a ferry dock on Delaware subaqueous soil near Fort Mott State Park in New Jersey. *See id.* at 67a-68a (Maloney Aff. ¶ 11). In 1997, Delaware issued a lease allowing Delmarva Power and Light Company to install fiber optic cable within the twelve-mile circle, extending from Pigeon Point in Delaware to Deepwater Point in New Jersey. *See id.* at 68a (Maloney Aff. ¶ 12). In May 2005, Delaware entered into

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<sup>33</sup> “Maloney Aff.” refers to the Affidavit of Kevin P. Maloney, which can be found at DE App. 65a-68a

a lease allowing Fenwick Commons to fill Delaware subaqueous lands at the Penns Grove Riverfront and Pier, in Penns Grove, New Jersey. *See id.* (Maloney Aff. ¶ 14). It is therefore beyond dispute that Delaware has continuously — and, until very recently, without objection from New Jersey — regulated the use of its subaqueous lands in connection with projects that either extend from the New Jersey side of the river or extend from Delaware to the New Jersey shore.<sup>34</sup>

In addition to enforcing its subaqueous lands statutes, Delaware has consistently exercised jurisdiction over such projects under the DCZA following enactment of that statute in 1971. In 1972, Delaware issued a status determination under the DCZA to El Paso Eastern Company advising that its plan to build an LNG terminal extending from the New Jersey side of the river into the twelve-mile circle was prohibited. *See id.* at 8a-12a (Cherry Aff. Ex. A). By letter dated February 23, 1972, Delaware notified the Commissioner of NJDEP of the pending application and solicited comments. *See id.* at 74a (Letter from John Sherman, Planner III, Delaware Planning Office, to Richard Sullivan, Commissioner, NJDEP (Feb. 23, 1972)). By letter dated March 2, 1972, the New Jersey Commissioner responded that it would be useful to communicate on matters of joint interest, but expressed no objection to Delaware’s jurisdiction over the application. *See id.* at 13a-14a (Cherry Aff. Ex. B). New Jersey’s assertion that Delaware “did not actually block a project until 2005,” NJ Br. 33, is thus incorrect.<sup>35</sup>

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<sup>34</sup> New Jersey’s observation that in two instances private parties have questioned whether Delaware had authority to regulate within the twelve-mile circle, *see* Br. 15, 32-33, in no way undermines the conclusion that Delaware’s course of performance has been to exercise its rights under the Compact. *Cf. New Jersey v. Delaware*, 291 U.S. at 375-77 (rejecting New Jersey’s argument that wharf-building by its citizens acquired prescriptive rights in Delaware soils).

<sup>35</sup> New Jersey’s failure to acknowledge that Delaware issued a status determination that the El Paso project was prohibited under the

In the late 1970s and 1980s, both Delaware and New Jersey officials further confirmed the applicability of the DCZA to projects entering Delaware from the New Jersey shore. On October 5, 1978, the Delaware Attorney General’s Office issued Opinion No. 78-018, stating that the DCZA’s exemption for docking facilities serving a single manufacturing facility would apply to docking facilities located in Delaware and serving a facility in New Jersey. *See* DE App. 77a. In August 1980, NJDEP submitted a final Environmental Impact Statement to the U.S. Department of Commerce that clearly acknowledged Delaware’s authority to regulate projects extending into Delaware territory under its coastal management program. *See* NJDEP & NOAA, *New Jersey Coastal Management Program and Final Environmental Impact Statement* (Aug. 1980) (“Final EIS”) (excerpted at DE App. 79a-83a). NJDEP stated that, because the relevant “Delaware – New Jersey State boundary” was “the mean low water line on the eastern (New Jersey) shore of the Delaware River,” “[t]he New Jersey and Delaware Coastal Zone Management agencies . . . have concluded that any New Jersey project extending beyond mean low water must obtain coastal permits from both states.” DE App. 82a (Final EIS at 20). NJDEP further explained that “New Jersey and Delaware, therefore, will coordinate reviews of any proposed development that would span the interstate boundary to ensure that no development is constructed unless it would be consistent with both state coastal management programs.” *Id.* at 82a-83a. Finally, with respect

