

No. 134, Original

---

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

STATE OF NEW JERSEY,  
*Plaintiff,*

v.

STATE OF DELAWARE,  
*Defendant.*

---

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

---

**NEW JERSEY'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

---

STUART RABNER  
Attorney General

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

Of Counsel  
GERARD BURKE  
Assistant Attorney General  
Richard J. Hughes Justice Complex  
25 West Market Street  
P.O. Box 112  
Trenton, New Jersey 08625  
(609) 984-6811

JOHN R. RENELLA  
Deputy Attorney General  
\* *Counsel of Record*

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

TABLE OF CONTENTS

	<u>PAGE</u>
SUMMARY OF ARGUMENT .....	1
STATEMENT OF FACTS .....	2
A. The Twelve-Mile Circle and the Delaware-New Jersey Boundary .....	3
B. New Jersey’s Exercises of Jurisdiction Predating the Compact .....	4
C. New Jersey v. Delaware I .....	5
D. Adoption of the Compact .....	7
E. New Jersey’s Exercises of Jurisdiction from 1905 to 1934 .....	10
F. New Jersey v. Delaware II .....	11
G. New Jersey’s Exercises of Jurisdiction After <i>New Jersey v. Delaware II</i> .....	14
H. The Scope of New Jersey’s Regulation of Riparian Lands .....	15
I. Delaware’s Acquiescence to New Jersey’s Exercises of Jurisdiction .....	16
J. Delaware’s Actions Within the Twelve-Mile Circle .....	18
K. New Jersey’s Efforts to Cooperate With Delaware .....	21
ARGUMENT .....	23
I. <b>NEW JERSEY IS ENTITLED TO SUMMARY JUDGMENT BECAUSE             THE PLAIN LANGUAGE OF THE COMPACT OF 1905 PROVIDES IT             WITH JURISDICTION TO REGULATE ALL ASPECTS OF THE             CONSTRUCTION AND USE OF RIPARIAN IMPROVEMENTS             EXTENDING FROM ITS SHORE, WITHOUT INTERFERENCE BY             DELAWARE</b> .....	23
A. <b>THE COMPACT OF 1905 PROVIDES, IN CLEAR AND UNAMBIGUOUS             LANGUAGE, FOR THE REGULATION BY NEW JERSEY OF ALL             ASPECTS OF THE OWNERSHIP AND EXERCISE OF RIPARIAN             RIGHTS APPURTENANT TO ITS SHORES WITHIN THE TWELVE             MILE CIRCLE.</b> .....	26

1.	<b>It Was Well Settled at the Time of the Compact That Riparian Rights Included, But Were Not Limited to, the Right to Wharf Out Beyond the Mean Low Water Mark to Reach the Navigable Channel. ....</b>	<b>27</b>
2.	<b>“Riparian Jurisdiction of Every Kind and Nature” Includes the Authority to Exercise Police Power to Regulate the Nature and Scope of Riparian Improvements, and the Manner in Which They are Constructed and Used. ....</b>	<b>29</b>
3.	<b>Riparian Jurisdiction of Every Kind and Nature Includes the Authority to Apply Laws Limiting the Exercise of Riparian Rights for the Protection of the Public, Including Present Day Environmental Laws. ....</b>	<b>32</b>
B.	<b>BECAUSE IT WAS SUBJECT TO THE COMPACT OF 1905, THE DECREE IMPLEMENTING THE SUPREME COURT’S 1934 DECISION REAFFIRMED NEW JERSEY’S RIGHT TO EXERCISE RIPARIAN JURISDICTION OVER RIPARIAN IMPROVEMENTS BELOW THE MEAN LOW WATER LINE.. ....</b>	<b>33</b>
II.	<b>BASED ON ITS REPRESENTATIONS IN <i>NEW JERSEY V. DELAWARE II</i>, DELAWARE IS JUDICIALLY ESTOPPED FROM ASSERTING THAT NEW JERSEY HAS NOT RETAINED ITS FULL RIPARIAN JURISDICTION. ....</b>	<b>35</b>
III.	<b>THE 1905 COMPACT IS ENFORCEABLE. ....</b>	<b>38</b>
IV.	<b>ANY DISPUTE ABOUT NEW JERSEY’S RIPARIAN JURISDICTION UNDER ARTICLE VII IS RESOLVED IN NEW JERSEY’S FAVOR UNDER THE DOCTRINE OF PRESCRIPTION AND ACQUIESCENCE ....</b>	<b>40</b>
A.	<b>Even if Article VII Did Not Give New Jersey the Right to Exercise its Riparian Jurisdiction Over Projects Emanating from the New Jersey Shore, New Jersey Would Have Obtained that Right Through Prescription and Acquiescence. ....</b>	<b>41</b>
B.	<b>Delaware has no Claim of Prescription and Acquiescence against New Jersey. ....</b>	<b>45</b>
	<b>CONCLUSION .....</b>	<b>46</b>

**New Jersey's Appendix  
Table of Contents  
Volume I**

**Documents Relating to the Compact of 1905**

Delaware Joint Resolution, February 13, 1905 ..... 1a  
23 Del. Laws Ch. 6 (1905) ..... 2a  
Laws of the State of Delaware 1905, Appendix ..... 7a  
Compact of 1905 (23 Del. Laws Ch. 5 (1905)) ..... 8a  
Compact of 1905 as enacted by Congress, January 24, 1907 ..... 14a

**Documents relating to the 1935 Decree, New Jersey v. Delaware II**

Decree, No. 11 Orig., June 3, 1935 ..... 18a

**New Jersey v. Delaware I transcript (extracts)**

Transcript of proceedings, pages 305-312 ..... 25a  
Transcript of proceedings, pages 240-241 ..... 33a  
Transcript of proceedings, pages 244-245 ..... 35a  
Transcript of proceedings, page 260 ..... 37a  
Transcript of proceedings, pages 272-283 ..... 38a  
Transcript of proceedings, pages 168 ..... 50a  
Transcript of proceedings, pages 133-134 ..... 51a  
Transcript of proceedings, pages 155-156 ..... 53a

## Volume I (cont.)

Transcript of proceedings, pages 242-245, (Exhibit 35 <u>Daniel H. Kent</u> Riparian grant 1883) .....	55a
Transcript of proceedings, pages 256-265, (Exhibit 37 <u>Dupont</u> Riparian grant 1891) .....	59a
Transcript of proceedings, pages 266-271 (Exhibit 38 <u>Annie E. Brown</u> Riparian grant 1891) .....	68a
Transcript of proceedings, pages 60-78 .....	74a

### **Documents Related to and Predating Compact of 1905**

Correspondence between the Governors of New Jersey and Delaware: May 9, 14, 22, 1872 .....	94a
<u>New Jersey v. Delaware I</u> , Order for Preliminary Injunction, March 26, 1877 .....	99a
Report of Commissioners of New Jersey, March 16, 1903 .....	102a
Letter Report from Delaware Commissioners, March 28, 1903 .....	105a
Letter from Delaware Commissioner Ward to Delaware Commissioner Bates, February 11, 1905 .....	108a
Letter to New Jersey Governor Stokes, December 19, 1905 .....	110a
Letter from the Secretary Of State of Delaware, December 21, 1905 .....	111a
Resolution passed by the Joint Commission on January 16, 1907 (with cover letter) .....	112a
Letter from Delaware Attorney General, January 19, 1907 .....	114a

### **Documents Related to New Jersey v. Delaware II**

Reply Brief of Defendant Before Special Master pages 6-11 .....	121a
---	------

**Volume I (cont.)**

Oral argument by Delaware before Special Master pages 90-93 ..... 125a

Report of the Special Master pages 52-55, 76-77 and 80 ..... 128a

Brief for Plaintiff on Exceptions to the  
    Report of the Special Master pages 126-131 ..... 133a

Reply Brief of Defendant pages 7-11, 16 and 17, 26-29 ..... 137a

**Documents Related to New Jersey’s Opening Statement and Sherman Testimony, New**

**Jersey v. Delaware II (excerpts)**

Transcript of proceedings, pages 77-87 ..... 143a

Transcript of proceedings, pages 106-111 ..... 149a

Transcript of proceedings, pages 114-115 ..... 153a

Transcript of proceedings, pages 116-123 ..... 155a

**Volume II**

**Documents Related to New Jersey’s Opening Statement and Sherman Testimony, New**

**Jersey v. Delaware II (excerpts) (continued)**

Transcript of proceedings, pages 126-129 ..... 159a

Transcript of proceedings, pages 130-155 ..... 161a

Transcript of proceedings, pages 270-285 ..... 174a

**Correspondence Related to Decision, New Jersey v. Delaware II**

Letter from Duane Minard N.J. Assistant Attorney General  
    to Hon. Clarence Southerland, Delaware Special Counsel, April 17, 1935 .... 182a

**Volume II (cont.)**

Letter from Clarence Southerland to Delaware  
    Attorney General Green, April 18, 1935 ..... 184a

Letter from Delaware Attorney General Green to the  
    Governor of Delaware, December 27, 1938 ..... 186a

Report by Clarence Southerland for Delaware Attorney General, July 3, 1935 ..... 190a

**New Jersey Laws**

Wharf Act of 1851, 1851 N.J. Laws ch. 335 ..... 206a

Legislative Grant to Thomas D. Broadway, 1854 N.J. Laws ch. 143 ..... 211a

Act to Incorporate the Pennsgrove Pier Company, 1855 N.J. Laws ch. 274 ..... 214a

Board of Riparian Commissioners Law, 1864 N.J. Laws ch. 391 ..... 217a

Report of Commissioners, February 1, 1865 ..... 220a

General Riparian Act, 1869 N.J. Laws ch. 383. .... 232a

Legislative Grant to Robert Walker, 1870 N.J. Laws ch. 131 ..... 240a

Legislative Grant to Joseph Guest, 1870 N.J. Laws ch. 344 ..... 241a

1871 N.J. Laws ch. 256 ..... 242a

Legislative Grant to Henry Barber, 1871 N.J. Laws ch. 307 ..... 243a

Proclamation by the Governor of New Jersey, May 8, 1872 ..... 245a

Joint Resolution by New Jersey Legislature,  
    1876 N.J. Laws p. 418, March 30, 1876 ..... 247a

1891 N.J. Laws ch. 123 ..... 249a

1903 N.J. Laws, p. 39: Joint Resolution Relating to the Boundary Controversy  
    Between the States of New Jersey and Delaware, March 5, 1903 ..... 254a

1903 N.J. Laws ch. 243: Act to Ratify a Compact, April 8, 1903 ..... 256a

1905 N.J. Laws ch. 42: Act to Ratify and  
    Confirm the 1905 Compact, March 21, 1905 ..... 262a

1905 N.J. Laws ch. 230: Act to Appoint  
    Three Commissioners by New Jersey, May 11, 1905 ..... 268a

1905 N.J. Laws ch. 131: Act to provide

**Volume II (cont.)**

uniform laws regarding fishing, May 7, 1907 ..... 273a

Waterfront Development Law, 1914 N.J. Laws ch. 123 (now codified  
in part as N.J.S.A. §12:5-1 et seq.) ..... 283a

New Jersey Board of Commerce and Navigation Permit  
to William Acton, 1923 and 1925 ..... 290a

1915 N.J. Laws ch. 242: New Jersey Board  
of Commerce and Navigation Act ..... 292a

1917 N.J. Laws ch. 189: New Jersey Cession to United States Government ..... 298a

**New Jersey Attorney General Opinions and Related Correspondence**

NJ Atty Gen. Op. 3 (1954), February 2, 1954 ..... 302a

Letter from Chief Deputy Attorney General of Delaware to Mr. Gannon, Chief  
of New Jersey Navigation Bureau, June 13, 1955 and Reply of June 19, 1955 305a

Letter from Mr. Friedman of New Jersey Navigation  
Bureau to Delaware Chief Deputy Attorney General, August 2, 1956 ..... 307a

NJ Atty Gen. Op. 22 (1956), November 16, 1956 ..... 308a

**Volume III**

**Delaware Laws**

Wilmington Ordinance, approved July 16, 1884 ..... 313a

40 Del. Laws ch. 179 (1935)(Wilmington boundaries), approved April 11, 1935 ..... 314a

Wilmington City Code, effective July 1, 1993 (portion) ..... 319a

**Delaware Attorney General Opinions on Fishing Laws and Delaware  
Governor's 1909 Message**

State of Delaware, Biennial Message of Preston Lea, Governor,  
January 5, 1909 (portion) ..... 356a

Del. Atty Gen. Op. 33 (1977), October 28, 1977 ..... 360a

Delaware Attorney General letter, September 11, 1946 ..... 362a



**Volume III (cont.)**

**Castagana Affidavit**

Affidavit of Richard G. Castagna, June 27, 2005 ..... 369a

**New Jersey State Tidelands Grants**

Daniel H. Kent grant, 1883 ..... 386a  
Annie E. Brown grant, 1891 ..... 392a  
Dupont grant, 1891 ..... 399a  
James A. Denny grant, 1906 ..... 404a  
Pennsgrove Pier Company grant, 1916 ..... 412a  
Harry S. Barber grant, 1916 ..... 419a  
Dupont grant (9 tracts), August 21, 1916 ..... 427a  
Dupont grant, November 20, 1916 ..... 439a  
Dupont grant, 1917 ..... 445a  
Dupont lease, 1918 ..... 450a  
French's Hotel Company grant, 1921 ..... 457a  
Acton grant, February 27, 1923 ..... 463a  
Acton grant, November 22, 1923 ..... 468a  
Lease to Fogg and Hires Company, 1924 ..... 473a  
Delaware-New Jersey Ferry Company grant 1930 ..... 482a  
Acton grant, August 17, 1925, (Liber H-1 p. 81) ..... 486a  
Acton grant, August 17, 1925, (Liber K-1 p. 58) ..... 491a  
Township of Lower Penns Neck grant, 1925 ..... 496a  
Acton grant, October 19, 1925 ..... 501a  
The Franklin Real Estate Company grant, 1928 ..... 506a  
Anna C. B. Locuson grant, 1929 ..... 511a

**Volume IV**

Josephine Grace Locuson grant, April 15, 1929 (Liber Q-1 p. 155) ..... 516a  
Josephine Grace Locuson grant, April 15, 1929 (Liber Q-1 p. 149) ..... 521a

## Volume IV (cont.)

William G. Locuson grant, June 17, 1929 .....	526a
Josephine Grace Locuson grant, 1929 .....	531a
Dupont grant, 1929 .....	538a
Delaware River Power Company Lease, 1929 .....	543a
Penn Beach Property Owners' Association grant, 1933 .....	549a
J. Landis Strickler grant, 1935 .....	554a
Dupont grant, 1943 .....	559a
Sun Oil Company grant, 1957 .....	565a
Dupont grant, 1960 .....	575a
Dupont grant, 1967 .....	582a
Keystone Urban Renewal Limited Partnership lease, 1992 .....	589a
William G. Bergman license, 2001 (renewal) .....	610a
Township of Pennsville Revocable license, 2000 .....	616a
New Jersey Parks Assignment of Management Rights, 1999 .....	622a

### **Documents Relating to E. I. du Pont de Nemours and Company**

Letter of W.G. Ramey, Vice President of DuPont, to B.F. Cresson, Jr., Chief Engineer, New Jersey Board of Commerce and Navigation, September 11, 1916 .....	632a
Letter of B.F. Cresson, Jr. Consulting Engineer, New Jersey Board of Commerce and Navigation to C.R. Mudge, Esq. of Legal Department of Dupont, November 7, 1917 .....	633a
Letter of Mr. Cresson to Mr. Mudge, November 8, 1917 .....	634a
Letter of Mr. Cresson to Mr. Mudge, November 12, 1917 .....	635a
Letter of Alan L. Skinner, of Counsel to R.A. Haber, Chief Engineer, Delaware Highway Department, September 30, 1957 .....	636a
Letter of Mr. Haber to Mr. Skinner October 25, 1957 .....	638a

**Volume IV (cont.)**

Letter of S. Samuel Arst, Counsel to the State Highway Department to Mr. Haber, December 2, 1957 .....	639a
Letter of Mr. Haber to Army Corps. of Engineers, December 13, 1957	
Letter of Edward T. Fogg, Engineer of Dupont to B. E. Lane of D.N.R.E.C., May 12, 1971 .....	642a
Letter of Mr. Fogg to Mr. Lane, June 7, 1971 .....	648a
Letter of Richard H. Schlein, Delaware Deputy Attorney General to Hon., Russell W. Peterson, Governor of Delaware, September 23, 1971 .....	650a
New Jersey Permit for Dupont, March 1, 1977 .....	657a
New Jersey Permit to Dupont, August 1977 .....	658a
Acceptance of Revocable Permit, September 19, 1977 .....	660a
New Jersey Stream Encroachment Permit Application Acknowledgment, October 25, 1977 .....	661a
Memorandum from Mike Malkiewicz to Bill Moyer (of Delaware), September 4, 1981 .....	662a
Memorandum from Mike Malkiewicz to Bill Moyer, September 10, 1981 .....	663a
Delaware Lease to Dupont, September 29, 1971 .....	664a
Memorandum from William Moyer to June MacArtor (Delaware DAG), January 15, 1982 .....	670a
Letter of Deputy Attorney General MacArtor of Delaware to Mr. Skinner of Dupont, October 23, 1981 .....	671a
Project Summary of Chambers Works Proposal, 1982 .....	672a
Acceptance of Revocable Permit, April 8, 1982 and Coastal Permit, March 24, 1982 .....	676a
 <b>New Jersey Water Allocation Permits</b>	
Affidavit of Frederick Sickels, June 22, 2005 .....	683a
New Jersey Water Allocation Permit to Logan Generating Company, November 13, 1996 .....	688a

