
**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 REPLY BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT AND APPENDIX, VOLUME IX**

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TABLE OF CONTENTS

	<u>PAGE</u>
REPLY TO DELAWARE’S COUNTERSTATEMENT OF FACTS	1
ARGUMENT	
I. BASED ON THE PLAIN LANGUAGE OF ARTICLE VII AND OTHER PARTS OF THE COMPACT, NEW JERSEY HAS EXCLUSIVE STATE JURISDICTION OVER THE CONSTRUCTION, MAINTENANCE AND USE OF RIPARIAN IMPROVEMENTS EXTENDING FROM ITS SHORELINE INTO THE TWELVE MILE CIRCLE	4
II. THE DOCTRINES OF JUDICIAL ESTOPPEL AND PRESCRIPTION AND ACQUIESCENCE ALSO ENTITLE NEW JERSEY TO JUDGMENT IN THIS MATTER.	
 A. Judicial Estoppel	7
 B. Prescription and Acquiescence	10
CONCLUSION	11

TABLE OF AUTHORITIES

CASES

<i>Anjelino v. New York Times Co.</i> , 200 F.3d 73 (3d Cir. 1999)	8
<i>Bank America Corp. v. United States</i> , 462 U.S. 122 (1983)	1
<i>Mayor and Council of Wilmington</i> , 129 A. 512 (Del. Ch. 1925)	6
<i>New Hampshire v. Maine</i> , 532 U.S. 742 (2001)	8
<i>New Jersey v. Delaware II</i> , 291 U.S. 361 (1934)	passim
<i>New Jersey v. New York</i> , 523 U.S. 767 (1998)	11
<i>Newfield Exploration Co. V. Applied Drilling Tech., Inc.</i> , Civil Action No. 01-2746, 2002 U.S. Dist. LEXIS 24911 (E.D. La., Jan. 2, 2003)	8
<i>Scranton v. Wheeler</i> , 179 U.S. 141, 163(1900)	6
<i>Utah Power & Light Co. v. United States</i> , 243 U.S. 389 (1917)	2

STATUTES, SESSION LAWS, AND CODES

16 U.S.C. §1456(e)(1)	2
N.J. Stat. Ann. §32:11E-1	3
58 Del. Laws ch. 175 (1971)	10

REPLY TO DELAWARE'S COUNTERSTATEMENT OF FACTS

Article VII of the 1905 Compact protected New Jersey's right to continue to exercise, on its own side of the Delaware River, "riparian jurisdiction of every kind and nature" and to "make grants, leases and conveyance of riparian lands and rights" under its laws. Thus, the Compact allowed New Jersey to continue its practice of regulating the development of improvements extending from its shoreline and conveying related property interests, free of regulation by Delaware. That practice began in 1854 and continued until 2005, a period of 117 years.

Delaware argues for a contrary reading of the Compact, based on a strained reading of its plain language, and emphasis on events postdating 1971 and other compacts. *See* Del. Opp. Bf¹ at 2-18. However, the Compact's plain language must govern, and the parties' conduct closely preceding and following 1905 and the 1934 decision afforded much greater weight than conduct many decades later. *See* NJ Opp. Bf at 12-13, 25-30; *Bank America Corp. v. United States*, 462 U.S. 122, 130-32 (1983)(rejecting new statutory interpretation in favor of government's earlier construction). Moreover, a number of Delaware's factual allegations concerning events after 1971, as well as its claim that New Jersey's witnesses did not support its theory of the case (Del. Opp. Bf at 59), do not withstand scrutiny when the record is examined.²

¹In this brief, "NJ Bf" refers to New Jersey's opening brief filed in support of summary judgment; "Del. Bf" refers to Delaware's opening brief; "Del. Opp. Bf" refers to Delaware's opposition brief; and "NJ Opp. Bf" refers to New Jersey's opposition brief.