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DCZA is particularly inexplicable because the CZICB specifically relied on that prior determination in refusing to authorize the Crown Landing project. *See* DE App. 60a (Cherry Aff. Ex. H (CZICB Decision and Order at 10)) (noting DNREC’s argument that “the more relevant precedent, cited by several public speakers, is the 1972 denial of a permit to the El Paso Eastern Company for the construction of a pier in Delaware waters serving an LNG terminal in New Jersey”; noting that the El Paso project denial cited an analysis of the DCZA from the Delaware Attorney General; and finding that “a similar analysis applies to the proposed Crown Landing construction”).

to the Crown Landing project itself, NJDEP's Office of Dredging and Sediment Technology advised BP on February 4, 2005, that "activities taking place from the mean low water line . . . offshore are located in the State of Delaware and therefore are subject to Delaware Coastal Zone Management Regulations." *Id.* at 85a (Letter from David Q. Risilia, ODST, to David Blaha, Environmental Resources Management (Feb. 4, 2005)).

Just as Delaware continued to regulate projects extending into its territory after this Court's 1934 decision, New Jersey continued to grant leases, licenses, or conveyances to private and governmental entities for riparian structures. New Jersey's activities, however, are in no way inconsistent with Delaware's jurisdiction over its territory within the twelve-mile circle. With the exception of the El Paso and Keystone facilities discussed above, as well as structures requiring licenses to dredge Delaware's subaqueous soil, those riparian projects did not necessitate Delaware's exercise of its authority under the DCZA or the subaqueous lands statutes. For example, Delaware did not object to New Jersey's issuance of permits for the Carney's Point project, the Keystone project, the Fort Mott project, or the two Pennsville Township projects (which involved de minimis extensions of 30 feet and 9 feet into Delaware territory). *See* NJ App. 70a-72a (Broderrick Aff. ¶¶ 11-16). Unlike the Crown Landing project, those projects either did not implicate Delaware concerns or were otherwise regulated by Delaware.

Since this Court's 1934 boundary determination, New Jersey has also taken regulatory actions with respect to water intake and discharge that did not interfere with Delaware's jurisdiction and interests, and therefore provoked no protest from Delaware. For example, Delaware did not oppose New Jersey's issuance of permits regarding discharge of water within the twelve-mile circle because such permits are already subject to federal standards and are monitored by the Delaware River and Bay Commission, of which Delaware is a member. *See* DE App. 63a-

64a (Hansen Aff. ¶¶ 2-5)<sup>36</sup> (explaining that both EPA and the Delaware River Basin Compact require New Jersey to satisfy Delaware water-quality standards, eliminating the need for Delaware to issue separate permits). Delaware did not object to New Jersey’s issuance of permits relating to water withdrawal at the Keystone project, *see* NJ App. 64a (Sickels Aff. ¶ 8), in large part because Delaware has a say in such permits through the approval and modification process of the Delaware River and Bay Commission. *See* Del. Code Ann. tit. 7, § 6501 (Art. 10, § 10.1) (“[t]he Commission may regulate and control withdrawals and diversions from surface waters and ground waters of the basin”).

In the face of Delaware’s consistent and substantial exercises of jurisdiction over wharves and other structures appurtenant to New Jersey that extend into Delaware, New Jersey relies on two New Jersey cases that it claims demonstrate that New Jersey acted “under the 1905 Compact to regulate activities occurring on riparian structures.” Br. 31. In *State v. Federanko*, 139 A.2d 20 (N.J. 1958), however, the New Jersey court simply purported to apply Article I of the Compact in holding that “ownership of subaqueous soil by one state does not stand in the way of an agreement with its neighbor on the other side for a sharing of the criminal jurisdiction over the river.” *Id.* at 33; *see id.* at 36 (“administering the criminal law on the easterly half of the river for the full frontage of Salem County as our State had solemnly agreed with Delaware to do”). The New Jersey court neither cited nor suggested it was acting pursuant to Article VII. In the other case relied on by New Jersey (at 31), the court interpreted Article VII to permit New Jersey to tax a wharf in the twelve-mile circle, but that lone example, in a New Jersey case where Delaware was not a party, in no way bears on Delaware’s course of performance under the Compact.

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<sup>36</sup> “Hansen Aff.” refers to the Affidavit of R. Peder Hansen, which can be found at DE App. 62a-64a.