**Volume IV (cont.)**

Cogentrix Water Allocation Permit Renewal Application, September 29, 2005 ..... 698a

**New Jersey Surface Water Discharge Permits and Enforcement**

Jeffrey T. Redding Affidavit, June 23, 2005 ..... 710a

**Volume V**

**New Jersey Surface Water Discharge Permits and Enforcement (cont.)**

Cogentrix N.J.P.D.E.S. Permit Renewal Application, March 3, 2005 ..... 718a

Letter of N.J.D.E.P. Division of Water Quality to

Mr. Donnelly of D.N.R.E.C., March 29, 2006 ..... 758a

Dupont Administrative Consent Order, June 28, 1989 ..... 761a

Dupont Administrative Consent Orders, February 8, 1988 and December 14, 1984 ..... 770a

Connectiv Power Administrative Order, June 7, 2001 ..... 777a

Pennsville Sewerage Authority Administrative Order, June 16, 1988 ..... 785a

Pennsville Sewerage Authority Administrative Consent Order, June 29, 1991 ..... 794a

Penns Grove Sewerage Authority Consent Order, May 12, 1999 ..... 803a

Logan Generating Plant Discharge Permit Field

Compliance and Assistance Report, August 26, 1978 ..... 810a

Logan Generating Plant Settlement Agreement, January 4, 1996 ..... 811a

**Broderick Affidavit and Waterfront Development Permits, With Delaware Correspondence**

Affidavit of Kevin Broderick, June 2005 ..... 817a

Dupont Chambers Works New Jersey Waterfront Development Permit,

October 18, 1982 ..... 824a

Dupont Chambers Works New Jersey Waterfront Development Permit,

January 20, 1988 ..... 827a

Keystone Cogeneration System New Jersey Waterfront

Development Permit, September 24, 1991 ..... 830a

**Volume V (cont.)**

Keystone Cogeneration Systems Inc. Summary Analysis, September 24, 1991 ..... 837a  
Logan Generating Company Water Quality Certificate, September 14, 1998 ..... 870a  
Pennsville Township New Jersey Permit, March 22, 2000 ..... 876a  
Pennsville Township New Jersey Permit, February 20, 2001 ..... 879a  
Fort Mott State Park Permit, January 24, 1996 ..... 882a  
Letter from Fenwick Commons' Counsel to D.N.R.E.C.  
    Secretary Hughes, May 6, 2005 ..... 885a  
Decision by Secretary Hughes re: Riverwalk Project, March 10, 2005 ..... 886a

**Delaware Actions - El Paso**

Letter from David R. Keifer, Director, Delaware Planning Office to  
    N.J.D.E.P. Commissioner Sullivan, February 17, 1972 ..... 887a  
Letter from Mr. Keifer to Mr. Barry Huntsinger, Vice President of El Paso  
    Eastern Company, February 23, 1972 ..... 888a  
Letter from Commissioner Sullivan to Mr. Keifer, March 2, 1972 ..... 891a  
Letter from Mr. Huntsinger, to Mr. Keifer, March 3, 1972 ..... 892a  
Letter from Mr. Keifer to Mr. Huntsinger, March 17, 1972 ..... 893a

**Coastal Zone Management Documents**

The Coastal Zone of Delaware, July 1972 (excerpts) ..... 895a  
Comments of Sun Oil Company on the Proposed  
    Delaware Coastal Management Plan, August 9, 1979 ..... 932a  
Affidavit of Steven C. Whitney, July 27, 2005 ..... 936a  
DuPont Dredging Permit Issued by New Jersey, Sept. 16, 1977 ..... 939a-1

**Volume VI**

State of New Jersey Coastal Management Program  
    Bay and Ocean Shore Segment Draft Environmental Impact Statement,  
    May 1978 (portion) ..... 940a

**Volume VI (cont.)**

Options for New Jersey’s Developed Coast Appendices A-G, March 1979 (portions) ..... 1024a  
New Jersey Coastal Management Program Final  
    Environmental Impact Statement, August 1980 ..... 1057a  
Letter from Mr. Whitney of N.J.D.E.P. to Anthony P. Pratt of D.N.R.E.C.  
    re: Keystone Cogeneration Systems, March 14, 1991 ..... 1067a  
Draft Memorandum of Agreement, November 15, 1993 ..... 1068a  
Letter of Delaware Administrator Cooksey to Terrie Fowler, Planner,  
    N.J.D.E.P. re: Draft Memorandum of Agreement, May 9, 1994 ..... 1074a  
Draft Memorandum of Agreement, June 16, 1994 ..... 1076a

**Newspaper Articles Regarding Compact**

Every Evening - Wilmington, Delaware, March 10, 1905  
    “The Boundary Question” (p. 4) ..... 1081a  
Every Evening - Wilmington, Delaware, March 10, 1905  
    “The Boundary Question” (p. 6) ..... 1083a  
Every Evening - Wilmington, Delaware, March 11, 1905  
    Statement by Mr. H.H. Ward ..... 1086a  
Every Evening - Wilmington, Delaware, March 15, 1905 Editorial ..... 1088a  
Every Evening - Wilmington, Delaware, March 15, 1905 News report ..... 1090a  
Every Evening - Wilmington, Delaware, March 15, 1905 “The Boundary Battle” ..... 1092a  
Every Evening - Wilmington, Delaware, March 15, 1905  
    News report “Boundary Dispute” ..... 1103a  
Every Evening- Wilmington, Delaware, News report  
    “Boundary Settlement Compact is Signed” ..... 1108a

**Pre-New Jersey v. Delaware III Correspondence**

Letter of New Jersey Governor’s Chief Counsel, Paul T. Fader to Joseph Schoell,  
    Legal Counsel to Delaware Governor, April 11, 2005 ..... 1109a  
Letter of Mr. Schoell to Mr. Fader, May 9, 2005 ..... 1112a

**Volume VI (cont.)**

New Jersey Assembly Resolution No. 260, Assembly  
Committee Substitute - adopted May 2, 2005 ..... 1114a

**Volume VII**

**Request for Admissions (Delaware's Response) and September 19, 2006 Letter**

Delaware's Responses to New Jersey's First Request  
for Admissions September 8, 2006 ..... 1117a

Letter of Mr. Collins J. Seitz to Deputy Attorney General  
Rachel J. Horowitz, September 19, 2006 ..... 1189a

**Expert Reports**

Richard Castagna, New Jersey's Exercise of Regulatory Authority Over Waterfront  
Improvements In The Twelve Mile Circle Outshore of Low Water,  
November 9, 2006 ..... 1193a

J. Richard Weggel, Ph.D., P.E., Trends in Shipping, Dredging Technology and in  
Wharf and Pier Construction in the Years Surrounding 1905 with  
Emphasis on the Delaware River and Bay, November 7, 2006 ..... 1224a

**Treatises**

Farnham, The Law of Waters and Water Rights, Vol. I (1904) (excerpts) ..... 1279a

**Additional Miscellaneous Documents**

Letter of David Q. Risilia, N.J.D.E.P., to David Blaha, Environmental Resources  
Management, October 19, 2005 ..... 1296a

Letter of Janis Farmer of Crown Landing to Mr. Risilia, April 10, 2006 ..... 1298a

Letter of S. Samuel Arsht, Department Attorney, Delaware Highway Department,  
to Alan L. Skinner of Dupont, January 8, 1958 ..... 1299a

Letter of Mr. Skinner to John C. Bryson of D.N.R.E.C., February 10, 1971 ..... 1300a

Letter of Mr. Skinner to Delaware Deputy Attorney General June D. MacArtor,

Volume VII (cont.)

October 27, 1981 ..... 1303a

Letter of Herbert Ward, Delaware Attorney General, to  
 Delaware Governor Hunn, January 31, 1903 ..... 1305a

Joint Resolution of New Jersey Legislature, February 14, 1905 ..... 1315a

Webster’s Unabridged Dictionary (1898) (excerpts) ..... 1319a

Letter of Delaware Attorney General to Delaware Special Counsel Southerland,  
 April 25, 1935 ..... 1319a

Opinion of Delaware Attorney General, February 8, 1968 ..... 1320a

**TABLE OF AUTHORITIES**

**CASES**

*Ampro Fisheries v. Yaskin*, 606 A. 2d 1099 (N.J.), , *cert. den.*, 506 U.S. 954 (1992) ..... 9, 18

*Beer Company v. Massachusetts*, 97 U.S. 25 (1877) ..... 30

*Bell v. Gough*, 23 N.J.L. 624 (N.J. 1852) ..... 27, 35

*Boon v. Kent*, 7 A. 344 (N.J. Super. Ct. 1886) ..... 5, 27

*California v. Nevada*, 447 U.S. 125 (1980) ..... 40

*City of Wilmington v. Parcel of Land*, 607 A.2d 1163 (Del. 1992) ..... 24, 27

*Connecticut Nat’l Bank v. Germain*, 503 U.S. 247 (1992) ..... 23

*Corfield v. Coryell*, 6 F. Cas. 546 (Cir. Ct. E.D. Pa. 1823) ..... 6

*Cummings v. Chicago*, 188 U.S. 410 (1902) ..... 30

*Cuyler v. Adams*, 449 U.S. 443 (1981) .....23, 37

*Fertilizing Company v. Hyde Park*, 97 U.S. 659 (1878) ..... 30

*Georgia v. South Carolina*, 497 U.S. 376 (1990) ..... 40

*Harlan & Hollingsworth Co. V. Paschall*, 5 Del. Ch. 435 (Del. Ch. 1882).....24,30

*Hudson County Water Company v. McCarter*, 209 U.S. 349 (1908) ..... 29,32

*Illinois v. Kentucky*, 500 U.S. 380 (1991) ..... 39

*Kansas v. Colorado*, 206 U.S. 46 (1907) ..... 31



<i>Main Assocs. Inc. v. B &amp; R Enters., Inc.</i> , 181 A. 2d 541 (N.J. Super. Ct. Ch. Div. 1962) .....	18
<i>Mayor of Newark v. Sayre</i> , 45 A. 985 (N.J. 1900) .....	24
<i>Morrill v. St. Anthony Falls Water-Power Co.</i> , 2 N.W. 842 (Minn. 1879) .....	29
<i>Nebraska v. Wyoming</i> , 507 U.S. 584 (1993) .....	40
<i>New Hampshire v. Maine</i> , 532 U.S. 742 (2001) .....	35
<i>New Jersey v. Cooper</i> , 107 A. 149 (N.J. S. Ct. 1919) .....	10
<i>New Jersey v. Delaware</i> , 295 U.S. 694 (1935) .....	3
<i>New Jersey v. Delaware</i> , 304 U.S. 590 (1938) .....	17
<i>New Jersey v. Delaware</i> , 291 U.S. 361 (1934) .....	passim
<i>New Jersey v. Federanko</i> , 139 A. 2d 30 (N.J. 1958) .....	10, 18, 42
<i>New Jersey v. New York</i> , 523 U.S. 767 (1998) .....	37, 39, 40
<i>New York v. Central R.R. Co. of N. J.</i> , 42 N.Y. 283 (N.Y. 1870) .....	28
<i>Ohio v. Kentucky</i> , 410 U.S. 641 (1973) .....	40
<i>Oklahoma v. New Mexico</i> , 501 U.S. 221 (1991) .....	23
<i>Oregon ex rel. State Land Bd. v. Corvallis Sand &amp; Gravel Co.</i> , 429 U.S. 363 (1977) .....	31
<i>Shivley v. Bowlby</i> , 152 U.S. 1 (1894) .....	27, 29, 31
<i>State v. Mick</i> , No. 83-05-0092-93 (Del. Super. Ct., Sussex Cty. 1983).....	9
<i>Texas v. New Mexico</i> , 462 U.S. 554 (1983) .....	23
<i>Texas v. New Mexico</i> , 482 U.S. 124 (1987) .....	39, 50
<i>Virginia v. Maryland</i> , 540 U.S. 56 (2003) .....	28, 39, 40, 44
<i>Yates v. Milwaukee</i> , 77 U.S. 497 (1870) .....	29

**STATUTES, SESSION LAWS, AND CODES**

33 U.S.C. §1251 .....	15, 16
33 U.S.C. §1370.....	15
16 U.S.C. §1451 .....	15
16 U.S.C. §1452(4) .....	21
16 U.S.C. §1456(e) .....	15
Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1907) .....	2, 9, 23, 37

N.J. Stat. Ann. §12:3-2 .....	41
N.J. Stat. Ann. §12:3-10 .....	4, 25
N.J. Stat. Ann. § 12:3-21 .....	5, 25
N.J. Stat. Ann. §12:5-1 .....	9
N.J. Stat. Ann. §12:5-6 .....	10
N.J. Stat. Ann. §13:9A-1 .....	15
N.J. Stat. Ann. §13:19-1 .....	15
N.J. Stat. Ann. §58:10A-1 .....	15
Del Code Ann. Tit. 7, §4520 .....	23
1851 N.J. Laws ch. 335 .....	4, 25, 41
1854 N.J. Laws ch.143 .....	4,, 30, 41
1855 N.J. Laws ch.109 .....	4
1864 N.J. Laws ch. 391 .....	41
1869 N.J. Laws ch.383 .....	4
1870 N.J. Laws ch.131 .....	4
1870 N.J. Laws ch.344 .....	4
1871 N.J. Laws ch.256 .....	4
1871 N.J. Laws ch.307 .....	4
1872 N.J. Laws p. 115 .....	5
1876 N.J. Laws p. 418 .....	5
1891 N.J. Laws ch.123 .....	5
1903 N.J. Laws ch. 243 .....	7
1903 N.J. Laws p. 39 .....	8
1905 N.J. Laws ch. 42 .....	8
1905 N.J. Laws ch. 239 .....	8
1907 N.J. Laws ch. 131 .....	11
1914 N.J. Laws ch. 123 .....	9, 18
1917 N.J. Laws ch. 189.....	10
1970 N.J. Laws ch. 272 .....	18
1973 N.J. Laws ch. 185 .....	18

1977 N.J. Laws ch.74 .....	18
23 Del. Laws ch. 5 (1905) .....	8
23 Del. Laws ch. 6 (1905) .....	8
24 Del. Laws ch. 146 (1907) .....	11
40 Del. Laws ch. 179 (1935) .....	16
53 Del. Laws ch. 34 (1961) .....	23
58 Del. Laws ch. 175 (1971) .....	18
Wilmington City Code of 1993 .....	17
Wilmington City Ord., 1884 .....	18
N.J. Admin. Code 7:7E-1.1(b) .....	19
N.J. Admin. Code 7:7E-1.2 .....	21

**OTHER AUTHORITIES**

Farnham, The Law of Waters and Water Rights (1904) .....	29
Del. Op. Atty Gen. (1977) .....	39
Del. Op. Atty. Gen. (1946) .....	39
N.J. Atty Gen. Op. 3 (1954) .....	17
N.J. Atty Gen. Op. 22 (1956) .....	17
Webster's Unabridged Dictionary (1898) .....	24

## SUMMARY OF ARGUMENT

In 1905, New Jersey and Delaware resolved a longstanding dispute over their mutual boundary within an area known as the Twelve Mile Circle, by entering into a Compact that intended to effectuate “the final adjustment of all controversies relating to the boundary line between said states and to their respective rights in the Delaware river and bay(.)” *See* Preamble to Compact of 1905. This Compact, as ratified by Congress, was to be “binding in perpetuity upon both of said states...” Article IX. Among the matters resolved by the Compact was the scope and nature of the “riparian jurisdiction” that could be exercised by both states, each “on its own side of the river(.)” Article VII.

Using plain language, the Compact provides New Jersey with comprehensive jurisdiction over improvements extending from its shoreline outshore of mean low water within the Twelve Mile Circle. Specifically, Article VII provides that each state shall “on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature,” and to make grants, leases and conveyances of riparian lands and rights. This language must be read and understood in light of the established scope of allowable riparian uses, which include the right to wharf out below mean low water in order to reach the channel. Consequently, the Compact’s allocation of “riparian jurisdiction of every kind and nature,” which is made “binding in perpetuity” by Article IX, clearly includes continuing jurisdiction to regulate all aspects of the exercise of riparian rights in this area of the river.

Further, New Jersey’s practices before adoption of the Compact help to establish the scope of riparian jurisdiction authorized by the Compact, which provided that New Jersey would “*continue* to exercise riparian jurisdiction of every kind and nature.” Article VII (emphasis supplied). Since at least 1854, long before the entry of the Compact, New Jersey had exercised extensive regulatory jurisdiction over riparian improvements appurtenant to the New Jersey shore and extending below mean low water. New Jersey’s exercises of riparian jurisdiction included conveyances of riparian lands, and the exercise of its regulatory powers for the protection of the public, pertaining to structures and lands outshore of mean low water within the Twelve Mile Circle. New Jersey exercised this authority without interference by Delaware.