²For example, Delaware asserts that New Jersey "routinely recognized Delaware's right to exercise veto power over structural additions emanating from New Jersey into Delaware" (Del. Opp. Bf at 1), but the record shows that Delaware never exercised "veto power" until 2005; and that a 1954 New Jersey Attorney General opinion concluded that New Jersey had exclusive authority to grant tidally-flowed underwater lands outshore of low water within the Twelve Mile Circle, which opinion was provided to Delaware's Chief Deputy Attorney General in 1956 (*See* NJ Bf at 17). Delaware also states that New Jersey's coastal management plan "shows substantial interaction with and review by the New Jersey Attorney General" (Del. Opp. Bf at 11). However, the portions of the record Delaware cites do not refer to the Compact, but to a

Delaware focuses on New Jersey's efforts to cooperate with Delaware following enactment of the federal Coastal Zone Management Act ("CZMA"), but those efforts cannot deprive New Jersey of its compact rights. *Cf. Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917)(laches by government officers is no defense to a suit to enforce public right). The CZMA of 1972 encouraged cooperation within government, and did not modify or supersede any interstate compact. *See* NJ Bf at 21; 16 U.S.C. §1456(e)(1). Further, while New Jersey's 1980 coastal zone management plan stated that projects located in both states would need permits from both, the plan never mentioned the Compact (NJ Bf. at 22); New Jersey never adopted any rule making this statement enforceable;³ and as of 1980 no development that might have precipitated conflict had been pursued (*see* Del. App. 2511-12, NJ App. 1055a).⁴ Thus, New Jersey's 1980 plan did not

legal opinion addressing the scope of New Jersey's authority over development *landward* of the shoreline (DE App. 3023-26), as well as to a statement by New Jersey witness Steven Whitney that he had "no specific knowledge" of whether the coastal plan was reviewed by counsel (DE App. 787, 781). As a third example, Delaware alleges that New Jersey's 1979 Options Report "extensively analyzed Delaware's coastal zone laws" (Del. Opp. Bf at 8), but the record cited (DE App. 2383-2517) contains only a few pages discussing Delaware law (DE App. 2509-12) or the New Jersey-Delaware boundary (DE App. 2401, 2427, 2449, 2451), and no references to the Compact. With respect to the testimony of those New Jersey witnesses that Delaware deposed, Delaware ignores statements by Richard Castagna and James Johnson, both of whom expressed an understanding that based on the Compact, New Jersey could exercise riparian jurisdiction over underwater lands outshore of the New Jersey-Delaware boundary. *See* DE App. 512 at T186, 628 at T37.

³New Jersey has appraised the federal coastal planning authorities of this litigation and its position regarding the Compact. *See* NJ App. 1528a.

⁴(Reciting that the only experience with Delaware's Underwater Lands Act and development in New Jersey was in 1971, when Dupont received a lease from Delaware to dredge, fill and bulkhead at its Chambers Works plant). As discussed previously, after Dupont objected to the Delaware lease, the lease was made "without prejudice" to either party's claim of title and Delaware did not collect any lease payments. *See* NJ Bf at 19-20.

reflect the Compact's provisions or any concrete experience.⁵ New Jersey permits issued after 1980 for projects in the Twelve Mile Circle also did not refer to the Compact, except for a 1991 analysis that recognized New Jersey's authority to issue a riparian lease for the entire Keystone Cogeneration project and that Delaware also had "assumed jurisdiction" over the project (DE App. 3519-20; NJ App. 839a-40a).

Similarly, Delaware improperly relies on a 1961 compact between New Jersey and Delaware, and on a draft Memorandum of Agreement ("MOA") the states discussed in the early 1990s. The 1961 compact created the Delaware River and Bay Authority ("DRBA") as a bi-state agency to address river crossings. Such crossings are not "riparian" and thus are not relevant. *See* NJ Opp. Bf at 7- 9. Moreover, as Delaware concedes and as is clear from the face of the 1961 compact, that compact applies only to DRBA-sponsored projects. *See* Del. Opp. Bf at 44; N.J. Stat. Ann. §32:11E-1 (defining "project") (DE App. 4434-35). Thus, it does not illuminate the 1905 Compact.⁶

Delaware's emphasis on an abandoned effort by New Jersey to enter into an MOA with Delaware in the 1990s likewise cannot overcome the Compact's plain language or the parties' conduct during the many decades preceding and following 1905. The MOA was never finalized or

⁵This lack of experience also is reflected in a letter sent by a New Jersey environmental official, Steven Whitney, to a Delaware environmental official, in 1991. Through that letter, Whitney forwarded a copy of the application received by New Jersey from Keystone Cogeneration Systems for a boundary-straddling project, and suggested that "[c]onsidering our federal Coastal Zone Management Grant task to produce a better coordination effort for development of this kind, I am forwarding to you this application for your review. This application might be a good *prototype for us to scope out some [of] the details we will need to address.*" (NJ App. 869a; DE App. 3511)(emphasis added).