*See Main Assocs., Inc. v. B. & R. Enters., Inc.*, 181 A.2d 541, 543-45 (N.J. Super. Ct. Ch. Div. 1962).

New Jersey's reliance on the Delaware State Highway Department's 1957 "resolution" disavowing jurisdiction over a proposed project by Dupont, *see* Br. 31-32, is also misplaced. First, a letter by the Highway Department's outside counsel, Samuel Arsht, simply concurring in DuPont's counsel's interpretation of the 1905 Compact (without any indication that either attorney was aware of the 1954 Formal Opinion of the New Jersey Attorney General directly contrary to DuPont's counsel's interpretation) in no way binds Delaware or other Delaware agencies to that interpretation.<sup>37</sup> Second, the Highway Department did not adopt its outside lawyer's interpretation of the Compact or express a view that Delaware lacked authority to regulate projects extending from the New Jersey shore into Delaware territory. On the contrary, the Highway Department merely stated that, "taking cognizance of" its lawyer's opinion, it would advise the Corps that "the Department has no jurisdiction over the area mentioned." NJ App. 109a-110a (Donlon Aff. Ex. G).

The Highway Department did not conclude that *Delaware* lacked jurisdiction to regulate within the twelve-mile circle or that the 1905 Compact stripped Delaware of authority over projects originating on the New Jersey side of the river. Even if it had, the Department's conclusion would not bind the State or other Delaware agencies. The Delaware legislature's decision in 1961 to regulate Delaware subaqueous lands after Arsht opined that Delaware

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<sup>37</sup> Arsht was a private lawyer with the firm of Morris, Steel, Nichols & Arsht at the time he was Counsel to the Delaware State Highway Department. *See* NJ App. 109a-110a. Moreover, even if Arsht had been an agent of Delaware, neither the State nor any of its agencies had conferred on him the authority to issue binding interpretations of the Compact. *Cf. Lee v. Munroe*, 11 U.S. (7 Cranch) 366, 369 (1813) (holding that the government is not bound by mistaken representations of an agent unless it is clear that the representations were within the scope of the agent's authority).

lacked jurisdiction to do so within the twelve-mile circle indicates that the legislature did not share Arsht's incorrect view of Delaware's authority. *See* 53 Del. Laws ch. 34; Del. Code Ann. tit. 7, § 4520 (repealed 1966). Finally, the 1957 Highway Department resolution preceded passage of Delaware's Underwater Lands Act adopted in 1966 and the DCZA in 1971. The resolution thus carries no weight in evaluating Delaware's course of performance in enforcing its subaqueous lands statutes and its coastal management program against projects that extend from the New Jersey shore into Delaware territory.

**5. New Jersey's reliance on Delaware's alleged "concessions" in the 1934 boundary case is misplaced**

New Jersey claims that, in the course of litigating the boundary case nearly 30 years after entry of the 1905 Compact, private counsel retained by Delaware "conceded both the right of New Jersey citizens to wharf out to navigable water and the exclusive right of New Jersey to regulate the exercise of those rights." Br. 27-28; *see id.* at 27-30. As shown above, however, the plain language of the Compact cannot be read to give New Jersey exclusive riparian jurisdiction in Delaware waters. Moreover, New Jersey's reliance on counsel's statements is misplaced for several reasons and in any event cannot fairly bind Delaware in the context of the issues presented in this case.

First, the scope of riparian jurisdiction in Article VII of the Compact was not at issue in the boundary case. Rather, New Jersey argued that the Compact had transferred *title* of the eastern half of the river from Delaware to New Jersey. This Court rejected that argument out of hand, explaining that "[t]he compact of 1905 provides for the enjoyment of riparian rights, for concurrent jurisdiction in respect of civil and criminal process, and for concurrent rights of fishery. Beyond that it does not go." *New Jersey v. Delaware*, 291 U.S. at 377-78. Thus, the Court plainly held that nothing in the Compact transferred title of any Delaware lands to New Jersey. The

Court's opinion did *not*, however, interpret the scope of Article VII's "riparian jurisdiction."