After the Compact was approved, New Jersey continued to regulate riparian improvements below the mean low water line, until Delaware’s actions in 2005 prompted New Jersey to bring this action to enforce its Compact rights. Delaware, on the other hand, took no actions to provide grants

or to regulate riparian improvements on the New Jersey side of the Delaware River until, at the earliest, 1971. Any such actions undertaken by Delaware are not sufficient to support a claim that it gained rights thereby, or to defeat New Jersey's claim for summary judgment. On the other hand, New Jersey's long history of regulation was known to Delaware. Based on this conduct, New Jersey is entitled to summary judgment based on the doctrine of prescription and acquiescence, even if the plain language of the Compact is ignored.

New Jersey's reading of the Compact also is consistent with the representations made by Delaware both at the time of the Compact's adoption, and later during *New Jersey v. Delaware II*. Most notably, in that litigation Delaware argued before this Court that New Jersey could not claim that it had acquired title to the middle of the Delaware River by prescription and acquiescence, by virtue of its regulation of riparian improvements below mean low water, because New Jersey's regulatory actions had been authorized by the Compact of 1905. Having persuaded this Court to accept its arguments, Delaware cannot now take a contrary position.

Delaware's contention that the Compact is unenforceable is similarly untenable, in light of the Compact's clear statement that its resolution of such issues as riparian jurisdiction would be "binding in perpetuity" upon ratification by Congress. Article IX. Indeed, upon this ratification, the Compact became a law of the United States, see *New Jersey v. New York*, 523 U.S. 767, 811 (1998), and New Jersey and Delaware both treated it as such, until Delaware argued in this action, for the first time, the Compact is unenforceable.

Because Article VII is clear and unambiguous, New Jersey respectfully submits that it is entitled to summary judgment determining that it has the jurisdiction to regulate all aspects of riparian improvements appurtenant to its shores, free from interference by Delaware. This result is further supported by the actions of New Jersey and Delaware, which separately call for a grant of the relief sought by New Jersey based on the doctrine of prescription and acquiescence.

### **STATEMENT OF FACTS**

The Compact of 1905 was adopted to resolve a jurisdictional conflict between New Jersey and Delaware, to amicably terminate longstanding litigation between the States, and to finally adjust "all controversies relating to the boundary between said States, and to their respective rights in the Delaware River and Bay." Compact of 1905, Preamble, 34 Stat. 858 (1907) (DE App. 11.) Article

VII of the Compact provides that, on its own side of the river, each State 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.” (DE App. 13.) Pursuant to this Article, New Jersey has exclusive State jurisdiction over the construction and use of improvements that extend from its shoreline into the Delaware River, within the Twelve-Mile Circle.

### A. The Twelve-Mile Circle and the Delaware-New Jersey Boundary

Until this Court settled the boundary line in 1934, New Jersey and Delaware had disputed the location of the boundary almost since their formation as independent States. *New Jersey v. Delaware*, 291 U.S. 361, 376 (1934) (“*New Jersey v. Delaware I*”). While the first boundary suit was pending (No. 1, Orig.), the States entered into the 1905 Compact, which settled their jurisdictional disputes while leaving the boundary line unresolved. This Court ultimately settled the line in 1934, *id.* at 385, and entered its decree in 1935, 295 U.S. 694 (1935) (“Decree”). (NJ App. 18a-24a.) Within the Twelve-Mile Circle, the Court established the boundary at the mean low-water line on the New Jersey side, “subject to the Compact of 1905.” 291 U.S. at 385.<sup>1</sup> The Twelve-Mile Circle refers to an area encompassed by a circle centered at New Castle, Delaware, that was the subject of a conveyance from the Duke of York to William Penn in 1682. *See New Jersey v. Delaware II*, 291 U.S. at 364.<sup>2</sup>

As the map that follows this brief illustrates, the Twelve-Mile Circle intersects the eastern bank of the Delaware River so that the boundaries of six New Jersey municipalities are all or partially at the mean low-water line of the River. (Castagna Aff., NJ App. 383a.)<sup>3</sup> The New Jersey municipalities located in this section of the New Jersey shoreline are Logan Township in Gloucester County, and Oldmans Township, Penns Grove Borough, Carneys Point Township, Pennsville Township and Elsinboro Township, all in Salem County. (*Ibid.*) From the northernmost intersection of the Twelve-Mile Circle and the New Jersey shoreline in Logan Township to the southernmost

---

1 The “low-water mark” of a river is defined as “the point to which the water recedes at its lowest stage.” Black’s Law Dictionary 1623 (8th ed. 2004).

2 A map illustrating the Twelve-Mile Circle and the Delaware-New Jersey boundary follows at the end of this brief.

3 “Castagna Aff.” refers to the affidavit of Richard Castagna dated June 27, 2005 (N.J. App. 369a).

intersection at the Elsinboro Township border, the shoreline measures approximately 29 miles. (*Ibid.*)

### **B. New Jersey's Exercises of Jurisdiction Predating the Compact**

Before the Compact of 1905 was adopted, New Jersey had exercised jurisdiction over riparian lands for many years, through laws regulating both the construction of improvements on tidally-flowed lands outshore of mean high water, and the conveyances of such lands. In 1851, the New Jersey Legislature adopted the Wharf Act, 1851 N.J. Laws ch. 335, which provided that underwater lands outshore of the low water line could not be filled without approval by the County freeholders, and only if such filling would not impair navigation. (NJ App. 206a-210a.) In 1864, the Legislature established the Board of Riparian Commissioners to set pierhead and bulkhead lines in the Hudson River. (NJ App. 217a-219a)(1864 N.J. Laws ch. 391, saved from repeal at N.J. Stat. Ann. 12:3-1). In 1869, the Legislature prohibited filling underwater lands and constructing structures outshore of the lines established by the Board. (NJ App. 232a-239a) (1869 N.J. Laws ch.383, §2, codified as N.J. Stat. Ann. 12:3-2).

New Jersey's exercise of jurisdiction over development and use of riparian lands on the easterly shore of the Delaware River within the Twelve-Mile Circle dates back to at least 1854. In that year, the New Jersey Legislature allowed Thomas D. Broadway to extend docks, piers or wharves into the Delaware River from the shoreline of what is now Pennsville Township, Salem County, "a sufficient distance for the accommodation of vessels for navigation of the River," but not "so far into the said river as to injure or impede the navigation of same." (NJ App. 211a) (1854 N.J. Laws ch.143.) Through subsequent legislation adopted in 1855, 1870, and 1871, the New Jersey Legislature similarly allowed other persons to build improvements within the Delaware River and Twelve-Mile Circle, outshore of low water. ((NJ App. 214a-215a) (1855 N.J. Laws ch.109) (Pennsgrove Pier Co.)); ((NJ App. 240a) (1870 N.J. Laws ch.131 (Robert Walker)); ((NJ App. 241a) (1870 N.J. Laws ch.344 (Joseph Guest)); ((NJ App. 243a-244a) (1871 N.J. Laws ch.307 (Henry Barber)).<sup>4</sup>

In 1871, New Jersey expanded the authority of its Board of Riparian Commissioners

---

<sup>4</sup> According to evidence presented in *New Jersey v. Delaware II*, structures subsequently were built within the areas granted to the Pennsgrove Pier Company, Joseph Guest, and Henry Barber. (NJ App. 1200a - 1201a)

("Board") to all tidal waters outshore of the State's mean high water line, and delegated to the Board and Governor the authority to approve grants and leases of underwater lands outshore of that line. ((NJ App. 242a) (1871 N.J. Laws ch.256, now codified as N.J. Stat. Ann. §12:3-10).) As a result, in 1877 the Board adopted pierhead and bulkhead lines for a portion of the Delaware River within the Twelve-Mile Circle, outshore of Gloucester and Salem Counties. ((NJ App. 1201a) (Castagna Report, Figure 1 (*New Jersey v. Delaware II*, Plaintiff's Exh.144).)<sup>5</sup> In 1891, New Jersey enacted legislation prohibiting dredging under tidal waters without a license from the State, but providing that owners of State grants or leases had the right to dredge a channel from the area granted to them to the main channel. ((NJ App.249a-253a) (1891 N.J. Laws ch.123, §1, now codified as N.J. Stat. Ann. §12:3-21).)

In 1883, the Board granted submerged tidal lands within the Twelve-Mile Circle in the Delaware River to Daniel Kent (NJ App. 386a-391a)<sup>6</sup> and in 1891, the Board granted such lands to E. I. DuPont de Nemours ("Dupont") (NJ App.399a-403a) and to Annie Brown (NJ App. 392a-398a). The Kent, Dupont, and Brown grants all referred to pierhead and bulkhead lines previously established by the Board as part of its ongoing responsibility to protect navigation. ((NJ App.1193a; 373a-374a)(Castagna Report; Castagna Aff.)) Thus, the grants included a right to fill, but not beyond the lines established by the Board (*Ibid.*) Those lines were necessarily located well outshore of low water, to allow vessels to travel between the piers and navigational channel.( (NJ App. 1198a.) (Castagna Report).) For example, the Brown grant authorized a pier extending a maximum of 850 feet offshore. (NJ App. 374a; 398a.).

### C. New Jersey v. Delaware I

In 1872, after Delaware enacted a law prohibiting New Jersey fishermen from fishing in waters of the Delaware River claimed by Delaware without a Delaware license, New Jersey's Governor issued a public notice and proclamation asserting that New Jersey had jurisdiction over the eastern half of the Delaware River and that previously the business of fishing in that area always

---

5 "Castagna Report" refers to the Expert Report of Richard Castagna, Nov. 9, 2006 (N.J. App. 1193a)

6 In 1886, New Jersey's Chancery Court held that a foreclosure on the upland property bordering the underwater lands granted to Kent also included the granted underwater lands. *Boon v. Kent*, 7 A. 344 (N.J. Ch. 1886).



had been conducted without any interference by Delaware. ((NJ App. 245a-246a (1872 N.J. Laws p. 115).) In 1876, the New Jersey Legislature adopted a Resolution stating that New Jersey had always claimed to own the eastern bed of the Delaware River, and was entitled to “exclusive jurisdiction” over that half of the River. ((NJ App. 247a-248a (1876 N.J. Laws p. 418).) (*New Jersey v. Delaware II*, Plaintiff’s Exh. 161, p. 24).

In 1877, after efforts to resolve the dispute with Delaware were not successful, New Jersey filed an original action against Delaware, (*“New Jersey v. Delaware I”*). In its Complaint, New Jersey asserted jurisdiction to the middle of the Delaware River, and sought to enjoin Delaware from arresting New Jersey residents or seizing New Jersey property in the River. (DE App. 20-54.) New Jersey’s Complaint specifically referred to improvements extending from its shoreline into the River, which at that time included wharves, docks and piers, all constructed without any interference by Delaware (DE App. 36.) New Jersey also alleged that the New Jersey proprietors (to whom western New Jersey had been granted during colonial times) had been granted lands dedicated to the construction of wharves and harbors, and that the residents of those lands had a right of free passage to the ocean (DE App. 33.) *See also Corfield v. Coryell*, 6 F. Cas. 546, 554-55 (Cir. Ct. E.D. Pa. 1823) (stating that the proprietaries of west New Jersey “from a very early period, asserted a right to the river Delaware, or to some part thereof, below low water mark, and along its entire length.”).

In 1877, the Court issued a preliminary injunction that restrained Delaware from imposing any tax or license on any citizen or resident of New Jersey fishing in the Delaware River. The Court’s Order contained a finding that “for a long period of time, to wit, more than seventy years last past, the State of New Jersey has claimed and exercised jurisdiction over the easterly portion of the river Delaware to the middle of the same . . . .” (NJ App. 99a-101a.)

With the preliminary injunction in place, the case lingered until 1901, when at the insistence of the Court, Delaware filed its Answer to New Jersey’s Complaint (DE App.95-162.) In its Answer, Delaware did not deny the existence of improvements extending from the New Jersey shoreline into the River nor assert that Delaware had ever exercised jurisdiction over their construction. (DE App. 117.) The Court appointed a Commissioner to hear the lawsuit, and in 1903 both States presented evidence to the Commissioner. New Jersey presented evidence regarding the State’s Board of Riparian Commissioners and its grants of underwater lands within the Twelve-Mile Circle, including testimony by John C. Payne, the Board’s Secretary and Engineer (NJ App. 74a-

92a.) New Jersey's witnesses also testified about existing improvements to the New Jersey shoreline within the Twelve-Mile Circle that extended to deep water (NJ App. 38a-39a), including a pier at Finn's Point (NJ App. 51a), new and old steamboat wharves at Pennsville (NJ App. 53a), and a wharf in front of French's Hotel, in what is now Penns Grove Township, that extended 400 to 600 feet into the Delaware River (NJ App. 54a.) This testimony disclosed that the docks and piers that existed in the Twelve-Mile Circle by 1903 extended from the New Jersey shoreline to deep water, so that vessels could unload cargo there (NJ App. 39a.) Additional testimony showed that as of 1903, the New Jersey Board of Riparian Commissioners had established pierhead and bulkhead lines outshore of all of Salem County and Gloucester County, New Jersey, through the Twelve-Mile Circle (NJ App. 81a-87a.)<sup>7</sup> New Jersey also presented evidence of various laws adopted to protect both fishing and navigation, including navigation laws adopted in 1755, 1762 and 1773, oyster bed laws adopted in 1822, 1823 and 1825, and the Wharf Act of 1851 (NJ App. 25a-31a.)

#### **D. Adoption of the Compact**

After presentation of evidence by both sides was substantially completed, both States appointed Commissioners to resolve the lawsuit. The Commissioners' task was to "equitably determine and settle the rights of Delaware and New Jersey," and "if possible to adjust all differences between the two states arising out of Delaware's territorial claim, in a manner satisfactory to both states." (NJ App. 1312a) (Letter of Delaware Attorney General to Delaware Governor, January 31, 1903.) Thus, the Joint Resolution of New Jersey appointing the Commissioners, dated March 5, 1903, described their mission as an "amicable termination of the suit" and "the final adjustment of all controversies relating to the boundary line between said States and to their respective rights in the Delaware river." (NJ App. 254a-255a) (1903 N.J. Laws p. 39.)

The Commissioners appointed in 1903 met and reached agreement on what eventually became the Compact of 1905. The New Jersey Legislature then ratified the Compact on April 8, 1903 (NJ App. 256a-261a) (1903 N.J. Laws ch. 243)) following a report from the New Jersey Commissioners that, while the exact geographical boundary remained unsettled "(nevertheless every

---

<sup>7</sup> According to the transcript of *New Jersey v. Delaware I*, four maps depicting these lines were admitted into evidence as Exhibits 30 through 33, over Delaware's objection (NJ App. 81a-87a.)

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

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

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

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

After adopting the Compact, the States appointed Commissioners to consider adoption of uniform fishing laws by the two States, as contemplated by Article IV, and asked Congress to defer action on the Compact pending consideration of such laws. 23 Del. Laws ch. 6 (1905) (NJ App.2a-

5a); 1905 N.J. Laws ch. 239 (NJ App. 268a-272a). In January 1907, those Commissioners reported that agreement on uniform fishing laws had been reached, and the States urged Congress to act on the Compact (NJ App. 112a-120a). Congress subsequently approved the Compact, in an Act entitled: “An Act Giving the consent of Congress to an agreement or compact entered into between the State of New Jersey and the State of Delaware respecting the territorial limits and jurisdiction of said States.” Act of Jan. 24, 1907, Ch. 394, 34 Stat. 858 (1907) (DE App. 11a-14a).

The Compact was adopted during a time of significant technological and scientific progress ((NJ App. 1227a-1239a (Weggel Report)).<sup>8</sup> Within the maritime field, this progress was evidenced by significant increases in the size of commercial vessels, and in accompanying advances in pier construction and dredging techniques, which were necessary to accommodate these larger vessels (*Ibid.*). Moreover, when the Compact was adopted, the Delaware River and Bay were the focus of substantial commercial port activity and vessel construction, with the Delaware Bay Area serving as the nation’s leading ship building area. (NJ App. 1229a). In 1896, Congress authorized surveys to create a 30-foot deep Delaware River Channel, a project that included removal of 35 million cubic yards of sediment (NJ App. 1234a). By 1910, the navigable channel of the Delaware River was approximately 35 feet deep (NJ App. 1229a), and piers exceeding 1,000 feet in length existed in the Delaware Bay area. (NJ App. 1236a-1238a).

After Congress approved the Compact, New Jersey and Delaware each enacted what both States at the time described as uniform fishing laws. 24 Del. Laws ch. 146 (1907); 1907 N.J. Laws ch. 131. However, as observed by Delaware’s Governor several years later, the laws adopted by Delaware deviated in some respects from those previously agreed to by the States’ Joint Commission (NJ App. 358a). Later, the Supreme Court of New Jersey and a Delaware trial court agreed that each State retained the ability to adopt and enforce separate fishing laws in the Delaware River and Bay, since the fishing laws adopted by the States in 1907 were not uniform. *Ampro Fisheries v. Yaskin*, 606 A. 2d 1099 (N.J.), *cert. den.*, 506 U.S. 954 (1992); *State v. Mick*, No. 83-05-0092-93 (Del. Super. Ct., Sussex Cty., 1983). *See also* Del. Op. Atty Gen. (1977) (NJ App. 360a-361a); Del. Op. Atty. Gen. (1946) (NJ App. 362a-368a).

