

IN THE
Supreme Court of the United States

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

**DELAWARE'S APPENDIX
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

VOLUME 7 (Pages 4213 – 4400)

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No. 134, Original
In the
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of the
United States

State of New Jersey

v.

State of Delaware

Expert Report of Carol E. Hoffecker, Ph.D.

My name is Carol E. Hoffecker, Ph.D. My address is 804 Cinnamon Drive, Hockessin, Delaware 19707. I am Richards Professor Emerita of History, University of Delaware, where I taught for approximately thirty-five years. I am the author of numerous books and articles dealing with aspects of Delaware history, including *Democracy in Delaware, The Story of the First State's General Assembly* (2004) and *Federal Justice in the First State: A History of the United States District Court for Delaware* (1992).

I have been assisted in preparing this report by Barbara E. Benson, Ph.D. Dr. Benson is the retired Executive Director of the Historical Society of Delaware and had served as an adjunct faculty member in the History Department of the University of Delaware from 1981-2003.

Neither I nor Dr. Benson has any financial interest in, or current employment or consulting arrangement with, any of the parties to this case other than having been

retained by the State of Delaware to review the claim made by the State of New Jersey, to provide my opinion as an expert on the background and historical context of the Compact of 1905 and to prepare this Expert Report.

Qualifications

Over more than forty years as a scholar and teacher, one of my principal interests has been research and teaching Delaware history, including the State's political history.

Information Required Pursuant to Rule 26(a)(2)(B)

My curriculum vitae is attached hereto as Exhibit A. Dr. Benson's curriculum vitae is attached hereto as Exhibit B.

All the data and information considered by me in forming the opinions herein, other than knowledge gained over many years of study in the field, are cited in this report.

I am being compensated for my work in preparing this report and for my testimony, if called, at the rate of \$200 per hour. Dr. Benson is being compensated at the same rate. Our compensation is not contingent on, or related in any way, to the outcome of this case.

Scope of Assignment

I have been retained by the State of Delaware to provide an opinion as to the historical background and context of the Compact of 1905.

Summary of Opinion

The Compact of 1905 grew out of an interstate conflict concerning the regulation of fishing rights in the Delaware River. In 1871, Delaware's General Assembly adopted a law to tax out-of-state commercial fisherman in Delaware's waters. Since colonial

times, Delaware had claimed water rights and the subaqueous soil in the Delaware River to the low water mark within a twelve-mile circle measured from the town of New Castle, Delaware. In 1877, New Jersey brought suit in the United States Supreme Court to contest Delaware's boundary claim and its right to regulate fishing in the river. The case languished for many years until both states decided to discontinue the litigation, without prejudice, based on agreements set forth in an interstate compact, which has come to be known as the Compact of 1905. The Compact of 1905 should be viewed in the context of a particular historical moment in time. It was designed to resolve the fishing dispute that caused the litigation. It was not intended to infringe on Delaware's boundary or jurisdictional claims in other respects, as to which both states reserved their claims. Delaware's boundary claim was later confirmed by the United States Supreme Court in 1934. By that time, there were few fish in the Delaware River, and the states were no longer concerned with the fishing issues that had led them to enter into the Compact of 1905.

Opinion

Disputes over the commercial uses of the Delaware River and Bay have plagued relations between Delaware and New Jersey since colonial times. The two states' protracted cases before the United State Supreme Court can remind readers of fiction of the seemingly endless suit of *Jarndyce v. Jarndyce*, in Charles Dickens's *Bleak House*. Since the Age of Discovery, the Delaware River and Bay have provided a major entry into the east coast of the United States. Today they remain a major commercial link to the world for the cities of Trenton, New Jersey, Philadelphia, Pennsylvania, and Wilmington, Delaware. These waterways are also an essential part of the Atlantic

Basin's ecosystem and have been an important source of food to the people who have lived along their shores for many centuries. Those many uses have not always coexisted harmoniously. The Delaware River and Bay have served both Delaware and New Jersey well, yet these bodies of water continue to separate the two states in more ways than one. This report describes the historical background of some of those conflicts and how the states have attempted to resolve them over time.

Early Fishing on the Delaware

Long before the European settlement of the Delaware River Valley, Native Americans paddled their dugout canoes on the waters of the Lenape Wihittuck, or the river of the Lenape, as the great river was then called.¹ The Lenni Lenape lived on both sides of the river, which was their major transportation artery and an important source of food. As part of their annual cycle of the seasons, Lenni Lenape visited the shores of the river and its tributaries during the summer months to fish for shad, sturgeon, and other fin fish, as well as to harvest oysters and shellfish. The abundance of fish and oysters made fishing easy. During the spawning season for shad and sturgeon, Lenape men and boys came to the river as those fish moved from salt to fresh water and then back again. They used woven nets and wooden stakes to create fence-like weirs to capture the fish. Some of the Native Americans would wade into the river to drive the fish into the net, where others could spear or even catch their slippery prey with bare hands.²

¹ C.A. Weslager and Louise Heite, "History," in *The Delaware Estuary: Rediscovering a Forgotten Resource*, eds. Tracey L. Bryant and Jonathan R. Pemock (Newark, Del.: University of Delaware Sea Grant Program, 1998), p. 11.

² Ibid.; C. A. Weslager, *The Delaware Indians* (New Brunswick, N. J.: Rutgers University Press, 1972), esp. chap. 3, pp. 50-76. For an illustration of Lenape shad fishing, see Weslager and Heite, "History," p. 14. Eventually the river once known as the "river of the Lenape" came to be known as the Delaware River, and the Native Americans living there as Delaware Indians.

Western Europeans arrived in ever-increasing numbers in the seventeenth century to exploit and to assert their control over the Delaware River and Valley and the lands that surround it. For nearly a hundred years, the Dutch, the Swedes, and the English vied for control over part or all of the lands along the Delaware. Fur trading and whaling brought the first Europeans, but soon many could see the opportunities for financial advancement through exploitation of other natural resources. Most people immediately think of the trade in animal pelts, especially the highly prized beaver, but the variety and abundance of fin fish and shellfish under the water were also seen as a major commercial resource.³

Virtually every explorer and early settler commented on the abundance of the Delaware River. For example, Thomas Yong, sailing for England in 1634, waxed eloquent about the region of the Delaware. He compared the climate to that of Italy, and of the fish he noted, "heere is plenty, but especially sturgeon all the sommer time"⁴ Peter Lindeström, who came about 1650 to the Delaware as part of the New Sweden Colony, had to describe shad for his masters in Stockholm: "a kind of large fish like the salmon, runs against the stream like a salmon . . . ; a very fine flavored and excellent tasting fish"⁵ Within a year of his arrival on the Delaware, William Penn bragged to friends back in England about the bounty of the Delaware River. To John Aubrey he

³ Two scholarly but highly readable introductions to colonization of the western shore of the Delaware River are John A. Munroe, *Colonial Delaware: A History* (Millwood, N.Y.: KTO Press, 1978) and C.A. Weslager, *The English on the Delaware, 1610-1682* (New Brunswick, N.J.: Rutgers University Press, 1967).

⁴ "Account of Thomas Yong, 1634," in *Narratives of Early Pennsylvania, West New Jersey, and Delaware, 1630-1707*, ed. Albert Cook Myers (New York: Charles Scribner's Sons, 1912), p. 48.

⁵ Peter Lindeström, *Geographia Americae*, trans. Amandus Johnson (Philadelphia: Swedish Colonial Society, 1925), p. 187.

wrote, "the sorts of fish in these parts are excellent and numerous. Sturgeon leap day and night that we can hear them . . . in our beds."⁶ A month later he told the Earl of Sunderland that there were "fish in abundance, especially of Shad and Rock [striped bass], which are excellent here."⁷

In 1683 William Penn had every reason to enjoy, in a proper Quaker way, his enviable position as proprietor of not one, but two, English colonies in North America. Little did he know then how difficult, how litigious, his struggle would be to hold claim to his colonies and to pass them down to his heirs. Because of his father's wealth and position, William traveled in the upper circles of the English aristocracy. His conversion to the radical new religion of the Society of Friends pained and frustrated his father and often moved young Penn beyond the realms of elite society. His faith led him to many places, including the Mid-Atlantic region of North America. His first encounter with this colonial world came with West Jersey, an experience that he found fraught with both potential and pitfalls. He learned that colonial lands could be used to create areas of settlement for Quakers and other religious nonconformists, but he also learned various lessons about the legal dangers of both partnerships and the Crown.⁸

William Penn subsequently sought a grant of land from England's monarch to create his own colony on the opposite or western side of the Delaware River. King Charles II owed Penn a large debt for money borrowed from Penn's late father. Penn preferred land to cash, and North American land was much easier for Charles to spare

⁶ William Penn to John Aubrey, June 13, 1683, *The Papers of William Penn*, 5 vols., eds. Richard S. Dunn and Mary Maples Dunn et al. (Philadelphia: University of Pennsylvania Press, 1981-1986), 2:395.

⁷ William Penn to Earl of Sunderland, July 28, 1683, *The Papers of William Penn*, 2: 417.

⁸ For a modern biography of William Penn, see Richard S. Dunn and Mary Maples Dunn, eds., *The World of William Penn* (Philadelphia: University of Pennsylvania Press, 1986).

than money. But such a grant had to fit a new colony into an area already partially carved up into the Colony of Maryland, granted to Lord Baltimore by Charles I in 1632, and the Three Lower Counties on Delaware, which the king's brother, James, duke of York, had seized from the Dutch in 1664. Imprecise knowledge of the area's geography, and its cartographic representations, made this grant tricky, and thereby began the controversy over the boundaries of Delaware.

Delaware's unusual shape and its claim to the Delaware River to the low-water mark on the eastern shore began with the royal grant of Pennsylvania. The Duke of York wanted to protect his major town and administrative center on the western side of the Delaware River, so his secretary, Sir John Werden, proposed a circle boundary from the town, New Castle, as a territorial buffer. The final determination of a twelve-mile circle was transferred just two years later, in 1682, by deed and lease to William Penn. Penn thus gained control of the western side of the Delaware River through two separately granted but contiguous colonies: the Province of Pennsylvania and The Three Lower Counties on Delaware.

Much time and attention, to say nothing of parchment, paper, and ink, have been lavished on the question of Delaware's boundaries for over 300 years. The Duke of York's "clouded title" to land on the western side of the river, as noted historian John A. Munroe so delicately termed it, accounts for those controversies. Lawyers, historians, and archivists have spent countless hours marshalling the documents and arguments used to assert the rights of one claimant over another, from William Penn and Charles Calvert, Lord Baltimore, to the states of New Jersey and Delaware. Legal decisions establishing and affirming the boundaries of the second smallest colony/state by size took from 1750

when the English Court of Chancery upheld the Penn claims over those of Lord Baltimore to the 1934 United States Supreme Court decision written by Justice Benjamin Cardozo upholding the State of Delaware's claim to the territory within the twelve-mile circle from New Castle to the low-water mark on the eastern shore of the Delaware River.⁹

The Nineteenth-Century Fishing Industry on the Delaware

While the colonial population expanded and territorial boundaries were adjudicated, the river of the Lenni Lenape became a major transportation corridor, and its fin fish and shellfish continued to be an important part of the local diet and commerce. By the middle of the nineteenth century fishing on the Delaware had become a profitable business, and newspapers in Philadelphia eagerly reported on the enormity of the annual catch.¹⁰ Fishermen and fishing industries on the Delaware, like individuals and companies almost everywhere, reacted accordingly. Throughout history, when natural resources appear to be so plentiful as to be without limit, those involved in their exploitation see little reason for restraint. Exploitation, not conservation, becomes the operative mentality. The reasoning is always the same: if the harvest of a resource, like fish, is good, then more capital, more labor, and more tools will surely lead to greater exploitation and greater profits.

⁹ For brief summaries of early boundary decisions, see, among many, Weslager, *English on the Delaware*, pp. 221-26, and Munroe, *Colonial Delaware*, pp. 79-84. The Duke of York's deed of feoffment to William Penn delineated the boundary thusly: "all that the Towne of NewCastle otherwise called Delaware and All that Tract of Land lying within the Compass or circle of Twelve Miles about the same scituate lying and being upon the River Delaware in America And all Islands in the same River Delaware and the said River and Soyle thereof lying North of the Southernmost part of the said Circle of Twelve Miles about the said Towne" (*State of New Jersey v. State of Delaware*, 291 U.S. 361, 364 (1934)).

¹⁰ Quoted in *Delmarva Star* (Wilmington, Del.), Mar. 31, 1929.

The two fin fish of particular value to the Delaware River's nineteenth-century fishing industry were the favorites from time immemorial: the shad and the sturgeon. William Penn's beloved shad is one of the largest and most valuable members of the herring family. Shad, which can weigh as much as twelve pounds, live in the salt water of the Atlantic Ocean, but from age three to five onward they return to fresh water to spawn. Shad-spawning season on the Delaware is primarily April through June. Shad can be found along the Atlantic coast of North America from the Gulf of Saint Lawrence to Florida, but they are most abundant in the Delaware River and the Chesapeake Bay. Atlantic sturgeon are found from the Saint Lawrence River south to the Gulf of Mexico. At the height of the sturgeon industry, the Delaware fishery was the largest in America. Sturgeon can reach a length of ten to twelve feet and, like shad, live in salt water but travel to fresh water to spawn. Sturgeon spawning season on the Delaware is normally the months of May and June.¹¹

The Delaware River's commercial fishing industry began and ended with shad. From the 1870s, shad fishermen on the Delaware found eager buyers. At first fishermen sold their catch from their boats, or their wives hawked them at local markets. Then buyers from all over the East Coast came to the major port towns. By the end of the nineteenth century, much of Delaware's shad catch was sent to distant markets in water-tank rail cars. As the shad industry boomed, its expenses increased. More men and boats took to the water, and the drift nets used to catch the shad got longer and longer, reaching up to a mile in length. Often fishermen worked cooperatively in groups, fishing in teams

¹¹ For an overview of the fish and fishing industry of the Delaware River and Bay, including shad and sturgeon, see Kent S. Price, Robert A. Beck, Steward M. Tweed, and Charles E. Epifanio, "Fisheries," in *The Delaware Estuary: Rediscovering a Forgotten Resource*, eds. Tracey L. Bryant and Jonathan R. Pennock (Newark, Del.: University of Delaware Sea Grant Program, 1998), pp. 71-89.

and sharing shoreline fishing shacks for eating and sleeping between trips. On the western shore of the river, the dominant shad-fishing area extended from Port Penn to Wilmington, while on the eastern shore, Penn's Grove was an important shad center. The shad catch in the Delaware increased dramatically: from about 3 million pounds a year in 1880 to nearly 15 million pounds in the early twentieth century. But then the shad industry fell as rapidly as it had soared. For the State of Delaware alone, the shad catch dropped 99 percent from 1896 to 1944. What brought about this collapse? One newspaper bluntly summed it up by saying, "killed off by greed and pollution."¹²

Initially, commercial fishermen on the Delaware viewed the huge, jumping sturgeon as a "nuisance" rather than an exploitable asset. Sturgeon surged upriver in spawning season in such huge numbers that people swore that the fish would actually jump into boats.¹³ Shad fishermen hated sturgeon because the fish caused heavy damage, even destruction, when caught in shad nets. When shad fishermen saw sturgeon racing toward their nets, their best recourse was to try to take their nets in. Slowly a market grew for sturgeon meat, particularly smoked sturgeon, but the sturgeon really took off

¹² *Delmarva Star*, Mar. 4, 1923. No single comprehensive source on the history of shad fishing in the Delaware River exists, but a good understanding can be gained by reading Price, Beck, Tweed, and Epifanio, "Fisheries," pp. 71-77, who note that improved water quality and government regulations have recently significantly increased the shad population in the Delaware. This increase, however, has not created a similar return of a shad fishing industry because the competitive situation has changed. See also, James G. Horn, "The History of the Commercial Fishing Industry in Delaware" (B.A. thesis, University of Delaware, 1957), pp. 2-20; Jay L. Harmic, "History of Delaware's Shad Fisheries," in *Delaware Conservationist* (Spring 1963): 14-15; and a series of articles in Delaware newspapers, especially *Wilmington Journal-Every Evening*, Aug. 30, 1947, and *Wilmington Evening Journal*, Jan. 25, 1927.