Second, in one of the statements on which New Jersey relies, counsel made quite clear that Delaware was arguing in the alternative: "*Even if* the Compact of 1905 be construed as ceding to the State of New Jersey the right to determine to whom riparian rights (i.e., wharf rights appurtenant to riparian lands) shall be granted, it would still not affect the boundary between the States in any conceivable way." NJ Br. 30 (quoting NJ App. 237a) (emphases added and deleted). Delaware simply made the point that, "even if" the Compact gave New Jersey riparian jurisdiction (whether exclusive or concurrent) over wharves extending from New Jersey into Delaware, the Compact did not support New Jersey's claim to title to Delaware soil. *See* NJ App. 183a (Delaware Reply Brief to Special Master) ("The conclusion . . . is that the exercise of riparian rights by the inhabitants of the Province of New Jersey was not in any sense hostile or adverse to the ownership of the soil by William Penn.")

New Jersey further seeks to exploit a statement by Delaware's counsel that "Article VII of the Compact is 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." *Id.* at 186a. But New Jersey makes too much of that statement, for the very next sentence of the brief stresses Delaware's ultimate ownership (and therefore control) of the subaqueous lands on which such riparian rights might be exercised: "That the Compact of 1905 left the title to the subaqueous soil unaffected is clear from the express language of Article VIII." *Id.* Thus, understood in context, Delaware counsel was merely acknowledging that New Jersey could decide who could exercise riparian rights from the New Jersey shore, and that its regulations would apply to those structures even if they extended into Delaware lands. But, given the importance of title to a State's lands and the important inci-

dence of sovereignty over a State's submerged lands, which Delaware counsel repeatedly invoked throughout the litigation, counsel's statement cannot fairly be understood to mean that Delaware itself would *not* have any regulatory authority over riparian structures built on Delaware lands. At most, counsel's statement was a recognition of the obvious principle that, where a structure traverses two States, both have regulatory jurisdiction with respect to those parts of the structure within the State's boundary. See, e.g., *McGowan v. Columbia River Packers' Ass'n*, 245 U.S. 352, 357-58 (1917) (holding that State cannot remove structure on neighboring State's submerged lands in navigable river that forms boundary between the two States).

Finally, to the extent this Court perceives any tension between Delaware's position today and in certain isolated statements from the boundary case, Delaware should not be taken to have conceded an issue that was not presented to the Court for adjudication.<sup>38</sup> The Court's opinion in the boundary case in no way relied on and did not rule on any arguments concerning the scope of Article VII's riparian jurisdiction. Cf. *New Hampshire v. Maine*, 532 U.S. at 751 (applying judicial estoppel because "interpretation of the words 'Middle of the River' . . . was 'necessary' to fixing the . . . boundary" in the prior litigation).<sup>39</sup>

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<sup>38</sup> New Jersey presumably intends to claim judicial estoppel. That doctrine, however, is inapplicable where the party's statement was not relied on by the Court to rule in that party's favor. See *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). "Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations." *Id.* (internal quotation marks omitted).

<sup>39</sup> The special master's report adopted by the Court, see *New Jersey v. Delaware*, 295 U.S. 694, 694 (1935), found that "[b]y the Compact of 1905 between the States of New Jersey and Delaware the State of Delaware recognized the rights of riparian owners to wharf out on the easterly side of the Delaware River within the twelve-mile circle. By said Compact the State of Delaware did not convey to the State of New Jersey title to any part of the Delaware River or to any part of the subaqueous soil thereof, and said Compact did not in anywise alter or

Application of any estoppel principle would be particularly inappropriate here, given that counsel's arguments are not "clearly inconsistent with its earlier position." *Id.* at 750 (internal quotation marks omitted). Here, the conditional nature of Delaware's statements undercuts New Jersey's assertion that Delaware could concede an issue that was in no way necessary to resolution of the boundary dispute. Nor is there any "unfair advantage" in permitting Delaware to litigate an issue not decided by the Court in the boundary case. *Id.* at 751.<sup>40</sup>

Any application of judicial estoppel here would be especially unwarranted given that the lands implicated by New Jersey's attempt here to exercise "exclusive" riparian jurisdiction involve public lands held in trust by Delaware for its citizens. As this Court has explained, "broad interests of public policy may make it important to allow a change of positions that might seem inappropriate as a matter of merely private interests." *New Hampshire v. Maine*, 532 U.S. at 755 (quoting 18 Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 4477, at 784 (1981)).