---

<sup>8</sup> “Weggel Report” refers to the expert report of J. Richard Weggel, Ph.D., P.E., prepared for the State of New Jersey, dated November 7, 2006. (N.J. App. 1224a)

### E. New Jersey's Exercises of Jurisdiction from 1905 to 1934

After the Compact was adopted, New Jersey continued to exercise regulatory, police power jurisdiction over improvements appurtenant to its shoreline within the Twelve-Mile Circle, without interference by Delaware. In 1914, the New Jersey Legislature adopted the Waterfront Development Law, N.J. Stat. Ann. §§12:5-1 *et seq.* ((1914 N.J. Laws ch. 123) (NJ App. 283a-289a)), in order to promote commerce and navigation. The Act established the New Jersey Harbor Commission and empowered it to prevent waterfront encroachments that would impair navigation or the improvement of commerce, and required any person proposing a waterfront development such as a dock, wharf, pier, bulkhead, bridge, pipeline or cable, to first obtain the Commission's approval. N.J. Stat. Ann. §12:5-3. The Act provided that any waterfront development started without the required approval "shall be deemed to be a purpresture and a public nuisance and shall be abated in the name of the state in such action as shall be appropriate for that purpose." N.J. Stat. Ann. §12:5-6. After the Act was adopted, grants of submerged tidal lands within the Twelve-Mile Circle specified that improvements within the granted area could not be constructed without a permit. (Castagna Report, NJ App. 1205a-1206a.)

In 1916, New Jersey's Board of Commerce and Navigation (the successors to the Board of Riparian Commissioners) adopted new pierhead and bulkhead lines for the easterly shore of the Delaware River, between Pennsgrove and Cedar Point, New Jersey, within the Twelve-Mile Circle and outshore of the mean low water line. ((NJ App. 376a)(Castagna Aff.)); (NJ App. 1133a, ¶¶59-60.) In some areas, the lines established were located more than 3,000 feet outshore of mean high water. (NJ App. 376a.) In 1917, a New Jersey court affirmed that New Jersey had jurisdiction over criminal offenses on the eastern half of the Delaware River, by virtue of Article I of the Compact, in a case where the offense occurred on the Delaware River outshore of Penns Grove. *New Jersey v. Cooper*, 107 A.149 (N.J. S.Ct. 1919).<sup>9</sup>

After the Compact was adopted, New Jersey also continued its practice of conveying underwater lands outshore of mean low water within the Twelve-Mile Circle, without interference from Delaware. In 1917, the New Jersey Legislature granted to the United States jurisdiction and

---

<sup>9</sup> New Jersey's Supreme Court reached the same conclusion in 1958, see *New Jersey v. Federanko*, 139 A. 2d 30 (N.J. 1958),

title over lands in the Delaware River, but retained sovereignty and jurisdiction to serve civil and criminal process (NJ App. 298a-301a (1917 N.J. Laws ch. 189).) In addition, New Jersey conveyed or leased underwater lands outshore of low water within the Twelve-Mile Circle to: James Denny in 1906 (NJ App. 404a-408a); the Pennsgrove Pier Co. in 1916 (NJ App. 412a-418a); Harry Barber in 1916 (NJ App. 419a-426a); Dupont in 1916 (NJ App. 427a-438a), 1917 (NJ App. 445a-449a) and 1918 (NJ App. 450a-456a), French's Hotel Company in 1921 (NJ App. 457a-462a); William Acton in 1923 and 1925 (NJ App. 463a-472a; 486a-495a); Fogg and Hires in 1924 (NJ App. 473a-481a); the Township of Lower Penns Neck in 1925 (NJ App. 496a-500a); the Franklin Real Estate Company in 1928 (NJ App. 506a-510a); Anna Locuson in 1929 (NJ App. 516a-525a); Josephine and Anna Locuson in 1929 (NJ App. 516a-525a; 531a-536a); William Locuson in 1929 (NJ App. 526a-530a); Dupont in 1929 (NJ App. 538a-542a); the Delaware River Power Company in 1929 (NJ App. 543a-548a); the Penn Beach Property Owner's Association in 1933 (NJ App. 549a-553a); and the Delaware-New Jersey Ferry Company in 1930 (NJ App. 482a-485a.)

Many of the grants, including those to Denny ((NJ App. 404a-411a) (500 feet)), Dupont, ((NJ App. 427a-438a) (over 4,200 feet)), and French's Hotel ((NJ App. 457a-462a) (almost 1,300 feet)), extended hundreds of feet outshore of low water within the Twelve-Mile Circle. The record in *New Jersey v. Delaware II* and aerial photography show that structures subsequently were built on the underwater lands conveyed by New Jersey to Denny, Dupont, Acton, Fogg and Hires, Franklin Real Estate, the Delaware River Power Company, and the Penn Beach Property Owner's Association. ((NJ App. 1202a-1206a (Castagna Report).)

#### **F. New Jersey v. Delaware II**

In 1929, following a dispute over oyster beds in the Delaware Bay, New Jersey filed a second original action against Delaware (*New Jersey v. Delaware II*), in which New Jersey alleged that within the Delaware River and Bay, the New Jersey-Delaware boundary was located at the middle of the navigational channel (DE App. 202-203.) In response, Delaware alleged that within the Twelve-Mile Circle the boundary was located at the mean low water line on the New Jersey side, and that below the Twelve-Mile Circle the boundary was located at the geographic middle of the Delaware River and Bay (DE App. 218.) *See also New Jersey v. Delaware*, 291 U.S. 361, 363-64 (1934). Delaware conceded in its Answer that since colonial times the States had continuously

disputed their boundary, and did not deny that New Jersey citizens had built improvements extending from the easterly shoreline of the Delaware River. (DE App. 233-35.)

To support its position on the boundary within the Twelve-Mile Circle, New Jersey argued that since 1854, it had conveyed underwater lands extending from its shoreline on the Delaware River to outshore of the mean low water line without objection from Delaware. New Jersey further contended that the granted underwater lands now contained valuable improvements, including some on granted lands purchased by Delaware citizens (NJ App. 136a). In response, Delaware did not deny that the grants or improvements existed, or argue that the Compact should be ignored. Instead, Delaware contended that the grants and improvements did not conflict with the boundary claimed by Delaware, because “[r]iparian rights on the New Jersey side of the river were recognized by the Compact of 1905.” (NJ App. 123a.) In addition, Delaware stated:

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. (NJ App. 123a.)

At oral argument before the Special Master, Delaware’s Special Counsel, Clarence Southerland, continued to recognize the Compact and reiterated that under the Compact, New Jersey had jurisdiction over the construction of improvements extending from its shoreline into the Delaware River. Mr. Southerland asserted:

We say moreover that the Compact of 1905 expressly acknowledged the rights of the citizens of New Jersey, at least by implication to wharf out, and in my view the Compact of 1905 ceded to the State of New Jersey all the right to control the erection of wharves and to say who shall erect them, and it was a very sensible thing to do. (NJ App. 126a-1).<sup>10</sup>

In 1933, the Special Master found that under the Compact, “clearly all improvements made by riparian owners upon the shore of either State are protected;” that “any decree fixing the boundary . . . must so provide,” (NJ App. 130a); that through the Compact Delaware had “recognized the rights of riparian owners to wharf out on the easterly side . . . within the twelve-mile

---

<sup>10</sup> In addition to serving as special counsel for Delaware in *New Jersey v. Delaware II*, Mr. Southerland also served as the first Chief Justice of the Delaware Supreme Court, appointed in 1951.

circle” (NJ App. 131a); and that the Delaware-New Jersey boundary was “subject to the Compact of 1905.” (NJ App. 132a.) The Special Master found that Delaware had not acquiesced in New Jersey’s territorial claims regarding the Twelve-Mile Circle, “except as modified by the said Compact of 1905.” (NJ App. 131a.) The Special Master recommended that within the Twelve-Mile Circle, “the river and the subaqueous soil thereof be adjudged to belong to the State of Delaware, *subject to the Compact of 1905.*” (NJ App. 132a.) (Emphasis added)

In its exceptions to the Special Master’s report, New Jersey argued that the boundary should be in the channel, based on its activities in the Twelve-Mile Circle. (NJ App. 136a.) In response, Delaware relied on New Jersey’s rights under Article VII of the Compact to assert that Delaware owned the underwater lands in the Twelve-Mile Circle, even though the Compact protected New Jersey’s right to control riparian improvements appurtenant to its shoreline. Thus, Delaware advised the Supreme Court that it had “never questioned the right of citizens of New Jersey to wharf out to navigable water,” and represented to the Court that such a right could not “be questioned now because it is clearly protected by the Compact of 1905 between the States.” (NJ App. 139a.) Moreover, Delaware reassured the Court that a boundary at the low water line within the Twelve-Mile Circle would neither destroy nor seriously prejudice the rights of New Jersey’s riparian owners, because the Compact of 1905 “recognized the rights of riparian owners in the river to wharf out, and the Master so found.” (NJ App. 140a.) Delaware represented that, through the Compact of 1905, Delaware “recognized the rights of the inhabitants on the east side of the river to wharf out to navigable water” and that this right “has never been questioned.” (NJ App. 141a.) Delaware further represented that the right “was undoubtedly inserted to put beyond question the *riparian rights* (as distinguished from *title*) of land owners in New Jersey.” (NJ App. 141a.) (Emphasis added.)

In 1934, the Court followed the Master’s recommendations and set the New Jersey-Delaware boundary within the Twelve-Mile Circle at the mean low water line on the New Jersey side, “subject to the Compact of 1905.” *New Jersey v. Delaware II*, 291 U.S. 361, 385 (1934). The Court’s decree provided 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.” (NJ App. 23a.)

The language within the decree referring to the Compact of 1905 reflected an agreement by the Attorneys General of Delaware and New Jersey. (NJ App. 195a.) By letter of April 17, 1935, New Jersey Assistant Attorney General Duane Minard suggested to Delaware Special Counsel



Southerland that the decree refer to the Compact of 1905 through the language quoted above, so that purchasers of wharf rights from New Jersey who were neither inhabitants nor citizens of New Jersey (such as Dupont) would continue to be protected. (NJ App. 182a.) On April 18, 1935, Mr. Southerland recommended to Delaware's Attorney General that Delaware accept the language suggested by New Jersey, "for protection of many Delaware corporations who have acquired wharfage rights in New Jersey." (NJ App. 184a.) The Delaware Attorney General then advised Delaware's Special Counsel on April 29, 1935 that "the proposed draft meets my approval." (NJ App. 1319a.)

### **G. New Jersey's Exercises of Jurisdiction After *New Jersey v. Delaware II***

After the Court decided *New Jersey v. Delaware II*, New Jersey continued its longstanding practice of conveying underwater lands outshore of low water within the Twelve-Mile Circle, without interference by Delaware. These transactions included grants of underwater lands by New Jersey to :J. Landis Strickler in 1935 (NJ App. 554a-558a); Dupont in 1943 (NJ App. 559a-564a), 1960 (NJ App. 575a-581a), and 1967 (NJ App. 582a-588a); and to the Sun Oil Company in 1957 (NJ App. 565a-574a); leases to the Keystone Urban Renewal Limited Partnership in 1992 (NJ App. 589a-609a ); William Bergmann in 1999 ((NJ App. 610-615a); and the Township of Pennsville in 2000 (NJ App. 616a-621a); and an Assignment of Management Rights (lease) to the New Jersey Division of Parks and Forestry in 2001 (NJ App. 622a-631a.)

In addition, New Jersey continued its longstanding practice of regulating the construction of improvements on the underwater lands outshore of mean low water and within the Twelve-Mile Circle, without interference by Delaware. These exercises of regulatory, police power jurisdiction included permits for dredging and repairs to an outfall pipe issued by New Jersey to Dupont in 1977 (NJ App. 657a; 939a-1); a permit and a water quality certificate for a new sheet piling cell, issued by New Jersey to Dupont in 1982 (NJ App. 677a-682a); a dredging permit issued by New Jersey to Dupont in 1982 (NJ App. 824a); a dredging permit issued by New Jersey to Dupont in 1988 (NJ App. 827a-828a); a permit issued by New Jersey to Keystone Cogeneration System, Inc. in 1991, which allowed a 1,600-foot long pier and dredging, in conjunction with a cogeneration plant on

upland within Logan Township, New Jersey (NJ App. 830a-836a);<sup>11</sup> a permit issued by New Jersey to Logan Generating Co., LP in 1996, which allowed withdrawal of water from the Delaware River outshore of low water (NJ App. 688a-689a)<sup>12</sup>; a permit to rehabilitate a historic pier at New Jersey's Fort Mott State Park, issued by New Jersey to the State's Division of Parks and Forestry in 1996 (NJ App. 882a-884a);<sup>13</sup> a dredging approval issued by New Jersey to the Logan Generating Company in 1998 (NJ App. 870a-875a); and permits issued by New Jersey to Pennsville Township in 2000 for a boat ramp (NJ App. 876a-878a) and in 2001 for a stormwater force main pipe (NJ App. 879a-881a.) See also Broderick Affidavit dated June 2005 (N.J. App. 817a - 823a); Reading Affidavit, dated June 23, 2005 (N.J. App. 710a - 717a); Sickels Affidavit dated June 22, 2005 (N.J. App. 683a - 687a.)

#### **H. The Scope of New Jersey's Regulation of Riparian Lands**

Before 1914, New Jersey's regulatory efforts with respect to tidally-flowed, riparian lands were focused on protecting navigation and ensuring that improvements to the State's shoreline did not impair navigation or cause a nuisance. See Statement of Facts at B and E, *supra*. After 1914, when New Jersey adopted its Waterfront Development Law, 1914 N.J. Laws ch. 123, New Jersey's regulatory focus expanded to include other concerns. In addition, starting in 1970, the New Jersey Legislature enacted a series of environmental laws, which contained additional standards for development of waterfront lands and underwater lands. Those laws included the Wetlands Act of 1970, N.J. Stat. Ann. §§13:9A-1 *et seq.* (1970 N.J. Laws ch. 272), the Coastal Area Facility Review Act ("CAFRA"), N.J. Stat. Ann. §§13:19-1 *et seq.* (1973 N.J. Laws ch. 185), and the Water Pollution Control Act, N.J. Stat. Ann. §§58:10A-1 *et seq.* (1977 N.J. Laws ch. 74).

In 1972, Congress enacted the federal Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§1451 *et seq.*, and the federal Clean Water Act ("CWA"), 33 U.S.C. §§1251 *et seq.* The CZMA was enacted to improve coastal planning and coordination of federal, state and local planning in

---

11 Delaware also approved the Keystone pier. (See, NJ App. 835a; 839a; 840a).

12 An application to renew this permit was submitted to New Jersey in 2005. (NJ App. 698a-709a.)

13 This New Jersey permit required approval by Delaware of certain activities outshore of low water. (NJ App. 883a).

coastal areas, while the CWA was enacted to protect and improve the quality of the nation's waters.<sup>14</sup> In 1978, New Jersey adopted, and the federal authorities approved, a State coastal zone management plan and implementing regulations for the ocean and bay section of New Jersey's coastal area. In 1980, New Jersey adopted, and the federal authorities approved, New Jersey's coastal zone management plan and regulations for the remaining portions of the State's coastal area, including tidal areas such as the Delaware River waterfront. ((NJ App. 937a) (Whitney Aff., ¶2)); N.J. Admin. Code 7:7E-1.1(b); -1.2.<sup>15</sup>

In 1981, the United States Environmental Protection Agency (USEPA) delegated to New Jersey permitting jurisdiction under the federal Clean Water Act, 33 U.S.C. §§1251 *et seq.*, over discharges of effluent, including discharges outshore of mean low water within the Twelve-Mile Circle. ((NJ App. 712a) (Reading Aff., ¶4.))<sup>16</sup> Based on that delegation, New Jersey expanded its exercise of regulatory jurisdiction outshore of low water within the Twelve-Mile Circle to encompass additional activities. Thus, New Jersey issued a permit allowing Dupont to discharge effluent into the Delaware River outshore of low water, in 1987 (*See* NJ App. 761a); a permit allowing Keystone Cogeneration to discharge effluent outshore of low water in 1995 (NJ App. 754a); a permit allowing Atlantic City Electric Co. to discharge effluent outshore of low water in 1986 (*See* NJ App. 777a); a permit allowing the Pennsville Municipal Sewerage Authority to discharge effluent outshore of low water in 1986 (*See* NJ App. 785a); and a permit allowing the Penns Grove Sewerage Authority to discharge effluent into the Delaware River outshore of low water in 1994, (*See* NJ App. 803a.) Since the 1980s, New Jersey has renewed and enforced these discharge permits on a continuing basis, without interference by Delaware. (*See* NJ App. 718a-816a; 710a-715a.)

### **I. Delaware's Acquiescence to New Jersey's Exercises of Jurisdiction**

Before *New Jersey v. Delaware II* was decided, Delaware exercised jurisdiction only over improvements extending from its shoreline into the Delaware River ((*See* NJ App. 313a) (1884 City of Wilmington ordinance regulating only wharves on Delaware side of the river)), and did not

---

14 The CZMA did not displace or modify any interstate compact, 16 U.S.C. §1456(e), while the CWA did not affect any state's rights or jurisdiction, 33 U.S.C. §1370.

