

SUPREME COURT OF THE UNITED STATES

NO. 134, ORIGINAL

ORIGINAL

STATE OF NEW JERSEY, )  
 )  
 Plaintiff )  
 )  
 V. )  
 )  
 STATE OF DELAWARE, )  
 )  
 Defendant )

TELEPHONE CONFERENCE before Special Master  
 RALPH I. LANCASTER, JR., ESQ., held at the law offices  
 of Pierce Atwood at One Monument Square, Portland, Maine,  
 on June 7, 2006, commencing at 10:05 a.m., before  
 Claudette G. Mason, RMR, CRR, a Notary Public in and for  
 the State of Maine.

APPEARANCES:

For the State of New Jersey: RACHEL J. HOROWITZ, ESQ.  
 DEAN JABLONSKI, ESQ.  
 EILEEN P. KELLY, ESQ.

For the State of Delaware: DAVID C. FREDERICK, ESQ.  
 SCOTT H. ANGSTREICH, ESQ.  
 SCOTT K. ATTAWAY, ESQ.  
 MATTHEW F. BOYER, ESQ.

Also Present: MARK E. PORADA, ESQ.  
 STUART A. RAPHAEL, ESQ.



1 Thank you.

2 SPECIAL MASTER: And just to clarify,  
3 Mr. Raphael yesterday, without objection by the  
4 other counsel, requested an opportunity to listen  
5 to this morning's oral argument, which we'll  
6 finish -- which will follow when we're finished  
7 with the conference call on the progress reports.

8 And welcome, Mr. Raphael, as an observer.

9 MR. RAPHAEL: Thank you, Mr. Lancaster.

10 SPECIAL MASTER: Turning to the progress  
11 reports, counsel, once again, they indicate no  
12 major problems, which is clearly indicative of the  
13 continued cooperation of counsel, which I  
14 certainly appreciate.

15 It appears we're right on schedule. We have  
16 now moved into the more active discovery phase of  
17 the proceeding. And I'm hopeful that as minor  
18 discovery questions or disputes arise, as we all  
19 know they inevitably will, that counsel will  
20 continue to cooperate to resolve them  
21 collaboratively.

22 There's a roughly six-month window left for  
23 completion of discovery. And I'm confident that  
24 if the same level of cooperation continues, we can  
25 stay on schedule and complete the discovery by the

1 end of October.

2 Having read the progress reports, I don't see  
3 that there's anything of substance in there that  
4 we need to discuss. So let me ask whether there's  
5 anything else that either state wishes to add by  
6 way of supplement to its latest progress report.

7 New Jersey?

8 MS. HOROWITZ: No, we don't have anything to  
9 add other than to note obviously that the motions  
10 are pending, as noted in Delaware's progress  
11 report. We are continuing to review Delaware's  
12 interrogatories; and a number of them, I would  
13 note for the record, do address issues that are  
14 the subject of today's motion.

15 SPECIAL MASTER: All right. Delaware?

16 MR. FREDERICK: I would like to note for the  
17 record, Mr. Lancaster, that Delaware --

18 SPECIAL MASTER: Excuse me. Is this  
19 Mr. Frederick?

20 MR. FREDERICK: Yes, it is.

21 SPECIAL MASTER: Thank you.

22 MR. FREDERICK: -- that Delaware strenuously  
23 objects to certain statements made in recent  
24 filings by both counsel for New Jersey and BP  
25 suggesting that we have --

1           SPECIAL MASTER: Mr. Frederick, excuse me.

2           There was a break in the reception here.

3           Ms. Mason, where was it?

4           (The reporter read the requested testimony.)

5           SPECIAL MASTER: Suggesting that we have  
6 something, and then there was a break.

7           Mr. Frederick, if you could pick it up there again  
8 for the record.

9           MR. FREDERICK: Sure. Suggesting that we  
10 have been feeding information to the press for  
11 purposes of besmirching either BP or New Jersey.  
12 I would like the record to reflect that on May 9  
13 we received one request for a public document from  
14 a member of the press. We have scrupulously filed  
15 and followed the confidentiality designations that  
16 BP has now withdrawn, and we provided a public  
17 version only of that document. And it turned out  
18 that was six days before the office of the Special  
19 Master announced that it would be setting up a  
20 website containing links to all of the public  
21 documents.

22           SPECIAL MASTER: The record will reflect your  
23 concern. And I'm sure that I am -- I'm confident  
24 that despite perhaps the rhetoric, neither New  
25 Jersey nor BP intended in any way to suggest that

1 Delaware had done something wrong.

2 Anything else, Mr. Frederick, that you want  
3 to add to supplement your latest progress report?

4 MR. FREDERICK: Not at this time.

5 SPECIAL MASTER: The next progress report is  
6 due, by my record, on July 7 and the next  
7 conference call on July 11. And then we have a  
8 subsequent progress report and conference call  
9 scheduled for August 7 and August 8. I suggest  
10 that we set September 5 and September 6 for the  
11 September progress report and conference call  
12 respectively.

13 How are those dates, New Jersey?

14 MS. HOROWITZ: Those are fine with New  
15 Jersey.

16 SPECIAL MASTER: Delaware?

17 MR. FREDERICK: I believe those dates will be  
18 fine, Mr. Lancaster. It is -- I would note it's  
19 the day after Labor Day.

20 SPECIAL MASTER: It is exactly that. And I  
21 set them or I suggest them specifically because of  
22 my own schedule, which will require me to be out  
23 of the country shortly thereafter on another  
24 matter. But if those dates are inconvenient for  
25 any reason, I wish you would let me know promptly

1 so that we could find alternate dates.

2 Not hearing from anybody at this juncture,  
3 we'll set them tentatively. And if it turns out  
4 that they are, for some reason, inconvenient, if  
5 you will let me know as soon as possible, we'll  
6 look at other dates. Is that acceptable, counsel?

7 New Jersey?

8 MS. HOROWITZ: Yes, that's fine with New  
9 Jersey.

10 SPECIAL MASTER: Delaware?

11 MR. FREDERICK: Yes. That's fine.

12 SPECIAL MASTER: Now, before we proceed to  
13 oral argument on New Jersey's Motion to Strike,  
14 let me just run the numbers here and inquire as to  
15 the status of other matters. We have pending BP's  
16 Motion to Quash, in part, Delaware's subpoenas;  
17 and we had pending Delaware's Motion to Strike  
18 BP's designation of confidentiality as to its  
19 privilege log and supporting declarations.

20 I understand from Mr. Frederick's e-mail  
21 yesterday that that designation has been withdrawn  
22 by BP, and so that would leave us only with BP's  
23 Motion to Quash, on which briefing will be  
24 completed on Monday.

25 Is my understanding correct, New Jersey?

1 MS. HOROWITZ: Yes.

2 SPECIAL MASTER: Delaware?

3 MR. FREDERICK: Yes, sir.

4 SPECIAL MASTER: Okay, good. Well, with  
5 that, that brings us to oral argument on New  
6 Jersey's Motion to Strike with Mr. Raphael as an  
7 observer.

8 Once again, I commend counsel on their  
9 cooperative and collaborative approach to the  
10 handling of this matter. I suggested earlier that  
11 counsel might want to address the issues seriatim  
12 rather than collectively. And I assume that you  
13 have discussed that suggestion and have decided  
14 how you want to proceed.

15 As I indicated in my earlier e-mail, I'm  
16 perfectly comfortable with any process that meets  
17 counsels' approval. So let me -- let me ask  
18 counsel as to what process you want to follow  
19 here, Ms. Horowitz, Mr. Frederick.

20 MS. HOROWITZ: The process we would like to  
21 follow, Mr. Lancaster, is to first address issue 2  
22 followed by issues 1 and 6 and then by issues 8  
23 and 9. And we would like to, on New Jersey's  
24 behalf, provide a statement with respect to all of  
25 those issues at one time rather than breaking them



1 up. But that's our proposal as to how to group  
2 the issues.

3 SPECIAL MASTER: Mr. Frederick?

4 MR. FREDERICK: I had not anticipated --

5 SPECIAL MASTER: Sorry. Again,  
6 Mr. Frederick, you broke off. You said I had not  
7 anticipated a discussion; is that what you said?