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affect the boundaries of the respective states." NJ App. 256a; *see also* NJ Br. 28. Thus, as the report states, its reference to the scope of the Compact was not necessary to resolving the disputed boundary issue. *See Bennis v. Michigan*, 516 U.S. 442, 450 (1996) ("[I]t is to the holdings of our cases, rather than their dicta, that we must attend.") (internal quotation marks omitted); *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 300 (1995) ("Breath spent repeating dicta does not infuse it with life."). In any case, the special master did *not* find that New Jersey's Article VII riparian jurisdiction was exclusive, as New Jersey must have it in order to prevail.

<sup>40</sup> Finally, this Court has recognized that "it may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake." *New Hampshire v. Maine*, 532 U.S. at 753 (internal quotation marks omitted). The Delaware statements cited by New Jersey are not accompanied by any textual analysis of the Compact. *Cf. supra* pp. 45-56. Indeed, the private counsel representing Delaware in the boundary case couched one statement as being merely "in my view," NJ Br. 28 (quoting NJ App. 191a), and thus should not be deemed to be the considered interpretation of the State of Delaware.

Thus, “[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.” *Heckler v. Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 (1984).<sup>41</sup>

**D. *Virginia v. Maryland* Does Not Deny Delaware The Right To Exercise Its Coastal Zone Laws And To Reject A Structure Built On Delaware Subaqueous Lands**

New Jersey (at 27) cites *Virginia v. Maryland* for the proposition that Article VII should be read to grant New Jersey the exclusive authority over BP’s project that it claims. Although that case may appear to share some surface similarities with this one, at root it raises fundamentally different concerns and involves different legal principles.

The case arose out of Maryland’s ownership of the bed of the Potomac River to the low-water mark on the Virginia side. In 1996, Fairfax County, Virginia, applied to Maryland for a permit to withdraw water from the river. Several Maryland officials objected because the water would divert economic growth and development from Maryland to Virginia. Maryland initially denied the permit on the ground that the county had not demonstrated a sufficient need for the water, but in 2001 it approved the permit. However, the Maryland legislature placed a limit on the amount of water that could be withdrawn. Maryland therefore conceded Virginia’s right to withdraw water but argued that its sovereignty over the bed

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<sup>41</sup> The Court found this principle inapplicable in *New Hampshire v. Maine*, because it found that “New Hampshire advances its new interpretation not to enforce its own laws within its borders, but to adjust the border itself.” 532 U.S. at 756. Here, Delaware seeks to enforce its own laws within its own undisputed territory.

gave it the right to regulate the amount of Virginia's withdrawals.

In rejecting Maryland's position and upholding the right of Virginia to withdraw water for the use of its citizens, this Court held that a 1785 Compact gave Virginia immunity from Maryland sovereignty over a portion of the bed of the Potomac awarded to Maryland more than a century after the compact became law. The Court reasoned that the language in Article Seventh of the 1785 Compact gave the citizens of each State "full property in the shores of [the] Potowmack river adjoining their land, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements," 540 U.S. at 62, and therefore settled the issue at a time when the location of the boundary between the two States and thus control over the river was contested. Article IV of the subsequent boundary award gave Virginia "a right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership, without impeding navigation or otherwise interfering with the proper use of it by Maryland." *See id.* at 62-63. The Court held that Virginia gained the right "to use the River beyond low-water mark . . . *qua* sovereign." *Id.* at 72.

*Virginia v. Maryland* is readily distinguishable from New Jersey's present dispute with Delaware. Fundamentally, that case involved an application of the well-established principle of equitable apportionment, pursuant to which sovereigns on both sides of a shared river are permitted to draw out water for their citizens' use. That is a different legal regime from the public-trust doctrine, which vests special sovereign attributes in the submerged lands owned by a sovereign.

Even aside from that fundamental distinction, Article VII of the 1905 Compact is limited to a continuation of the exercise of "riparian jurisdiction" and does not involve the grant of ownership in submerged lands or a cession of any public trust responsibility with respect to those lands. By

contrast, the 1785 Maryland-Virginia Compact gives an unconditional right to wharf out. *See Virginia v. Maryland*, 540 U.S. at 62. Such a provision would have been consistent with the common law at the time when the right was only subject to the principle that a wharf not constitute a nuisance by interfering with navigation. Article VII of the 1905 Compact, however, is more limited because, by 1905, the right to wharf out was more contingent and subject to the additional limitations imposed by a sovereign if the wharf was not deemed to be in the public interest. *See supra* pp. 43-45.