¹³ No single comprehensive source for the history of sturgeon fishing on the Delaware exists, but a good overview of the industry can be gained from John N. Conn, "The Sturgeon Fishery of Delaware River and Bay," in U.S. Commission of Fish and Fisheries, *Report of the Commissioner for the United States Commission of Fish and Fisheries for 1899* (Washington, D.C.: Government Printing Office, 1899), pp. 369-80; John A. Ryder, "The Sturgeon and Sturgeon Industries of the Eastern Coast of the United States . . ." *Bulletin of the United States Commission of Fish and Fisheries for 1888* (Washington, D.C.: Government Printing Office, 1889), pp. 231-328; Price, Beck, Tweed, and Epifanio, "Fisheries," pp. 71-77; Horn, "Commercial Fishing Industry in Delaware," pp. 2-20; *Wilmington Every Evening*, Jan. 25, 1927.

when the price of caviar increased. The price of sturgeon eggs, or roe, jumped from 30 cents a pound in 1897 to \$3.50 1922.¹⁴ Now female sturgeon became truly valuable. Sturgeon vessels and nets appeared on the Delaware to compete with shad ships. Sturgeon fishermen often worked from scows fitted out with two cabins, a large one for communal living and a small one for butchering the catch and preparing the roe. Others fished from sailing ships known as sturgeon skiffs, which were larger than shad skiffs. Sturgeon fishermen drifted long gill nets, often using fifteen small boats working as a team. The center of the sturgeon industry on the western side of the Delaware was from approximately twenty miles north to twenty miles south of Delaware City, while Penn's Grove and Bayside were important sturgeon centers on the eastern shore. Fishermen sold locally, nationally, and particularly internationally for caviar. As market demand increased, so did the number of fishermen and the size of the catch, leading to the beginning of the end of the sturgeon industry on the Delaware. The number of nets might increase, but the catch per net began a steady decline as early as 1888. High prices, however, sustained some level of commercial sturgeon fishing on the Delaware into the 1930s. Once again, "greed and pollution" got the blame for the industry's demise; but in the case of sturgeon, over-fishing through greed was believed to be the greater culprit.

From the Fishing War of 1871 to the United States Supreme Court, Round 1

Not all of those who worked in the fishing industries or in the governments of the states in which fisheries operated remained oblivious to the imperative of sustainability. Without regulation and protection of a natural resource, fishing could not survive at a commercial level. As early as 1871 the federal government created the United States

¹⁴ Price, Beck, Tweed, and Epifanio, "Fisheries," p. 75.

Commission of Fish and Fisheries to study why food fish in American waters were declining and how that decline could be turned around. From that commission came two major reports on the sturgeon industry of the Delaware River and Bay in 1888 and 1899.¹⁵ At about the same time state governments with interests in the Delaware River and Bay began to enact legislation designed to protect the fishing interests of their citizens. New Jersey appointed Commissioners of Fisheries in 1870, and the following year Delaware's governor urged the legislature to appoint a study commission. The Delaware legislature subsequently approved the appointment of five fish commissioners in 1873.¹⁶

As commercial fishing became important at the beginning of the 1870s, both Delaware and New Jersey took an increasing interest in the Delaware River. Delaware Governor Gove Saulsbury included a section on fishing in his message of 1871 to the Delaware legislature concerning the conservation of the resource for the benefit of Delaware citizens.¹⁷ "The laws of the state have not been adequate to the protection of

¹⁵ Ryder, "The Sturgeon and Sturgeon Industries of the Eastern Coast of the United States . . .," is a scientific study delineating the need to control over-fishing, protect habitat, and promote propagation; Conn, "The Sturgeon Fishery of the Delaware Bay and River" is a detailed history of the sturgeon industry to the end of the nineteenth century.

¹⁶ *Revision of the Statutes of New Jersey, Published under the Authority of the Legislature* (Trenton: John L. Murphy, 1877), 425 [This law, passed in 1870 and amended in 1873 and 1874, was entitled "An act for the appointment of commissioners for the better protection of fishing interests of the state of New Jersey"]; Gove Saulsbury, Governor's Message of Jan. 3, 1871, in Delaware, *Journal of the Senate*, 1871, pp. 16-17; *Laws of Delaware*, vol. 14, chap. 419, sec. 2, p. 281.

The laws cited above were not the first passed by either state relating to fin fishing. At least as early as 1808, New Jersey enacted concurrent legislation with Pennsylvania to regulate fishing on the northern portion of the Delaware River. This legislation, supplemented many times, was in effect at the time the State of New Jersey created fish commissioners (*Revision of the Statutes . . .*, 1877, pp. 426-33). The State of Delaware passed its first regulatory fishing law in 1829, an act to regulate and tax gill nets, but promptly repealed it a year later. Another law adopted a decade later made it illegal for nonresidents to hunt, fish, or take oysters "from, in, or near the waters of the Delaware River and Bay" (*Laws of Delaware*, vol. 7, chap. 181, p. 372, and vol. 9, chap. 216, p. 263).

¹⁷ Saulsbury, "Message of Jan. 3, 1871," p. 17.

our oyster beds, planting grounds, and fisheries from depredation by non-residents”

The legislature, he wrote, has a duty

to protect our inhabitants in the proximity to our rivers and streams, and the proprietors of the soil along our coasts, and all engaged in the business of fishing and culture of oysters, in all the rights which their location and business entitle them to, as it is to protect our fruit growers or the producers of any other of our staple crops.¹⁸

Governor Saulsbury’s concerns relating to fishing were nothing new in Delaware. The state’s first such law in the nineteenth century, passed in 1812, declared Delaware’s waters off-limits to non-Delawareans. While this law was concerned with oysters and terrapin, the legislature’s next protective effort, in 1839, prohibited all non-Delawareans from fishing and hunting in or near the “waters of the Delaware.”¹⁹ Clearly Delaware’s lawmakers assumed ownership of the river, but equally clearly those laws lacked teeth, for funds were never allocated to enforce them.

New Jersey’s fish commissioners approached their mandate from a perspective very different from that of Governor Saulsbury. In 1871 they recommended legislation to regulate fishing by day, season, and mesh size of net. They also sought a tax on drift nets, which met immediate opposition from fishermen. All of the commissioners’ recommendations were passed by New Jersey’s legislature on March 15, 1871, with the exception of the tax on fishing nets.²⁰

¹⁸ Ibid.

¹⁹ *Delaware Laws*, vol. 9, chap. 216, pp. 263-65; *Delaware Laws*, vol. 4, chap. 209, pp. 568-69. In 1851, the legislature extended the law of 1839 to include all rivers and streams in addition to the Delaware River and Bay (*Delaware Laws*, vol. 10, chap. 569, pp. 564-65).

²⁰ *Laws of New Jersey*, Supplement to An Act to regulate the fisheries in the river Delaware, and for other purposes, Article 44, Mar. 15, 1871, p. 433.

New Jersey's legislators and fish commissioners approached fishing issues through the perspective of creating interstate agreements. The act was adopted as a supplement to legislation first passed in 1808 that had required the Commonwealth of Pennsylvania to pass an act of the same or similar wording before it took effect in New Jersey. Likewise, in 1871 New Jersey's fish commissioners sought Delaware's participation in creating a tri-state coalition on fishing laws. The commissioners, in fact, were most concerned with what New Jersey considered to be the southern portion of the Delaware River (that is the area of the river between the states of New Jersey and Delaware) because that area saw the most traffic in drift-net shad fishing. Thus, they sought, and received, permission from their governor to visit Delaware's legislators in Dover.²¹ In some ways they counted their trip a success, for on March 28, 1871, the Delaware General Assembly passed an act that joined with New Jersey's law in regulating day, season, and mesh size of nets. But Delaware's legislators added a provision that addressed the issue raised by their governor. Section 1 of "An Act for the Protection of Fishermen" made it illegal for all non-Delaware residents to "catch or take fish of any kind in Delaware bay or river, or any of the creeks emptying into the same within the limits of the same" without a license. It would now cost non-Delawareans \$20 per annum for a license.²²

Instead of creating harmony between and among the governments and fishermen of the states bordering the Delaware River, this fishing law emanating from Dover in 1871 unleashed a tidal wave of ill will and litigation that has pitted New Jersey against

²¹ *Third Annual Report of the Commissioners of Fisheries of the State of New Jersey, For the Year 1872* (Trenton: State Gazette, 1872), pp. 9-10.

²² An Act for the Protection of Fishermen, *Delaware Laws*, vol. 14, chap. 72, pp. 84-87. A supplemental act in 1871 (vol. 14, chap. 73, p. 88) instituted a \$5.00 license fee for state residents.

Delaware for over 130 years, as the protection of fish and fishermen morphed into a full-scale, recurring judicial argument on state boundaries so reminiscent to Delawareans of the earlier, and seemingly endless, boundary dispute among William Penn, Lord Baltimore, and the English Crown.

Delaware's fishing law of 1871 sought to protect the state's own fishermen and fishing industry by oversight and control of all of the Delaware River that it had claimed since 1682, during the Duke of York-William Penn era—all of the water, and its soil below, to the low-water mark on the eastern side of the river within the twelve-mile circle from the town of New Castle. To Delawareans this boundary was beyond discussion. Indeed, it appears that the State of Delaware considered the twelve-mile circle to be such a given that it did not bother to codify it until 1852, in response to the Pea-Patch Island dispute in the 1840s.²³

To non-Delaware fishermen using the Delaware River, the out-of-state licensing provision of Delaware's law of 1871 was offensive. No matter who claimed to own the river, fishermen had always taken equal access for granted. News did not travel as fast as it does today, but once people heard, they were anxious and confused. What would be the practical implications? The answer came in the spring of 1872 and was a straightforward application of the law, apparently initiated by Delaware's attorney general. On May 2, 1872, W.W. Pritchett, a constable in Wilmington, accompanied by an armed posse, took a steam tugboat to the eastern side of the Delaware River and arrested twenty-two New Jersey residents for fishing in the waters of the State of Delaware without

²³ "Of Sovereignty, Jurisdiction and Limits," chap. 1, sec. 1, *Revised Statutes of Delaware*, 1852, pp. 2-3. For the Pea-Patch Island case, see Justice Cardozo's discussion of *In re Pea Patch Island*, 30 F. Cas. 1123 (Arb. Ct. 1848) (No. 18311). *State of New Jersey v. State of Delaware II*, 291 U.S. 361, 377, 54 S. Ct. 407, 412-13 (1934).

licenses. The men were taken, some at gun point, to the district attorney in Wilmington, along with their eleven rowboats and fishing nets. When the fishermen told the district attorney that they had always fished on the river and never had had to have a license, he told them of the new law and gave them a choice of buying licenses and paying court costs or forfeiting their boats and nets and going to jail to await trial. Reluctantly the men bought licenses.²⁴

Reaction to those arrests was swift. Within a week, New Jersey's governor, Joel Parker, issued a proclamation asserting the State of New Jersey's right to the Delaware River from its own shore to the middle of the river and the right of New Jersey fishermen to fish in those water without having to get licenses from the State of Delaware. Governor Parker then warned "all persons" (meaning, of course, Delaware officials) not to arrest New Jersey fishermen in the disputed area and urged New Jersey citizens to resist violence.²⁵ Governor Parker next wrote a letter to Delaware's governor that both asserted New Jersey's territorial claim to the eastern half of the Delaware River and announced his proclamation of the previous day. New Jersey, he said, believed the question of state boundary claims required judicial resolution.

A few days later, Governor James Ponder of Delaware responded to Governor Parker with a strong assertion of Delaware's right to the river within the twelve-mile

²⁴ Affidavits of John Q.A. Denny, George Stanton, and Job Barker, in Record, *New Jersey v. Delaware*, No. 1, (1877) (excerpt), reprinted in Documents submitted by the State of Delaware to U.S. Supreme Court in *New Jersey v. Delaware III* on Oct. 27, 2005, Lodging, tab 1:44-47.

²⁵ Joel Parker, governor of the State of New Jersey, to James Ponder, governor of the State of Delaware, Trenton, May 9, 1872, in *Report of the correspondence between Govs. Parker and Ponder . . .* (Trenton: State Gazette, 1873), p. 3; "A Proclamation by the Governor of New Jersey," May 8, 1872, reprinted in Record, *New Jersey v. Delaware*, No. 1, p. 25.

circle. It was, said Governor Ponder, "not . . . an open question."²⁶ From Delaware's perspective, the law of 1871 was not at all a territorial assertion; it was enacted "for the purpose of aiding the propagation of certain fish which were fast becoming extinct," a law passed "at the suggestion and request of the fish commissioners of New Jersey. . . ."²⁷ As to judicial review, Governor Ponder asked for a proposal from his counterpart because he (Ponder) did not have the constitutional power to agree to arbitration.

Governor Parker got the final word in this particular flurry of correspondence. On May 22, he sent a letter to Governor Ponder that again denied Delaware's boundary claim. His proposal for judicial review was to pass the question to his attorney general.²⁸ So, the first salvo of the Delaware River fishing war, which started with a drawn gun, ended in a barrage of words and legal maneuvering.

Later, Governor Parker, Governor Ponder, and the attorneys general of the two states met. After a "free interchange" of ideas, the officials of both states agreed that Delaware would make no arrests east of the middle of the Delaware River while both governors urged their respective state legislatures to appoint three commissioners to settle the question of river jurisdiction.²⁹ After some to-ing and fro-ing, both legislatures agreed.

Delaware went first. On January 30, 1873, the legislature adopted joint resolutions to establish the six-man commission recommended by the governor. The

²⁶ James Ponder, governor of the State of Delaware, to Joel Parker, governor of the State of New Jersey, Dover, May 14, 1872, in *Report of the Correspondence between Govs. Parker and Ponder . . .*, p. 4.

²⁷ *Ibid.*

²⁸ *Ibid.*, pp. 5-8.

²⁹ Governor's Annual Address, July 14, 1873, New Jersey, *Senate Journal*, pp. 47-48.

legislature agreed that the decision of the commission was to be final. Two weeks later the legislature added supplementary joint resolutions that clarified their intent: Delaware would not submit the boundary question, but only the right, and the extent of that right, of citizens of New Jersey to fish in the Delaware River within the twelve-mile circle.³⁰ To up the ante, the Delaware General Assembly then passed a supplement to the "Act for the Protection of Fishermen of 1871" instituting a tax for nonresidents on nets greater than 300 fathoms.³¹

New Jersey's legislature soon followed Delaware's by passing an act to appoint three commissioners to a joint commission to "negotiate and agree respecting territorial limits and jurisdictions of the two states." When the legislature learned of the precise wording of Delaware's supplementary resolutions of February 14, it, in turn, modified its original legislation after receiving a message from Governor Parker. The governor reminded the legislators that "the important practical question which interests most of our citizens is the right of fishing in the river Delaware, its nature and extent"³² By a supplement approved March 11, New Jersey's legislature agreed, for the sake of expediency, to negotiate on the narrow issue of fishing rights.³³ Delaware responded to New Jersey's apparent willingness to negotiate within Delaware's more narrow parameters with a major olive branch. In joint resolutions of April 8, 1873, the Delaware

³⁰ Delaware, Legislature, Joint Resolutions, Jan. 30, 1873, Feb. 14, 1873, and Feb. 19, 1873, reprinted in Record, *New Jersey v. Delaware*, pp. 26-28.