15 "Whitney Aff." refers to the affidavit of Steven Whitney, dated July 27, 2005. (NJ App. 936a)

16 "Reading Aff." refers to the affidavit of Jeffrey Reading dated June 23, 2005. (NJ App. 710a)

exercise jurisdiction over improvements extending from the New Jersey shoreline into the Delaware River within the Twelve-Mile Circle. Further, after the decision and decree were entered in *New Jersey v. Delaware II*, Delaware continued for many years to recognize New Jersey's right to exercise exclusive State jurisdiction over improvements on its side of the Delaware River within the Twelve-Mile Circle.

In 1935, Delaware enacted legislation that revised the boundaries of the City of Wilmington ((NJ App. 314a-318a) (40 Del. Laws ch. 179 (1935))), but provided that "no property situated within that part of the City of Wilmington which shall have become a part of the said City by virtue of this Act shall be taxable until the final determination of the effect of [the Compact of 1905]." (NJ App. 318a.) Later that year, Delaware Special Counsel Southerland reported to the Delaware Attorney General that numerous valuable wharves had been constructed on the New Jersey side of the river, but never had been taxed by Delaware. (See NJ App. 197a-198a.) In 1938, after New Jersey's petition to the Court for rehearing was denied, *New Jersey v. Delaware II*, 304 U.S. 590 (1938), Delaware's Attorney General asked Delaware's Governor to consider asserting ownership rights "over to the New Jersey shore." (NJ App. 186a-189a.) Notwithstanding the invitation, however, the Wilmington City Code of 1993 continued to limit taxation of property on the easterly side of the Delaware River. ((NJ App. 344a-325a) (Wilmington City Code, §§1-1 and 1-100).)

In 1954, New Jersey's Attorney General issued a formal opinion in which he concluded that New Jersey had exclusive authority under the Compact to issue grants and leases of riparian lands below the low water mark on its side of the Delaware River. NJ Atty. Gen. Op. 3 (1954) (NJ App. 302a-304a.) In 1956, the Chief of New Jersey's Bureau of Navigation provided a copy of this Opinion to Herbert Cobin, Chief Deputy Attorney General of Delaware, in response to the Chief Deputy's inquiry about whether Delaware's approval was required for Dupont to build dikes in the Delaware River at the company's Carneys Point Works. (NJ App. 306a.) Also in 1956, New Jersey's Attorney General issued an opinion that acknowledged the Court's boundary ruling of 1934 and that Delaware owned the underwater lands outshore of low water within the Twelve-Mile Circle. NJ Atty. Gen. Op. 22 (1956) (NJ App. 308a-312a.)

In 1957, the Delaware Highway Department ("Department") asked that United States Army Corps of Engineers ("Corps") delay approving facilities proposed by Dupont to extend from the New Jersey waterfront into the Delaware River within the Twelve-Mile Circle, pending Delaware's

approval. However, on September 30, 1957, counsel for DuPont objected, writing to R.A. Haber, Chief Engineer of the Department that Delaware's approval was not required, based on the "Treaty of 1905" and the Court's decision in *New Jersey v. Delaware II*. (NJ App. 636a-637a.) The Delaware Chief Engineer referred Dupont counsel's letter to the Department's attorney, S. Samuel Arsht. (NJ App. 638a.) As a result, on December 2, 1957, Mr. Arsht advised the Chief Engineer that he concurred that "the State of New Jersey is the proper authority with which the DuPont Company should deal in connection with any lands lying under the Delaware River within the boundary of the State of Delaware, but on the New Jersey side of the river and within the twelve-mile circle." (NJ App. 639a.) Thus, Mr. Arsht recommended that the Department advise that "the State of Delaware has no jurisdiction over grants that may be made in and to the lands lying under the Delaware River on the New Jersey side thereof and within the twelve-mile circle, and that the prior approval of the State of Delaware in such matters is not required." (NJ App. 640a.) On December 13, 1957, the Chief Engineer wrote to the Corps that it should not hold up any permit for work on the New Jersey side of the Delaware River, based on the Department's failure to act. (NJ App. 641a.)

In 1958, the New Jersey Supreme Court held in *New Jersey v. Federanko*, 139 A. 2d 30 (N.J. 1958), that New Jersey had jurisdiction over a gambling offense that occurred on a pier extending into the Delaware River from the Pennsville shoreline, within the Twelve-Mile Circle. The opinion notes that Delaware filed an amicus brief in the case, in which Delaware adopted New Jersey's position that the 1905 Compact remained in effect following adjudication of *New Jersey v. Delaware II*. 139 A. 2d at 33.<sup>17</sup> In 1992, the New Jersey Supreme Court continued to acknowledge New Jersey's right to regulate within the Delaware River, based on the Compact and the *Federanko* Court's interpretation of it. *Ampro Fisheries v. Yaskin, supra*, 606 A. 2d 1099.

### **J. Delaware's Actions Within the Twelve-Mile Circle**

In contrast to New Jersey's longstanding regulation of the construction of improvements extending from its shoreline into the Delaware River within the Twelve-Mile Circle, Delaware made no effort to regulate such activities until 1971. (NJ App. 1159a, ¶184; 1189a-1190a, ¶¶ 1, 3.)

---

<sup>17</sup> In 1962, a New Jersey court held that the Borough of Penns Grove could tax the value of the pier. *Main Assocs. Inc. v. B & R Enters., Inc.*, 181 A. 2d 541, 543-45 (N.J. Super. Ct. Ch. Div. 1962).

Moreover, since 1971, Delaware has regulated only a handful of such projects.

Delaware first adopted a statute that addressed conveyances of its underwater lands in 1961 ((see 53 Del. Laws ch. 34; Del Code Ann. Tit. 7, § 4520 (repealed 1966)), but did not adopt implementing regulations for several years. (See DE App. 371a.) Delaware then adopted its Coastal Zone Act, 58 Del. ch. 175 (1971), in 1971. In the latter year, in conjunction with plans by Dupont to build a tanker unloading and storage facility at its Chambers Works Plant in Deepwater, New Jersey, Delaware attempted to lease to Dupont underwater lands that New Jersey previously had granted to Dupont in 1916. (NJ App. 1300a-1301a.) However, Dupont objected to Delaware, asserting that “the 1905 Treaty between New Jersey and Delaware ceded to the State of New Jersey full authority over subaqueous lands from the New Jersey shore to the center of the Delaware River, including the right to convey title to such lands; and that the subsequent Supreme Court cases did not, and in fact could not, modify the terms of said Treaty.” (NJ App. 648a.) In the face of Dupont’s objection, Delaware agreed to defer collection of lease payments until the title question was resolved in its favor “by a court of competent jurisdiction” (NJ App. 649a), and issued a lease to Dupont which provided that it was “without prejudice to the title claim of either party.” (NJ App. 651a.) To date, there is no evidence that Dupont has made any lease payments to Delaware. (NJ App. 1161a, ¶195; 670a; 1303a-1304a.)

In 1972, the Director of Delaware’s Planning Office, David Keiffer, contacted New Jersey’s Commissioner of Environmental Protection regarding a liquified natural gas terminal and pier proposed by the El Paso Eastern Company to extend from the New Jersey shoreline near Penns Grove, New Jersey (NJ App. 887a), but then advised El Paso that the project was “prohibited” under Delaware’s newly-adopted Coastal Zone Act before receiving any response from New Jersey.<sup>18</sup> (NJ App. 888a; 891a.) However, El Paso never made a formal application to either Delaware or New Jersey, and therefore never appealed the Delaware denial. (NJ App. 892a-894a.)

Nine years later, in 1981, Delaware Deputy Attorney General June MacArtor attempted to collect a lease payment from Dupont, in connection with renewal of the Dupont ten-year lease of 1971. (NJ App. 671a.) However, Dupont again declined to submit payment and repeated its

---

<sup>18</sup> In response to Delaware’s inquiry, New Jersey’s Commissioner of Environmental Protection advised Delaware that New Jersey had not received an application from El Paso, but would regulate the entire project if an application were received. (NJ App. 891a.)

objection of ten years earlier, asserting once again that New Jersey “has jurisdiction over the matters covered by the 1971 lease.” (NJ App. 671a.) The following year, in 1982, both New Jersey and Delaware allowed Dupont to repair an existing pile cluster at its facility in Deepwater, New Jersey. (See NJ App. 679a; 672a.)

Eight years later, in November 1990, the Secretary of Delaware’s Department of Natural Resources and Environmental Control (“DNREC”) advised Keystone Cogeneration Systems, Inc., that a pier proposed to extend from the New Jersey shoreline of Logan Township as part of a coal unloading facility was not prohibited under Delaware’s Coastal Zone Act, provided a permit was obtained. (NJ App. 1163a, ¶ 206.)<sup>19</sup> Keystone then entered into subaqueous land leases for the area to be occupied by the pier with both Delaware and New Jersey. (NJ App. 1152a, ¶153; 1163a, ¶¶203-207.) Keystone also obtained a New Jersey waterfront development permit for the pier (NJ App.830a-836a), a New Jersey water allocation permit for withdrawals of water from the Delaware River by the onshore facility (NJ App. 688a-692a), and a New Jersey pollutant discharge elimination system permit for discharges from the onshore facility into the Delaware River. (NJ App. 718a-757a.)

In 1996, Delaware and New Jersey’s Division of Parks and Forestry entered into a subaqueous land lease related to the rehabilitation of an historic pier and a new floating ferry dock outshore of mean low water, near a New Jersey State Park (Fort Mott) in Salem County, New Jersey and a Delaware State Park. (NJ App. 1163a-1164a, ¶¶ 208-209.) However, New Jersey also entered into an Assignment of Management Rights (lease) with its Division of Park and Forestry, covering these lands. (NJ App. 622a-631a.) In addition, New Jersey issued a waterfront development permit for the pier, which approved structures only to low water and thus required Delaware’s approval for structures outshore of that point. (NJ App. 882a-884a.)

In 2005, Delaware entered into a subaqueous lands lease with Fenwick Commons, LLC, related to the construction of a 750-foot long pier extending from the New Jersey shoreline of Penns Grove, Salem County, New Jersey into the Delaware River within the Twelve-Mile Circle. (NJ App. 1164a, ¶¶ 210, 211.) Fenwick Commons objected to the lease, because it covered lands previously

---

<sup>19</sup> New Jersey provided Delaware with a copy of the Keystone application to New Jersey, as part of an effort in the early 1990s to improve coordination with Delaware (NJ App. 1067a).

granted by the State of New Jersey. As stated by Fenwick's counsel, financing considerations compelled Fenwick to execute the Delaware lease so as to be able to proceed with its project. (NJ App. 885a.)

Also in 2005, Delaware denied an application by Crown Landing, LLC for a coastal zone approval, advising Crown Landing that its proposed pier and associated onshore liquified natural gas facility was "prohibited" under Delaware's Coastal Zone Act. (NJ App. 1164a, ¶¶212, 213.)<sup>20</sup> This was the first instance where Delaware purported to use its regulatory authority to deny an application for a proposed project on the New Jersey shoreline that New Jersey was evaluating, because the project included a pier extending into Delaware.

After Delaware purported to block this project on the New Jersey side of the Delaware River, New Jersey's Counsel to the Governor attempted to resolve the matter by calling to the attention of his Delaware counterpart Article VII of the Compact of 1905 (NJ App. 1109a-1111a.). In addition, the New Jersey Assembly passed a Resolution asking Delaware to amend its laws to make it clear they were subject to the Compact. (NJ App. 1114a-1116a.) These efforts were not successful, (NJ App. 1112a-1113a), and this lawsuit followed.

### **K. New Jersey's Efforts to Cooperate With Delaware**

New Jersey has exercised continuing jurisdiction over improvements to its shoreline within the Twelve-Mile Circle for at least one hundred fifty years, without interference from Delaware. In addition, for much of this time, Delaware expressly recognized New Jersey's right to act in this way. Nevertheless, during the early 1990s, New Jersey also experimented with efforts to coordinate its exercise of jurisdiction with Delaware. These efforts followed the enactment of the federal CZMA in 1972.

The CZMA was enacted in 1972 to encourage coordination and cooperation between federal, state and local management of the coastal zone. 16 U.S.C. §1452(4), (5). After adoption of the CZMA, NJDEP prepared a coastal zone management plan (CZMP). The first portion of the CZMP covered New Jersey's Ocean and Bay coastal area, and received federal approval in 1978. The second portion of New Jersey's CZMP covered the remaining portions of New Jersey's tidally-

---

<sup>20</sup> Delaware also refused to allow Crown Landing to take sediment samples needed for New Jersey to completely evaluate the project. (NJ App. 1296a-1298a.)



flowed waters and waterfront, including its waterfront within the Twelve-Mile Circle, and received federal approval in 1980. ((NJ App. 937a) (Whitney Aff., ¶2)); N.J. Admin. Code 7:7E-1.2.

In addition, in 1979 New Jersey released a document entitled “Options for New Jersey’s Developed Coast,” which discussed management of waterfront areas that included the Delaware River waterfront within the Twelve-Mile Circle. (NJ App. 1053a-1056a.) This document included a discussion of the Delaware-New Jersey boundary line; stated that Delaware’s Coastal Zone Act of 1971 “precludes, or at least impedes, major waterfront industrial development along the shoreline of Salem County, New Jersey” and stated that “major development extending into the Delaware River could require approval from the State of Delaware, in addition to approvals from the State of New Jersey.” (NJ App. 1053a.) However, the document contained no reference to the Compact of 1905, to the New Jersey Attorney General Opinion of 1954 recognizing New Jersey’s exclusive jurisdiction to issue riparian grants, or to New Jersey’s historic exercise of exclusive State regulatory authority over such projects.

New Jersey’s CZMP of 1980 was a lengthy document covering many issues. (*See* NJ App. 1057a-1063a.) The CZMP did not refer to the Compact of 1905; recognized the potential for conflict with Delaware within the Twelve-Mile Circle; and stated that a New Jersey project extending from the New Jersey shoreline into Delaware would require permits from both states, and that the two states would coordinate reviews of such projects (NJ App. 1065a.) Nevertheless, following adoption of its CZMP, New Jersey continued to exercise jurisdiction over projects extending from its shoreline into Delaware, without any input from Delaware. In addition, New Jersey never adopted any rule or regulation to give this statement included in the CZMP any enforceable, legal effect. (NJ App. 937a-938a (Whitney Aff., ¶3).)

Although New Jersey’s CZMP did not refer to the Compact, the process by which Delaware’s CZMP was prepared and approved by the federal authorities included such references. In 1972, Delaware prepared a Task Force Report to address coastal zone management issues. (NJ App. 896a-931a.) The Report contained a discussion of various interstate compacts, including the Compact of 1905. (NJ App. 926a.) The Report also included a recommendation that this Compact be “nullified.” (NJ App. 931a.) Thereafter, in 1979, Delaware submitted for federal approval a CZMP that never referred to the Compact. This omission prompted the Sun Oil Company, to whom New Jersey had granted underwater lands in 1957, to complain to the federal authorities that the

Delaware CZMP Plan was deficient, because it ignored the Compact and the company's rights under it. (NJ App. 932a-935a.)

In 1990, as part of its ongoing coastal planning efforts, NJDEP decided to explore a means of coordinating with Delaware permit reviews for projects at the New Jersey-Delaware border. As part of this effort, NJDEP provided Delaware a copy of a permit application received from Keystone Cogeneration, LP, for a project in Logan Township, Gloucester County, New Jersey that included a 1,600 pier extending into the Delaware River. (NJ App. 1067a.) In addition, New Jersey drafted and forwarded to Delaware's Department of Natural Resources and Environmental Control (DNREC) a Memorandum of Agreement ("MOA"). (See NJ App. 1068a-1083a.) As drafted, the proposed MOA would have provided that the states share information on rulemaking and applications, and work to make their coastal programs more consistent (NJ App. 1076a-1079a.), while stating that each State had independent authority to approve or deny applications (NJ App. 1077a.) Later in 1994, however, New Jersey decided not to adopt the MOA, based on concerns that the MOA would create an overly cumbersome review process and give Delaware veto power over projects that met New Jersey standards. ((NJ App. 939a (Whitney Aff., ¶8).)

Based on these facts and on the plain language of the Compact, New Jersey has jurisdiction over improvements extending from its shoreline outshore of mean low water within the Twelve-Mile Circle. Accordingly, New Jersey's motion for summary judgment must be granted.

## ARGUMENT

### **I. NEW JERSEY IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE PLAIN LANGUAGE OF THE COMPACT OF 1905 PROVIDES IT WITH JURISDICTION TO REGULATE ALL ASPECTS OF THE CONSTRUCTION AND USE OF RIPARIAN IMPROVEMENTS EXTENDING FROM ITS SHORE, WITHOUT INTERFERENCE BY DELAWARE**

Article VII of the Compact of 1905 establishes New Jersey's jurisdiction over riparian improvements and activities emanating from its shore, as follows:

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. Act of Jan 24, 1907, ch. 394, 34 Stat. 858 (1907).