⁶Although not relevant to interpreting the 1905 Compact, the 1961 compact did address ferry crossings. The Fort Mott project approved by both New Jersey and Delaware in 1996 included such a crossing between a New Jersey state park and historic forts in Delaware (NJ App. 882a; DE App. 3631, 3635, 3649, 3655).

reviewed by counsel (NJ App. 1073a, 1075a, 1080a), and did not address the Compact (*see* DE App. 780(T35-T36); 799 (T113); 586).⁷ In contrast, the 1905 Compact was adopted by the legislatures of both states and approved by Congress, after which this Court held that the New Jersey-Delaware boundary within the Twelve Mile Circle was “subject to” the Compact.

ARGUMENT

I. BASED ON THE PLAIN LANGUAGE OF ARTICLE VII AND OTHER PARTS OF THE COMPACT, NEW JERSEY HAS EXCLUSIVE STATE JURISDICTION OVER THE CONSTRUCTION, MAINTENANCE AND USE OF RIPARIAN IMPROVEMENTS EXTENDING FROM ITS SHORELINE INTO THE TWELVE MILE CIRCLE.

New Jersey is entitled to summary judgment because its interpretation of Article VII follows its plain language. Delaware attempts to cloud the plain language of Article VII by arguing that in 1905 the States intended to defer resolution of the extent of riparian jurisdiction until the boundary was resolved; that New Jersey’s Article VII jurisdiction does not extend outshore of low water or confer new rights; and that riparian jurisdiction “of every kind and nature” excludes police power jurisdiction exercised to protect public rights. These arguments are baseless.

As New Jersey previously explained, Article VII sets forth the scope of each State’s jurisdiction in precise terms tailored to the subject matter. Like the compact at issue in *Virginia v. Maryland*, which provided that the citizens of each state would have full property “in the shores of the Potowmack River adjoining their lands,” Article VII of the 1905 Compact addresses riparian rights and jurisdiction by identifying the shore to which riparian rights are appurtenant, giving New Jersey full authority over those rights on its side of the Delaware River, and Delaware full authority

⁷Conversely, when the Compact was expressly brought to Delaware’s attention in 1957, 1971 and 1981, it declined to press its claims. *See* NJ Bf at 17-20; NJ Opp. Bf at 7-8.

on the opposite side. Moreover, while Compact Articles V and VI expressly state the limits of the Compact, Article VII provides an affirmative, reciprocal allocation of jurisdiction, without any express limitation. In light of this contrast, Article VII plainly is not a savings clause. *See* NJ Opp. Bf at 14-17, 21-22.

Delaware argues that Articles I and II support its position, because Article I uses the term “eastern half of the river” while Article VII refers instead to each State’s “own side of the river.” Del. Opp. Bf at 32-34. However, Article I undermines Delaware’s contentions, by precluding service of process by Delaware over vessels attached to docks and piers attached to the New Jersey shoreline,⁸ while allowing New Jersey to serve process for criminal offenses committed on the eastern half of the river. Article I’s failure to provide Delaware with criminal jurisdiction over wharves and docks attached to New Jersey, or over vessels secured to those structures, is wholly at odds with Delaware’s claim that Article VII reserved to Delaware broad police power jurisdiction over riparian structures appurtenant to the New Jersey shoreline.