8 MR. FREDERICK: Yes, with New Jersey prior to  
9 the call. But my anticipation was to address  
10 jurisdiction first --

11 SPECIAL MASTER: I'm sorry. Unfortunately,  
12 you broke off again. You said my --

13 MR. FREDERICK: Yes. I believe there may be  
14 someone on a cell phone on this call.

15 SPECIAL MASTER: Is that correct? Is someone  
16 on a cell phone?

17 Apparently not.

18 MS. HOROWITZ: No one from New Jersey is on a  
19 cell phone.

20 SPECIAL MASTER: Okay. So apparently not.  
21 It must just be the weather. It's raining in  
22 Maine as it has been since the end of April.

23 Let's go ahead. What -- again,  
24 Mr. Frederick, if you would state your suggestion.

25 MR. FREDERICK: Well, my suggestion was to go

1 to the jurisdiction issue first, plus the Issues  
2 of Fact --

3 SPECIAL MASTER: Excuse me. Again, for some  
4 reason your response is breaking up here,  
5 Mr. Frederick. So I'm going to have to ask you to  
6 repeat it. And if, again, it breaks up, we'll  
7 hang up; and then we'll come back again. Would  
8 you state that once more.

9 MR. FREDERICK: Yes. My suggestion was to  
10 address the jurisdiction issue first and then to  
11 address the other Issues of Fact. So that would  
12 be addressing issue No. 2 and then addressing the  
13 other issues 1, 6, 8 and 9.

14 SPECIAL MASTER: Collectively?

15 MR. FREDERICK: I can do it either way.

16 SPECIAL MASTER: Yes. Well, why don't we  
17 proceed then with New Jersey. And apparently  
18 we're going to address them all at one time. So  
19 the order in which you address them really is not  
20 important since they will all be addressed within  
21 the same relative time frame.

22 Who is going to speak for New Jersey?

23 MS. HOROWITZ: This is Rachel Horowitz. I'll  
24 be speaking for New Jersey.

25 SPECIAL MASTER: And who is going to speak

1 for Delaware?

2 MR. FREDERICK: David Frederick.

3 SPECIAL MASTER: All right. Ms. Horowitz, do  
4 you want to reserve some of your time for  
5 rebuttal?

6 MS. HOROWITZ: Yes, I do.

7 SPECIAL MASTER: And how much of that time?

8 MS. HOROWITZ: 10 minutes.

9 SPECIAL MASTER: Okay. Let me say, counsel,  
10 that I am not, in this instance at least, a  
11 stickler for absolute deadlines. I don't have any  
12 little colored lights in front of me. I will  
13 allow counsel what time they think necessary to  
14 complete their arguments, within reason.

15 Having said that, let me first remind counsel  
16 that I have had the benefit of your excellent  
17 briefs. And if I may, I suggest that few souls  
18 will be saved by simple repetition.

19 With that, Ms. Horowitz?

20 MS. HOROWITZ: Yes. Thank you,  
21 Mr. Lancaster.

22 We appreciate this opportunity to argue our  
23 Motion to Strike Delaware's Issues of Fact 1, 2,  
24 6, 8 and 9 and to preclude discovery on those  
25 issues. New Jersey has moved to strike these

1 issues because they don't relate to the merits of  
2 the important matter in controversy, the State's  
3 rights under Article VII of the Compact of 1905.

4 SPECIAL MASTER: Excuse me. Ms. Horowitz?

5 MS. HOROWITZ: I'm sorry?

6 SPECIAL MASTER: Excuse me. The court  
7 reporter -- you're speaking fairly rapidly; and  
8 the court reporter is having difficulty keeping up  
9 with you. You don't have to worry about the exact  
10 time frame of 30 minutes. So please take whatever  
11 time you need. But if the reporter indicates to  
12 me that, unfortunately, you're going a little too  
13 fast, I'm going to have to slow you down again.  
14 So I'm sorry to interrupt.

15 Please proceed.

16 MS. HOROWITZ: Thank you.

17 As I had stated, New Jersey has moved to  
18 strike these issues because they do not relate to  
19 the merits of the important matter in controversy,  
20 the State's rights under Article VII of the  
21 Compact of 1905. In addition, these issues are  
22 redundant and duplicative of other issues raised  
23 by Delaware or of the Supreme Court's prior  
24 rulings in this case.

25 Discovery on issue 2, which relates to New

1 Jersey's motive for filing this original action,  
2 would be duplicative of the Supreme Court's ruling  
3 of October 2005 in which the Court granted New  
4 Jersey leave to file a complaint against Delaware.  
5 Discovery on issue 2 also would allow Delaware to  
6 probe the mental processes and motives of New  
7 Jersey's Governor and Attorney General who  
8 authorized the filing of New Jersey's action,  
9 thereby, allowing inquiry into --

10 SPECIAL MASTER: I'm sorry. We had a squeak  
11 on this end. Inquiry into?

12 MS. HOROWITZ: -- irrelevant and privileged  
13 areas.

14 SPECIAL MASTER: Thank you.

15 MS. HOROWITZ: Discovery on issues 8 and 9,  
16 which relate to the BP proposed liquefied natural  
17 gas plant, would be entirely duplicative and  
18 cumulative of the voluminous materials already  
19 available and provided to Delaware regarding the  
20 BP project.

21 Further, Delaware stated reasons for  
22 including these issues, avoidance of future  
23 conflicts over the scope of the riparian  
24 jurisdiction referenced in Article VII, easily can  
25 be addressed through Delaware's Issues of Law 8

1 and 9.

2 Similarly, Delaware's Issue of Fact 6 is  
3 duplicative of its Issue of Fact 5, and Delaware's  
4 stated reason for including factual issue 6 can  
5 easily be addressed through Issue of Law 9 as well  
6 as through Delaware's Issues of Fact 10, 11 and  
7 12.

8 Inquiry into factual issues 1, 2, 6, 8 and 9  
9 will not shed any light at all on the substantive  
10 issues in dispute and will only serve as a  
11 distraction from them. Therefore, New Jersey's  
12 Motion to Strike these issues and to preclude  
13 discovery on them is completely consistent with  
14 the Federal Rules of Civil Procedure 26(b)(1),  
15 25(b)(2) and 26(c). 26(b)(1) and (b)(2) allow the  
16 Court to preclude discovery of irrelevant matters  
17 or discovery that is cumulative, duplicative and  
18 available from other sources. Rule 26(c) provides  
19 for a protective order for good cause, which would  
20 include discovery of irrelevant or privileged  
21 material.

22 Just to provide some brief background on how  
23 this motion arose, in February 2006 you asked the  
24 states to identify the issues to be addressed. In  
25 response, New Jersey identified three Issues of

1 Law. Issue 1 was whether Article VII of the  
2 Compact gives New Jersey exclusive jurisdiction on  
3 this side of the Delaware River to regulate all  
4 matters and authorize all activities necessary to  
5 the exercise of riparian rights, including  
6 improvements or modifications within the  
7 twelve-mile circle.

8 New Jersey's issue 2 was whether Delaware is  
9 judicially estopped from denying that it agreed  
10 New Jersey would have exclusive jurisdiction over  
11 the exercise of riparian rights on the easterly  
12 side of the river.

13 New Jersey's final issue, 3, was whether New  
14 Jersey lost its Article VII Compact rights through  
15 the doctrine of prescription and acquiescence.

16 In response to New Jersey's three legal  
17 issues, Delaware identified 16 Issues of Fact and  
18 11 Issues of Law. New Jersey has moved to strike  
19 five of Delaware's Issues of Fact since they're  
20 irrelevant to the merits of interpreting the  
21 Compact, will only divert attention from the  
22 important substantive issues presented, and will  
23 require time-consuming inquiry into collateral,  
24 cumulative and privileged areas.

25 Focusing first on Issue of Fact No. 2, I

1 would like to focus first on fact -- it's factual  
2 issue 2 followed by factual issues 1 and 6 and 8  
3 and 9.

4 With respect to factual issue 2, the  
5 relationship between New Jersey's filing and BP's  
6 interest, Delaware has claimed that such an  
7 inquiry is necessary to support its allegation  
8 that New Jersey is not the real plaintiff in this  
9 case and that New Jersey only filed this case to  
10 further the interest of BP. This issue needs to  
11 be stricken as a matter of law because New Jersey  
12 clearly is the real party in interest, and  
13 Delaware has no reasonable basis for alleging  
14 anything to the contrary.