³¹ "A Supplement to the Act Entitled 'An Act for the Protection of Fishermen,'" vol. 14, chap. 419, Feb. 19, 1873, in *Revised Statutes of the State of Delaware . . . to . . . 1874* (Wilmington: James and Webb, 1874), p. 281.

³² Governor Joel Parker, Message to the Legislature, printed in New Jersey, *Journal of the Senate*, Mar. 5, 1873, p. 505.

³³ New Jersey, Legislature, Act of Feb. 26, 1873, and Supplement to Act, Mar. 11, 1873, reprinted in Record, *New Jersey v. Delaware III*, Lodging, tab 1, pp. 29-32.

legislature suspended the out-of-state fishing license section of the troublesome 1871 fishing protection act pending the outcome of the commission's negotiations. Moreover, if the commission decided favorably on Delaware's position, its state commissioners were authorized to agree to a mutual right of fishery.³⁴

The new commission held meetings in the spring and summer of 1873. Delaware's three commissioners made several proposals to their counterparts from New Jersey, but since all of those proposals began with acceptance of Delaware's title to the river to the low-water mark on the eastern shore within the twelve-mile circle, the New Jersey commissioners declined to agree. The commission held three more unproductive meetings through June 1874. Then Delaware's commissioners presented their New Jersey counterparts with what in essence amounted to a closely argued legal brief, taking thirty-four pages to "prove" Delaware's title.³⁵ Eight months later Delaware's commissioners still had not received a response. Thus, they reported to their legislature that they did not believe the joint commission could ever come to a mutually agreeable settlement.³⁶

In his message to Delaware's General Assembly in January 1877, Governor John P. Cochran reviewed the history of the joint commission. He said that the previous legislature of 1875 had construed New Jersey's long silence as "an implied abandonment of their case and a tacit relinquishment of their alleged claim of title and jurisdiction," so

³⁴ Delaware Legislature, Joint Resolution, Apr. 8, 1873, reprinted in *Record, New Jersey v. Delaware*, 32-37.

³⁵ *The Fishery Question Argument of the Delaware Commissioners* (Wilmington: James & Webb, 1874).

³⁶ Report of the Fishery Commissioners, in Delaware, *Journal of the Senate*, Feb. 2, 1875, pp. 211-12.

on March 18, 1875, Delaware lawmakers disbanded the commission.³⁷ The Delaware legislators then reinstated the out-of-state fishing license requirement of the 1871 act. According to New Jersey's attorney general, New Jersey knew nothing about those actions until a New Jersey citizen called Governor Joseph D. Bedle's attention to a notice placed in the *Wilmington Morning Herald* on March 15, 1876, announcing the need for fishermen to again secure licenses from Delaware. The attorney general asserted that Delaware had misconstrued New Jersey's silence, for its commissioners were, in fact, still wrestling with the issues on the table.³⁸

Territorial title remained an unresolved issue, but of greater concern to New Jersey's governor was the return of Delaware's fishing license law. Governor Bedle invited Governor Cochran of Delaware to a meeting in Philadelphia in hopes of winning a postponement of the law's reinstatement. At their meeting the governors could not resolve the issues, so the only recourse left to the State of New Jersey was to seek resolution by the United States Supreme Court. And so it did in March 1877.³⁹

Efforts to Reach a Settlement

In preparation for litigation, Delaware's General Assembly adopted joint resolutions proclaiming the state's ownership of, and exclusive jurisdiction over, the twelve-mile circle across the Delaware River to the low water mark on the New Jersey

³⁷ *First Biennial Message of His Excellency John P. Cochran, Governor of Delaware to the General Assembly, Session of 1877* (Wilmington, 1876 [sic]), p. 21; *Delaware Laws*, vol. 15, chap. 2249, pp. 254-55.

³⁸ Bill of Complaint, reprinted in Record, *New Jersey v. Delaware*, pp. 31-36. See also New Jersey, *Journal of the Senate*, Mar. 22, 1876, pp. 325-27 for letters of Governor Joseph D. Bedle and A. Browning for New Jersey Commissioners to governor of New Jersey.

³⁹ *First . . . Message of John P. Cochran . . .*, p. 22; *Laws of Delaware*, vol. 15, pt. 2, chap. 504, Jan. 26, 1877, pp. 641-42; *Third Annual Message of His Excellency Joseph D. Bedle, Governor of New Jersey to the legislature, Session of 1878*, Doc. No. 1 (Trenton, 1878), p. 23.

shore and authorizing the governor to employ counsel to defend the First State's position before the United States Supreme Court.⁴⁰ Governor John P. Cochran then appointed three of the state's most outstanding lawyers to represent the state in the suit. They were Thomas F. Bayard, George Gray, and George H. Bates. All were Democrats, then the majority party in Delaware. By 1885 only Bates, the son of a prominent Delaware jurist, Chancellor Daniel Moore Bates, and a former Speaker of the House of the Delaware legislature, was left. Bayard had gone on to become United States Secretary of State in Grover Cleveland's first administration, while Gray became a United States senator and then a federal judge. Preparation of the case was extremely time-consuming. Between 1901 and 1905, George Bates amassed piles of documents from the early colonial period. Some required translation; all had to be typed, edited for modern readers, and interpreted.⁴¹

In March 1877 the Supreme Court issued an injunction ordering Delaware to suspend the out-of-state license provision pending resolution of the litigation. The suit then languished for want of interest on the part of New Jersey, the complainant state, until the next fishing dispute arose. This time the source of the controversy lay south of the river, in the Delaware Bay. In 1885 Delaware authorities arrested and even jailed some fishermen in the upper Delaware Bay, confiscating their boats and nets.⁴² Delaware argued that such arrests were permissible because the United States Supreme Court's injunction applied only to the contested portion of the Delaware River, that is, the area

⁴⁰ *Laws of Delaware*, vol. 15, chap. 504, pp. 641-42.

⁴¹ George H. Bates to Attorney General Robert H. Richards, March 8, 1909, Bates Family Collection (hereafter B.F.C.), Historical Society of Delaware, Wilmington, Del. (hereafter H.S.D.).

⁴² *Report of the Commissioners of the Fisheries of New Jersey, 1884-85* (Trenton: John J. Murphy, 1886), pp. 5-6 (quotation, p. 5); *New York Times*, Aug. 13, 1885.

within the twelve-mile circle. But where did the river and bay divide? The governors of New Jersey and Delaware agreed that their respective attorneys general should meet to determine the boundary line. With the assistance of scholars and lawyers, Attorney General John H. Paynter of Delaware and Attorney General John P. Stockton of New Jersey set the dividing line between river and bay to run from Cohansey Light in New Jersey west to Bombay Hook Point in Delaware. Once that agreement was reached, Delaware agreed to drop its charges against the fishermen, whose boats and nets had already been returned. Delaware continued to insist upon its citizens' exclusive fishing rights in its half of the Delaware Bay, but for all practical purposes Delaware does not seem to have enforced that position. Attorney General Stockton urged another conference between the two states to secure mutual fishing rights in all the waters of the Delaware Bay. Such a conference never took place, most probably because it did not prove necessary. With the acquiescence of both states to the concept of mutual fishing rights in the waters of the river and bay, fishing continued unmolested.⁴³ As Governor Joel Parker had reminded the New Jersey legislature more than a decade earlier, "the important practical question . . . is the right of fishing in the Delaware" ⁴⁴ For the moment fishing rights were secure.

⁴³ *Report of the Commissioners of Fisheries*, p. 6; *Annual Report of the Attorney General of the State of New Jersey, for the Year 1887*, pp. 19-21; *Final Report of the State Geologist*, vol. 1: *Topography, Magnetism, Climate* (Trenton: John J. Murphy, 1888), pp. 83-84; *New York Times*, Aug. 13, 1885.

⁴⁴ *New Jersey, Senate Journal*, 1873, p. 505.

The Oyster Conflict Opens and Closes

Between 1871 and 1905, only once did an issue beyond fin fishing cause a ripple in the relationship of New Jersey and Delaware. The issue concerned oysters, and this time the aggressive assertion of legal rights came from New Jersey and not Delaware.

Oysters, like fin fish, had been an important part of the local diet since the time of the Native Americans, and they attracted as much attention from Western European explorers and settlers as did the Delaware River's shad and sturgeon. From earliest times, the governments of Delaware and New Jersey recognized the significance of this aqueous resource and passed laws to protect, preserve, and control an important food source and an increasingly valuable economic commodity. The main stimulus to commercial oystering in the Delaware Bay came in 1870 with the extension of the New Jersey Southern Railroad, a division of the New Jersey Central Railroad, to the Maurice River, a tributary of the Delaware Bay. With the railroad, the number of shucking houses increased, and New Jersey oysters could reach well beyond local and regional markets.⁴⁵

Even without the railroad connection, New Jersey always had the advantage over Delaware because its oyster beds were larger than those of its neighbor to the west. Still, Delaware had significant oyster resources. Many families living along the Delaware Bay earned their livings from oystering. Delaware's oysters were most plentiful along the shores of Kent County from Leipsic to Bowers Beach, with the center at Port Mahon. With poorer train connections and smaller shucking houses, Delaware always lagged

⁴⁵ Mary Emily Miller, "The Delaware Oyster Industry," *Delaware History*, 14(1971): 239-41; James E. Valle, "Harvesting Oysters," in *The Delaware Estuary: Rediscovering a Forgotten Resource*, eds. Tracey L. Bryant and Jonathan R. Pennock (Newark, Del.: University of Delaware Sea Grant Program, 1998), p. 26; Donald H. Rolfe, "Bivalve, New Jersey: 'Long Reach Remembered,'" in *The Delaware Estuary: Rediscovering a Forgotten Resource*, p. 82.

behind New Jersey in the scale of its oystering operations. Indeed, as time went on, Philadelphians came to dominate Delaware's oyster beds. Philadelphia entrepreneurs sent sailing ships equipped with two-to-four dredges into the Delaware Bay. The ships took their cargoes directly to Philadelphia for shucking and transport.⁴⁶

Philadelphia ships also dredged for oysters in the eastern half of the Delaware Bay, which led to the first complaints about territorial claims to oyster areas. In 1871, the Commonwealth of Pennsylvania issued a report "in Reference to the Oyster fisheries in Delaware Bay" in response to a law passed by New Jersey's legislature earlier that year.⁴⁷ According to Pennsylvania, the three states of Pennsylvania, New Jersey, and Delaware had enjoyed common usage of oystering areas since the 1830s.

Then in 1871 the New Jersey legislature passed a law to require every boat working in New Jersey's waters to buy a license. The license was available only to individuals who had been residents of New Jersey for at least six months. The law added a sliding scale of license fees ranging from \$10 to \$60, depending upon the size of the oyster boat, as well as multiple enforcement provisions such as the appointment of a "special officer" who would have the power of arrest.

Not to be outdone, Delaware's legislature passed similarly restrictive laws that same year. The state closed its oyster beds to non-Delawareans or non-owners of Delaware plantation rights. Legislators also added a licensing fee on boats dredging in public beds that was three times that charged by New Jersey. Finally came the

⁴⁶ Valle, "Harvesting Oysters," p. 26; Weslager and Heite, "History," p. 25; Mary Emily Miller, "The Delaware Oyster Industry: Past and Present" (Ph.D. diss., Boston University, 1962), pp. 142-44.

⁴⁷ Miller, "The Oyster Industry: Past and Present," pp. 133-34. The New Jersey law was entitled "An Act for the better enforcement in Maurice River cove and Delaware Bay of the act entitled 'An Act for the preservation of clams and oysters . . .'" (New Jersey P.L., 1871, p. 642). The original law was enacted on April 14, 1846.

enforcement provisions, which included a collector with arrest powers and the purchase of a watchboat.⁴⁸

Aside from angering some in Pennsylvania, few jurisdictional problems appear to have arisen from the oystering legislation emanating from Trenton and Dover. One scholar noted no significant friction arising from the laws passed on both sides of the river. He found that for Delaware, the major result of the residency requirement was that members of New Jersey oystering families moved to Delaware to expand their operations, a migration that perhaps worked both ways.⁴⁹ In the last quarter of the nineteenth century, Delaware's oystermen voiced concern primarily about individuals who illegally dredged for oysters, "marauders" primarily from Pennsylvania. Eventually the conflict escalated to a level of combat and bloodshed. "Oyster pirates," as they came to be called, armed their boats with cannon and were able to overwhelm Delaware's watchboat and small, legal oyster boats.⁵⁰

In 1887, Delaware's legislature passed a law that expanded the state's claim to oyster beds in the Delaware Bay. Until that time Delaware legislators had not asserted jurisdiction east of Blake's Channel.⁵¹ Now they extended Delaware's jurisdictional claim to the oyster bed at Ship John Light. New Jersey responded by arresting two Delaware oystermen working in the Ship John bed. Prosecution was dropped when the

⁴⁸ *Laws of Delaware*, vol. 14, chaps. 9-14, pp. 11-25. Oyster plantations, according to Delaware's 1871 legislation, were available in one area located south of Reedy Island and west of Blake's Channel. Private citizens could obtain a plantation for the planting of oysters for an annual fee plus a boat license.

⁴⁹ Valle, "Harvesting Oysters," p. 26.

⁵⁰ Miller, "The Delaware Oyster Industry: Past and Present," pp. 137-40; Miller, "The Delaware Oyster Industry," 245-46.

⁵¹ *Laws of Delaware*, vol. 18, pt. 1, chap. 248, p. 464.

State of Delaware agreed to a settlement through negotiation, which must have included a repeal of the law.⁵² No attorney general files exist in the Delaware Public Archives for this period, but, according to the New Jersey attorney general's statement in his brief to the United States Supreme Court in 1933, calm was returned. Under those circumstances, it does not seem surprising that the question of oysters did not loom large in the Compact of 1905. Over time each state had enacted, amended, repealed, and rewritten dozens of acts to promote, protect, and regulate oystering. Each side had vested interests, which at the time of the writing of the Compact of 1905 were satisfied by the status quo.⁵³

Construction into the River

Although Delaware consistently laid claim to the waters and subaqueous soils to low water on the New Jersey shore within the twelve-mile circle, the wharves, piers, and bulkheads along the New Jersey shore were never part of the debate in the nineteenth century. Delaware neither interfered with their construction, nor did it tax such structures on either side of the river.

Delaware and New Jersey pursued different policies regarding wharfage. New Jersey established extensive controls, but Delaware did not. Urbanization was the major

⁵² Brief of Plaintiff, reprinted in Documents submitted by the State of Delaware to U.S. Supreme Court in *New Jersey v. Delaware III* on Oct. 27, 2005, Lodging, tab. 10, p. 373; *Laws of Delaware*, vol. 18, pt. 1, chap. 557, p. 679.