Delaware’s argument that riparian regulation by New Jersey before 1905 did not constitute the exercise of police power (Del. Bf at 37-38) is similarly baseless. Regulation of pier and wharf construction to protect public navigation is an element of the police power, with its roots in the law of nuisance. *See* NJ Bf at 30, 32; NJ Opp. Bf at 38-43; NJ Bf at 10 (citing 1914 New Jersey law describing unapproved waterfront development as a “public nuisance”). Similarly, the decision to issue grants of underwater lands to riparian owners inherently requires a determination that the

⁸Delaware contends that Article I gives it authority over New Jersey docks and piers by allowing Delaware to serve process on a vessel attached to such a pier if the vessel already was under arrest or seizure by Delaware before being secured to the dock. Instead of supporting Delaware’s argument, this extremely narrow exception underscores Delaware’s inability to serve process for criminal offenses on New Jersey piers except in this highly limited circumstance.

exercise of the private right is consistent with the public interest, since the government holds these lands in trust for the public. *See* NJ Opp. Bf at 39. Delaware’s contention that these regulatory actions were simply property right determinations defining the scope of the riparian right ignores the fact that all exercises of the police power limit private rights or balance them with public rights, to protect the public interest. *See Mayor and Council of Wilmington*, 129 A. 512, 515 (Del. Ch. 1925)(losses to property caused by valid exercises of police zoning power is “one of the conditions with which the right of property is burdened.”); NJ Opp. Bf at 39-43.⁹

Delaware also contends that in arguing that “riparian jurisdiction of every kind and nature” encompasses police power jurisdiction over riparian improvements, New Jersey confuses jurisdiction with sovereignty. This contention draws a distinction where none exists. Jurisdiction clearly is an aspect of sovereignty. *See* NJ App. 1317a (1898 definition of “jurisdiction”). Article VII’s allocation of riparian jurisdiction “of every kind and nature” plainly includes this established aspect of sovereign jurisdiction. Moreover, the boundary set in 1934 was subject to the Compact.

Finally, Delaware misinterprets New Jersey’s statement that it is impossible for New Jersey to exercise riparian jurisdiction “of every kind and nature” over riparian improvements appurtenant to its shore, if Delaware also can exercise regulatory authority over the same structures. New Jersey’s argument is not based on the impracticality of implementing concurrent jurisdiction, but on the fact that the division of jurisdiction Delaware suggests conflicts with New Jersey’s ability

⁹Delaware cites several cases that characterize the right of the government to limit riparian improvements as creating a “servitude” on the riparian owner’s right. *See* Del. Bf at 38 (citing *Scranton v. Wheeler*, 179 U.S. 141, 163-64 (1900)). These cases reflect the fact that a riparian owner’s interest is subject to the paramount right of the United States to provide for commerce and navigation, without the need to compensate the riparian landowner. *Id.*, 179 U.S. at 162-63. The cases do not stand for the proposition that when a State limits private property rights to protect navigation and promote commerce, it is exercising something other than police power.

to exercise “every kind and nature” of riparian jurisdiction. Moreover, none of Delaware’s illustrations of concurrent jurisdiction would have the effect of the division of authority it proposes, which would allow one state to control or even prohibit development of the uplands along another state’s shoreline, by controlling riparian improvements. This is an issue of obvious importance to New Jersey, as it was in 1905 when both states assured through Article VII of the Compact that each state would be able to control the development of its waterfront and the amount and nature of access to navigable waters on its side of the Delaware River,¹⁰ without interference by the other state.

II. THE DOCTRINES OF JUDICIAL ESTOPPEL AND PRESCRIPTION AND ACQUIESCENCE ALSO ENTITLE NEW JERSEY TO JUDGMENT IN THIS MATTER.

A. Judicial Estoppel

As New Jersey previously explained, Delaware is judicially estopped from contesting New Jersey’s exclusive riparian jurisdiction on the eastern shore of the Delaware River in the Twelve-Mile Circle because of statements by Delaware in *New Jersey v. Delaware II* 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. (NJ Bf at 35-37.)

Delaware responds to New Jersey’s argument, and the statements cited, by distinguishing

¹⁰Delaware presents additional “plain language” arguments, but none withstand scrutiny. Delaware asserts that each state’s “own side of the river” refers to the area within its boundary, without explaining why, if that was intended, the term “boundary” was not used. Delaware also does not explain how Delaware’s “side” of the river could include both the western side of the river and the area outshore of low water within the eastern half of the river, giving Delaware jurisdiction over improvements appurtenant to New Jersey’s side of the river, not Delaware’s side. Similarly, Delaware alleges that “continue to exercise” does not confer new rights, but ignores the fact that the ability to continue to exercise “riparian jurisdiction of every kind and nature” necessarily includes the ability to enact and apply new legislation. Delaware emphasizes the fact that Article VII does not use the term “exclusive,” but fails to explain how “exclusive” jurisdiction differs from “jurisdiction of every kind and nature.” In fact, Delaware never addresses the import of the phrase “every kind and nature” at all.