15 New Jersey is asserting its Compact rights in  
16 response to actions by Delaware that in New  
17 Jersey's view violate those rights. New Jersey is  
18 not seeking relief on behalf of BP or any other  
19 entity.

20 In addition, this action is between New  
21 Jersey and Delaware and was filed when New Jersey  
22 was not a party to any pending action involving  
23 the Compact issue. There is no alternative  
24 forum. New Jersey plainly had the right to  
25 bring this action pursuant to Article III,



1 section 2, clause 2 of the Constitution and to  
2 28 USC 1251A. New Jersey then was under no  
3 obligation whatsoever to assert its Compact rights  
4 as part of any appeal of any Delaware denial or  
5 other action taken.

6 Since this clearly is a controversy between  
7 New Jersey and Delaware, the Supreme Court decided  
8 in 2005 in October, nearly eight months ago, that  
9 New Jersey should be allowed to file its action  
10 against Delaware. Since New Jersey has clearly  
11 stated its own claim and is pursuing its own  
12 interest, scrutiny of its motives simply is not  
13 germane. Further, such scrutiny would allow  
14 time-consuming and intrusive inquiry into the  
15 thought process of New Jersey's Governor and  
16 Attorney General.

17 If New Jersey prevails in this case, New  
18 Jersey will be entitled to assert its jurisdiction  
19 to decide whether the pending BP project that  
20 includes the pier or any other riparian project  
21 pending in a twelve-mile circle is in the best  
22 interests of New Jersey's citizens and can be  
23 constructed and under what conditions. This will  
24 not guarantee approval of the BP proposal or any  
25 other pending projects. Approval of the BP

1 project or any other project is simply not a part  
2 of the relief being requested by New Jersey in  
3 this case.

4 At the moment, however, New Jersey cannot  
5 even completely review the BP project because such  
6 review requires sediment samples from the Delaware  
7 River. And as -- and it's our understanding that  
8 at this point Delaware has denied BP permission to  
9 even take the samples.

10 Since Delaware also is arguing that this case  
11 will not even be right until New Jersey issues a  
12 permit to BP, accepting Delaware's position would  
13 mean that the important substantive issues raised  
14 by New Jersey in this case never could be  
15 considered an original action, even though that is  
16 what the Constitution and the U.S. Code provide  
17 for.

18 Accordingly, New Jersey urges you to strike  
19 Issue of Fact No. 2.

20 With regard to Delaware's Issues of Fact 1  
21 and 6, those issues relate to pending projects in  
22 the 12-mile circle and other projects that involve  
23 dredging besides the BP project.

24 Issue of Fact 1 is completely irrelevant to  
25 addressing the merits of the Compact. Issue of

1 Fact 6 is irrelevant and also is duplicative of  
2 Delaware's Issue of Fact 5.

3 Delaware's rationale for including this issue  
4 also can be addressed through Issue of Law 9 as  
5 well as through Issues of Fact 10, 11 and 12. New  
6 Jersey has not objected to any of those latter  
7 issues.

8 To interpret the Compact, of course, the  
9 Court must first look at its plain language and,  
10 if it finds that is ambiguous, at the legislative  
11 history and at negotiations predating the Compact.  
12 They also can look at the parties' subsequent  
13 conduct and particular conduct that closely  
14 followed the adoption of the Compact. Later  
15 conduct may be relevant with respect to the issue  
16 of prescription and acquiescence. Nevertheless,  
17 scrutinizing projects that are currently pending  
18 today after the litigation was filed in 2005, as  
19 respectfully submitted, will shed absolutely no  
20 light on what the persons who drafted the Compact  
21 in 1905 intended 100 years ago.

22 Delaware has stated that pending projects  
23 must be examined so as to prevent future  
24 controversies about whether a specific project  
25 falls within their apparent jurisdiction that New

1 Jersey can exercise under Article VII. However,  
2 Delaware has its sequencing backwards. The first  
3 task should be to interpret the Compact. The  
4 second task should be to apply that interpretation  
5 to any pending or future projects. Courts clearly  
6 reach decisions every day that must later be  
7 applied to the different fact patterns, and that  
8 certainly can be done here.

9 In addition, Delaware's concerns about  
10 avoiding future conflict can be addressed through  
11 examination of Delaware's Issues of Law 8 and 9  
12 and its Issues of Fact 10, 11 and 12, which New  
13 Jersey has not moved to strike. So all of those  
14 issues are directed into finding the precise  
15 nature of the "riparian jurisdiction" included in  
16 Article VII.

17 By including factual issues 1 and 6, it  
18 appears that Delaware wants to know what projects  
19 are pending so it then can potentially argue that  
20 certain projects it dislikes fall outside of  
21 Article VII. Therefore, keeping the issues in  
22 this case could transform the case from one that  
23 addresses the Compact to one that addresses the  
24 merits of particular projects and whether or not  
25 those projects comply with Delaware's Coastal Zone

1 Act.

2 New Jersey did not file an original action  
3 with the Supreme Court or ask the Court for leave  
4 to file an action so that specific proposed  
5 projects could be examined and debated before the  
6 Court. Delaware also, when it moved for a Special  
7 Master, did not ask for such a debate or  
8 examination. Instead, Delaware represented that a  
9 Special Master was needed to probe the historical  
10 and legal background of the Compact, not to probe  
11 the particulars of the pending applications. And  
12 New Jersey agrees that that is the reason the  
13 Special Master was appointed and that that is  
14 where the Special Master and discovery efforts  
15 should be directed. Therefore, New Jersey asks  
16 that Issues of Fact 1 and 6 be stricken.

17 Delaware's Issue of Fact 8 and 9 relate to  
18 the BP project. Issue of Fact 8 relates to the  
19 nature and scope of the project, while Issue of  
20 Fact 9 asks whether BP has all of its New Jersey  
21 approvals. These issues also will not help in any  
22 way to interpret the Compact. Instead, they will  
23 simply divert and distract attention away from the  
24 Compact and onto a particular project.

25 In addition, Delaware is fully aware of the

1 scope and nature of the BP project. Delaware  
2 denied an application for the project in 2005 and  
3 is participating in the Federal Energy Regulatory  
4 Commission proceedings regarding the project and  
5 has received over 6,000 pages of documents, as we  
6 understand it, from BP on the project, as well as  
7 a complete copy of the New Jersey Department of  
8 Environmental Protection project file in the fall  
9 of 2005.

10 In addition, Delaware's Issues of Law 8 and 9  
11 already address the issue of whether a project  
12 such as the BP project falls within riparian  
13 jurisdiction of Article VII. Therefore, Issues of  
14 Fact 8 and 9 focus on collateral matters and are  
15 also redundant and duplicative. Therefore, New  
16 Jersey would ask that these issues be stricken.

17 To sum up, New Jersey's motion should be  
18 granted, and issues 1, 2, 6, 8 and 9 of fact be  
19 stricken and discovery precluded on the issues.  
20 Including the issues will not help address the  
21 matter in controversy, which is the State's rights  
22 under the 1905 Compact. Instead, including the  
23 issues will divert and distract attention from the  
24 merits, force duplicative, redundant and  
25 time-consuming and intrusive inquiry into

1 collateral and privileged areas.

2 At this point I would like to reserve my  
3 remaining time for rebuttal and would be happy to  
4 answer any questions that you may have,  
5 Mr. Lancaster.

6 SPECIAL MASTER: Thank you very much,  
7 Ms. Horowitz.

8 You have addressed the Issues of Fact that  
9 are also addressed in your brief. Is it New  
10 Jersey's -- has New Jersey also addressed  
11 Delaware's Issue of Law No. 1?

12 MS. HOROWITZ: We did not move to strike that  
13 issue. Our motion was directed at the Issues of  
14 Fact that I have discussed.

15 SPECIAL MASTER: So let me see if I'm clear  
16 on this. New Jersey does not contest Delaware's  
17 position on jurisdiction?

18 MS. HOROWITZ: We do contest it. We did not  
19 move to strike it at this point. We are certainly  
20 contesting any inquiry into the motives for New  
21 Jersey's filing and any other inquiry that would  
22 be raised by factual issue No. 2.