⁵³ The Delaware legislature created an oyster commission in 1909, and with the U.S. Bureau of Fisheries produced a report and a map entitled "Chart of Leased Oyster Bottoms, Delaware Bay, State of Delaware" that showed no Delaware oyster beds east of the Delaware Bay's main shipping channel (Delaware Oyster Survey Commission, *Report of Commission* [Baltimore: King Bros., n.d.]. Twenty years later, the situation had changed dramatically, with the Ship John oyster bed as the flash point. Wilmington's *Every Evening* subsequently termed it an "armed fight" between New Jersey and Delaware oystermen over rights to the beds from the ship channel to the middle of the bay (Oct. 9, 1933). By 1929 oysters had become one of the two issues of sufficient magnitude to New Jersey to lead that state to return to the U.S. Supreme Court. The other issue was wharfage. ("Report to Honorable Morgan F. Larson, Governor of New Jersey by William A. Stevens, Attorney General . . .," 1929).

factor in explaining those differences. New Jersey had the major port cities of New York and Philadelphia opposite its watery borders, whereas Delaware had none. In 1851 New Jersey began taking control over its riparian lands by requiring that land owners obtain licenses from the state to build structures into New Jersey's waterways.⁵⁴ In 1864 the New Jersey legislature adopted "An Act to ascertain the rights of the state and of the riparian owners in the lands lying under the water of the bay of New York and elsewhere in the state."⁵⁵ It was the first of a series of laws, all of which traced their origins to the 1864 statute, by which New Jersey governed, sold, leased, and taxed submerged lands. The 1864 law explicitly focused on two urban areas: the waters along the Hudson River and New York Bay, and "the lands lying under the water of the Delaware river, opposite to the county of Philadelphia." Neither that law, nor those that followed, mentioned those parts of the Delaware River lying north or south of Philadelphia.

It is not surprising that New Jersey lawmakers concentrated their riparian laws on those parts of their state's waterways that were in contact with the major out-of-state commercial and industrial centers of New York City and Philadelphia. Those were the places where wharfage was most important and most lucrative. In 1871 New Jersey began the practice of committing the taxes it raised from those urban-area wharves to help support the state's public schools.⁵⁶

By contrast, Delaware had no major urban centers lying across its portion of the Delaware River's eastern shore to prod it into licensing, controlling, or taxing wharves.

⁵⁴ New Jersey P.L., 1851, p. 335.

⁵⁵ New Jersey P.L., 1864, p. 681.

⁵⁶ New Jersey P.L., 1871, p. 98.

A search of the state's laws in the nineteenth century reveals a few acts whereby the legislature gave steamboat and railroad companies permission to build wharves as part of the powers granted to them in their acts of incorporation.⁵⁷ In addition, in the 1850s a few individuals requested private acts whereby the legislature concurred in their construction of wharves, but, in the absence of a legal requirement to get advance approval from Delaware, such requests soon disappeared from Delaware law books.⁵⁸ The state did not tax wharves that extended into the state's waters, nor did it require a state license to erect them.

The State of Delaware has never taxed real estate. Its counties tax real estate. Until the mid-twentieth century all three of Delaware's county governments were called "Levy Courts" because they set the levies on taxable real estate. A search in the Delaware Public Archives found no records from the nineteenth century to show whether or not the assessors from New Castle County, the county that includes the twelve-mile circle, included wharves extending from either the western or eastern shore of the Delaware River in their assessment of real estate. Theirs was a rather unsophisticated operation designed to raise the modest sums needed to support the county jail and a poor house, and to build bridges across creeks. It is not surprising that the assessors never ventured across the Delaware River to claim taxes from wharf-owners on the eastern shore.

⁵⁷ See, for example, *Laws of Delaware*, vol. 9, chap. 11, "An Act to Incorporate the Delaware Rail Road Company," pp. 17-26, and chap. 312, "An Act to Incorporate the Breakwater, Lewes, and Philadelphia Steam-boat Company," pp. 359-62.

⁵⁸ *Laws of Delaware*, vol. 11, chap. 463, p.528; chap. 398, p. 444.

The most important wharves extending from the New Jersey side of the Delaware River within the twelve-mile circle were associated with Delaware-based companies. Throughout most of the nineteenth century and well into the twentieth century, the Wilmington Steamboat Company, later called the Wilson Line, ran boats from Wilmington to Chester and Philadelphia, Pennsylvania. In the summer months the company also ran excursion boats from the west bank cities to a picnic grove at Penns Grove, New Jersey. In the 1920s an amusement park called Riverview Beach was added on the New Jersey shore of the river. Likewise, Delaware-owned ferry companies operated between Delaware and New Jersey until the Delaware Memorial Bridge opened in 1951.⁵⁹ The only industrial site with structures extending into the river from the New Jersey side within the twelve-mile circle was the Du Pont Company's Chambers Works. The Du Pont Company was, then as now, a Wilmington-based corporation.

Seeking a Settlement

The repeated postponements of *New Jersey v. Delaware I* stopped in 1901 when the Supreme Court's clerk alerted the parties that the Justices would wait no longer. Delaware had to decide to go forward or risk losing its boundary claim to the New Jersey shore. Neither Delaware's governor nor legislature hesitated to continue to press for vindication of the state's boundary rights. The legislature adopted a resolution whereby the attorney general and special counsel were "instructed to maintain the defense of said suit."⁶⁰ George Bates stopped all other business to concentrate on meeting the deadline to file an answer to New Jersey's Bill of Complaint.⁶¹

⁵⁹ See Richard V. Elliott, *The Saga of the Wilson Line, Last of the Steamboats* (Cambridge, Md.: Tidewater Publishers, 1970).

⁶⁰ *Laws of Delaware*, vol. 22, chap. 244, p. 531.

The work of meeting Supreme Court deadlines proved so onerous to both sides that in 1903 they agreed to appoint the two states' governors, attorneys general, and counsels as their commissioners in an attempt to find a settlement without recourse to further court proceedings. Whereas Delawareans had no experience with interstate compacts, New Jersey's leaders could look back to a great deal of such experience. The Garden State already had compacts with both New York and Pennsylvania regarding those states' respective contiguous watery boundaries: the New York harbor and the Delaware River, respectively. Those documents provided for boundaries through the middle of those waters and explicitly noted which state owned every island in between. Each state had jurisdiction over the area within its own boundary, except that authorities on either side of the waterway were permitted to cross those bounds to pursue, arrest, and remove back to their own state persons accused of committing crimes in the arresting officer's state.⁶² Thus New Jersey had a template for what might constitute an interstate compact.

The Delawareans had no such experience, but George H. Bates was a seasoned negotiator who had dealt with obstinate opponents in delicate diplomatic situations. In 1885 Bates had gone to the Samoan Islands as the special agent of the United States government to help re-establish peace among warring chiefs who were being urged on by the competing governments of Imperial Germany and Great Britain. The United States also had significant commercial and naval interests in the Samoan Islands. Bates was

⁶¹ Attorney General Herbert H. Ward to Governor John Humm, Jan. 31, 1903, Delaware Public Archives, Dover (hereafter D.P.A.).

⁶² New York Compact: N.J. Stat. sec. 52:28 *et. seq.*; Pennsylvania Compact: N.J. Stat. sec. 52:18-23 *et. seq.*

later one of three commissioners to represent the United States government at conferences with the Germans and British held in Washington, D.C., in 1887 and in Berlin in 1889 for the purpose of restoring peace in Samoa. Bates proved to be a vigorous negotiator on behalf of his country in dealing with such seasoned diplomats as Chancellor Otto von Bismarck of Germany. The representatives of the three powers all claimed to want a restoration of the *status quo*, whereby citizens of their countries could live and trade in the islands without fear that one of the other powers would stir up trouble. Bates's experience was thus appropriately germane to the business of negotiating on behalf of Delaware over the ownership and use of the Delaware River.⁶³

Delaware's commissioners began their work by seeking the views of the people most concerned about the dispute: the state's fishermen. Those commercial fishermen, together with their New Jersey counterparts, constituted a major industry that employed 165 boats, each of which reportedly took in \$550 weekly during shad season. In early March 1903, Delaware's commissioners, including George Bates, organized a meeting with Delaware fishermen in the coastal town of Delaware City. The meeting proved to be very instructive. One fisherman complained of his arrest by New Jersey authorities when he had been fishing for sturgeon near the Jersey shore. Most fishermen agreed, however, that although the river within the circle rightfully belonged to Delaware, New Jerseymen should be permitted to cast their nets wherever they pleased so long as they abided by Delaware's Sabbath and seasonal restrictions.⁶⁴

⁶³ George Handy Bates Samoan Papers, University of Delaware Special Collections, Newark, Del. See particularly box 1, folder 13; box 2, folder 21; and box 3, folders 28-28.

⁶⁴ *Wilmington Evening Journal*, Mar. 4, 1903.

In light of such "live and let live" testimony from the fishermen, and considering the additional cost and effort of continuing the suit, the commissioners attempted to conclude a compact that would unify the states' conflicting fishing laws and thus end the case. As Delaware's Attorney General Herbert H. Ward put it to Governor John Hunn, "if the entire controversy between the two states can be settled out of court, it would seem the part of good reason to attempt to make such a settlement."⁶⁵

The commission composed of the governors, attorneys general, and counsels of the two states, met in Philadelphia on March 12, 1903. The evidence is very scant, but it would appear that both sides came with ideas and language that they would like to see written into the compact. It is worth noting, for example, that Articles I and II, permitting each state to serve legal papers or make arrests on the entire breadth of the river, contain principles similar to New Jersey's compacts with New York and Pennsylvania.

The proposed document created in 1903 was designed to resolve the fishing issue, as detailed in Articles III, IV, and V, which proclaimed a common right of fishery, provided for the passage of uniform fishing laws in both states, and permitted the continuance of certain existing laws until adoption of the uniform legislation. The document also permitted the states to continue enforcing their laws with respect to two matters that had not been the subject of longstanding controversy: the oyster industry and the building of piers and wharves. But for the dispute in 1887, which had been resolved, the oyster industry had not been the cause of controversy between the states. In drafting the compact in 1903, Article VI was written to maintain the *status quo* of that industry. Likewise, with respect to Article VII, there was no evidence of a practical dispute with

⁶⁵ Ward to Hunn, Jan. 31, 1903, D.P.A.

regard to the construction of piers and wharves extending from the New Jersey shore that entered onto the portion of the Delaware River within Delaware's twelve-mile circle. At that time the modest piers on the New Jersey shore that entered into the twelve-mile circle served the interests of citizens of both states.

Article VIII of the 1903 compact stated that nothing would affect the "territorial limits, rights or jurisdiction of either state" relating to the river or the ownership of its subaqueous soil except as "expressly set forth" in the document. Through this provision, the states sidestepped the dispute over ownership within the twelve-mile circle, as to which the two states could never have reached agreement, and similarly deferred other jurisdictional questions that did not require resolution at the time. Each state preserved its claims in Article IX, which stated that the lawsuit was to be dismissed "without prejudice."

The effort to forge an interstate agreement proved fruitless, however, because the Delaware General Assembly ended its session too soon to take up the proposed compact.⁶⁶ The suit would go on, at least until 1905, when Delaware's legislators were next scheduled to meet.

The lawyers on both sides had no recourse but to carry on their preparations for the fast-approaching deadline to submit their briefs to the Supreme Court's Special Commissioner, Francis Rawle. Francis Rawle (1846-1930) knew George Bates very well. In 1895, at Rawle's request, Bates drafted a law regarding street railways that was adopted by the Delaware General Assembly. That same year, George Bates's son, Theodore, became a law clerk in Rawle's Philadelphia office. When Theodore

⁶⁶ Attorney General Herbert H. Ward to George H. Bates, Feb. 11, 1905, B.F.C., H.S.D.

committed suicide later that year, his father assumed responsibility for completing work that Rawle had assigned to his son.⁶⁷

In developing his case Bates called several of Delaware's most distinguished elderly lawyers to appear at a hearing held in Salem, New Jersey. Those men all testified that going back as far as the 1840s, Delaware had exercised the right to arrest and try violators of Delaware state laws on the river, and that federal cases drawn from the river territory had been heard in the Federal District Court for Delaware.⁶⁸

By the end of 1904 Bates's quest for evidence was nearly complete. The most pressing claim on his time was to organize the mass of historical documents he had collected. The clerk of the U.S. Supreme Court agreed to one final extension, to March 1, 1905, by which time the defense must present its evidence. New Jersey would then have until June 1, 1905, for rebuttal, and both parties were to have their arguments in the hands of Special Master Rawle by November 1, 1905.⁶⁹

Adopting the Compact of 1905

It was in this context that Delaware's General Assembly met in Dover for its biennial session in January 1905. In his final month as governor, John Hunn told the assemblymen of his hope to end the long-smoldering case with New Jersey through "the appointment of a commission with full powers to settle the issue by arbitration." The "continuance of this suit," he said, "has been, and is likely to be, an extremely costly one

⁶⁷ See various letters in B.F.C., H.S.D., especially Francis Rawle to George Bates, Jan. 31, 1895; George Bates to F. Rawle, Feb. 14, 1895; Theodore Bates to F. Rawle, Jun. 1895; Elizabeth Bates to George Bates, Dec. 4, 1896.

⁶⁸ The State of Delaware had made it illegal for nonresidents to fish in Delaware waters in 1839 (*Laws of Delaware*, vol. 9, chap. 216, p. 263).

⁶⁹ James H. McKenney, Esq., Clerk, U.S. Supreme Court, to George H. Bates, n.d., B.F.C., H.S.D.

for the State, thousands of dollars having already been expended in its prosecution." He told the legislators that his recent communications with New Jersey officials convinced him that they, too, were willing to pursue "an amicable arrangement for a settlement" outside the judicial system. It is worth noting that the interconnection of reaching an "amicable settlement" with that of saving a large sum of the state's money must have been particularly appealing to a governor who was both a Quaker and a businessman.⁷⁰ Later that same month Governor Hunn sent a message to the legislature drawing their attention to the chaotic nature of the state's fishing laws. He admonished them that rationalizing the fishing laws "demands primary consideration in as much as it concerns the propagation and protection of one of the largest sources of food supply belonging to the people." He recommended the creation of a commission charged to draft "a uniform, reasonable, comprehensive, and plain bill" to be presented to the next meeting of the legislature in 1907.⁷¹

Delaware's outgoing attorney general, Herbert H. Ward, and his successor, Robert H. Richards, were in complete agreement with Governor Hunn regarding both the desirability of an interstate compact and the need to redraft Delaware's fishing laws. In February 1905 Ward notified George Bates that the Delaware General Assembly had adopted a joint resolution "of precisely similar terms to that of two years ago, with the addition of the words 'and bay.'"⁷² The commissioners appointed to serve were to be Delaware's new governor, Preston Lea, a Republican and Quaker businessman like his predecessor, together with Ward himself, his successor as attorney general, Robert H.

⁷⁰ Delaware, *Journal of the Senate*, 1905, p. 93.

⁷¹ *Ibid.*, pp. 91-92.

⁷² Herbert H. Ward to George H. Bates, Feb. 11, 1905, B.F.C., H.S.D.

Richards, and George Bates. The New Jersey legislature having passed a similar measure earlier that same week, the commissioners could begin their work promptly so as to complete their compact in time for the Delaware General Assembly to act on it before it adjourned.

Once again commissioners from the two states met in Philadelphia, where they made the minor adjustments to the two-year-old compact document noted above. The first difference was changing the term "Delaware River" to "Delaware River and Bay" in passages concerning the regulation of fishing in Article IV. The Compact of 1905 also added a provision whereby the states were to determine the dividing line between the river and bay and then mark that division with monuments on both shores.⁷³

All was not the same, however. In the two years since he had been a member of the commission of 1903, George Bates had changed his mind about the idea of substituting a compact for a ruling by the United States Supreme Court. He had prepared what he regarded as an unimpeachable case in support of Delaware's title and was ready to present the First State's arguments to Special Master Rawle. Why then should Delaware agree to put aside the case before the United States Supreme Court?