Moreover, Maryland's objections to Virginia's use of the Potomac and the way Maryland tried to implement its objections raise serious legal issues not present in Delaware's denial of BP's request for a coastal zone permit. Nor did Maryland's objections have any connection to a legitimate interest of that State. Maryland initially asserted the right to control all of the water in the river for the benefit of its citizens. It then unilaterally decided Virginia's share of the river. At oral argument, however, Maryland conceded that Virginia's withdrawal pipe would have no adverse impact on Maryland or its residents. *See Oral Arg. Tr., Virginia v. Maryland*, No. 129, Orig., 2003 WL 22335915, at \*11 (Oct. 7, 2003).

Maryland's actions also violated other bedrock principles of Federal law. Under the dormant Commerce Clause, a State may not withhold resources, including water, from interstate commerce, *see Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), or from a co-riparian state, *see Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1024-25 (1983). Maryland violated the second principle by, in effect, unilaterally allocating the waters of the Potomac. That effort ran afoul of the three means recognized by this Court for allocating interstate waters: (1) an original equitable apportionment action in the Supreme Court, (2) an interstate compact, or a (3) congressional Act. Because none of those actions had occurred, the Court could have upheld Virginia's claim without deciding

that Maryland had surrendered its sovereign rights, and indeed suggested as much. *See* 540 U.S. at 74 n.9.

The third distinction between the two cases is that Delaware is not interfering with a recognized interest of New Jersey in the Delaware River as Maryland did in *Virginia v. Maryland*. There is an important difference between the use of water and the construction of enormous structures on the submerged lands of the river. This Court upheld Virginia's right to use the waters of the Potomac as a sovereign, a use well known in water law as a usufructory right. *See id.* at 72. That right, however, is distinct from ownership. The general rule is that no one can own the waters of a river; one can only obtain a lesser right to use them. Ultimately, *Virginia v. Maryland* was a "use" dispute, whereas New Jersey here has implicated Delaware's sovereign right to decide how the subaqueous lands that it indisputably owns should be utilized. New Jersey has no common law or federal constitutional right in Delaware's decision because that decision involves the control of Delaware territory. Any right, if one exists, must come from the 1905 Compact. As we have shown, no such right emanates from the plain language or purposes of that Compact.

### **III. APPOINTMENT OF A SPECIAL MASTER IS WARRANTED IF THE COURT TAKES JURISDICTION OVER THIS CASE BUT CANNOT RESOLVE IT SUMMARILY AGAINST NEW JERSEY**

This Court routinely appoints a Special Master in cases involving disputes between two States about the meaning of an interstate compact or their respective rights to use the waters of an interstate waterway. *See, e.g., Kansas v. Colorado*, 543 U.S. 86 (2004); *Virginia v. Maryland*, 540 U.S. 56 (2003); *New Jersey v. New York*, 523 U.S. 767 (1998); *Oklahoma v. New Mexico*, 501 U.S. 221 (1991); *Texas v. New Mexico*, 482 U.S. 124 (1987); *see also Nebraska v. Wyoming*, 515 U.S. 1 (1995) (appointing a Special Master in a case brought by Nebraska to enforce a

1945 decree by this Court); Robert L. Stern, *et al.*, *Supreme Court Practice* § 10.12, at 576 (2002). This Court should follow the same procedure here, in the event that this Court takes jurisdiction over this case but cannot resolve it based on any of the substantive grounds presented above.

A Special Master would be best positioned to consider, in the first instance, the extensive historical evidence that each State could be expected to put forward. Delaware would submit historical evidence about each State's riparian rights within the twelve-mile circle under common law and applicable state statutes — as well as evidence of the historical exercise of those rights — prior to the 1905 Compact. Delaware would also seek to introduce historical evidence demonstrating each State's intent at the time it signed the Compact. And Delaware would put forward course-of-performance evidence from the 100 years that have passed since the signing of the Compact. Not only are these fact-finding duties best entrusted to a Special Master in the first instance, but a Special Master would be able to preside over the discovery process, as Delaware continues its efforts to gather historical materials in New Jersey's possession that pertain to these various issues.<sup>42</sup>

Without acknowledging this Court's normal practice of appointing a Special Master in cases comparable to this one or this Court's sound reasons for that practice, New