23 SPECIAL MASTER: Well, I'm -- I must admit  
24 I'm puzzled. New Jersey has stated that there is  
25 no jurisdiction as its first Issue of Law, and

1           you -- I'm sorry, Delaware has stated that there  
2           is no jurisdiction as its first Issue of Law; and  
3           New Jersey is not moving to strike that issue?

4           MS. HOROWITZ: Not at this time. We haven't  
5           moved it. Our motion did not include that. I  
6           think that's a broader issue than what our motion  
7           is focused on at the moment, which is factual  
8           issues and discovery on factual issues.

9           SPECIAL MASTER: Well, again, I'm --

10          MS. HOROWITZ: We certainly dispute any  
11          allegation that there is no jurisdiction; and we  
12          certainly have -- do take the position that that's  
13          already been addressed by the Supreme Court and  
14          that nothing has changed to alter or require  
15          revisiting of the Supreme Court's ruling and  
16          granting of leave to file this original action.

17          SPECIAL MASTER: Well, then perhaps you can  
18          tell me why New Jersey has not moved to strike  
19          that first issue if, in fact, that's your  
20          position?

21          MS. HOROWITZ: Our position is that New  
22          Jersey's rationale for filing is not relevant to  
23          the jurisdictional issue. And as we understood  
24          Delaware's Issue of Law No. 1, it was focused on  
25          discovery of New Jersey's motives or the



1 relationship between New Jersey and BP as a -- as  
2 a basis for asserting a lack of jurisdiction. So  
3 in our view moving to strike issue 2 addressed  
4 Issue of Law No. 1, as we understood it, as raised  
5 by Delaware.

6 SPECIAL MASTER: Let me see if I can set the  
7 stage for where we're going with this, and perhaps  
8 Mr. Frederick can address it. Delaware says as  
9 the first issue out of the box that there is no  
10 jurisdiction in the Supreme Court. If there is no  
11 jurisdiction in the Supreme Court, then the rest  
12 of the argument is moot.

13 Now, I read your brief as implicitly  
14 suggesting that that Issue of Law was wrong; but I  
15 could not find a Motion to Strike it. So I'm not  
16 quite clear as to what New Jersey suggests, if  
17 anything, that I do with regard to that Issue of  
18 Law.

19 Perhaps you can help me, Ms. Horowitz.

20 MS. HOROWITZ: Well, we certainly don't think  
21 there is any reason, again, to revisit it; and nor  
22 do we think there is any reason to have discovery  
23 that goes to the jurisdictional issue. And if the  
24 Court or if you would like us to file a Motion to  
25 Strike No. 1, we would be prepared to do that.

1           SPECIAL MASTER: Well, it isn't what I would  
2 like to do; it's what counsel would like to do.  
3 If you're comfortable leaving it where it is, then  
4 we have an Issue of Law that has to be addressed  
5 at some point raised by Delaware and apparently  
6 not addressed by you.

7           As I heard Mr. Frederick's outline of the way  
8 his argument is going to go, he's going to start  
9 with the jurisdictional question. But if that's  
10 not in play, then there is no need for  
11 Mr. Frederick to address it at this stage. But it  
12 is a very serious issue raised by Mr. Frederick  
13 and apparently not addressed by New Jersey. So I  
14 am in somewhat of a quandary as to New Jersey's  
15 position.

16           MS. HOROWITZ: Well, as I stated before, our  
17 position is that we understand Delaware's Issue of  
18 Law 1 to be related solely to the real party in  
19 interest issue. And we have moved to strike that  
20 issue from the case which, as we understand  
21 Delaware's Issue of Law No. 1, would remove the  
22 only basis they stated for a lack of jurisdiction.

23           SPECIAL MASTER: Well, if you're content to  
24 leave it that way, we'll leave it that way. And  
25 we'll turn to Delaware.

1 Mr. Frederick?

2 MR. FREDERICK: Thank you, Mr. Lancaster.

3 I would like to start with Issue of Law No. 1  
4 presented by Delaware and read it for the Court.  
5 It says, whether, in light of the facts to be  
6 discovered, the Court has jurisdiction over this  
7 action, on February 17 pursuant to Case Management  
8 Order No. 1. In the subsequent conference held  
9 with counsel, the Special Master directed New  
10 Jersey to file a Motion to Strike if it perceived  
11 any issues to be irrelevant.

12 Case Management Order No. 2 --

13 SPECIAL MASTER: I'm sorry. Excuse me,  
14 Mr. Frederick. You broke off after Case  
15 Management Order No. 2.

16 MR. FREDERICK: Case Management Order No. 2  
17 says, quote, on or before March 20, 2006 New  
18 Jersey shall file any motion it chooses to make,  
19 together with its supporting brief, as to Issues  
20 of Fact Nos. 1, 2, 6, 8 and 9 and Issue of Law  
21 No. 1 set forth by Delaware in a letter of  
22 February 17, 2006.

23 I believe that New Jersey has waived a Motion  
24 to Strike for Issue of Law No. 1 because they  
25 failed to put that in their motion.

1           Now, with respect to the other Issues of  
2 Fact, New Jersey has now conceded that they are  
3 not moving to strike the other Issues of Law. And  
4 it seems inconceivable to me that Issues of Fact  
5 that go to the Issues of Law which we have  
6 presented can't be struck as irrelevant either.

7           Furthermore, in numerous places counsel for  
8 New Jersey has said that certain Issues of Fact  
9 are "redundant". That assumes that they are  
10 relevant and that the Issues of Fact that we  
11 are -- we have presented are, in fact, relevant to  
12 the Issues of Law that we have also presented.

13           So with respect to New Jersey's motion, we  
14 would submit that it has to be denied. New Jersey  
15 does not contest any of the Issues of Law that we  
16 have presented. They face a very heavy burden of  
17 showing the irrelevance of the particular Issues  
18 of Fact that we have presented.

19           Moreover, with respect to jurisdiction, this  
20 was not an issue that the Supreme Court decided as  
21 law of the case when it granted New Jersey's  
22 Motion to Reopen. Jurisdiction is always an issue  
23 that is for the Court's consideration. And I  
24 would direct the Court to Wyoming versus Oklahoma  
25 in which the Court admonished Oklahoma for

1 repeatedly raising jurisdiction, but not seeking  
2 any facts that would support its arguments.

3 The purpose of our discovery requests and our  
4 subpoena to BP was in part to provide the facts  
5 that would support our jurisdictional position.  
6 We raised that in the Motion to Reopen at a time  
7 when the record had not been developed. We  
8 reiterated those jurisdictional arguments in our  
9 answer which was filed after the Court granted the  
10 Motion to Reopen and to convert New Jersey's  
11 effort to make this case No. 11, Original and to  
12 convert it into No. 34, Original -- or 134,  
13 Original.

14 So I would submit to you that jurisdiction is  
15 not an issue that can be waived or that -- or that  
16 can be disposed of simply by the Court's granting  
17 New Jersey's motion. It is a live issue. It is  
18 in play. And, therefore, we are entitled by New  
19 Jersey's waiver to seek the facts to be discovered  
20 which is what issue 1 -- Issue of Law 1  
21 specifically provides.

22 Now, at this point, Mr. Lancaster, I can go  
23 into our arguments about ripeness and real party  
24 in interest and the like and explain to you why  
25 the facts that we would like to develop are

1 relevant to the jurisdictional point. But in  
2 light of New Jersey's concession that it is not  
3 contesting our Issue of Law No. 1, I just as soon  
4 save the Court's time and all the rest of our time  
5 and not address that specifically unless you would  
6 like me to.

7 SPECIAL MASTER: Well, I appreciate  
8 your concern for the Court's time. But I would  
9 like to hear from you. I -- the record is  
10 confusing in a way, Mr. Frederick, as you can  
11 appreciate, because, in fact, by addressing the  
12 subissues -- Issue of Fact No. 2, et cetera,  
13 New Jersey has effectively argued that the  
14 jurisdictional issue has been decided by the Court  
15 but has not, as I indicated earlier, filed a  
16 formal Motion to Strike that defense. And while  
17 you're correct that the jurisdictional issue can  
18 be raised at any time if, in fact, there are facts  
19 to support it; nevertheless, given the history of  
20 this case, it is clear that Delaware would have a  
21 substantial burden were the motion appropriately  
22 before me.