Disagreements among Delaware's commissioners over the efficacy of adopting a compact in lieu of continuing the state's defense before the Supreme Court became public knowledge through the pages of the *Wilmington Every Evening*. The *Every Evening* was aligned with George Bates and his political party, the Democrats. Interestingly, Wilmington's leading Republican daily, the *Morning News*, largely ignored the compact issue.

⁷³ Delaware, *Journal of the Senate*, 1903, pp. 898-902; *Laws of Delaware*, vol. 23, chap. 5, pp. 12-17.

On March 2, 1905, the compact went to the Delaware Senate, where it was ratified by a unanimous vote without debate.⁷⁴ In the days that followed, the *Every Evening* published a daily barrage of editorials, articles, and letters to the editor hostile to the boundary compact. "Shall We Surrender All That We Have Contended For In The New Jersey Boundary Dispute?" the paper asked on the front page of the March 6 edition. The article that followed mirrored Bates's view that "no agreement should be made until the Supreme Court has judicially decided the underlying and basic question of territorial jurisdiction." The writer was not against establishing a fishing compact with New Jersey but thought that the compact should follow a ruling by the Supreme Court rather than serve as its substitute. The article also noted that some Delaware fishermen had been arrested and fined by New Jersey authorities, yet nothing in the compact provided for their reimbursement. "Shall we surrender . . . on the threshold of success?"⁷⁵

The *Every Evening's* aggressive journalism drew a prompt response from Herbert Ward. The former state attorney general sent a letter to the editor that appeared just two days later. Ward wrote that the case had sprung from Delaware's "unwise legislation" in 1871. He contended that the proposed compact dealt solely with fishing rights and did nothing to affect Delaware's title to waters or soil within the twelve-mile circle.⁷⁶

The next day's edition featured a letter from Alexander B. Cooper, a Democratic lawyer from New Castle. Cooper had made a close study of Delaware's historic

⁷⁴ Delaware, *Journal of the Senate*, 1905, p. 335.

⁷⁵ *Wilmington Every Evening*, Mar. 6, 1905.

⁷⁶ *Ibid.*, Mar. 8, 1905.

boundaries that had convinced him that the colonial records supported Delaware's claim to the low water mark on the New Jersey shore within the twelve-mile circle. According to Cooper, the compact's language merely postponed an inevitable showdown before the United States Supreme Court over the First State's eastern boundary. Cooper also challenged the compact's supporters sanguine expectation that by endorsing the agreement Delaware could let New Jersey bear some of the cost of policing the river. Allowing authorities from both shores to arrest people on the river was certain to cause confusion, Cooper said. He ended with a grandiloquent flourish: "It is not a question of expense; it is a question of principle—the title to our lands, both under and above the water."⁷⁷ Cooper, like Bates, believed so firmly in the strength of the Delaware claim that he rejected the less expensive expedient of a compact with the uncertainty that might bring.

Not surprisingly, two days later Herbert Ward responded to Alexander Cooper's arguments. Ward recalled that as attorney general he had presented the almost identical compact to Delaware's House of Representatives two years before. He had then told the legislators that he was willing to continue to fight the case before the Supreme Court if that was what they wanted him to do, "but that my own judgment strongly favored the adoption of the compact . . . and thus avoiding the expense." Had the legislature taken his advice and acted at that time, Delaware could have saved substantial legal fees.⁷⁸ Whereas George Bates was eager to present his evidence in support of Delaware's title before the United States Supreme Court, Herbert Ward, who believed that the compact

⁷⁷ *Ibid.*, Mar. 9, 1905.

⁷⁸ *Ibid.*, Mar. 11, 1905.

did nothing to undermine Delaware's title, was determined to save the state the expense of further litigation.

Because of the public disagreements over the wisdom of ratifying the compact, the Delaware House of Representatives set aside an afternoon to hear all sides of the issue before the vote was scheduled. Perhaps because the event provided a venue for the compact's defenders to speak publicly, the Republican Wilmington *Morning News* covered the hearing in much greater detail than did the *Every Evening*.

At the hearing Alexander Cooper and George Bates urged the legislators to reject the compact while Attorney General Robert Richards and former attorney general Herbert Ward argued for its ratification. The compact's defenders said that the agreement would provide "an amicable solution to the problem without surrendering Delaware's rights or title to territory within the famous Twelve-mile Circle." Speakers on both sides of the issue agreed that continuing the suit before the Supreme Court was likely to cost the state between \$15,000 and \$20,000.

Herbert Ward and Robert Richards repeatedly assured members of the House of Representatives that ratification of the compact would not impact Delaware's clear title to the Delaware River within the twelve-mile circle. Ward explained that under the compact New Jersey would no longer be able to arrest Delaware fishermen. If a Delaware fisherman broke the law, he would be arrested and tried by Delawareans, in Delaware, the former attorney general said. In response to a question, Ward responded "that Delaware would have jurisdiction in criminal matters over the entire river to the New Jersey shore."

Placed on the defensive, George Bates stated his belief that the compact that he had participated in writing and had championed two years before was "unwise and a useless and serious blow to the dignity of Delaware." These words drew an equally patriotic declaration from Attorney General Richards, who professed to be second to none in his willingness to uphold Delaware's honor. But the state's honor was not the issue. Speaking for himself and his predecessor, Herbert Ward, Richards told the legislators, "we do advise you that we consider it is for the best interests of the state to adopt this compact without yielding a foot of property or title." He also reminded the House members that should they reject the compact he would be coming back to them to ask that they appropriate at least \$10,000 to continue the suit.⁷⁹

In all the news reports about the drafting and adoption of the compact, there is no record of any debate about the provisions of Articles VI and VII concerning regulation of the oyster and other shellfish industry or riparian rights. Issues concerning the oyster industry appeared to be settled, and riparian issues presented no problems since at that time Delaware did not regulate or tax structures built into the Delaware River on either side of the river.

Three days after the hearing the House ratified the compact with New Jersey by the close vote of seventeen to fourteen. Almost to a man, the Republicans voted "yea" while the Democrats voted "nay."⁸⁰

⁷⁹ *Wilmington Morning News*, Mar. 15, 1905.

⁸⁰ *Delaware, Journal of the House of Representatives*, 1905, p. 783.

The Compact in the Context of its Time

The compact never rose to the prominence in Delaware politics that one might have assumed from the articles that appeared in the *Wilmington Every Evening* or from the partisan nature of the vote in the House of Representatives. Other issues were riveting the attention of politically-minded Delawareans. In March 1905 all eyes focused on efforts to rescind Delaware's infamous Voter Assistance Law. That law had a curious history that explains a good deal about the state's politics during the first decade of the twentieth century.

Delaware had been a border state during the Civil War: that is, it was a slave state that remained loyal to the Union. In the post-war years the Democrats were the major party in Delaware, although the Republican Party was strong among businessmen, especially in Wilmington. In 1889, after years in the minority, a split among the Democrats allowed the Republicans to claim control of the General Assembly.

The GOP triumph meant that Republican legislators could choose Delaware's next United States senator. Party stalwarts were astonished when a man who was a complete unknown in state politics appeared in Dover and announced that he must be the Republicans' choice. The man was John Edward O'Sullivan Addicks, a Philadelphia-based owner of municipal gas works, who was known as the "Napoleon of Gas." To claim citizenship in Delaware, Addicks bought a house in Claymont, the state's northernmost town.

In his quest for a seat in the United States Senate, Addicks proved to be rich, unscrupulous, and persistent. When persuasion failed in 1889, he resorted to spending large sums of money to elect Republican legislators who would be beholden to him,

particularly in rural parts of the state where the Democrats had been dominant. Delaware's Voter Assistance Law allowed Addicks's lieutenants to enter the voting booth with voters and thus make sure that Addicks got the votes he had paid for.

The Addicks phenomenon helped make the Republicans Delaware's major party, but it also split the party into two fiercely rival groups. To the acute frustration of all, in legislative session after session neither side had the votes to elect its candidate for the United States Senate seat. In 1903 the factions finally worked out a compromise that allowed one of Addicks's followers to be elected, but this did not satisfy the gas king.

In 1905 Addicks made what proved to be his final attempt to secure election. Once more he failed, and thereafter, his money exhausted, he dropped from the political scene, setting the stage for the emergence of the du Pont family as the major force in Delaware's Republican politics.

In 1905 amid cries denouncing corruption and "wholesale bribery" or shouting "Addicks or nobody" it was hard to concentrate legislators' attention on a mere fishing compact.⁸¹ Yet, as the Assembly was riveted on those more compelling political concerns, it did find time on March 23, 1905, to appoint commissioners to confer with their counterparts in New Jersey regarding the two transcendent issues in the compact: drafting uniform fishing laws and delineating the boundary between the Delaware River and the Delaware Bay. Among Delaware's three commissioners was Alexander B.

⁸¹ Carol E. Hoffecker, *Democracy in Delaware: The Story of the First State's General Assembly* (Wilmington: Cedar Tree Books, 2004), pp. 120-25, 138-39.

Cooper, who became president of the "Delaware Commissioners, (Delaware-New Jersey Fisheries Compact)," as the commission's letterhead read.⁸²

At the initial meeting of the joint commission held in Philadelphia on December 15, 1905, the six commissioners unanimously agreed to a resolution requesting their respective governors to seek a delay in Congressional ratification of the compact "until the Commission shall make further request."⁸³ The governors of both New Jersey and Delaware agreed to the commissioners' request.⁸⁴ But the postponement created new problems because of the constraints of the various state and national governmental bodies dealing with both the lawsuit and the compact. Two governors, two state legislatures, the United States Congress, and the United States Supreme Court all operated on differing schedules and with different time limitations.

Those time constraints, coupled with the large number of participants, sometimes led to miscommunications and hard feelings. For example, on March 14, 1906, Walter Hayes, secretary of the Delaware commissioners, sent Hiram R. Burton, Delaware's Congressman, a copy of the joint commissioners' resolution of December 15, 1905, asking for Congressional delay in ratification of the compact. Delaware's Attorney General Richards had also written to Burton to request such a delay.⁸⁵ Just a day earlier,

⁸² *Laws of Delaware*, vol. 23, pt. 1, chap. 6, pp. 17-20. See various correspondence using the letterhead, such as Alexander B. Cooper to Walter H. Hayes, Esq., January 29, 1907.

⁸³ Minutes of Meeting, Dec. 15, 1905, Delaware Commissioners, Delaware-New Jersey Fisheries Compact, Minute Book, 1905-1908, D.P.A.

⁸⁴ E.C. Stokes to H.C. Loudenslager, Mar. 14, 1906, New Jersey State Archives, Trenton, N.J. (hereafter N.J.S.A.)

⁸⁵ Walter H. Hayes to Hiram Burton, Mar. 14, 1906, Delaware Commissioners, Delaware-New Jersey Fisheries Compact, Letter Book, 1905-1908, D.P.A.; [Robert H. Richards] to Hiram R. Burton, Jan. 19, 1907, National Archives, Washington, D.C. (hereafter N.A.) There is no signature, but attribution is confirmed by internal dating, content, and style of letter.

however, it appears that at least some New Jersey leaders were so eager to secure ratification that they had encouraged Senator John Kean to rush the compact bill through the United States Senate without even informing his Delaware colleague of his action.⁸⁶ This apparent cross-purpose of activity led to telegrams between commissioners and their Congressmen. Delaware's commissioners alleged "bad faith" on the part of New Jersey. Congressman H.C. Loudenslager sought clarification from Trenton.⁸⁷ William J. Bradley, one of New Jersey's fish commissioners and head of the New Jersey Senate, wrote to his Delaware counterpart on the joint fishing commission that he believed that Kean's action was due to "some misunderstanding."⁸⁸

Meanwhile, the work of the joint fishing commission went forward. Commissioners on both sides of the river held public meetings in the spring of 1906 to solicit the opinions of the states' fishermen about what the fishing regulations should contain. They found the views of the fishermen of the two states to be quite "harmonious."⁸⁹ At a meeting of the joint commission on October 10, 1906, the Delaware commissioners were first to present their version of an appropriate uniform fishing law.⁹⁰ New Jersey acted more slowly to draft a proposal, too slowly from the perspective of the Delaware commissioners, whose legislature was scheduled to meet in

⁸⁶ Because of the Addicks dispute, Delaware had but one elected U.S. senator in 1907.

⁸⁷ Telegram, H.C. Loudenslager to E.C. Stokes, Mar. 14, 1906, N.J.S.A.

⁸⁸ William J. Bradley to Alexander B. Cooper, Mar. 19, 1906, D.P.A.

⁸⁹ Minutes of Meeting, May 8, 1906, Delaware Commissioners, Delaware-New Jersey Fisheries Compact, Minute Book, D.P.A.

⁹⁰ Minutes of Meeting, Oct. 10, 1906, *ibid.*

January 1907.⁹¹ When the New Jersey document was completed, it was found to be incongruent with the Delaware draft. The joint body then met twice in January 1907 in an effort to bring the two proposed laws into uniformity.

On January 16, 1907, the six members of the joint fishing commission agreed that they had created the uniform fishing laws demanded by the compact and were ready to present them to their respective state legislatures. They wrote to their governors that Congress could now ratify the compact.⁹² Three days later, Robert H. Richards, Delaware's Attorney General, informed Congressman Burton that it was now "necessary" that the Compact be ratified before the expiration of the February 1, 1907, deadline set by the United States Supreme Court.⁹³ On January 19, the same day he had written to Burton, Richards also wrote to the chairman of the House Judiciary Committee to say that, speaking on behalf of the government of Delaware, he urged the House of Representatives to move promptly to ratify the compact. Richards explained that "the object and purpose of this compact was to settle certain matters concerning fisheries which had been the cause of the litigation for years pending in the Supreme Court."⁹⁴

Attorney General Richards was at pains to point out that the compact had gained the support of both states' legislatures. He added that "It does not purport to settle any of the boundary line between the two states," and went on to say "but on the other hand, [the compact] expressly provides that the boundary line between the two states shall not in

⁹¹ Alexander B. Cooper to William J. Bradley, Jan. 5, 1907, D.P.A.

⁹² Minutes of Meeting, Jan. 16, 1907, Delaware Commissioners, Delaware-New Jersey Fisheries Compact, Minute Book, D.P.A. The commissioners met again several days later to complete minor adjustments.

⁹³ [Richards] to Burton, Jan. 19, 1907, N.A..

⁹⁴ Attorney General Robert H. Richards to Chairman, Judiciary Committee, U.S. House of Representatives, Jan. 19, 1907, D.P.A.

any wise be affected by the compact." Robert Richards's desire for speedy action in the United States House of Representatives was fulfilled when, on January 24, 1907, the House ratified the New Jersey-Delaware Compact.

On April 23, 1907, the Delaware General Assembly approved "An Act Providing Uniform Laws to Regulate the Catching and Taking of Fish in the Delaware River and Bay between the State of Delaware and the State of New Jersey."⁹⁵ New Jersey's legislature approved a comparable, but not identical, law on May 7, 1907.⁹⁶

With passage of the fishing laws, the members of the joint commission's work was over. If preserving the health of the fishing industry on the Delaware River and Bay was the ultimate goal of the new laws, then the commissioners bore a heavy burden. In their final report, Delaware's commissioners noted "the undoubted fact of the gradual disappearance of the shad ... and the almost total disappearance of the valuable sturgeon industries." They focused blame on two factors: the destruction of small food fish by menhaden fishermen and industrial pollution. The commissioners suggested that the menhaden fishing problem could be resolved by restricting its season to the summer months. To the pollution problem they offered no remedy.⁹⁷

The commissioners had also fulfilled their mandate under Article IV of the compact to place monuments to mark the division of the Delaware River and Bay on both shores. In June 1906 the members of the Joint Commission boarded a tug boat that took them down the Delaware River to locate the place that they would declare to be the end

⁹⁵ *Laws of Delaware*, vol. 24, pt. 1, chap. 146, pp. 272-81.