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<sup>42</sup> On August 25, 2005, Delaware's Attorney General, M. Jane Brady, made a preliminary request to New Jersey's Attorney General, Peter C. Harvey, for certain documents relating to the allegations in New Jersey's Motion to Reopen and Request for a Supplemental Decree. While New Jersey permitted counsel for Delaware to inspect certain public documents in September and October 2005, as late as the week of October 24, 2005, only days before Delaware's Brief in Opposition to New Jersey's Motion was due, New Jersey produced a significant amount of documents that Delaware has not had a reasonable opportunity to review prior to the deadline for filing its brief. Delaware, as a result, has not been able to complete its review of all of the relevant facts for this complicated historical proceeding that may be included in New Jersey's most recent production.

Jersey asserts that this Court ought not follow that practice here. See NJ Br. 33-34. But the few cases on which New Jersey relies are inapposite. As an initial matter, the Court's decision in *Virginia v. Maryland*, 540 U.S. 56 (2003), which was based on its review of a Special Master's report, supports the appointment of a Special Master here as well. Although New Jersey asserts (at 33-34) that *Virginia v. Maryland* "decided a similar legal issue" as the issue presented here, that case involved withdrawal of water from a river. See, e.g., 540 U.S. at 63. Here, by contrast, New Jersey couches the construction of a massive bulk transfer facility 2,000-feet long and 50-feet wide, with the attendant dredging of 27 acres of Delaware land, as a separate riparian right "to wharf" out to navigable waters. Even if such a facility could be viewed simply as "wharfage," historically such rights have been subject to clear limitations on the uses to which such wharves can be put. See *supra* pp. 43-45.

In any event, this Court made clear that its decision in *Virginia v. Maryland* turned not on generally applicable legal principles, but instead on the specific terms of "Article Seventh of the 1785 Compact [between Virginia and Maryland] and Article Fourth of the Black-Jenkins Award," such that resolution of the dispute "obviously require[d] resort to those documents." 540 U.S. at 65-66. Because a different compact, with a different history and course of performance are at issue here, this Court's decision in *Virginia v. Maryland* provides no basis for dispensing with the appointment of a Special Master.

Furthermore, the circumstances here are decidedly unlike those in *California v. United States*, 457 U.S. 273 (1982), and *New Hampshire v. Maine*, 532 U.S. 742 (2001), where this Court did not appoint a Special Master. See NJ Br. 34. *California v. United States* involved a narrow "choice-of-law issue," as to which this Court found that "[n]o essential facts [were] in dispute." 457 U.S. at 278. But that is not the case here, where Delaware and New Jersey currently dispute a number of essential facts,

involving the historical exercise of riparian rights within the twelve-mile circle, the parties' intent in framing the 1905 Compact, and the inferences to be drawn from each State's course of performance since 1905. *New Hampshire v. Maine* is equally inapposite, as the Court found that it could "pretermitt the States' competing historical claims" because New Hampshire was judicially estopped from disputing Maine's claim that a "1740 decree and [a] 1977 consent judgment divided the Piscataqua River at the middle of the main channel of navigation." 532 U.S. at 748. The Court could not avoid reaching the parties' historical disputes here on that same ground because, as shown above, no position taken by Delaware in prior litigation with New Jersey judicially estops Delaware from disputing New Jersey's claim of exclusive jurisdiction to govern the uses of structures built out onto land owned by Delaware within the twelve-mile circle. *See supra* pp. 68-71.

Given the complexity of the historical facts and the attendant legal principles, the Court likely would obtain substantial benefits from a Special Master's distillation of the issues and a recommendation on how this Court should resolve them.

### CONCLUSION

For the foregoing reasons, this Court should dismiss New Jersey's pleading for lack of jurisdiction. If the Court takes jurisdiction over New Jersey's pleading, it should deny New Jersey's request for declaratory and injunctive relief because Delaware has the right, as a sovereign and under the 1905 Compact, to regulate the manner in which BP intends to construct a massive LNG bulk product transfer facility within Delaware's territory. If the Court finds that it cannot resolve this case against New Jersey based on the arguments presented herein, the Court should follow its customary practice and appoint a Special Master to hear evidence and make a recommendation on the resolution of this dispute.

Respectfully submitted,

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