23 So I would like to hear your argument,  
24 please.

25 MR. FREDERICK: Well, I don't know that we

1 have a substantial burden, Mr. Lancaster. And I  
2 would contest that that is what we have. When we  
3 raised the issue of jurisdiction in the Motion to  
4 Reopen, we had no record to speak of. We were  
5 doing this on the basis of pleadings. And we  
6 contested jurisdiction at that point. And there's  
7 a passage in the Wyoming case in which Justice  
8 White's opinion for the Court makes clear that --

9 MS. HOROWITZ: Hello?

10 MR. FREDERICK: The Court -- makes clear that  
11 the Court would not hesitate to dismiss a case for  
12 lack of original jurisdiction if it was convinced  
13 that it was wrong in accepting jurisdiction  
14 through the motion to file a complaint. And the  
15 Court also stated -- and I'm looking at page 502,  
16 U.S. Reports at 446 -- that Oklahoma had not made  
17 a factual development of its jurisdictional issue.

18 So in light of that, we submit that it is  
19 appropriate for the Court and Special Master to  
20 permit us to engage in discovery on jurisdictional  
21 issues, particularly in light of facts that it  
22 developed since the Court's granting the Motion to  
23 Reopen. And I would specifically point out as  
24 follows. We now know, which we did not know at  
25 the time, that BP has provided enormous assistance

1 to New Jersey in proceeding with this case,  
2 including 531 pieces of legal research, making  
3 available a data base, doing historical research  
4 for New Jersey and engaging in hundreds --  
5 literally hundreds of communications with various  
6 New Jersey officials. We didn't know that at the  
7 time we filed our original jurisdiction objection.

8 Moreover, we assumed the truth of the  
9 statement by the Crown facility -- Crown Landing  
10 facility, BP, when they said there was no  
11 alternative forum for BP to raise its arguments.  
12 And now in Mr. Raphael's declaration, he says that  
13 BP is contemplating bringing litigation against  
14 Delaware to contest the authority of Delaware to  
15 challenge BP's plan.

16 It is fundamental to the Court's original  
17 jurisdiction that there be no alternative forum  
18 from which a party could contest issues and then  
19 ultimately bring them to the Supreme Court on a  
20 petition for a Writ of Certiorari. Yet, these two  
21 declarations by BP are directly contrary to each  
22 other. They raise serious questions about whether  
23 or not the Court's original jurisdiction has  
24 properly been invoked. We submit that we are  
25 entitled to engage in discovery as to those



1 matters.

2 Now, we have addressed in the brief the  
3 assertions of privilege; but those privileges go  
4 to New Jersey's documents and not to documents  
5 that BP has created or that New Jersey has waived  
6 its privilege by sending to BP. And I would  
7 submit to you that there is an ample ground for  
8 allowing jurisdictional discovery with respect to  
9 a couple of key points. And let me raise those  
10 now.

11 Most of my argument thus far has concerned  
12 party in interest prong of jurisdiction. But let  
13 me also point out that the reasons for bringing  
14 this suit now are also relevant for jurisdiction  
15 because New Jersey acknowledges that Delaware  
16 has been exercising jurisdiction over New  
17 Jersey-originated riparian projects since at least  
18 1971. But the source of the injury that they  
19 assert is Delaware's assertion of projects like  
20 the BP project. They don't have a concrete harm,  
21 however, until they give approval to the BP  
22 project. In effect what they are asking the Court  
23 to decide is that New Jersey has the power to say  
24 no to the BP project; Delaware does not. But if  
25 New Jersey rejects BP's permit, it can show no

1 concrete harm that rises to the level of an  
2 Article III case or controversy by Delaware's also  
3 refusal to give permission for the BP project.

4 So at a level of concrete injury, there is a  
5 fundamental question of jurisdiction that is still  
6 in this case. There is no harm that New Jersey  
7 can assert by Delaware's refusal to give a permit,  
8 and that is a jurisdictional issue on which  
9 further factual discovery should be engaged. That  
10 also, I would submit, goes to, furthermore, as a  
11 matter of jurisdiction the question of whether an  
12 alternative location that would not encroach on  
13 Delaware's territory also goes to original  
14 jurisdiction because it presents the matter of  
15 whether or not New Jersey is pursuing this action  
16 solely for the commercial benefit of BP.

17 BP obviously likes the site that it has  
18 chosen. But that's not a good enough reason for  
19 one state to bring another state to the Bar of the  
20 Supreme Court. If BP could put its facility in  
21 another location that does not encroach on  
22 Delaware's soil or give rise to the fragile  
23 economic and coastal considerations that Delaware  
24 has presented, then that would be a basis for the  
25 Supreme Court to deny its original jurisdiction.

1           And finally, with respect to an alternative  
2 forum, Mr. Raphael's current comment that -- in  
3 his declaration that BP does plan to file a  
4 lawsuit has implications not only for  
5 jurisdiction, but also for the work product  
6 privilege which we have addressed in our  
7 opposition to their Motion to Quash. And I won't  
8 otherwise talk about that here, but with respect  
9 to jurisdiction, it's fundamental. And the Court  
10 addressed this in the Pennsylvania versus New  
11 Jersey case, the Delaware bridge case, where the  
12 Court said because the issue could come to the  
13 Court on a petition for Writ of Certiorari, it was  
14 unnecessary for there to be an original action.  
15 And it dismissed the original action that had been  
16 pursued on that ground.

17           We have asserted that BP has an alternative  
18 forum in which to make their arguments, and their  
19 arguments go to Delaware's ability and  
20 jurisdiction to decide that the plant should not  
21 proceed.

22           If I could turn now to the Issues of Fact,  
23 unless the Court has further questions on  
24 jurisdiction --

25           SPECIAL MASTER: I will reserve on that until

1 I hear your argument on the Issues of Fact,  
2 Mr. Frederick.

3 MR. FREDERICK: Okay. With respect to Issue  
4 of Fact No. 1 for consideration, other than  
5 landings, it's absolutely critical to focus on the  
6 scope of the relief that New Jersey is asking for.  
7 On page 17 of their Motion to Reopen asked for an  
8 injunction that would prevent Delaware, quote,  
9 from requiring permits for the construction of any  
10 improvement appurtenant to the New Jersey shore of  
11 the Delaware River within the twelve-mile circle.  
12 That relief goes beyond Article VII which talks  
13 about riparian jurisdiction. And we submit that  
14 it is critical for the Court to understand the  
15 difference between, quote, any improvement and a  
16 project that would be a, quote, riparian project.  
17 And, therefore, it is directly relevant to the  
18 scope of the relief that New Jersey has sought in  
19 this case for the Court to understand what kinds  
20 of projects New Jersey is contemplating and that  
21 would be relevant for the scope of the relief that  
22 New Jersey sought.

23 New Jersey can't have it both ways. It  
24 submitted voluminous affidavits to its complaint  
25 that described the nature and the scope of other

1 projects. Those are in the appendix to New  
2 Jersey's very first submission at pages 25A to 53A  
3 and following. It can't now say that discovery  
4 adds to those projects and those submissions is  
5 irrelevant.

6 And their Motion to Strike is -- is overbroad  
7 in what it seeks to accomplish because the Motion  
8 to Strike is to say that discussion of these  
9 issues is irrelevant to the lawsuit and can't be  
10 inquired into. But that's far -- that's far too  
11 broad given New Jersey's own attempt to use these  
12 other projects as the basis for bringing this  
13 action to begin with.

14 Now, with respect to issue of project No. 6,  
15 which concerns dredging, New Jersey -- I  
16 understood Ms. Horowitz to say that they believe  
17 that issue of No. 6 is encompassed within No. 5  
18 and that it is, therefore, redundant. We would  
19 submit to you that if it is redundant, it is  
20 relevant; and for purposes of a Motion to Strike  
21 it cannot be struck as irrelevant, which was the  
22 point that we understood their motion to be  
23 addressing. I would argue that a Motion to Strike  
24 as redundant is something that can be addressed at  
25 the level of particular discovery requests and

1 that it would be premature for the Special Master  
2 now to reject this Issue of Fact as irrelevant  
3 where a more finely-calibrated mechanism exists;  
4 and if there are particular discovery requests  
5 that go to this issue, that would be burdensome or  
6 otherwise objectionable on the part of New Jersey.