between statements to the Court and to the Special Master, asserting that the latter cannot give rise to a claim of judicial estoppel because the master can only recommend a disposition of a matter. (Del. Opp. Bf at 50-51.) This Delaware response implicitly assumes that a different standard applies to proceedings before the court itself and other aspects of a legal proceeding. Delaware's argument thus ignores the fundamental purpose of judicial estoppel, "to protect the integrity of the judicial process" and "to prevent improper use of judicial machinery." *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (internal citations and quotations omitted). Understandably, courts have not recognized such a distinction, but have found judicial estoppel based on a party's statements before a federal magistrate judge, whose authority is limited to recommendation to a federal district judge for final disposition. See, e.g., *Anjelino v. New York Times Co.*, 200 F.3d 73, 76-78 (3d Cir. 1999); *Newfield Exploration Co. v. Applied Drilling Tech., Inc.*, Civil Action No. 01-2746, 2002 U.S. Dist. LEXIS 24911 (E.D. La., Jan. 2, 2003).

Delaware also contends that judicial estoppel should not apply because the *New Jersey v. Delaware II* Court did not actually rely on Delaware's statements concerning riparian rights and jurisdiction. (Del. Opp. Bf at 48-50, 53-54.) This assertion is simply incorrect. Delaware prevailed in *New Jersey v. Delaware II*, in part, by persuading the Court of the distinction between the riparian rights enjoyed by New Jersey and its citizens under Article VII and Delaware's ownership of the River (NJ App. 131a.) Both the Special Master and the Court accepted this argument, as they determined to establish the boundary within the Twelve-Mile Circle at the mean low-water mark on the New Jersey shore. (NJ App. 132a.) See *New Jersey v. Delaware II*, 291 U.S. 361, 385 (1934).

Delaware also argues that its statements from *New Jersey v. Delaware II* are not clearly inconsistent with its current position because it never conceded New Jersey's right to regulate riparian rights on the New Jersey side of the River. (Del. Opp. Bf at 46-47, 51-53). Delaware places

particular reliance on the following statement it made to the Court:

Even if the Compact of 1905 can be construed as ceding to the State of New Jersey the right to determine to whom riparian rights (i.e., wharf rights appurtenant to riparian lands) shall be granted, it would still not affect the boundary between the State in any conceivable way. The boundary line would continue to be low water mark. (NJ App. 142a (first emphasis added).)

Delaware's reliance on this statement is misplaced because it ignores the context in which it was made. In its exceptions to the Special Master's report, New Jersey argued that the boundary should be in the channel of the River because the Compact established its "ownership of the subaqueous soil thereof." (NJ App. 136a). In response, Delaware argued that although the Compact protected New Jersey's riparian rights and control over riparian improvements, it did not grant New Jersey ownership to the middle of the channel. Thus, rather than contesting New Jersey's authority, Delaware was effectively conceding that the Compact granted New Jersey this regulatory authority. Indeed, Delaware confirmed this was its position on at least two other occasions, expressly stating that the Compact ceded regulatory authority to New Jersey. *See* NJ App. 123a ("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.*") (emphasis added); NJ App. 126a-1 ("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."). In short, the "Even if" excerpt was simply the third time that Delaware conceded New Jersey's regulatory authority in *New Jersey v. Delaware II*,¹¹ a case in which Delaware never contended that it had any right to regulate the construction, maintenance, or use of riparian improvements on the New Jersey side of the River.

¹¹Counsel for Delaware's Highway Department made a similar concession in 1957. NJ Bf at 18.