⁹⁶ New Jersey P.L., 1907, chap. 131, p. 302.

⁹⁷ Report of the Commissioners to the Del. Gen. Assembly, 1906.

of the river and beginning of the bay. Their efforts were thwarted by the soggy marshland soil on either side, but not by any disagreement concerning where the imaginary line should be drawn. They settled on places of adequately fast land, one near Liston's Point on the Delaware side and another near the mouth of Hope Creek in New Jersey. In those places monuments to delineate the mouth of the Delaware River could be erected without fear of their sinking.⁹⁸

Perhaps finally the troublesome and costly issues that had sprung from Delaware's fishing law of 1871 could be put to rest, but it was not to be. As early as 1909 Governor Preston Lea told the legislators in Dover that "unfortunately, certain modifications were made in the bill as passed by the General Assembly of Delaware so that it does not conform to the bill prepared by said Joint Commission and which was passed by the state of New Jersey."⁹⁹ Put simply, in spite of so much effort, the two states' fishing laws were not uniform, and they were destined to become even less so in the years to come. The mandate in Article IV of the compact for the passage of uniform laws never happened, not within the two year requirement of the compact—or ever.

The Post-Compact Era

Legislative memory was short. Members of Delaware's General Assembly seldom served for more than one or two terms. In the years after 1907 the state government focused its attention on the large-scale tasks of providing modern roads and highways for the increasing number of automobiles and providing modern schools, including high schools, for the state's youth. In that environment, the Compact of 1905

⁹⁸ *Report of Delaware Commissioners on Delaware and New Jersey Fisheries Compact* (no place, no date), pp. 6-8. D.P.A.

⁹⁹ State of Delaware, *Biennial Message of His Excellency Preston Lee, Governor, to the General Assembly convened at Dover on Tuesday, The Fifth Day of January, 1909*, p. 25, D.P.A.

quickly receded into hazy memory. No one complained when the legislatures of either state made changes in their respective fishing laws; and the Delaware River within the twelve-mile circle came to be seen as a commercial highway rather than as a source of food.

A letter from New Jersey's attorney-general, John W. Wescott, to Herbert H. Ward dated July 3, 1914, demonstrates how quickly memory of the compact had faded. The little that Wescott knew about the agreement had come in garbled form from an older colleague. The attorney-general falsely claimed that Delaware had never even tried to pass a fisheries law subsequent to the 1905 Compact. Wescott went on to observe that New Jersey had recently changed its fishing law and suggested that Delaware adopt that same law. Thus, he said, the two states might yet achieve uniform laws. Delaware did not respond, and New Jersey never pursued the issue.¹⁰⁰

In the mid-1920s jurisdiction over oyster beds in the Delaware Bay became an issue. The Compact of 1905 had not established an east-west boundary between the states in the Delaware Bay. Article VI of the compact had merely allowed both states to maintain their laws respecting oysters. In 1925, the arrest of Delaware oystermen by New Jersey for working in water claimed by both states set in motion a series of steps that led to another joint commission. According to the joint resolution of the Delaware legislature, the commission was charged with creating "the final adjustment of all controversies relating to the boundary line between said States and to their respective

¹⁰⁰ John W. Wescott to Herbert H. Ward, Trenton, N. J., July 3, 1914.

rights in the Delaware River and Bay.¹⁰¹ After that commission failed, New Jersey decided to put the state's land claims to the final test in the United States Supreme Court. In its bill of complaint New Jersey claimed title to the subaqueous soil of the Delaware River and Bay to the ship channel, specifically including the area within the twelve-mile circle. In addition to maintaining its ownership of the river within the twelve-mile circle, Delaware also claimed the boundary below the circle along the center of the waterway as measured from shore to shore. Delaware would finally get the day in court to put the boundary question to rest that George Bates and Alexander Cooper had desired back in 1905.

Unlike the dilatory movement of the similar case filed in 1877, this time the process moved forward quickly. William L. Rawls, Esq., of Baltimore, Maryland, was appointed special master in 1930 and promptly began hearings in 1931. Oral arguments were completed in the fall of 1932, and Special Master Rawls filed his report with the United States Supreme Court on October 9, 1933. To keep abreast of this speedy schedule Delaware's counsel, Clarence Sutherland, made extensive use of the documentary evidence that George Bates had collected nearly thirty years before.¹⁰²

The special master gave something to both sides. He accepted Delaware's contention that the Penn grant had given the First State the river's subaqueous soils within the twelve-mile circle. On the other hand, he rejected Delaware's claim to the

¹⁰¹ *Laws of Delaware*, vol. 35, chap. 243, p. 644, reprinted in Documents submitted by the State of Delaware to U.S. Supreme Court in *New Jersey v. Delaware III* on Oct. 27, 2005, Lodging, tab 4, pp. 20-21.

¹⁰² Clarence Sutherland to the Hon. Percy Warren Green, Attorney General of Delaware, July 3, 1935, D.P.A.

geographic center below the circle in favor of New Jersey's assertion that the dividing line was the ship channel.

On February 5, 1934, Justice Benjamin Cardozo announced the Supreme Court's final decree, which upheld the special master's rulings on both counts. After a careful review of the documentary evidence from colonial times Justice Cardozo concluded that the twelve-mile circle did indeed extend to the low water mark on the New Jersey shore. He also took pains to refute New Jersey's contention that by agreeing to the Compact of 1905 Delaware had abandoned its claims to the river waters and subaqueous soils within the twelve-mile circle.

Justice Cardozo wrote, "We are told that by this compact the controversy was set at rest and the claim of Delaware abandoned. It is an argument wholly without force. The compact of 1905 provides for the enjoyment of riparian rights, for concurrent jurisdiction in respect to civil and criminal process, and for concurrent rights of fishery. Beyond that it does not go."¹⁰³ In closing, Justice Cardozo reiterated the court's opinion that "Within the twelve-mile circle, the river and the subaqueous soil thereof up to low water mark on the easterly or New Jersey side will be adjudged to belong to the State of Delaware, subject to the Compact of 1905."¹⁰⁴

What might the words "subject to the Compact of 1905" have meant, taken in historical context? The compact had been created to address conflict over the rights of commercial fishermen of New Jersey and Delaware, particularly within the twelve-mile circle. The compact's major goal had been the creation of uniform fishing laws, yet,

¹⁰³ *New Jersey v. Delaware*, 291 U.S. 361, 377-378.

¹⁰⁴ *Ibid.*, 385.

despite the compact, such laws never came into being. In the years that followed the Supreme Court's decree of 1934, various officials in both Delaware and New Jersey occasionally brought the uniform law issue to the attention of other officials in their respective states, but neither side rose to the challenge to address those suggestions.¹⁰⁵ The reason is clear: by the 1930s few if any commercial fishermen cast their nets within the twelve-mile circle because there were few fish to be caught there. Commercial fishing had moved downstream to the Delaware Bay and Atlantic Ocean.

There was also the question of jurisdictional rights in the waters and subaqueous soils of the circle. In his final report to Delaware's attorney general, Clarence Sutherland, Delaware's special counsel in the Supreme Court case, mused that the state might consider taxing wharfs on the New Jersey shore.¹⁰⁶ But nothing came of that idea, perhaps because in Delaware real estate taxes were levied by the counties, not the state.

Conclusion

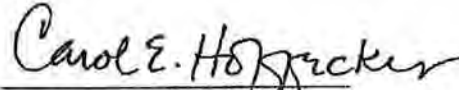
Viewed in historical context, the Compact of 1905 addressed the most pressing and divisive issue of the time, which was fishing rights in the Delaware River. The compact did not attempt to resolve other issues, it merely deferred them with language that permitted the *status quo* to continue. As George Bates told the United States Supreme Court when he made oral argument on behalf of both state's joint application for suspension of proceedings in February 1906, "the compact . . . [was] not a settlement of the disputed boundary, but a truce or *modus vivendi*. . . . Its main purpose is to

¹⁰⁵ See, for example, State of New Jersey Board of Fish and Game Commissioners to the Hon. A. Harry Moore, Governor of New Jersey, February 14, 1939; memo from Delaware Assistant Attorney General Jeremy W. Homer to Nathan Hayward, III, Director, Office of Management, Budget and Planning, October 28, 1977, 1977 WL 25804 (Del. A.G.), opinion number 77-033.

¹⁰⁶ Sutherland to Green, Jul. 3, 1935, D.P.A.

provide for enacting and enforcing a joint code of laws regulating the business of fishing in the Delaware River and Bay.”¹⁰⁷

Respectfully submitted,


Carol E. Hoffecker, Ph.D.

Date: November 9, 2006

¹⁰⁷ Statement of reasons submitted orally for the joint application of counsel on both sides for suspension of proceedings until the further order of the Court, reprinted in Documents submitted by the State of Delaware to U.S. Supreme Court in *New Jersey v. Delaware III* on Oct. 27, 2005, Lodging, tab 7, [p. 10].

EXHIBIT A

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CURRENT POSITION

Richards Professor and Alison Professor, University of Delaware, Emerita, 2003
Richards Professor of History, University of Delaware, 1982
Alison Professor, University of Delaware, 1998

PREVIOUS POSITIONS

Instructor, Sweet Briar College (1963-66)
Visiting Assistant Professor, Northeastern University (1967-68)
Junior Resident Scholar, Eleutherian Mills Historical Library (1968-69)
Coordinator, Hagley Graduate Program (1970-73)
Assistant Professor, University of Delaware (1973-75)
Associate Professor, University of Delaware (1975-82)
Chairperson, Department of History, University of Delaware (1983-88)
Associate Provost for Graduate Studies, University of Delaware (1988-95)

EDUCATION

B.A. (with Honors) University of Delaware, 1960
M.A. Radcliffe College, 1962
Ph.D. Harvard University, 1967

PUBLICATIONS

Books

Readings in Delaware History (editor), University of Delaware Press, 1973.
Wilmington, Delaware: Portrait of an Industrial City, 1830-1910, University of Virginia Press, 1974.
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 "Benjamin Ferris and the Perils of Liberal Religion," *Quaker History*, Spring 1988.
 "Delaware," *Encyclopedia Britannica*, 1998.
 "John James Williams (1904-1988)," *Scribner Encyclopedia of American Lives*, 1998.
 "Introduction," *University of Delaware, A Celebration*, 1998.
 "Emily P. Bissell," *American National Biography*, 1999.
 "The Changing Look of Delaware," *Picturing Delaware*, University of Delaware Library, 2001.
 "William V. Roth," *Scribner Encyclopedia of American Lives*, 2005.

GRANTS RECEIVED

Harry S. Truman Library Research Grant, 1963
Eleutherian Mills-Hagley Foundation, Junior Resident Scholar, 1968-69
National Endowment for the Humanities Research Grant, 1977-80
T. Wistar Brown Fellowship, Haverford College, 1986

PRIZES AND AWARDS

Richards Professor of History, 1982
Joseph P. delTufo Award, Delaware Humanities Forum, 1989
Goldey-Beacom College, Honorary Doctorate, 1993
Hall of Fame of Delaware Women, 1993
E. Arthur Trabant Institutional Award for Women's Equity, 1997-98
Francis Alison Professor, 1998
University of Delaware Medal of Distinction, 1998
CASE Professor of the Year for Delaware, 1999
University of Delaware Alumni Wall of Fame, 2001

SERVICE

Board of Managers, Wilmington Institute Free Library, 1974-79
Historical Records Advisory Board, State of Delaware, 1976-87
Historical Society of Delaware, Board of Trustees, 1979-88
State Records Advisory Task Force, 1984-96
National Endowment for the Humanities, review panelist and project reviewer, various years
Rockwood Museum Planning Task Force, New Castle County, 1999-2000
Rockwood Museum Advisory Committee, 2000-05
Delaware Geographic Names Committee, 2001-
Editor, Delaware History, periodical of the Historical Society of Delaware, 1995-
In addition, I give talks and speeches on Delaware-related subjects to a wide variety of organizations throughout the state, usually about twenty per year.

UNIVERSITY SERVICE (selected examples)

University Women's Studies Executive Committee, with brief interruptions from 1972-2000
Vice-president, University Faculty Senate, 1980-81
President, University Faculty Senate, 1981-83
Coordinator, University Roundtable on Secondary Education, 1984-85

University President's Advisory Council, 1981-83
Winterthur Graduate Program Executive Committee, 1983-85
Hagley Museum and Library Advisory Committee, 1983-88
Council on Program Evaluation, 1985-1992
Middle States Re-accreditation Committee, 1989-1992, 1999-2000
Chair, University's Project Vision Implementation Committee, 1990
Chair, University Ad Hoc Committee on General Education, 1997-2000
University of Delaware Press Board, 1997-2001
President Phi Beta Kappa Honorary, UD Chapter, 1999-2000
Chair, Commission on the Status of Women, 1999-2000
Chair, Faculty Senate Committee on Student and Faculty Honors, 1999-2000

EXHIBIT B

BARBARA E. BENSON

804 Cinnamon Drive
Bon Ayre
Hockessin, Delaware 19707
302-239-6724
bcde1@verizon.net

Historical Consultant (September 2003--)

Provides a range of strategic planning, management, writing, and design assistance to individuals, businesses, and nonprofit organizations.

Recent Projects:

- Co-author, *The Delaware Adventure* (Gibbs Smith, 2006), a social-studies textbook
- Curator, 300th Anniversary Exhibition on Delaware General Assembly, Delaware Public Archives (2003)
- Space planning and exhibition creation, Rehoboth Beach Historical Society (2003--)
- Strategic planning and Director's Search Committee, Hagley Museum and Library (2003--)

Historical Society of Delaware

- *Executive Director*, (1990—2003)
- *Managing Editor of Delaware History*, Historical Society of Delaware (1977—2003)
- *Director of Library and Publications* (1980-1990)

Responsibilities: chief staff and administrative officer for a private, nonprofit state historical organization (founded in 1864) with three principal museum sites, a major manuscript and reference library, and four additional historical properties used for a variety of purposes; educational programs serving over 50,000 adults and children a year; and publications program.

University of Delaware

- *Adjunct Associate Professor* (1989--2003)
- *Adjunct Assistant Professor* (1981-1989),

Responsibilities: Teaching H200, History and Government of Delaware, H206 Survey of United States History, 1865-Present, H268 History Seminar for Undergraduate Majors, H411 History Seminar, H603 Public History, H667 Seminar in Historical Editing, H803 Writing Seminar in the History of the Delaware Valley.

Hagley Museum and Library

- *Assistant to the Director of the Library* (1973-19s75)
- *Editor of Publications* (1975-1980)

EDUCATION:

Ph.D., *American History*, Indiana University, 1977

Areas of specialization: economic history; regional history. Dissertation: "The Development of Michigan's Lumber Industry, 1837-1870"

M.A., *American History*, Indiana University, 1969

B.A., *History*, Beloit College, 1965

COMMUNITY SERVICE:

New Castle County Historic Review Board, Chairperson, 2003--

New Castle County Personnel Committee board member, 2000--2003

New Castle County Rockwood Advisory Committee, Chairperson, 2000--2005

African American Museum of Delaware, Board Member, 1999--2003

New Castle County Taskforce Committee on Rockwood Museum, 1999

Wilmington Rotary Club, Board of Directors, 1997-1999

YWCA, Centennial Committee, 1994

Delaware Humanities Forum (the state-based agency of the National Endowment for the Humanities), council member, 1987-90; 1990-94; chairperson, 1992-94; vice-chairperson, 1990-1992; chairperson, grants review committee, 1988-1992; outside evaluator, 1980-1987

Delaware State Tourism Advisory Board, gubernatorial appointment, 1988-1991; 2002--

Association of Delaware Historical Societies, secretary-treasurer, 1985-1995

Delaware Heritage Commission, member of publications committee, 1984-1988; scholarship judge, 1986-94, ex-officio member of board, 1993--

Sister Cities of Wilmington, member of board of directors, 1986-96; official delegate to Kalmar, Sweden, 1985

Lectures and Workshops for state and local groups (1991--), including schools, church groups, patriotic organizations, genealogical societies, school districts, public libraries, museums, and historical societies in all three counties.