7 But even so, our submission is that dredging  
8 is a distinct concept from other projects there  
9 are, because under normal riparian understanding  
10 dredging has always been thought of as something  
11 distinct because it addresses the sovereign -- in  
12 most cases the sovereign submerged land. So the  
13 issue of dredging is critically important because  
14 it is outside the scope of, quote, riparian  
15 jurisdiction that would have been contemplated  
16 in --

17 SPECIAL MASTER: I'm sorry. Excuse me,  
18 Mr. Frederick. Contemplated in?

19 MR. FREDERICK: Contemplated in Article VII.

20 SPECIAL MASTER: Thank you. You broke up  
21 again.

22 I apologize for interrupting you. Please  
23 continue.

24 MR. FREDERICK: That's quite all right.

25 Now, as for Issues of Fact No. 8 and 9, the

1 BP project. I would just start with the  
2 contradiction inherent in New Jersey's position.  
3 They invoked the Court's original jurisdiction  
4 with an affidavit from BP's vice president saying  
5 that Delaware had acted improperly in denying the  
6 permit. They devote numerous paragraphs of their  
7 original complaint to complaining about Delaware's  
8 rejection of BP's plant. They provided hundreds  
9 of pages of documents of what they thought was  
10 important from BP's project to us in initial  
11 phases of information exchange. And now, they're  
12 moving to strike an issue as irrelevant and to  
13 prohibit discussion of it for all time.

14 Frankly, it doesn't make sense for New Jersey  
15 to assert that the information about BP's project  
16 is relevant for it in showing why it should  
17 prevail in this lawsuit but to deny it the  
18 opportunity to discover what would ordinarily be  
19 discoverable information to support our defenses  
20 and arguments in the case. They have not -- and  
21 they have acknowledged that they don't contest at  
22 this stage Delaware Issues of Law 8 and 9; and  
23 they have not moved to strike those. It seems  
24 inconceivable that they can logically strike an  
25 Issue of Fact while allowing the Issue of Law to

1 be part of the case.

2 Now, they try to do that by arguing that this  
3 case really is only about plain meaning. But at  
4 every turn they introduce the word exclusive into  
5 Article VII where it doesn't appear. And they  
6 don't address the fact that there has been a use  
7 of a phrase, riparian jurisdiction, that  
8 apparently did not have any settled meaning or at  
9 least none that we have been able to discover thus  
10 far in our research. And so the question of what  
11 these kinds of projects consist of and what they  
12 do is relevant to the Court's ultimate  
13 determination into the scope of the relief that is  
14 necessary.

15 With respect to Issue of Fact No. 9, whether  
16 BP has obtained all the necessary permits, that  
17 goes to ripeness. And that is a jurisdictional  
18 issue. And, as we have argued, if New Jersey has  
19 not given the approvals to BP, then the issue that  
20 they present to the Supreme Court is not ripe.  
21 They can't assert an Article III injury simply --

22 SPECIAL MASTER: Mr. Frederick?

23 We got broken off here.

24 Can anyone hear me?

25 (Discussion off the record.)



1           SPECIAL MASTER: Mr. Frederick?

2           MR. FREDERICK: Yes.

3           SPECIAL MASTER: I'm sorry. I don't know if  
4 other counsel were affected or not; but,  
5 unfortunately, the phone connection at our end  
6 broke off just as you were saying something like  
7 they cannot assert. And I -- that's when the --  
8 it disconnected. I don't understand the technical  
9 problems that we have been having in this  
10 conference call, and I apologize to all counsel.

11           If you can figure out where you were in your  
12 argument, I would be pleased to have you continue.

13           Ms. Horowitz, are you on?

14           MS. HOROWITZ: Yes.

15           SPECIAL MASTER: Mr. Raphael?

16           MR. RAPHAEL: Yes, I'm still here.

17           SPECIAL MASTER: Okay. Again, my apologies.

18           Mr. Frederick?

19           MR. FREDERICK: It would help me, if it's  
20 possible, to go back a few sentences before that  
21 because I have not prepared a written summary to  
22 read to the Court.

23           SPECIAL MASTER: Yes. You pick it up  
24 wherever you're comfortable, please,  
25 Mr. Frederick.

1 MR. FREDERICK: Well, can I -- were you on  
2 when I was talking about Issue of Fact No. 8?

3 SPECIAL MASTER: Yes.

4 MR. FREDERICK: Okay. And I -- I was arguing  
5 that it is inconsistent for New Jersey to use BP's  
6 information in its affidavit in bringing the  
7 complaint and now asserting that it is impossible  
8 for us to argue the irrelevance as to that  
9 submission and to make discovery as to that.

10 SPECIAL MASTER: Yes.

11 MR. FREDERICK: If the Crown Landing project  
12 is, you know, fundamentally different from  
13 riparian projects in the 1905 era, it doesn't  
14 necessarily follow that Delaware gave up the right  
15 to regulate such different projects.

16 And I want to take a moment here to talk a  
17 little bit about the nature of riparian  
18 jurisdiction because it's important for the Court  
19 to understand that riparian jurisdiction is a much  
20 more limited subset of the kinds of regulatory  
21 rights and sovereignty interest that a state can  
22 exercise. And it's important to understand what  
23 is encompassed within riparian. As the Court in  
24 the Virginia versus Maryland case noted, there are  
25 certain actions that can be outside of riparian

1 but, nonetheless, concern rivers. And counsel for  
2 Virginia in that case acknowledged in the oral  
3 argument that certain activities that would occur  
4 on a pier would be subject to the regulation of  
5 the State of Maryland. And our submission is  
6 exactly the same here, that even if in the  
7 alternative, we have argued, that there would be  
8 deemed to be some concession of authority over  
9 certain riparian projects in certain ways after  
10 1905, that that doesn't necessarily encompass all  
11 of the kinds of regulation over public uses of the  
12 river that Delaware would seek to assert. And an  
13 understanding about the Crown Landing project and  
14 where it is going and what it is is fundamental to  
15 understanding how this project relates to Article  
16 VII of the Compact.

17 Now, with respect to Issue of Fact No. 9,  
18 whether BP has obtained all the necessary permits,  
19 our submission is that it is relevant to ripeness.  
20 It's a jurisdictional question. If New Jersey  
21 plans to deny the project, the whole point of this  
22 original action becomes theoretical. It isn't  
23 constitutionally ripe. There is no Constitutional  
24 injury that can be asserted. And New Jersey, for  
25 Article III purposes, cannot assert a right to be

1 the state that stops the BP project. There is no  
2 independent harm to New Jersey if its state  
3 officials are the ones to block the BP project  
4 rather than Delaware's state officials.

5 Now, at one point New Jersey points to the  
6 final environmental impact statement of the  
7 Federal Energy Regulatory Commission which  
8 recommends that BP get a consistency determination  
9 from both Delaware and New Jersey, but that  
10 doesn't make the case ripe because there remains  
11 the possibility that New Jersey will deny the  
12 consistency determination. And until New Jersey  
13 makes an affirmative act with respect to the BP  
14 project, there is a certain theoretical quality to  
15 this case that goes to the heart of jurisdiction.

16 I would stop at that point, Mr. Lancaster, if  
17 you have questions of Delaware.

18 SPECIAL MASTER: Let me -- let me ask you,  
19 Mr. Frederick, just for clarification. Is it --  
20 is it Delaware's position that the Delaware courts  
21 have jurisdiction to define definitively the  
22 meaning and the scope of the Compact?

23 MR. FREDERICK: No. Delaware courts could  
24 opine on the meaning of the Compact; but as the  
25 Court made clear in the Delaware toll bridge case,

1 such would be for the Supreme Court to decide upon  
2 a Writ of Certiorari. So the Supreme Court  
3 ultimately has the power to opine on the meaning  
4 of an interstate compact. And that, I think, is  
5 well-established law, not just in the Delaware  
6 toll case but in other cases that we have cited in  
7 our brief.

8 SPECIAL MASTER: So what then from Delaware's  
9 position is the significance of the fact that  
10 Mr. Raphael has indicated that he may or BP may  
11 bring an action in the Delaware courts?