An interstate compact is, first, “a contract ... that must be construed and applied in accordance with its terms.” *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (internal quotations and citations omitted). Once approved by Congress, a compact also becomes a law of the United States. *New Jersey v. New York*, 523 U.S. 767, 811 (1998), (citing *Cuyler v. Adams*, 449 U.S. 443, 448 (1981).) Where the compact’s language is clear and unambiguous, that plain language is conclusive and binding, and there is no need to resort to extrinsic evidence for its interpretation. *New Jersey v. New York*, *supra*, 523 U.S. at 811.; *Connecticut Nat’l Bank v. Germain*, 503 U.S. 247, 253-54 (1992); *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n. 5 (1991); *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

Because Article VII clearly and unambiguously provides New Jersey with full jurisdiction to regulate the construction of improvements appurtenant to the New Jersey shore of the Delaware River within the Twelve Mile Circle, free from regulation by Delaware, New Jersey is entitled to summary judgment granting the relief sought in its Petition. More specifically, the use of the phrase “riparian jurisdiction” connotes State sovereignty over riparian improvements. “Riparian” derives from the Latin word “ripa,” meaning “shore of the river,” and is defined as “[o]f or pertaining to the bank of a river; as, riparian rights.” Webster’s Unabridged Dictionary (1898) (NJ App. 1318a.) And “jurisdiction,” as used in Article VII, refers to the “authority of a sovereign power to govern or legislate.” *Id.* (NJ App. 1317a.) Thus, the term “riparian jurisdiction” clearly refers to each State’s sovereign authority to regulate activities on its own shores of the Delaware River.

At the time of the 1905 Compact, “riparian jurisdiction” also was clearly understood in both States to encompass the regulation of improvements extending outshore of the low-water mark. As this Court recognized in *New Jersey v. Delaware II*, in a number of jurisdictions, including New Jersey and Delaware, “riparian proprietors have very commonly enjoyed the privilege of gaining access to a stream by building wharves and piers . . . .” 291 U.S. at 375. Indeed, New Jersey has long recognized that a primary objective of riparian rights is the ability to wharf out from the shore, beyond the low-water mark, as necessary to gain access to navigable waters. *See Mayor of Newark v. Sayre*, 45 A. 985, 990 (N.J. 1900). *See also City of Wilmington v. Parcel of Land*, 607 A.2d 1163,

1168 (Del. 1992) (citing *Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435, 456-57 (Del. Ch. 1882)).

Article VII of the 1905 Compact also makes clear that this “riparian jurisdiction” is to be interpreted broadly. It is jurisdiction “of every kind and nature,” to be enjoyed by each state “on its own side of the river...” By using these broadly inclusive terms, Article VII clearly provides that each state shall have complete riparian jurisdiction, covering all activities or improvements that may be undertaken in the exercise of riparian rights. The scope and nature of riparian rights, including the right to build wharves and piers, is commonly established through the exercise of the State’s police powers to protect the public from uses or encroachments that constitute a nuisance. Consequently, the ability to exercise these powers is logically and necessarily included within “riparian jurisdiction of every kind and nature.”

Moreover, Article VII specifically confirmed that each State would be able to exercise exclusive riparian jurisdiction along its own shores. It did this by providing that each State would be able to exercise its authority “on its own side of the river” pursuant to “the laws of the respective States.” By agreeing to these terms, New Jersey and Delaware assured that each State’s exercise of its riparian jurisdiction would be free of interference by the other.

The use of the term “continue” is also of critical importance because it shows that the States intended that they would each continue to exercise their riparian sovereignty as they had in the past. Before the Compact was enacted, New Jersey had exercised riparian jurisdiction over the construction of docks, wharves, piers, and other waterfront developments, pursuant to statutes that applied to all of areas of its own waterfront, including the area within the Twelve-Mile Circle. *See, e.g.*, 1851 N.J. Laws 335; N.J. Stat. Ann. §§12:3-10, -12, -21.21; *See also* Statement of Facts, Part B, *supra*. In contrast, prior to the Compact of 1905, there is no record of Delaware having exercised riparian jurisdiction of any kind on the New Jersey side of the river. Thus, when Article VII provided that the States would “continue” to exercise “riparian jurisdiction of every kind and nature” under the “laws of the respective states,” it confirmed that New Jersey would continue to exercise riparian jurisdiction in the same manner to which it had historically been accustomed, free of regulation or interference by Delaware.

---

21 This included dredging to reach the navigable channel. *See* N.J. Stat. Ann. § 12:3-21 (1979) (enacted in 1891).

Other related provisions of the Compact addressing the allocation of jurisdiction reinforce this conclusion. Article I provides to New Jersey the authority to serve criminal process anywhere on the river, up to the Delaware low water mark, upon “any person accused of an offense committed on the soil of said state (New Jersey), *or upon the eastern half of said Delaware river...*” (emphasis added). Article II provides identical authority to Delaware for offenses on its soil or “upon the western half” of the river. The Compact thus provides a clear, and mutually exclusive, allocation to each State of jurisdiction to exercise its criminal police powers over offenses committed on the “half” of the river appurtenant to its shores. The allocation of comprehensive riparian jurisdiction to New Jersey, and not to Delaware, over riparian improvements appurtenant to New Jersey’s shoreline is consistent with the fact that the area adjacent to New Jersey’s shores was also made subject to New Jersey’s criminal laws rather than Delaware’s. Articles I and II further recognize the jurisdiction of each State over wharves and piers appurtenant to their shores by prohibiting the service of process by one State aboard a vessel secured to a pier or wharf attached to the shores of the other, despite the fact that the entire river otherwise remained open for service of process by either State.

Finally, a reading of the language of Article VII as a whole further confirms that “riparian jurisdiction of every kind and nature” identifies more than the right to make grants or leases of riparian lands, or to adjudicate competing property interests among riparian owners. Article VII authorizes New Jersey and Delaware, each acting on its own side of the 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.*” (Emphasis added). Article VII thus provides a comprehensive delegation of the power to make riparian grants and leases that is completely separate from its allocation of riparian jurisdiction. This separation of the power to issue grants from the power to exercise “riparian *jurisdiction* of every kind and nature” clearly underscores the fact this jurisdiction encompasses more than authority over property conveyances.

**A. THE COMPACT OF 1905 PROVIDES, IN CLEAR AND UNAMBIGUOUS LANGUAGE, FOR THE REGULATION BY NEW JERSEY OF ALL ASPECTS OF THE OWNERSHIP AND EXERCISE OF RIPARIAN RIGHTS APPURTENANT TO ITS SHORES WITHIN THE TWELVE MILE CIRCLE.**

The Compact of 1905 was intended to effectuate “the final adjustment of all controversies

relating to the boundary line between said states *and to their respective rights in the Delaware river and bay...*” Preamble to Compact of 1905 (emphasis added). The parties, however, were unable to agree on the physical location of that boundary. Consequently, in order for the Compact to provide an effective solution to this dispute, it was necessary to identify the scope of each state’s authority within the Twelve Mile Circle in practical terms that did not depend on resolution of the boundary question.

Article VII accomplishes this by establishing the scope of each state’s jurisdiction by reference to the rights to be regulated, rather than by establishing a physical dividing line. More specifically, Article VII provides to each state, on its own side of the river, “riparian jurisdiction of every kind and nature(.)” This allocation clearly establishes both the physical extent of each state’s jurisdiction, and the scope and nature of the activities that may be regulated, based on the common understanding of riparian rights and of the limitations that may be placed on those rights by the states.

**1. It Was Well Settled at the Time of the Compact That Riparian Rights Included, But Were Not Limited to, the Right to Wharf Out Beyond the Mean Low Water Mark to Reach the Navigable Channel.**

Because the rights of a riparian proprietor are generally determined according to state law, “there is no universal and uniform law upon the subject(.)” *Shivley v. Bowlby*, 152 U.S. 1, 26 (1894). Nevertheless, “riparian proprietors have very commonly enjoyed the privilege of gaining access to a stream by building wharves and piers, though the title to the foreshore or the bed may have been vested in the States.” *New Jersey v. Delaware II, supra*, 291 U.S. at 375. This right to wharf out was among the riparian rights recognized by both New Jersey and Delaware prior to the Compact of 1905. *Id.* See also *Bell v. Gough*, 23 N.J.L. 624 (N.J. 1852); *City of Wilmington v. Parcel of Land, supra*, 607 A.2d at 1168 citing *Harlan and Hollingsworth Co. v. Paschall, supra*, 5 Del Ch. at 456-57 (“Among the riparian property rights associated with ownership of the foreshore is the right to wharf out directly from the foreshore to the bulkhead line and the right to have free access to the navigable portion of the river.”).

It further was well established as of 1905 that the right of the riparian landowner included the right to build wharves or similar structures beyond the mean low water line, as necessary to

enable vessels to reach the channel. As observed in a treatise contemporary to the Compact, 1 Henry Philip Farnham, *The Law of Waters and Water Rights* §116, at 534 (1904), the right to wharf out, “which pertains particularly to the ownership of the upland, necessarily includes the right to fill in and to build wharves and other structures in the shallow water *in front of such land and below low-water mark, . . .*” (emphasis supplied).

New Jersey expressly recognized that, provided he obtained the necessary riparian grant, a riparian proprietor could wharf out below the low water mark. *Bell v. Gough*, 23 N.J.L. 624 (N.J. 1852) (recognizing that “it has been the common understanding ... that the owners of land bounding on navigable waters had an absolute right to wharf out and otherwise reclaim the land *down to even below low water*, provided they did not thereby impede the paramount right of navigation...”) (emphasis added); *Boon v. Kent*, supra, 7 A. 344 (holding that foreclosure of shoreline property within the Twelve Mile Circle included the riparian grant extending beyond low water mark). Similarly, Delaware established pierhead and bulkhead lines that extended beyond the mean low water mark on its side of the river. See NJ App. 1198a, 1208a, 1209a (Castagna Report at 3, Figures 2 and 3).

Other jurisdictions similarly recognized a right to wharf out beyond the mean low water line. For example, in 1877 a team of arbitrators interpreted a 1785 Compact between Virginia and Maryland, which provided to each “full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river.” The arbitrators concluded that this Compact guaranteed to Virginia, as against Maryland, “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,” despite the fact that the Virginia/Maryland boundary was at the Virginia mean low water line. *Virginia v. Maryland*, 540 U.S. 56, 62-63 (2003) (citing the Black-Jenkins Award of 1877). Indeed, the right to wharf out below mean low water was so well established and understood that a New York court, interpreting an 1834 compact between New York and New Jersey, concluded that it would be “preposterous to suppose that these wharves and docks .... were to be constructed upon the dry land, remote from the water, or above low water mark.” *New York v. Central R.R. Co. of N. J.*, 42 N.Y. 283, 298-99 (N.Y. 1870).

Consistent with this understanding, New Jersey issued a number of grants that included the

area below mean low water in the years both preceding and following the Compact, including eight grants in the Twelve Mile Circle prior to 1905. It was clearly evident, therefore, that by reserving to New Jersey “every kind and nature” of riparian jurisdiction on its own side of the river, the drafters of Article VII foresaw that an exercise of this jurisdiction would require New Jersey to regulate uses extending beyond its mean low water line, regardless of which State was ultimately determined to own that area. A reading of the Compact that would limit New Jersey’s jurisdiction over wharves and piers appurtenant to its shores to the area above the mean low water thus would negate a significant portion of Article VII’s grant of “riparian jurisdiction of every kind and nature(.)”

**2. “Riparian Jurisdiction of Every Kind and Nature” Includes the Authority to Exercise Police Power to Regulate the Nature and Scope of Riparian Improvements, and the Manner in Which They are Constructed and Used.**

It was well established prior to 1905 that the rights of riparian owners, including the right to wharf out, were subject to the limitation that they could not be exercised so as to create a nuisance. New Jersey, like other states at the time, asserted its police powers over this right by including conditions within in its grants of tidally-flowed lands, which limited the exercise of wharfage rights in order to prevent them from interfering with the public right of navigation. In addition, New Jersey further regulated these uses by legislatively adopting pierhead lines and bulkhead lines to limit the length of piers, and the area within which the grantee of submerged lands could place fill. See Statement of Facts Part B, *supra*. It was also common for states, including New Jersey, to limit the exercise of other riparian rights to prevent other types of nuisance. See *Hudson County Water Company v. McCarter*, 209 U.S. 349, 354 (1908). Against this background, it is clear that the ability to “continue to exercise riparian jurisdiction of every kind and nature” authorized each state to continue to control, through its police powers, the manner in which these riparian rights were exercised.

The scope of a riparian proprietor’s right to “wharf out” to reach navigable waters consistently has been defined as the right to undertake such actions as may be necessary to reach navigable waters, subject to limitations imposed to protect the public. This Court described the right to wharf out in *Yates v. Milwaukee*, 77 U.S. 497, 501 (1870), as follows:



among those rights (of the riparian owner) are the right of access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, *subject to such general rules and regulations as the legislature may see proper to impose for the protection of the public, whatever those may be.* [Emphasis supplied].

Thus, as Farnham recognizes in the context of the riparian water use rights, “the limit of the private right is imposed by the public right, and the private right exists up to the point beyond which it will be inconsistent with the public right.” 1 *Law of Waters and Water Rights, supra*, § 64b, at 290, citing *Morrill v. St. Anthony Falls Water-Power Co.*, 2 N.W. 842, 846 (Minn. 1879). Farnham comprehensively described this interplay between public and private rights to build and maintain a wharf as involving “several conflicting interests”, including “the right of the public to be free from any encroachment upon the water way which shall constitute a nuisance....”;<sup>[1]</sup> Farnham, *The Law of Waters and Water Rights, supra*, § 113, at 525-26. (emphasis supplied)]. See also *Shivley v. Bowlby, supra*, 152 U.S. at 37 (discussion of Supreme Court decisions recognizing that, despite the diversity of State law, wharves and piers ““have never been held to be nuisances unless they obstruct the paramount right of navigation....””).

The authority to prohibit piers and wharves that are nuisances because they interfere with the public right of navigation represents an exercise of the police power. This Court has recognized that the police power of the states “rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions.” *Fertilizing Company v. Hyde Park*, 97 U.S. 659, 667 (1878). This power extends “to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals.” *Id.* at 669 (citing *Beer Company v. Massachusetts*, 97 U.S. 25, 33 (1877)).

The adoption of pierhead and bulkhead lines, by which a state legislatively maps the limits beyond which the construction or operation of a pier or wharf will be deemed a nuisance, has been recognized as an exercise of the State’s police power. See *Cummings v. Chicago*, 188 U.S. 410, 423-25 (1902) (upholding a statute establishing pierhead and bulkhead lines as a proper exercise of the police power that was not preempted by Congress). Prior to the Compact, the Delaware Supreme Court had similarly recognized that wharves and piers may create nuisances if they obstruct navigation, and that “(t)he lawmaking power of the State is the rightful authority to provide

for the preservation and maintenance of ... a public navigable stream, free and unobstructed, for all the citizens of the State, and if necessary it has authority to enact that even a riparian owner thereon shall not so use his own property-rights as to destroy or obstruct the free navigation of the river.” See *Harlan & Hollingsworth v. Paschall*, supra, 5 Del. Ch. at 10-11 (Del. Ch. 1882).

It is impossible to exercise “riparian jurisdiction of every kind and nature” without the ability to identify the allowable size of riparian improvements, where they may be located, and the manner in which they may be constructed and used. Indeed, long before it agreed to the Compact of 1905, New Jersey regulated the manner in which the riparian right to wharf out could be exercised, in order to protect the public right of navigation in the river. New Jersey’s first legislative enactment on the topic, the 1851 Wharf Act, required that approvals for the filling of offshore lands be limited by the condition that such filling could not interfere with navigation. In fact, prior to 1905, individual grants of riparian lands expressly limited the riparian activities that could be undertaken based on these parameters; after 1914, those grants were subject to the permitting requirements of the Waterfront Development Act. See Statement of Facts at B and E, *supra*. Individual legislative grants also addressed whether dredging could occur, and established limitations on that dredging. (See NJ App. 211a; 1854 N.J. Laws ch.143) (grant to Thomas D. Broadway, providing the right to build a wharf, but imposing the limit that it could not impede navigation). New Jersey further exhibited its commitment to the regulation of riparian grants by the 1877 adoption of pierhead and bulkhead lines applicable to the Twelve Mile Circle by the Board of Riparian Commissioners. See Statement of Facts at B, *supra*.

New Jersey’s longstanding practice of regulating the manner and scope of a riparian owner’s exercise of the right to wharf out prior to 1905 is important not only because it reflects the clear understanding of the parties as to the regulatory interests identified by “riparian jurisdiction of every kind and nature,” but also because the Compact of 1905 provides that New Jersey and Delaware may “continue” to exercise that jurisdiction, each on “its own side of the river.” Based on both the clear import of the use of the term “riparian jurisdiction of every kind and nature,” and the longstanding practice of New Jersey with regard to regulation of riparian uses, it follows that the Compact provided New Jersey with comprehensive authority to regulate all aspects of riparian activities.