PROFESSIONAL/SCHOLARLY ACTIVITIES:

Delaware State Records Commission, gubernatorial appointment, 1988--2000

Delaware State Historical Records Advisory Board (state-based program of the National Historical Publications and Records Commission), member, 1986-89, 1990-93, vice-chair, 1994--2000

American Association of State and Local History, state representative for awards committee, 1985-91; state membership chair, 1996--2003

Hagley Museum and Library, McShain Editorial Board, 1993-94

Museum Council of Philadelphia, board member, 1991-92

Delaware Historic Preservation Review Board, member, 1990-93, 1993-97

Institute of Museum Services, grants reviewer, 1986, 1987, 1988, 1991, 1992, 1993, 1994, 1996, 1997, 1999, 2001

Mid-Atlantic Regional Archives Conference, member of governing board, 1982-1984, 1984-1986; chairperson of nominating committee, 1985-1986; conference speaker and commentator, 1985 ("Getting Published"), 1986 ("Collecting African-American Sources"), 1988 ("Conservation for Small Organizations"), 1989 ("Designing and Constructing Archival Storage Facilities")

Salisbury State University, workshop leader, 1989

Taft Seminar at University of Delaware, 1989, 1990, 1991 presented papers on government in Delaware

New Sweden Conference, University of Delaware, 1988, chair and commentator for session on archival sources in Scandinavia and America

New Jersey Historical Commission Annual Symposium, 1988, chair and commentator for session on Swedish and Finnish Migration

Delaware Valley Eighteenth-Century Society, 1987, presented paper on Delaware in the 1780s

University of Delaware, History of Technology Speakers Series, 1987, presented a paper on the underwater archaeology of the Kronan

Delaware State House Symposium, chairperson of sessions, 1977, 1984, 1986

Central Michigan University, Clarke Memorial Lecturer, Clarke Historical Library, 1983

Consultant on Collections, Exhibitions, and Publications

Chesapeake Bay Girl Scouts Council; Mrs. Lammot du P. Copeland; Hershey Archives; History Store, Inc.; Greater Harrington Historical Society; Laurel Historical Society; Lewes Historical Society; Milford Museum; Rockwood Museum

**American Library Association, Rare Books and Manuscripts Preconference, 1985 panelist,
library exhibits and the public**

Consultant to Video Projects

Whispers of Angels, Teleduction, 2001

Slavery in Delaware, WHY-Y-TV, 1997

Celebrate 75, Celebrate 75 Video Production, 1995

Wilmington in the Age of Confidence, WHY-Y-TV, 1990-92

1968 – The Siege of Wilmington, WHY-Y-TV, 1989

New Sweden: An American Portrait, Dick Young Productions for Swedish Tobacco
Company, 1988

PUBLICATIONS:

The Delaware Adventure (Gibbs Smith Publishers, 2006)

“New Castle County Courthouses,” in *Delaware Lawyer* (2003)

“Delaware in World War II,” in *Delaware History* (vol. 23, 1995-96)

Co-editor, *New Sweden in America* (University of Delaware Press, 1996)

Wilmington and Beyond with Michael Biggs (Jared Press, 1990)

Logs to Lumber: The Development of the White Pine Lumber Industry in Michigan (Clark
Library Press of Central Michigan University, 1989)

Editor, *Arriving in Delaware: The Italian-American Experience* by Priscilla Thompson (History
Store and Italo-Americans United, 1989)

Editor, “Colonial and Revolutionary Delaware,” in *Dictionary of Colonial and Revolutionary
America* (Sachem Press, 1989)

“Joshua Clayton” and “Henry Latimer,” *Delaware Medical Journal* (April, 1989)

Contributor, *A Historical Dictionary of American Industrial Language*, ed. William H. Mulligan,
Jr. (Greenwood Press, 1988)

Introduction and text for Michael Biggs, *Delaware...A Photographic Journey* (Jared Press, 1986)

“Delaware’s First ‘Doctor’: Tyman Stidham and the Tools He Used,” *Delaware Medical Journal*
(Oct. 1986)

Contributor, *The Craft of Public History*, ed. Robert Pomeroy and David Trask (Greenwood
Press, 1983)

“Profile of Delaware,” “Thomas F. Bayard,” and “Bayard Family” in *World Book Encyclopedia*,
1985-86, 1990

Editor, *The Engineer as an Agent of Technological Transfer in the Nineteenth Century*
(Eleutherian Mills Historical Library, 1975)

Book reviews and conference report in *Indiana Magazine of History, Business History Review,*
and *Technology and Culture*

AWARDS AND HONORS:

Who's Who in America, 1991-2003

New Castle County Historic Review Board, Achievement Award, 2003

City of Wilmington, Certificate of Recognition, 2003

Delaware State Society of the National Society of the Daughters of the American Colonists,
Certificate of Recognition, 1989

Council for the Advancement of Citizenship and the Center for Civic Education Bicentennial
Leadership Award, 1988

Delaware Teacher Center Award, 1988

Royal Recognition Medallion, King Karl XVI Gustav of Sweden, 1988

Official Visitor from Wilmington to Kalmar, Sweden, Sister Cities Program, 1985

No. 134, Original

In the Supreme Court of the United States

State of New Jersey

v.

State of Delaware

Expert Report of Professor Joseph L. Sax

1. My name is Joseph L. Sax. My address is: Boalt Hall, School of Law, University of California, Berkeley, California, 94720. I am the James H. House & Hiram H. Hurd Professor (emeritus) at the University of California, Berkeley. I have been a member of the Berkeley faculty since 1987. From 1966 to 1986, I was on the faculty of the University of Michigan, where I was the Philip Hart Distinguished University Professor. Prior to that time, I practiced law in Washington, D.C. and was on the faculty of the University of Colorado. From 1994 to 1996, I served as Deputy Assistant Secretary of the Interior and as Counselor to the Secretary of the Interior. I am a graduate of Harvard College and the University of Chicago Law School, and hold an honorary Doctor of Laws degree from the Illinois Institute of Technology. I am a fellow of the American Academy of Arts and Sciences.
2. I have no interest in, or connection with, any of the parties to this case other than having been retained by the State of Delaware to review the claim made by the State of New Jersey, to provide my opinion as an expert on the background and historical understanding of riparian law, and to prepare this Expert Report.

Qualifications

3. For more than 40 years as a scholar and teacher, one of my principal interests has been research and teaching in the field of water law. It has been a central issue considered in classes and seminars I have taught. I am the author of a number of books and articles on the subject, including *Water Law: Cases and Commentary* (Pruett Press, 1965); *Water Law, Planning and Policy* (Bobbs-Merrill, 1968); *Federal Reclamation Law, in II Waters and Water Rights*, Chapter 8 (Allen Smith Co., ed. R. E. Clark, 1967); and four editions of *Legal Control of Water Resources*, the most recent being the 4th edition (with Barton H. Thompson, John Lesly & Robert H. Abrams) (St. Paul, Thomson/West, 2006). I have consulted for the Council of Great

Lakes Governors and the International Joint Commission (Great Lakes). During my tenure at the United States Department of the Interior, one of my principal responsibilities was dealing with interstate water issues on the Colorado River. After leaving the Department of the Interior, I served as a consultant for the U.S. Bureau of Reclamation, and I am currently a consultant for the Southern Nevada Water Authority. I served as an expert for the State of Mississippi in a case involving riparian rights and submerged lands owned by the State. I recently prepared a report on the law of groundwater for the California State Water Resources Control Board.

Information Required Pursuant to Rule 26(a)(2)(B)

4. My *curriculum vitae* is attached hereto as Exhibit A, and a list of all my publications within the past 10 years is attached hereto as Exhibit B.
5. All the data and information considered by me in forming the opinions herein, other than knowledge gained over many years of study in the field, are cited in this report.
6. I am being compensated for my work in preparing this report and for my testimony, if called, at the rate of \$500 per hour, plus out-of-pocket and travel expenses. My compensation is not contingent on or related in any way to the outcome of this case.
7. I testified as an expert witness for the State of Mississippi in *Bayview Land, Ltd. v. Mississippi*, Cause No. C2402-98-389, in the Chancery Court of Harrison County, Mississippi, in 2002. I have recently prepared an expert report for the United States and expect to be called to testify in the pending case of *Glamis Gold, Ltd. and United States of America (In the Arbitration Under Chapter Eleven of the NAFTA and the UNCITRAL Arbitration Rules)*.

Scope of Assignment

8. I have been retained by the State of Delaware to provide an historical analysis of riparian rights and laws as they existed at the time the 1905 Compact was executed by Delaware and New Jersey, as well as an opinion as to the interpretation to be given to the language in Article VII of the 1905 Compact at issue in this case, insofar as I can do so based on my knowledge of the history and understanding of the law of riparian rights in the 19th and early 20th centuries. For the purpose of preparing this opinion, I have read the initial pleadings and appendices filed in this case, the riparian grants, leases, and conveyances issued by New Jersey between 1854 and 1920 (which are discussed in the Affidavit of Richard Castagna and attached to New Jersey's initial filing), New Jersey's responses to Delaware's requests for admissions, certain documents pertaining to New Jersey's 1980 Coastal Management Plan, a permit issued by New Jersey in 1991 to the Keystone project, and a permit issued by New Jersey in 1996 to the Fort Mott project.
9. I have been asked to address the historical context for the drafting of Article VII, and the meaning and scope of the Article VII language "to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States." My report therefore describes the history and understanding of riparian

rights and laws in the United States, including New Jersey and Delaware, up to the execution of the 1905 Compact.

Summary of Opinion

10. Riparian jurisdiction embraces jurisdiction only over the incidents of riparian land-ownership, such as authorization to build a wharf to access navigable waters far enough to permit the loading and unloading of ships, and the right to own accretions. Authority to make grants, leases, and conveyances of riparian lands and rights is the concomitant power to make available state-owned lands beneath navigable waters needed to implement incidents of riparian landownership, such as construction of a wharf. Such authority is jurisdiction over the definition and scope of property rights, that is, the rights and privileges that attach to riparian lands. It does not include police power jurisdiction to determine the legality of activities on, or in connection with the use of, riparian property such as a wharf. Nor does it include jurisdiction to determine the scope or content of public rights in navigable waters, which may be invoked to limit the exercise of riparian rights.

Opinion

11. Article VII of the 1905 Compact reads: "Each state may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective states." The phrase "riparian jurisdiction" was not then, and is not now, a legal term of art. It is, to the best of my knowledge, found neither in the treatise or article literature, nor in judicial opinions or statutes. That particular verbal formulation seems to have been devised for use in Article VII of the 1905 Compact as a limitation on the term "jurisdiction."¹

12. Riparian law is a distinctive sub-category of the law of property. It deals with the incidents specific to ownership of riparian land.² A riparian tract of land is one that abuts the water's edge on a river or lake, or the shore of the sea.³ The term derives from the Latin word "ripa", which means bank, as in the bank of a river. Land that is on the bank of a river is riparian land. As a

¹ Elsewhere in the 1905 Compact one finds the more familiar terms "jurisdiction" (in the introductory paragraphs and in Article VIII) or "exclusive jurisdiction" (in Article IV).

² In this Report, I shall speak of riparian rights as they existed prior to the time of the 1905 Compact, though the general shape of riparian rights has not changed significantly in the past century.

³ See John M. Gould, *A Treatise on the Law of Waters, Including Riparian Rights and Public and Private Rights in Waters Tidal and Inland* § 148, at 297 (3d ed. 1900) ("Gould"). Legally, there is no distinction between land on the bank of a river and land on the bank of a lake or the sea, though technically the latter categories are termed littoral land, lit(t)us being the Latin word for sea shore or coast.

legal matter, the test of whether land is riparian is whether its boundary is at the water's edge, touching the water, whether or not there is anything like a bank. Such lands – and only such lands – are riparian. Riparian law, or what is usually called the law of riparian rights,⁴ describes a set of special benefits in regard to the adjacent water body to which riparian landowners are entitled.

13. Riparian landownership conventionally includes the right to divert a reasonable amount of water for use on the riparian tract, the right to use the entire surface of the water (regardless of bottomland ownership) for recreational swimming or boating, and the right to stop up a river to install a dam in order to produce hydro-power.⁵ There are other incidents of riparian ownership, such as a right to cut ice in the winter, though that use is of little importance today, as compared with the 1800s. Other important elements of riparian law are the rules of accretion, avulsion, erosion, and reliction, which determine how and whether the shore boundary moves as land is deposited or eroded at the edge of the tract, or as the sea level rises or falls. Another incident of riparian landownership is wharfing out, which is a right of access to a navigable depth of water.⁶

⁴ While it is conventional to use the term riparian rights, or entitlements, some riparian incidents are property rights, and some – such as wharfing out onto state-owned bottomlands – are usually privileges that depend on prior governmental permission. See, e.g., 1 Henry Philip Farnham, *The Law of Waters and Water Rights* § 113, at 528 (1904) (“Farnham’s Law of Waters”). For convenience, in this Report, I will use “riparian rights” as a general term to describe use incidents of riparian landownership.

⁵ See generally 1 Farnham’s Law of Waters at 278-347; Gould at 296-447. A modern description of the incidents of riparian ownership, which for most purposes are quite similar to what they were a century ago, can be found in 1 Joseph W. Dellapenna, *Waters and Water Rights* §§ 6.01 *et seq.* (1991).

⁶ See Gould § 149, at 300; 1 Samuel C. Wiel, *Water Rights in the Western States* § 904, at 942 (3d ed. 1911) (“Wiel”). See, e.g., *New Jersey v. Delaware*, 291 U.S. 361, 375 (1934) (“By the law of waters of many of our states, a law which in that respect has departed from the common law of England, riparian proprietors have very commonly enjoyed the privilege of gaining access to a stream by building wharves and piers, and this though the title to the foreshore or the bed may have been vested in the state.”); *Shively v. Bowlby*, 152 U.S. 1, 40 (1894) (“a riparian proprietor, whose land is bounded by a navigable stream, has the right of access to the navigable part of the stream in front of his land, and to construct a wharf or pier projecting into the stream, for his own use, or the use of others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public”) (internal quotation marks omitted); *Mayor of Newark v. Sayre*, 60 N.J. Eq. 361, 372-73, 45 A. 985, 990 (Ct. Errors & Appeals 1900) (“Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river, as one of the public. This, however, is not a right coming to him qua owner or occupier of any lands on the bank, nor is it a right which per s[e] he enjoys in a manner different from any other member of the public. But, when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a

Essentially, wharfing out allows the riparian landowner to build a structure in the adjacent bottomlands sufficiently far out into the water to allow a ship to navigate to it, so it could load and unload, and its cargo could be transported on the wharf to the shore. As an access right, it provides the riparian landowner the physical capacity to make use of its water adjacency to benefit from water-borne commerce or recreation.⁷

14. As these examples demonstrate, riparian rights deal with facilitation of the ability by a riparian landowner to make general use of the water to which the riparian land is adjacent, rather than with the ultimate specific uses made of the water. Riparian law is property law.⁸ It speaks to the rights of riparian landowners to make use of tidelands beneath navigable waters. And it speaks to the rights of riparian landowners among themselves, but not to the application of the general police power to riparian property. Thus, for example, riparian law determines how much water a riparian landowner may divert for use on his riparian tract, vis-à-vis other riparian landowners, but it does not speak to regulation of the kind of crops that may be grown, or whether

very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land, and of the river in connection with the land[.]” (Depue, J., concurring) (internal quotation marks omitted).