12 MR. FREDERICK: Well, that is to -- that  
13 suggests that the original jurisdiction here isn't  
14 appropriately invoked. The Court has said on  
15 repeated occasions that it exercises original  
16 jurisdiction sparingly. New Jersey, in picking up  
17 on cases that this court had decided, said there  
18 was no other forum in which these issues could be  
19 addressed. And it is clear from Mr. Raphael's  
20 declaration that that's not so, that if BP is  
21 planning to bring litigation against Delaware, it  
22 would be perfectly appropriate at the appropriate  
23 time for New Jersey to intervene in that case.  
24 And if the point of the lawsuit is to get a  
25 declaration about Delaware's rights under the 1905

1 Compact, that would certainly be available to be  
2 appealed at the appropriate time.

3 SPECIAL MASTER: And how would that, in  
4 Delaware's mind, defeat the jurisdiction here if,  
5 in fact, this Court did have jurisdiction?

6 MR. FREDERICK: Well, the original  
7 jurisdiction is discretionary and it is limited.  
8 And as I understand the question, Mr. Lancaster,  
9 the issue would go to whether or not the Supreme  
10 Court had appropriately exercised this  
11 jurisdiction or, in the words of the Court in the  
12 Wyoming versus Oklahoma case, should dismiss the  
13 case for lack of jurisdiction. And that is  
14 certainly something that the Court could decide if  
15 it believed that there had been gamesmanship in  
16 the invocation of its jurisdiction or whether  
17 circumstances changed so that the dispute was no  
18 longer ripe or whether the facts as they uncovered  
19 determined that there was no concrete injury  
20 suffered by New Jersey or any number of other  
21 jurisdictional issues that could --

22 SPECIAL MASTER: I'm sorry. That could what?

23 MR. FREDERICK: That could come to light.

24 SPECIAL MASTER: I see.

25 MR. FREDERICK: And the Court has also made

1 clear that it has a preference for having issues  
2 percolate up even in cases that could be brought  
3 as original actions.

4 So I think that the contradiction and  
5 inconsistency in BP's position goes directly to  
6 jurisdiction. And we should be permitted to  
7 engage in actual discovery as to the circumstances  
8 surrounding that changed position and as to  
9 whether or not the Court has properly granted New  
10 Jersey's Motion to Reopen or for leave to file a  
11 complaint.

12 SPECIAL MASTER: Right. Mr. Frederick,  
13 without indicating my present inclination at all,  
14 if I should agree with New Jersey as to the Issues  
15 of Fact which are pertinent to the jurisdictional  
16 question, what happens to your jurisdictional  
17 issue?

18 MR. FREDERICK: Well, we're faced with a  
19 couple of issues, Mr. Lancaster. One is to appeal  
20 to the Supreme Court where the Court has  
21 indicated, I think, that it would be an abuse of  
22 discretion to deny us the opportunity to develop  
23 facts on an issue of jurisdiction. And the other  
24 is to attempt through the other discovery that we  
25 are engaging. I suppose that if we find facts at

1 discovery that would permit us to ask you to  
2 revisit the issue, to do so at that time.

3 But because jurisdiction is an issue that is  
4 not waivable and can be raised at any time, I  
5 would submit that it would be inappropriate to  
6 grant the issue -- to grant New Jersey's Motion to  
7 Strike the issue as to No. 2.

8 SPECIAL MASTER: I'm sorry. Would you just  
9 repeat the last part of that again. You broke up,  
10 Mr. Frederick.

11 MR. FREDERICK: It would be inappropriate to  
12 grant New Jersey's Motion to Strike Issue of Fact  
13 No. 2.

14 SPECIAL MASTER: Thank you.

15 Anything further, Mr. Frederick?

16 MR. FREDERICK: Not unless you have  
17 questions, sir.

18 SPECIAL MASTER: All right. Thank you very  
19 much.

20 Ms. Horowitz?

21 MS. HOROWITZ: Yes, thank you.

22 I would like to go back to the first question  
23 you asked which went to why New Jersey did not  
24 move to strike the jurisdictional Issue of Law  
25 raised by Delaware. I think Mr. Frederick's



1 argument has sort of highlighted that because we  
2 do recognize that this is an issue that is very  
3 broad and is not waivable and can be raised at any  
4 time. Consequently, we elected not to move. We  
5 certainly were never intending to waive our  
6 continuing position that, of course, jurisdiction  
7 was properly exercised by the Supreme Court.

8 With respect to the ripeness issue raised by  
9 Mr. Frederick, I think there's a fundamental  
10 misunderstanding of what New Jersey's injury is in  
11 this case. We have a continuing injury based on  
12 Delaware's assertion of jurisdiction. And it  
13 relates to projects that are pending and to New  
14 Jersey's future ability to decide what can and  
15 can't happen on its shoreline.

16 What we have at the moment is a Delaware  
17 Coastal Zone Management Act that says that there  
18 can't be any heavy industry in the Delaware  
19 coastal zone, and there can't be any bulk transfer  
20 facilities. But the very existence of that act at  
21 the moment means that any project that comes down  
22 the pike now or in the future that involves a bulk  
23 transfer station or heavy industry, we presume  
24 that Delaware would assert that cannot be  
25 constructed on New Jersey's shoreline. And that

1 is, we would submit, a very direct, concrete,  
2 continuing injury to New Jersey and to its ability  
3 to determine what is best for its citizens and to  
4 regulate and determine what should or shouldn't be  
5 going on on New Jersey's shoreline.

6 That's a very, very important issue. This is  
7 not, for that reason, limited to the BP project.  
8 It's limited to any -- or it's -- it concerns any  
9 project that may be pending or could come down the  
10 pike that Delaware might claim somehow is not  
11 consistent with its Coastal Zone Management Act.

12 Further, with respect to the -- to the BP  
13 project and Delaware's claim that that may fall  
14 outside of riparian jurisdiction and, therefore,  
15 they need to know the particulars of that project,  
16 I think the particulars of that project are  
17 extremely well known to Delaware. We all know  
18 what the project is. We all know what it  
19 encompasses. And we all know that Delaware's  
20 assertion of jurisdiction over the project arose  
21 from the fact that it included a pier that  
22 extended beyond the low water line into Delaware  
23 waters. And I would respectfully submit that in  
24 anyone 's understanding of the term riparian  
25 jurisdiction, that would encompass a pier, the

1 ability to construct a pier so as to be able to  
2 have ships come to the pier and load and unload  
3 products. And I would respectfully submit that's  
4 an extremely classic riparian use, if you will,  
5 and riparian right. So to argue that we need to  
6 delve into the particulars of this BP project to  
7 figure out whether it falls within riparian  
8 jurisdiction I just think is missing the mark in  
9 light of the fact that what we are talking about  
10 that the BP project -- the aspect of the BP  
11 project that would be implicated in this case is  
12 the pier.

13 Just I would like also to address Delaware's  
14 position or apparent position that New Jersey  
15 should have to participate in some sort of action  
16 that BP may or may not hereafter file in the  
17 Delaware courts and then go to the Court by way of  
18 certiorari. This is an action, again, as I  
19 stated, that New Jersey brought to assert its own  
20 interests in its own shoreline and in its citizens  
21 and their prosperity and what they may or may not  
22 do on their shoreline. And to suggest that New  
23 Jersey should have to wait until some private  
24 party decides to go into some other state's court  
25 in order to raise this issue we would respectfully

1 submit is completely baseless. And that should be  
2 rejected out of hand.

3 There is original jurisdiction provided for  
4 in the Constitution and in the U.S. Courts  
5 specifically so that when two states have a  
6 dispute, no state is obligated or required to put  
7 its dispute in the courts of the other state.  
8 Clearly, New Jersey has the ability and the right  
9 to bring its own action in the forum of its  
10 choosing and not to wait until some other party  
11 files an action and then to decide whether or not  
12 to intervene in that action. And so we take a  
13 lot -- great exception to Mr. Frederick's  
14 suggestion that that's what we should be required  
15 or forced to do.

16 SPECIAL MASTER: Is there anything further?

17 I'm sorry?

18 MS. HOROWITZ: No. I don't think there's any  
19 inconsistency between the fact that we called to  
20 the Court's attention the fact that there were  
21 pending projects in the twelve-mile circle such as  
22 the BP project and that there was a problem  
23 because Delaware had denied the BP project even  
24 before New Jersey had had the ability to review  
25 it. We don't think there is any inconsistency

1 between that and between now saying that in order  
2 to figure out what this Compact means, there is no  
3 reason at all and no purpose served by delving  
4 into the particulars of a particular project  
5 because if you want to figure out what this  
6 Compact means, you look at its language. You look  
7 at what preceded it. You look at what happened  
8 afterwards. But you do not have to look at  
9 projects that arose 100 years later and that arose  
10 during the course of litigation.