**3. Riparian Jurisdiction of Every Kind and Nature Includes the Authority to Apply Laws Limiting the Exercise of Riparian Rights for the Protection of the Public, Including Present Day Environmental Laws.**

The authority to exercise “riparian jurisdiction of every kind and nature” includes the authority to require that riparian improvements and activities comport with current New Jersey regulatory requirements, including the requirements imposed by New Jersey’s environmental laws. This conclusion is inescapable in light of the all-encompassing nature of a grant “of every kind and nature” of riparian jurisdiction. In addition, it is necessary in order to effectuate the stated purpose of the Compact to achieve a “final adjustment” of the disputes between New Jersey and Delaware that can be “binding in perpetuity(.)” See Preamble and Article IX. The common law of riparian rights in each State is subject to change by its courts and Legislature. *Shivley v. Bowlby, supra*, 152 U.S. at 14, 43; *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 379 (1977) (“[T]he states could formulate, and modify, rules of riparian ownership as they saw fit.”); *Kansas v. Colorado*, 206 U.S. 46, 86 (1907) (“power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State”) (internal quotation and citations omitted). Since specific laws necessarily change to address changing needs, a final resolution of all controversies would be effected only if the Compact also resolved the allocation of jurisdiction over any regulatory enactments defining or limiting riparian rights that the states might deem necessary in the future.

Because Article VII does not limit its allocation of jurisdiction to those specific laws in existence at the time of its adoption, it must be interpreted to encompass subsequently adopted laws regulating the exercise of riparian rights. Nevertheless, it is significant that, at the time it was adopted, a number of states, including New Jersey, commonly limited the use of riparian rights in order to protect a number of public interests. These limitations were established based on the assumption that the riparian owner had a right only to the reasonable use of the resources of the stream. See *Hudson County Water Co. v. McCarter, supra*, 209 U.S. at 354. Because the expansion or codification of limitations on riparian uses was foreseeable at the time of the Compact, the authority to impose these limitations must be treated as an element of “riparian jurisdiction of every kind and nature.”

**B. BECAUSE IT WAS SUBJECT TO THE COMPACT OF 1905, THE DECREE IMPLEMENTING THE SUPREME COURT'S 1934 DECISION REAFFIRMED NEW JERSEY'S RIGHT TO EXERCISE RIPARIAN JURISDICTION OVER RIPARIAN IMPROVEMENTS BELOW THE MEAN LOW WATER LINE.**

Delaware has argued in opposition to New Jersey's initial motion that this Court's 1934 decision in *New Jersey v. Delaware II* requires the reinterpretation of the meaning of each state's "own side of the river" to comport with the boundary line established within the Twelve Mile Circle by that ruling. Del. Br. Opp. Mot. Reopen at 25, n. 13; 58 (Oct. 27, 2005). More specifically, Delaware appears to argue that, once the Supreme Court set this boundary at the New Jersey mean low water line, New Jersey's "own side of the river" could only mean the lands on the New Jersey side of that boundary. Thus, Delaware contends that the Compact, as adjusted by the 1935 decision and Decree, limits New Jersey's riparian jurisdiction to the area above its mean low water line.

Delaware's interpretation not only is at odds with the clear language of the Compact, but would render meaningless the Compact's reciprocal allocation of riparian jurisdiction between the two states. The Preamble to the 1905 Compact stated that the intent of the Compact was to achieve "the final adjustment of all controversies relating to the boundary between said states, and to their respective rights in the Delaware River and Bay." Further, upon ratification the Compact was to "become binding *in perpetuity* upon both of said states..." Article IX (emphasis supplied). These provisions make clear that the Compact's allocation of jurisdiction was not dependent on the subsequent establishment of the actual boundary line or territorial limits of either State. *See* Article VIII. Delaware's attempt to reason that the reference to each state's "own side of the river" was included as a type of place holder, pending establishment of the boundary, is directly contrary to the Compact's express language stating that it provides a final resolution of all controversies arising from the disputed boundary.

Delaware's argument, moreover, simply fails to make practical sense. If it is assumed that Delaware correctly asserts that each state's "own side of the river" was used to identify the area that might ultimately be determined to be within their boundaries, Article VII would have provided no guidance to the two states regarding the allocation of riparian jurisdiction during the thirty year period between the ratification of the Compact and the decision in *New Jersey v. Delaware II*, during which that boundary remained in dispute.

Delaware's interpretation would also nullify that portion of the 1935 Decree implementing the Supreme Court's ruling in *New Jersey v. Delaware II*, which expressly made the Court's identification of the boundary within the Twelve Mile Circle subject to the Compact of 1905. The Decree, negotiated and agreed to by the parties, expressly recognized the continued effect of the Compact of 1905, which identified New Jersey's riparian jurisdiction in accordance with the scope and nature of the riparian activities to be regulated, without reference to the location of the boundary. If *New Jersey v. Delaware II* in fact modified New Jersey's riparian jurisdiction under the Compact to comport with the boundary line, the provision making the Decree subject to the Compact of 1905 would be nullified, and New Jersey deprived of the "riparian jurisdiction of every kind and nature" that was guaranteed by the Compact. Indeed, the result would be exactly the same as if the Decree had not made the Supreme Court's ruling subject to the Compact of 1905. New Jersey would have enjoyed not only riparian jurisdiction, but every kind of jurisdiction, up to its territorial boundary even if the Decree resolving *New Jersey v. Delaware II* had expressly nullified the Compact.

Finally, this result would also be directly contrary to the intent of the parties, as expressed in correspondence related to the negotiation of the terms of the Decree. In particular, that conclusion directly contradicts the representations made in a letter from Delaware Special Counsel Southerland to Delaware's Attorney General dated April 18, 1935, in which Mr. Southerland recommended acceptance of New Jersey's suggestion to make the decree subject to the Compact "(f)or the protection of many Delaware corporations who have acquired wharfage rights in New Jersey" (NJ App. 727a.) Delaware's Attorney General approved this suggestion, stating that "I feel his reason for the correction to the present form is proper." (NJ App. 1319a).

In short, the only reasonable interpretation of the Compact is one that conforms to the plain meaning of the phrase "own side of the river," and thus identifies each state's "own side of the river" as the area along its own shore. Because the Compact identifies each state's "own side of the river" for the purpose of establishing riparian jurisdiction, it encompasses those activities or structures extending to a point outward from that shore beyond the mean low water mark, as required by the common understanding of what it means to exercise riparian rights. This interpretation gives full effect to the language of the Compact as described by the New Jersey Commissioners, who reported that, although the geographical boundary remained unsettled, "nevertheless every interest of the

State of New Jersey has been protected, all its riparian, fishery and other rights and jurisdiction thoroughly safeguarded and every question of practical difficulty between the two States settled for all time.” (NJ App. 103a.) This is the same interpretation as that propounded by Delaware Special Counsel Southerland, who asserted at oral argument that “in my view the Compact of 1905 ceded to the State of New Jersey all the right to control the erection of wharves and to say who shall erect them, and it was a very sensible thing to do.” (NJ App. 126a-1).

**II. BASED ON ITS REPRESENTATIONS IN *NEW JERSEY V. DELAWARE II*, DELAWARE IS JUDICIALLY ESTOPPED FROM ASSERTING THAT NEW JERSEY HAS NOT RETAINED ITS FULL RIPARIAN JURISDICTION.**

In *New Jersey v Delaware II*, Delaware made numerous statements to the Special Master and Court conceding New Jersey’s exclusive riparian jurisdiction on the eastern shore of the Delaware River. These statements directly contradict Delaware’s current interpretation of Article VII in this litigation, and reflect New Jersey’s interpretation of the plain language of the 1905 Compact. These statements, however, do not simply confirm of New Jersey’s position in this litigation. Because Delaware relied on this reading of the 1905 Compact to prevail in the border dispute settled in *New Jersey v Delaware II*, Delaware is judicially estopped from now asserting a different reading of Article VII.

Judicial estoppel may be invoked to prevent a party who assumes a certain position in a legal proceeding, and succeeds in maintaining that position, from later assuming a contrary position, especially if the change in position will prejudice the party who has acquiesced in the formal position. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). The purpose of this doctrine is “to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *Id.* at 749-50 (internal citations and quotations omitted).

[S]everal factors typically inform the decision whether to apply the doctrine in a particular case: First, a party’s later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party’s earlier position . . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair

detriment on the opposing party if not estopped. *Id.* at 750-51 (internal citations and quotations omitted).

Delaware's interpretation of the 1905 Compact in *New Jersey v. Delaware II* implicates each of these factors and now judicially estops Delaware from arguing otherwise.

First, any argument that Article VII of the 1905 Compact does not protect New Jersey's full riparian jurisdiction to regulate improvements on its side of the River would be clearly inconsistent with Delaware's position in *New Jersey v Delaware II*. At the time, New Jersey argued that the long history of riparian improvements by New Jersey citizens established New Jersey's ownership to the channel of the Delaware River within the Twelve-Mile Circle and therefore settled the boundary, and that the 1905 Compact confirmed this ownership. (DE App. 212-14.) In response, Delaware argued that these activities did not confer ownership of those lands on New Jersey because, *inter alia*, the activities were simply the manifestation of riparian rights incident to the ownership of riparian lands on the New Jersey shore of the Delaware River. (DE App. 234-35.)

To support its position, Delaware represented to the Special Master and Court that New Jersey's full riparian jurisdiction was continued by the 1905 Compact, conceding both the right of New Jersey citizens to wharf out to navigable water and the exclusive right of New Jersey to regulate that activity. For example, in its Reply Brief to the Special Master, Delaware stated: "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.*" (NJ App. 123a (emphasis added)). Moreover, in its oral argument before the Special Master, Delaware stated:

We say moreover that the Compact of 1905 expressly acknowledged the rights of the citizens of New Jersey, at least, by implication to wharf out, and in my view the Compact of 1905 *ceded to the State of New Jersey all the right to control the erection of those wharves and to say who shall erect them, and it was a very sensible thing to do.* (NJ App. 126a-1 (emphasis added)).

On numerous other occasions, before both the Special Master and the Court, Delaware conceded that the 1905 Compact protected the riparian rights on the New Jersey side of the Delaware River. *See, e.g.*, NJ App. 139a ("[T]he State of Delaware has never questioned the right of citizens of New Jersey to wharf out to navigable water nor can such a right be questioned because it is clearly protected by the Compact of 1905 between the States."); NJ App. 141a ("The effect of

Article VII of the Compact . . . was that the State of Delaware recognized the rights of the inhabitants on the east side of the river to wharf out to navigable water. This right had never been questioned and was undoubtedly inserted to put beyond question the *riparian rights* (as distinguished from *title*) of land owners in New Jersey.”) (emphasis in original). Thus, the first requirement for the application of judicial estoppel is met because Delaware’s current position in this litigation is clearly inconsistent with its position in *New Jersey v. Delaware II*.

The second requirement for the application of judicial estoppel – “whether the party has succeeded in persuading a court to accept that party’s earlier position” – also is met here because Delaware succeeded in persuading the Court to accept its position that the riparian activities identified by New Jersey did not confer ownership of those lands on New Jersey since, *inter alia*, the activities were simply the manifestation of riparian rights incident to the ownership of riparian lands on the New Jersey shore. (DE App. 234-235.) Both the Special Master and the Court accepted Delaware’s argument, as they determined that the boundary within the Twelve-Mile circle be established at the mean low-water mark on the New Jersey shore. (NJ App. 132a.) *See also New Jersey v. Delaware II*, 291 U.S. at 385. This ruling was based, in part, on the conclusion that the 1905 Compact conferred no ownership right on New Jersey in the disputed part of the Delaware River and that New Jersey’s exercise of riparian rights was distinct from any ownership interest in the lands over which those rights were exercised. (NJ App. 131a.) Delaware’s success in making this distinction between the riparian rights enjoyed by New Jersey and its citizens and Delaware’s ownership of the River supports the application of judicial estoppel here.

The third and final requirement for judicial estoppel is met here because Delaware would derive an unfair advantage if it were allowed to argue a position different from the position it asserted in *New Jersey v. Delaware II*. To prevail on the boundary dispute at issue, Delaware conceded that the 1905 Compact both protected the right of New Jersey citizens to wharf out to navigable water and ceded to New Jersey the jurisdiction to regulate the exercise of such rights. In light of these arguments, the Court’s acceptance of Delaware’s position, and the States’ historical activities before and after the 1905 Compact, it would be manifestly unfair to allow Delaware to now argue that the 1905 Compact should be read differently.



### III. THE 1905 COMPACT IS ENFORCEABLE.

The Special Master has identified as an issue: “Is the 1905 Compact unenforceable.” (CMO7, ¶ 1(a)). This issue appears to arise from Delaware’s assertion, which it apparently had not raised prior to this litigation, that the 1905 Compact is unenforceable based on the States’ failure to enact uniform fishing laws in accordance with Article IV of the Compact. Not only is Delaware’s argument patently contrary to the plain language of the Compact, the findings of the Supreme Court in *New Jersey v. Delaware II*, and numerous statements through the years from Delaware officials and representatives recognizing the existence and effect of the Compact, Delaware’s argument ignores the simple fact that the Compact is the law of the United States.

After the States’ approved the Compact in March 1905, Congress ratified the Compact on January 24, 1907, (N.J. App. 14a (Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1907))). Because “congressional consent ‘transforms an interstate compact . . . into a law of the United States . . .,’” *New Jersey v. New York, supra*, 523 U.S. at 811 (quoting *Cuyler v. Adams*, 449 U.S. 433, 438 (1981)), Delaware is in effect arguing that an act of Congress is unenforceable. However, Congress has never repealed this act, so the Compact remains the law of the United States and binding on New Jersey and Delaware, as it has been for nearly 100 years.

Delaware’s argument also is contradicted by the plain language of the Compact itself, which makes clear that it was about more than fishing and that its continuing force and effect did not depend on the enactment of uniform fishing laws. While the Compact contains four articles about fishing (Articles III – VI), it also contains two articles about each State’s respective criminal jurisdiction (Articles I and II), and one article about each State’s respective riparian jurisdiction (Article VII). The Compact also provides that it be submitted to Congress for “consent and approval” and that, upon Congressional ratification, “it shall be and become binding in perpetuity.” (Article IX).

Delaware’s argument also is contradicted by the Supreme Court’s findings in *New Jersey v. Delaware II*, where the Court recognized that the Compact was in effect. In its decision, the Court set the New Jersey-Delaware boundary within the Twelve-Mile Circle at the mean low water line on the New Jersey side, “subject to the Compact of 1905.” *New Jersey v. Delaware II, supra*, 291 U.S. at 385. Further, the Court’s decree provided that its boundaries decision 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.” 295 U.S. at 699.

The Decree’s language referring to the Compact of 1905 reflected an agreement by the Attorneys General of Delaware and New Jersey. That agreement, which implicitly recognized both the Compact’s reach to issues beyond fishing and its continuing force and effect, is consistent with numerous other statements by Delaware officials and representatives about the Compact. For example, in a March 28, 1903 letter to the New Jersey commissioners, the Delaware commissioners recognized that the Compact involved issues beyond fishing by explaining that “opposition to the measure which developed in the Legislature was the reflection of a sentiment among the people of the State unalterably opposed to the surrender directly or indirectly of the title and jurisdiction which the State of Delaware claims to and over the soil and waters of the Delaware River within the twelve mile circle.” (NJ App. 105a-106a.) Similarly, the Delaware enabling legislation re-appointing commissioners in 1905 was not limited to resolving fishing controversies but granted broad negotiating power to reach a “final adjustment of all controversies relating to the boundary line between said states and to their respective rights in the Delaware River and Bay.” (NJ App. 1a (23 Del. Laws ch. 216 (1905)).

More recently, a February 1968 opinion issued by the Delaware Attorney General confirms the continuing force and effect of the Compact despite the States’ failure to enact uniform fishing laws, stating:

It is the opinion of this Office that (1) the Interstate Compact, passed in 1907, is still binding upon both the State of Delaware and the State of New Jersey, and (2) that a law enacted by the Delaware Legislature pertaining to fishing in Delaware Bay would not be effective until a similar law was enacted by the New Jersey Legislature. Del. Op. Atty. Gen. (1968) (NJ App. 1320a-1321a.)<sup>22</sup>

And, even in the days immediately preceding this litigation, Delaware defended its assertion of jurisdiction over the proposed BP Crown Landing project and its more general “right to regulate structures appurtenant to the shore that extend into Delaware waters” by reference to Article VII and VIII of the Compact and the Court’s subsequent decision in *New Jersey v. Delaware II*. (NJ App. 1112a.) At no point did Delaware argue that the Compact was unenforceable or invalid, but instead recognized its continuing force and effect, as well as its relevance to issues other than fishing. Thus,

---

<sup>22</sup> In 1977, the Delaware Attorney General included that the states had retained their ability to adopt separate fishing laws. (Del. Op Atty. Gen. 33 (1977) (NJ App. 360a).)

any current contention by Delaware that the compact is unenforceable is untenable and wholly at odds with both the Compact's language and Delaware's prior statements.

#### **IV. ANY DISPUTE ABOUT NEW JERSEY'S RIPARIAN JURISDICTION UNDER ARTICLE VIII IS RESOLVED IN NEW JERSEY'S FAVOR UNDER THE DOCTRINE OF PRESCRIPTION AND ACQUIESCENCE.**

As between two states, jurisdiction may be obtained by one state through prescriptive action at the other's expense, over the course of a substantial period, during which the latter has acquiesced in the impositions upon it. *See New Jersey v. New York, supra*, 523 U.S. at 807; *Virginia v. Maryland*, 540 U.S. 56, 76 (2003); *Illinois v. Kentucky*, 500 U.S. 380, 384-85 (1991).<sup>23</sup> To establish regulatory jurisdiction in this manner, the state advancing a claim based on prescription and acquiescence must "show by a preponderance of the evidence . . . a long and continuous . . . assertion of sovereignty over" another state's regulatory activities, as well as the second state's acquiescence in the first state's prescriptive acts. *Virginia v. Maryland, supra*, 540 U.S. at 76 (quotations omitted).