B. Prescription and Acquiescence

New Jersey has explained that it also can establish its exclusive jurisdiction over riparian improvements in the Twelve Mile Circle through prescription and acquiescence. (NJ Bf at 40-44.) Delaware responds in much the same manner as it has responded to any argument concerning the States' course of performance – by ignoring or minimizing the significance of the long history preceding and immediately following 1905 and instead focusing on more recent conduct.¹² (See Del. Opp. Bf at 55-60; see also Del. Bf at 16-21, 45). Nevertheless, as previously explained, to the extent that extrinsic evidence is needed to interpret a compact, both its legislative history and contemporaneous construction are given much greater weight than more recent conduct. (See NJ Opp. Bf at 13, 24-30). More importantly, however, Delaware's focus on more recent evidence cannot obscure the fact 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.¹³

¹² Delaware does not appear to argue that New Jersey lost its Compact rights through prescription and acquiescence, and such an argument clearly would fail. At most, any prescriptive period was only 34 years, running from 1971, when Delaware tried to require a lease from DuPont (DE App. 3395) and then enacted the Delaware Coastal Zone Act, 58 Del. Laws ch. 175 (1971), to April 2005, when New Jersey formally demanded that Delaware cease its efforts to require permits for riparian projects on the New Jersey side of the River (NJ App. 1109a). As Delaware concedes, such a period is too short as a matter of law for New Jersey to have lost its federally- approved Compact rights. (Del. Bf Opp. at 57.) Moreover, many events occurred during this 34-year period that interrupted any prescriptive claims by Delaware. See, e.g., NJ App. 610a, 616a, 657a, 676a, 824a, 827a, 870a, 876a, 879a, 939a-1 (New Jersey's issuance of dredge permits to maintain piers and structures outshore of the mean low-water mark and to maintain existing structures built under permits issued by New Jersey); NJ App. 653a, 1303a (Delaware's acquiescence to DuPont's opposition to a Delaware fee for DuPont's structures on the New Jersey side of the River).

¹³ As Delaware notes, the analysis of prescription and acquiescence in *New Jersey v. New York*, 523 U.S. 767, 789 (1998), clearly contemplates that New Jersey's post-1971 actions do not prevent establishing its rights based on a 117-year prescriptive period that began in 1854.

CONCLUSION

For these reasons and those previously stated, New Jersey's motion for summary judgment should be granted.

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Dated: February 15, 2007

Appendix, Volume IX

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June 13, 2005

Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
888 First St. NE, Room 1A
Washington, DC 20426

Re: Crown Landing LNG Project,
Docket No. CP04-411-000 et al
Letter of Susan Kennedy, NOAA, dated April 18, 2005

Dear Secretary Salas:

I am writing with regard to NOAA's comments on the Draft Environmental Impact Statement, submitted to you on April 18, 2005, and specifically to address NOAA's comments on the application of the Coastal Zone Management Act (CZMA) to this project. In those comments, NOAA states that the FEIS should state that the States of Delaware, New Jersey and Pennsylvania only can review that part of the project located within each State's respective territorial boundary, because none of the three States has completed certain interstate consistency consultation and program change processes.

The State of New Jersey, Department of Environmental Protection respectfully disagrees with this statement by NOAA. As explained in our letter to BP representatives of May 24, 2005, which was forwarded to you on May 25, 2005, the 1905 Compact between New Jersey and Delaware recognizes that New Jersey has exclusive riparian jurisdiction, of every kind and nature, on its side of the Delaware River. The CZMA provides that nothing within it shall displace, supersede, limit, or modify any interstate compact. Consequently, New Jersey has the right to regulate docks, wharves, piers, etc, and associated dredging that is needed to use the dock/wharf/pier, on its side of the river, under NJ laws. Furthermore, under the Compact, New Jersey has the right to federal consistency review over the docks, wharves, piers, etc, and associated dredging that is needed to use the dock/wharf/pier, on its side of the river, for consistency with New Jersey's enforceable policies. This includes both those parts of the project that are located in New Jersey, and that portion of the project located in the Delaware River that extends into Delaware.

If you have any questions regarding the above, please feel free to contact me at (609) 292-8838.

Sincerely yours,

Suzanne U. Dietrick, Chief
Office of Dredging and Sediment Technology
Site Remediation and Waste Management Program

c: Susan A. Kennedy, NOAA
David Blaha, ERM
Laurie Bepler, BP Crown Landing
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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.**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of February, 2007, counsel for the State of New Jersey caused New Jersey's Reply Brief in Support of Motion for Summary Judgment, and Volume IX of New Jersey's Appendix on Motion for Summary Judgment to be served upon counsel for the State of Delaware in the manner indicated below:

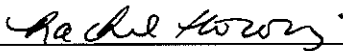
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