11 Furthermore, if you want to figure out what  
12 the scope of riparian jurisdiction is, you're  
13 perfectly capable of doing that without first  
14 figuring out what projects are pending and then  
15 figuring out whether you want to claim that those  
16 are -- constitute riparian jurisdiction or not.

17 I don't have anything further unless you have  
18 further questions.

19 SPECIAL MASTER: No. Thank you very much.

20 Unless there's anything else that either  
21 counsel for either side wants to add -- and I step  
22 out onto that thin ice very tentatively and  
23 cautiously because I don't want to prolong this  
24 argument. But I don't want to foreclose either  
25 counsel on issues that are obviously important --

1 very important for both counsel and both states in  
2 the future progress of the handling of this  
3 matter.

4 So let me drop my voice at this point and  
5 turn to Mr. Frederick and then back to  
6 Ms. Horowitz to see if there is anything else that  
7 either counsel wishes to state before I close this  
8 argument down.

9 Mr. Frederick?

10 MR. FREDERICK: Thank you, Mr. Lancaster. I  
11 would like to make a couple of additional points.

12 The relief that New Jersey seeks is a  
13 declaratory judgment for all time that will affect  
14 all improvements or other projects that start from  
15 New Jersey and go into Delaware. And they assert  
16 now that that's the basis of their injury  
17 sufficient to create the Court's original  
18 jurisdiction. If that is so, it cannot be  
19 irrelevant what the scope of those other projects  
20 pending and past should be. That is fundamental  
21 to the nature of the relief that New Jersey seeks.  
22 It is fundamental to Delaware's interest in  
23 understanding the implications of the declaratory  
24 judgment that New Jersey seeks.

25 Furthermore, New Jersey has known about the

1 Delaware Coastal Zone Management Act for 35 years.  
2 10 years ago it sought a permit under that act.  
3 And it is inconceivable that if New Jersey had  
4 suffered harm, it would have brought its original  
5 action before now. But the question of why it has  
6 brought the case now is fundamental to original  
7 jurisdiction rather than allowing these issues to  
8 percolate up through the normal process as they  
9 would. The Delaware toll case came out of the New  
10 Jersey court. It was a New Jersey Supreme Court  
11 decision that was appealed on a Petition for Writ  
12 of Certiorari to the Supreme Court, and the Court  
13 then dismissed an original action which  
14 Pennsylvania sought to invoke the Court's original  
15 jurisdiction.

16 Finally, with respect to the BP project, it  
17 is certainly true that there's a lot of public  
18 information; but that public information is geared  
19 toward BP's effort to persuade various authorities  
20 to approve the project. It is not necessarily  
21 geared towards the kinds of scope and  
22 jurisdictional questions that we have asked and  
23 that we should be entitled to get. There is a  
24 question fundamentally in this case about whether  
25 or not a pier is within the riparian jurisdiction

1 contemplated under Article 7 of the 1905 Compact  
2 and whether any other particular pier contains  
3 highly hazardous materials or may include adult  
4 entertainment or casinos or other kinds of  
5 activity that Delaware might wish to regulate on a  
6 pier.

7 Frankly, just because there's a pier being  
8 built does not take that project outside the  
9 regulatory jurisdiction of a state; and it does  
10 not make that project solely a riparian project  
11 that is relevant here.

12 And finally, BP has declined to raise its  
13 Compact arguments on appeal; and now they say that  
14 they might want to bring a new action. But they  
15 had the opportunity at various points in the  
16 Delaware proceeding to which it was already a  
17 litigant. And its effort now to kind of blow back  
18 and forth on whether or not it wants to litigate  
19 against Delaware has to do with its assertions of  
20 privilege and work product doctrine and whether or  
21 not it is faster and better and more efficient to  
22 do an original action that they can provide  
23 information and assistance to New Jersey and have  
24 New Jersey bring this action with BP as the real  
25 party in interest.



1 Thank you.

2 SPECIAL MASTER: Ms. Horowitz?

3 MS. HOROWITZ: Nothing further other than to  
4 reaffirm that in our view there is absolutely no  
5 disputed or debatable point about the fact that  
6 New Jersey is the real party in interest in light  
7 of the relief we're seeking. The fact that BP may  
8 or may not choose to engage in some other action  
9 should have absolutely no bearing on our ability  
10 as a state to bring an action against another  
11 state to assert our rights under Compact.

12 The Compact did not run in favor of BP. It  
13 runs in favor of New Jersey. And, therefore, we  
14 have an absolute right in our view to, again, as I  
15 have stated, bring such action as we think is  
16 appropriate and not to be dependent on any other  
17 party or any other party's action to assert our  
18 rights.

19 With respect to the issue of the assistance  
20 that BP may have provided to New Jersey, I have --  
21 I don't understand how that has any bearing on who  
22 is the real party in interest in light of the fact  
23 that New Jersey has stated objectively speaking  
24 its own claim and is asserting its own Compact  
25 rights. And whether assistance has been provided

1 by any one particular party has no bearing on  
2 that.

3 Further, in any Compact where you have a  
4 jurisdictional issue presented, you are  
5 necessarily always going to be affecting the  
6 rights of private parties who may prefer that you  
7 assert your jurisdiction rather than another state  
8 to the extent that your law may be more favorable  
9 to the particular private party, but that does not  
10 transform the state's Compact right somehow into  
11 the rights of the private party that would be  
12 regulated.

13 I don't have anything further unless you have  
14 any questions.

15 SPECIAL MASTER: All right. Counsel, thank  
16 you very much. The argument by both states has  
17 been very informative and very helpful.

18 And as always, from my own personal  
19 experience, oral argument is a great assist to  
20 someone who has to resolve complex issues. And  
21 these are complex issues because -- and as I  
22 indicated earlier, whichever way I rule, will help  
23 to shape the scope and form of the discovery which  
24 counsel are going to engage in.

25 It was my decision to attempt these matters

1 by conference call rather than by causing counsel  
2 to have to journey to some other location for  
3 in-person oral argument. And the reason for that  
4 is obvious. It's both to save counsels' time and  
5 also to try to keep expenses down. Unfortunately,  
6 we have experienced some transmission difficulties  
7 in this process. And I apologize to counsel and  
8 to the reporter for that. I don't know whether  
9 it's on our end or where it is. But it appears  
10 that it's going to continue as we try to work  
11 these things through by use of conference calling.

12 Because I think this transcript is going to  
13 be particularly important -- and although I -- as  
14 I have said before, Ms. Mason is a very good  
15 reporter, I think that we have had some  
16 difficulties here. And I would ask you to  
17 scrutinize very carefully the transcript and  
18 promptly let us know and let her know particularly  
19 if you see any gaps in the -- in the transcript  
20 caused by the transmission errors.

21 Mr. Raphael, would you want a copy of this  
22 transcript?

23 MR. RAPHAEL: I would, Mr. Lancaster, to the  
24 extent it's available on your docket. I would be  
25 happy to have it from there.

1           SPECIAL MASTER: All right. That will  
2 take -- that will -- there will be some delay in  
3 that, as you can appreciate, because it takes time  
4 to get that up on the docket. But if that's the  
5 way -- if you're comfortable with that, that's the  
6 way we'll leave it.

7           Counsel, thank you very much. I will turn to  
8 this matter promptly, and I will rule just as  
9 quickly as I can.

10           Is there anything further, New Jersey?

11           MS. HOROWITZ: No.

12           Thank you for hearing our argument.

13           SPECIAL MASTER: Delaware?

14           MR. FREDERICK: No.

15           Thank you, Mr. Lancaster.

16           SPECIAL MASTER: Thank you, all.

17           (The conference was concluded at 11:20 a.m.)

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CERTIFICATE

I, Claudette G. Mason, a Notary Public in and for the State of Maine, hereby certify that the foregoing pages are a correct transcript of my stenographic notes of the above-captioned Proceedings that were reduced to print through Computer-aided Transcription.

I further certify that I am a disinterested person in the event or outcome of the above-named cause of action.

IN WITNESS WHEREOF I subscribe my hand this 12~~th~~ day of June, 2006.

Claudette S. Mason

Notary Public

My Commission Expires  
June 9, 2012.