Because acquiescence presupposes knowledge, the state advancing a claim of prescription and acquiescence must present either direct evidence that the second state had knowledge of actions by the first state in support of its claim, or evidence of such "open, notorious, visible, and uninterrupted adverse acts" that the second state's knowledge and acquiescence may be presumed. *See New Jersey v. New York, supra*, 523 U.S. at 807. The state advancing the claim also must show that the second state "failed to protest" the first state's assertions of jurisdiction. *Virginia v. Maryland, supra*, 540 U.S. at 77 (quoting *New Jersey v. New York, supra*, 523 U.S. at 807).

Although the Court has "never established a minimum period of prescription' necessary for one State to prevail over a coequal sovereign on a claim of prescription and acquiescence," *Virginia v. Maryland, supra*, 540 U.S. at 76 (quoting *New Jersey v. New York, supra*, 523 U.S. at 789), the Court has stated that "the period must be 'substantial,'" *Virginia v. Maryland, supra*, 540 U.S. at 76 (quoting *New Jersey v. New York, supra*, 523 U.S. at 786). In the Court's most recent discussion

---

<sup>23</sup> It is not apparent, however, that one state can lose a federally-approved compact right through prescriptive acts of another state, as this would amount to one state unilaterally altering a federal law. To our knowledge, no case has held that prescription can alter a federally-approved compact. *Cf. Texas v. New Mexico, supra*, 482 U.S. at 128 ("There is nothing in the nature of compacts generally or of this Compact in particular that counsels against rectifying a failure to perform in the past as well as ordering future performance called for by the Compact.")

of the issue in *Virginia v. Maryland*, the Court noted that in one case, it found a period of 41 years sufficient to prove prescription, *Virginia v. Maryland*, 540 U.S. at 77 (citing *Nebraska v. Wyoming*, 507 U.S. 584, 594-95 (1993)), and in another that a prescriptive period of 64 years is “not insufficient as a matter of general law.” *Virginia v. Maryland*, 540 U.S. at 77 (quoting *New Jersey v. New York*, 523 U.S. at 789). Generally, however, most of the cases involve significantly longer periods. See, e.g., *Georgia v. South Carolina*, 497 U.S. 376, 392-93 (1990) (over 130 years); *California v. Nevada*, 447 U.S. 125, 126 (1980) (“the better part of a century”); *Ohio v. Kentucky*, 410 U.S. 641, 645-52 (1973) (150 years).

**A. Even if Article VII Did Not Give New Jersey the Right to Exercise its Riparian Jurisdiction Over Projects Emanating from the New Jersey Shore, New Jersey Would Have Obtained that Right Through Prescription and Acquiescence.**

As New Jersey explains in Point I above, Article VII clearly grants New Jersey exclusive state jurisdiction to regulate riparian improvements emanating from the New Jersey shore into the Twelve-Mile Circle and to make riparian grants associated with such improvements. However, even if the Court were to conclude that Article VII did not grant New Jersey these rights, New Jersey would have obtained them through prescription and acquiescence. As set forth above, to establish jurisdiction by prescription and acquiescence, New Jersey must demonstrate its “long and continuous . . . assertion of sovereignty over” another Delaware’s regulatory activities, as well as Delaware’s acquiescence in New Jersey’s prescriptive acts. *Virginia v. Maryland, supra*, 540 U.S. at 76 (quotations omitted). Here, New Jersey is able to establish both prongs.

First, the record demonstrates that for at least 117 years – from 1854 to 1971 – New Jersey repeatedly and continuously asserted its jurisdiction over riparian improvements extending from its shore into the Twelve-Mile Circle, without interference by Delaware. By the time the Compact was adopted in 1905, New Jersey had exercised riparian jurisdiction for over 50 years, through laws regulating both the construction of improvements on lands outshore of mean high water and the conveyances of those lands. See, e.g., Wharf Act, 1851 N.J. Laws, p. 335 ((NJ App. 206a) (providing that underwater lands outshore of the low water line could not be filled without approval by the County freeholders, and only if such filling would not impair navigation)); (1869 N.J. Law, ch. 383 ((N.J. Stat. Ann. §12:3-2) (NJ App. 232a) (prohibiting the filling of underwater lands and

the construction of structures outshore of the pierhead and bulkhead lines established by the Board of Riparian Commissioners)). At that same time, New Jersey's regulation of specific properties and improvements on the easterly shore of the Delaware River within the Twelve-Mile Circle dated back to at least 1854. In that year, the New Jersey Legislature allowed Thomas D. Broadway to extend docks, piers or wharves into the Delaware River from the shoreline of what is now Pennsville Township, Salem County, but not "so far into the said river as to injure or impede the navigation of same." (NJ App. 211a (1854 N.J. Laws ch. 143, p. 375).)

From its earliest days, the State of New Jersey has applied its regulatory system to lands on the New Jersey side of the Delaware River within the Twelve-Mile Circle. Indeed, on at least eight occasions from 1854 to 1905, the New Jersey Legislature and then the Board of Riparian Commissioners approved various riparian grants extending below the mean low-water line in the Twelve-Mile Circle area. (NJ App. 372a-375a.) And from 1905 to the present, New Jersey has exercised its riparian jurisdiction in this area on at least thirty-three occasions by approving State tidelands conveyances within the Twelve-Mile Circle. (NJ App. 375a-383a.)

In recent decades, the Legislature has further expanded New Jersey's regulation of riparian lands, including those within the Twelve-Mile Circle, by imposing additional regulatory and permitting requirements. New Jersey has applied these expanded requirements to dredging, pier construction discharge pipes and water diversion structures located outshore of the low-water line within the Twelve-Mile Circle. See Statement of Facts at G and H, *supra*. Thus, the undisputed record establishes that New Jersey continued to convey underwater lands outshore of low water within the Twelve-Mile Circle, to regulate the construction of improvements on those lands, and issue permits for structures or activities on underwater lands outshore of mean low water from 1854 until the present day.

In addition to demonstrating New Jersey's exercise of such riparian jurisdiction in this area from 1854 to the present, the undisputed record also demonstrates Delaware's acquiescence until at least 1971. In fact, rather than object to New Jersey's exercise of jurisdiction during this time period, Delaware routinely recognized New Jersey's right to control the construction of improvements on its side of the Delaware River within the Twelve-Mile Circle, without interference by Delaware.

For example, in *New Jersey v. Delaware II*, New Jersey argued that since 1854, it had

conveyed underwater lands extending from its shoreline on the Delaware River to outshore of the mean low water line without objection from Delaware. New Jersey further contended that the granted underwater lands now contained valuable improvements, and that many of the granted lands had been purchased by Delaware citizens. (NJ App. 136a.) In response, Delaware did not deny that the grants or improvements existed, or argue that the Compact should be ignored. Instead, Delaware contended that the grants and improvements did not conflict with the boundary claimed by Delaware, and that “the Compact in no way affected the boundary line between the States but merely protected the rights of riparian owners on the Jersey shore . . . .” (NJ App. 142a.)

Over twenty years later, the Delaware Highway Department’s attorney, S. Samuel Arsht recommended that the Delaware Highway Department advise the United States Army Corps of Engineers that “the State of Delaware has no jurisdiction over grants that may be made in and to the lands lying under the Delaware River on the New Jersey side thereof and within the twelve-mile circle, and that the prior approval of the State of Delaware in such matters is not required.” (NJ App. 639a.) And the following year, the New Jersey Supreme Court held in *New Jersey v. Federanko*, 139 A. 2d 30 (N.J. 1958), that New Jersey had jurisdiction over a gambling offense that occurred on a pier extending into the Delaware River from the Pennsville shoreline, within the Twelve-Mile Circle. The opinion notes that Delaware filed an amicus brief in the case, in which Delaware adopted New Jersey’s position that the 1905 Compact remained in effect following adjudication of *New Jersey v. Delaware II*. See *Federanko*, *supra*, 139 A. 2d at 33.

Delaware’s acquiescence to New Jersey’s jurisdiction over riparian improvements extending from New Jersey into the Delaware River within the Twelve-Mile Circle is further illustrated by Delaware’s decision not to assert its authority to levy property taxes on such improvements. Shortly after Delaware prevailed on the boundary issue in *New Jersey v. Delaware II*, Delaware enacted a law defining the boundary of the City of Wilmington as reaching the “low water mark upon the easterly side of the Delaware River.” (NJ App. 317a (40 Del. Laws ch. 179 (1935)). But the Legislature specifically barred the City from taxing property on the New Jersey side of the River “until the final determination of the effect of an agreement or compact entered into in the year 1905 . . . .” (NJ App. 318a.) Later that year, Delaware Special Counsel Clarence Southerland reported to the Delaware Attorney General that numerous valuable wharves had been constructed on the New Jersey side of

the river, but never had been taxed by Delaware. Although the possibility of taxing such improvements was raised by Delaware's Attorney General to its Governor in 1938, the charter of the City of Wilmington continues to limit taxation of property on the easterly side of the Delaware River.

Following more than a century of New Jersey's repeated and continuous assertion of exclusive state jurisdiction over riparian improvements emanating from its shore in the Twelve-Mile Circle, and Delaware's acquiescence to New Jersey's jurisdiction, Delaware's first action arguably at odds with its acquiescence came in 1971, when Delaware adopted its Coastal Zone Act. *See* 58 Del. Laws ch. 175 (1971). Since that time, the States' treatment of projects extending from the New Jersey shore into the Twelve-Mile Circle has varied. In some instances, the projects have been regulated by New Jersey without interference by Delaware. *See, e.g.*, NJ App. 824a (dredging permit issued by New Jersey to Dupont in 1982); NJ App. 876a-881a (Year 2000 permits to Township of Pennsville). In other instances, Delaware has sought to assert jurisdiction over such projects, over a property owner's objection. *See, e.g.*, NJ App. 885a (Delaware subaqueous lease to Fenwick Commons). And in the early 1990s, New Jersey and Delaware attempted to agree to a cooperative approach to a review of projects extending from the New Jersey shore beyond the low-water mark. *See* Statement of Facts at K, *supra*. Nevertheless, the record clearly establishes that Delaware made no effort to regulate such activities until 1971.

Thus, even in the absence of Article VII, New Jersey has obtained the rights to convey underwater lands outshore of low water within the Twelve Mile Circle and to regulate improvements on those lands without interference by Delaware, through prescription and acquiescence.

#### **B. Delaware has no Claim of Prescription and Acquiescence against New Jersey.**

To establish jurisdiction by prescription and acquiescence, Delaware must demonstrate its "long and continuous . . . assertion of sovereignty over" New Jersey's regulatory activities, as well as New Jersey's acquiescence in Delaware's prescriptive acts. *Virginia v. Maryland, supra*, 540 U.S. at 76 (quotations omitted). Here, Delaware is unable to establish either prong.

First, Delaware can make no claim that it attempted to regulate riparian improvements emanating from the New Jersey shore prior to 1971, when Delaware first enacted a Coastal Zone

Act.<sup>24</sup> Moreover, Delaware has regulated only a handful of projects since then. As a matter of law, the 35-year period from 1971 to the present with only a few assertions of jurisdiction is wholly insufficient to establish jurisdiction by prescription and acquiescence. *Virginia v. Maryland, supra*, 540 U.S. at 77.

Even assuming such a short prescriptive period would be adequate to overcome a sovereign right granted in a federally approved interstate compact, a claim by Delaware must fail because it cannot show Delaware's "long and continuous" assertion of jurisdiction over riparian improvements in this area or New Jersey's acquiescence to Delaware's claim. Since 1971, the States' treatment of projects extending from the New Jersey shore into the Twelve-Mile Circle has varied. The States' approaches to such projects have included regulation by New Jersey without interference by Delaware, attempts by Delaware to assert jurisdiction over such projects, and a period of attempted cooperation on review of projects extending from the New Jersey shore beyond the low-water mark.

Such a record is clearly insufficient to demonstrate that Delaware has obtained any rights or jurisdiction through prescription and acquiescence. Therefore, New Jersey's motion for summary judgement must be granted.

---

24 Delaware has previously argued that it approved leases in 1962 and 1963 for two pipelines that traversed the River between New Jersey and Delaware. (Del. Br. Opp. Mot. Reopen at 62.) But a pipeline or cable that crosses from one side of the River to the other is not a riparian improvement and, like a bridge, obviously cannot be constructed without permission from both States. Those examples have no bearing on the authority over riparian improvements appurtenant to the New Jersey shoreline.



## CONCLUSION

For the reasons stated above, New Jersey respectfully requests that the Special Master grant New Jersey's motion for summary judgment.

STUART RABNER  
Attorney General

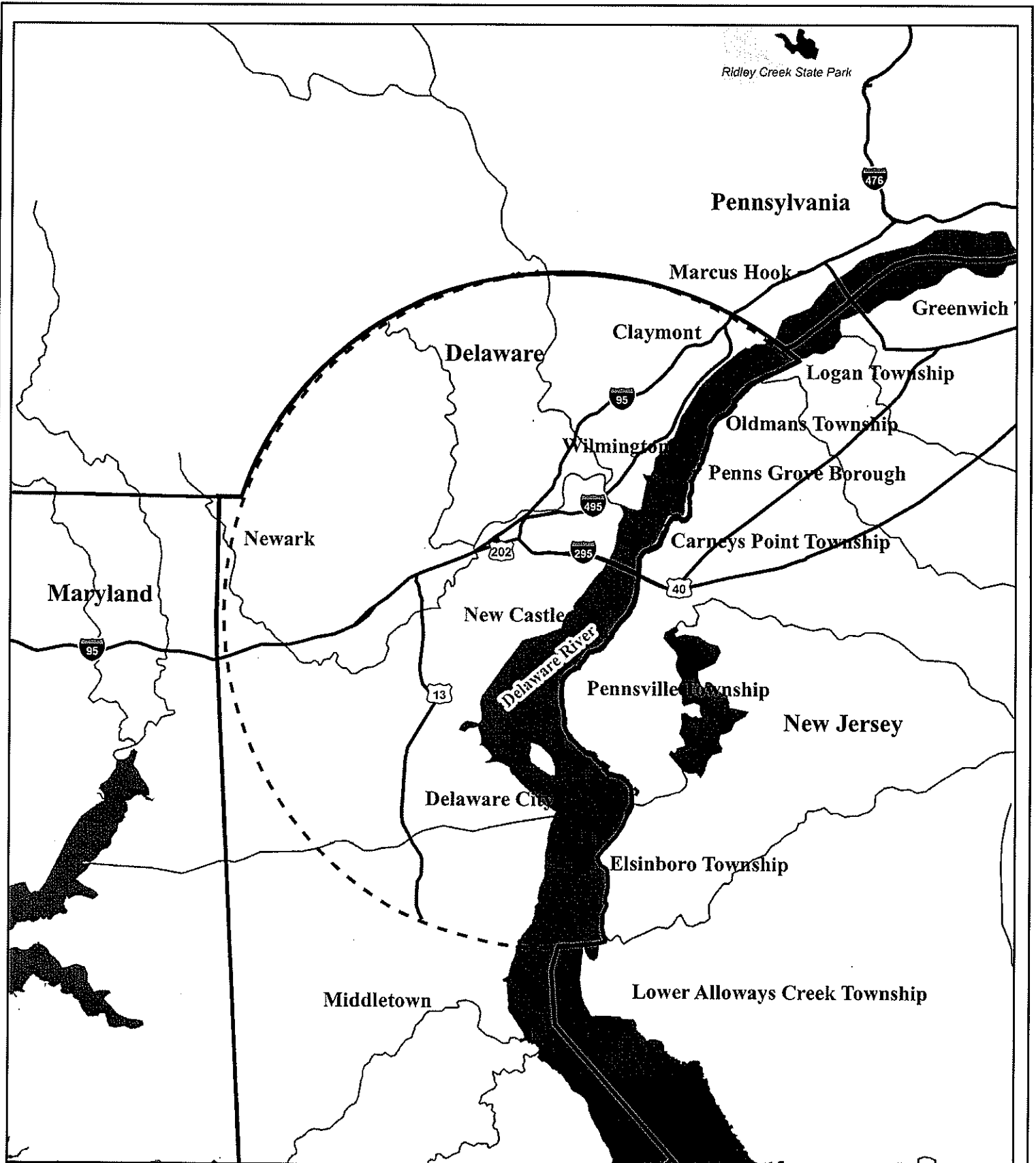
On the Brief

William E. Anderson  
Rachel J. Horowitz\*  
Barbara L. Conklin\*  
Deputy Attorneys General

Amy C. Donlon  
Dean Jablonski  
EILEEN P. KELLY  
Deputy Attorneys General

Of Counsel  
GERARD BURKE  
Assistant Attorney General  
John R. Renella  
Deputy Attorney General  
*\* Counsel of Record*

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



**Exhibit**

Delaware River: Twelve-Mile Circle