⁷ However, as a New Jersey court held long ago, while “[i]t is true[] that a grant of a right to build and maintain a wharf bears with it, by implication, the right to use it,” that does not mean that any use that is advantageous to, or desirable for, the owner of the wharf is permissible. *Keyport & Middletown Point Steamboat Co. v. Farmers Transp. Co.*, 18 N.J. Eq. 511, 1866 WL 89, at *5 (Ct. Errors & Appeals 1866). “Extraordinary, unusual modes of use, no matter how convenient they may be, are not annexed as incidents in law to” the property right of wharfing out. *Id.*

⁸ See *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497, 504 (1871) (“This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired.”); *Bell v. Gough*, 23 N.J.L. 624, 1852 WL 3448, at *38 (Ct. Errors & Appeals 1852) (“I am further of opinion that, by the true principles of the English common law, adopted in this state by the constitution of 1776, and adapted to the condition and requirements of our government, the owner of a freehold estate on the margin of tide water navigation has rights appurtenant to his freehold in the adjoining shore . . . as appurtenant to his riparian ownership, the right to exclude the influx of the tide by the erection of embankments, docks, or wharves, provided he does not impair or interfere with the common right of navigation or fishery or any other common right”) (Nevius, J.); see also *id.* at *23 (Elmer, J.), *33 (Potts, J.); 1 Farnham’s *Law of Waters* § 65, at 294 (“It appears to me impossible to say that a mode of enjoyment of land on the bank of a navigable river which is thus valuable, and as to which the landowner can thus protect himself against disturbance, is otherwise than a right, or claim to which the owner of land on the bank of the river is by law entitled within the meaning of the act requiring compensation for the destruction of such rights.”).

a certain type of industrial facility, for which cooling water may be diverted from the river, is permissible in regard to air pollution. Those are matters left to the general police power. One finds no discussion or consideration of such issues in treatises and case law describing riparian rights and riparian law. By analogy, the law of real property permits ownership and occupancy of real property, but those general rights may be limited under the police power to regulate, restrict, or even prohibit specific activities on that property.

15. Similarly, certain public rights such as the federal navigation servitude, or state public trust law, impose limits on what riparian landowners may do, but they do not arise out of riparian landownership, and they exist independently of riparian law.⁹ For example, the federal navigation servitude arises out of the federal commerce power,¹⁰ not out of property law, and imposes independent restrictions on riparian rights.¹¹ Similarly, there are public rights in the preservation of fisheries that arise out of an independent body of environmental law – international, national, or state – that may restrict the riparian rights to dam a stream for hydro-power, but the exercise of that power would not logically be deemed an exercise of “riparian” jurisdiction.¹²

16. Because the jurisdiction of only one state is at issue in ordinary cases affecting riparian rights, courts have not needed to distinguish between the realm of riparian jurisdiction and jurisdiction exercised pursuant to the police power. For example, if a riparian landowner loses the use of some of the industrial cooling water it was diverting under its riparian rights because the factory using it had to cut back production under applicable state air pollution laws, no question arises as to the scope of riparian jurisdiction, as all jurisdiction is ordinarily embodied within a single sovereign state or is dealt with under the Supremacy Clause of the Constitution¹³ if there is conflict between state and federal laws.

17. However, under the terms of the 1905 Compact at issue here, identification of the extent and limits of the riparian realm, “riparian jurisdiction,” in the specific context of wharfing out, becomes relevant. To ascertain why the “riparian jurisdiction” and grants language of Article VII

⁹ See, e.g., *Obrecht v. National Gypsum Co.*, 361 Mich. 399, 105 N.W.2d 143 (1960) (public trust, nuisance).

¹⁰ See *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713, 724-25 (1866).

¹¹ “[I]t was recognized from the beginning that all riparian interests were subject to a dominant public interest in navigation.” *United States v. Willow River Power Co.*, 324 U.S. 499, 507 (1945).

¹² Riparian landowners held their riparian rights and privileges subject to the public right to have migratory fish pass up rivers to their headwaters. See Gould § 188, at 358; Joseph K. Angell, *Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof* 89 (1826, reprint ed. 1983) (“Angell on Tide Waters”); Wiel § 905, at 945.

¹³ U.S. Const. art. VI, § 2.

of the 1905 Compact might have been chosen, it is useful to note the historic situation of the law affecting wharfing out.¹⁴

18. In the late 19th and early 20th centuries, wharfing out into navigable waters – an incident of the ownership of riparian land¹⁵ – was understood to have two elements that demanded state involvement: protection of the public right of navigation (usually implemented by setting a bulkhead line to mark the furthest permissible water-ward extent of wharfs and other structures) and permission to use submerged land below the high-water mark of navigable waters, which land was owned by the state.¹⁶ The latter use was often implemented by a grant or lease of such land, as was the case in New Jersey. Under an 1871 New Jersey statute, riparian owners on tidal waters who wanted to build a wharf could obtain a lease, grant, or conveyance to state-owned lands in front of their riparian tracts by application to a board of riparian commissioners.¹⁷ Some states, such as Delaware, however, seemed to recognize in this period that existing wharves would be protected so long they did not impede public rights such as that of navigation.¹⁸ As to the first element, protection of the right of navigation, if the wharf interfered with the public right of navigation, it was considered a public nuisance. As to the second element, permission to use

¹⁴ Nothing in this Report involves the meaning of the Article VII phrase “own side of the river.” Instead, the analysis in this Report is based on my expertise in the history of riparian rights and laws and thus the interpretation of the “riparian” language in Article VII.

¹⁵ “[O]wnership of the bed of the river . . . cannot be the foundation of a riparian rights properly so called, because the word ‘riparian’ is relative to the bank, and not to the bed of the stream, and the connection, when it exists, of property on the banks with property in the bed of the stream depends not upon nature, but on grant or presumption of law.” Gould § 148, at 297.

¹⁶ See *Shively*, 152 U.S. at 49-50; *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). “The right of property in the soil covered by tide waters, in all navigable rivers and arms of the sea within the limits of the state of New Jersey is vested in the state.” *Gough v. Bell*, 22 N.J.L. 441, 1850 WL 4394, at *10 (Sup. Ct. 1850), *aff'd*, 23 N.J.L. 624, 1852 WL 3448 (Ct. Errors & Appeals 1852); see *Mayor of Newark*, 60 N.J. Eq. at 363, 45 A. at 986.

¹⁷ 1871 N.J. Laws ch. 256, p. 44, § 1. The present version of the law is found in New Jersey Statutes Annotated § 12:3-10. Prior to the regulation of wharfing out by statute, “the owners of land bounding on navigable waters had an absolute right to wharf out and otherwise reclaim the land down to and even below low water, provided they did not thereby impede the paramount right of navigation.” *Bell v. Gough*, 1852 WL 3448, at *23, *29 (Elmer, J.). But the “absolute right” was apparently only recognized down to the line of low water. See *id.* at *38 (Nevius, J.). The Wharf Act of 1851 required state approval to fill below the low-water line. See 1851 N.J. Laws, p. 335.

¹⁸ “[I]n the case of a mere purpresture the court will not enjoin or abate it, unless it shall appear as a fact . . . to the injury of the public.” *Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435, 1882 WL 2713, at *11 (1882).

submerged lands, if permission to use state submerged land on which to build a wharf was not granted or otherwise assured, the wharf was subject to removal as a trespass on sovereign property, historically known as a purpresture.¹⁹

19. Riparian landowners who desired to wharf out routinely sought prior authority for their wharf from the state as to both these matters.²⁰ In the ordinary case, there was no ambiguity about which state had jurisdiction over this riparian activity: the state in which the riparian land was located also owned the submerged bottomlands.²¹ The failure to resolve New Jersey's challenge

¹⁹ "If a littoral proprietor, without grant or license from the Crown, extends a wharf or building into the water in front of his land it is purpresture, though the public rights of navigation and fishery may not be impaired. If such a structure causes injury to the public right, it is a common nuisance and abatable as such[.]" Gould § 21, at 45 (footnotes omitted); *see also* Farnham's Law of Waters § 113, at 527. For a discussion of the traditional law relating to wharfing out, *see* Angell on Tide Waters at 125-33.

²⁰ The law in New Jersey from the legislation of 1851 to modern times, as set out in note 17, *supra*, is discussed in detail in *Bailey v. Driscoll*, 19 N.J. 363, 117 A.2d 265 (1955). State permission to extend facilities into the state's territory was authorized by grant or lease of land within the external boundaries of the riparian tract after 1871. In addition, the laws established bulkhead and pier lines to set an outer boundary beyond which improvement could not be made, in order to protect public rights of use in the waters, essentially the public right of navigation. In that way, both state proprietorship and the public's rights of use were recognized. At the same time, the authority of the federal government to control the navigation of navigable waters to the extent necessary for the regulation of interstate and foreign commerce was acknowledged. This history was similar to that in other states. *See* 1 Farnham's Law of Waters §§ 113b, 115, at 533, 554.

²¹ *See* note 16, *supra*. Some states have granted specific tracts of land between high and low tide to the riparian owners (*e.g.*, *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913)) or, like Delaware, recognized generally that "title to riparian property extends from the upland to the low water mark," *City of Wilmington v. Parcel of Land Known as Tax Parcel No. 26.067.00.004*, 607 A.2d 1163, 1168 (Del. Sup. Ct. 1992); *Harlan & Hollingsworth*, 1882 WL 2713, at *10. What is unusual here is that New Jersey owns the land between the high- and low-water marks (except to the extent it has granted that land away), and Delaware owns the land below the low-water mark. *See New Jersey v. Delaware*, 291 U.S. 361 (1934). These are the lands usually referred to as being in the public trust, or *jus publicum*. American public trust law is usually traced back to the 1821 New Jersey case of *Arnold v. Mundy*, 6 N.J.L. 1, 1821 WL 1269 (Sup. Ct. 1821), a case involving conflicting claims to ownership of oyster beds, in which the court upheld the state's ownership of land beneath tidal waters, in this much-quoted passage: "[T]he navigable rivers, where the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purposes of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products . . . are common to all the people, and that each has a right to use them according to his pleasure,

to the boundary prior to the time of the 1905 Compact (or in the Compact itself) would have created an unusual set of potential problems for New Jersey with regard to its issuance of “grants, leases, and conveyances” to riparian landowners within the Twelve-Mile Circle, because New Jersey’s claim to have jurisdiction on, over, and under the Delaware River within that area had been denied by Delaware.

20. New Jersey may have been uncertain as to which state’s law governed the right to wharf out because the law was that “[i]n a case of wharfing out . . . [t]he rights of a riparian owner upon a navigable stream in this country are governed by the law of the state in which the stream is located.”²² Thus, New Jersey could have feared that its prior grants, leases, and conveyances applied to land that might turn out to be in Delaware, and that structures upon those lands would become subject to scrutiny under the riparian standards that Delaware applied in its state.²³ Whether those standards might turn out to be more rigorous than those New Jersey had applied could not be known with certainty. Because, as Justice Cardozo later noted, “New Jersey in particular has been liberal in according” to riparians “the privilege of gaining access to a stream by building wharves and piers,”²⁴ New Jersey might have wished to protect the owners of existing wharves and structures.

21. At the time the 1905 Compact was being drafted, there were, according to New Jersey’s Castagna Affidavit, only a handful of structures extending from New Jersey into Delaware. Insofar as the unresolved boundary question between the two states raised in a novel form the historic concern about purprestures and the states were concerned about which state’s law of wharfing out applied to those landowners, it may explain the distinctive language chosen by the drafters of Article VII of the 1905 Compact. The law of wharfing out concerns a question of jurisdiction over a riparian right; thus, it would explain the use of the phrase “riparian jurisdiction.” Moreover, because exercise of this riparian right under New Jersey law required a grant or lease of state-owned land, it would explain the phrase in Article VII “to make grants, leases, and conveyances of riparian lands and rights.” Such language would also have been appropriate to other riparian property rights questions, such as which state’s law governed accretions, or which state had jurisdiction to authorize diversions of water for use on riparian

subject only to the laws which regulate that use; that the property indeed vests in the sovereign, but it vests in him for the sake of order and protection, and not for his own use, but for the use of the citizen[.]” *Id.* at *9. For a brief historical discussion, see Moses M. Frankel, *Law of Seashore, Waters and Water Courses, Maine and Massachusetts* 125 (1969).

²² 1 *Wiel* § 898, at 934 (quoting *Weems Steamboat Co. of Baltimore v. People’s Steamboat Co.*, 214 U.S. 345, 355 (1909)).

²³ See, e.g., *Harlan & Hollingsworth*, *supra*.

²⁴ *New Jersey v. Delaware*, 291 U.S. at 375.

lands. Those concerns would be addressed by the phrasing “riparian jurisdiction of every kind and nature.”

22. Such an arrangement would have been consistent with descriptions in the then-existing treatises (cited throughout this opinion), and the laws of New Jersey and Delaware, as to what was comprised within the category of riparian rights: e.g., the right of access to navigable depths via a wharf, the right to own accretions, or the right to divert from the river for use on riparian land.

23. Riparian law descriptions and definitions do not, however, describe the conduct that may be engaged in on riparian property. Such conduct is governed under the jurisdiction of the general police power. For example, one has a riparian right to use river water to irrigate a riparian tract, but there is no riparian right to grow marijuana or any other crop on the tract. One may have a riparian right to wharf out to navigable water so that a ship can tie up to the dock, but that does not create a riparian right to have, or not to have, gambling on the ship or dock, or to determine the safety rules for the ships that dock, whether or not they must be double-hulled, or have air-pollution controls on their emissions, for example. Similarly, nothing in the law governing the right to construct a wharf insulates activities to be engaged in on the wharf, such as those involved in the loading or unloading of particular cargoes, if they should constitute a nuisance or otherwise violate general laws for the protection of public health or safety. These are matters of general police power law governed by the sovereign that has general police power authority.

24. I have examined New Jersey’s responses to Delaware’s Requests for Admissions, as well as the riparian grants, leases, and conveyances issued by New Jersey between 1854 and 1920 discussed in the Castagna Affidavit. The distinction between that which is authorized under these exercises of riparian jurisdiction, and that which is **within the scope of the general police power jurisdiction**, is manifest in these documents. The various grants describing the land being transferred state that piers or other structures are to be built, and where they describe the intended uses do so in general terms, such as “he may deem proper and necessary for the improvement of his property or for the benefit of commerce”;²⁵ or “for the accommodation of vessels navigating the same, and from time to time to rebuild and repair the same as may be necessary for the improvement of his property and the benefit of commerce”;²⁶ or “to exclude the tide-water from so much of the land above described as lie under tide-water, by filling in or otherwise improving the same, and to appropriate the lands under water above described to exclusive private uses.”²⁷ These actions exercising riparian jurisdiction do not include examination or regulation of the particular activities intended to be engaged in.

²⁵ Cited in Affidavit of Richard Castagna (reproduced as Appendix 5 to NJ Brief at 33a, ¶ (5)).

²⁶ *Id.* at 32a-33a, ¶ (4).

²⁷ *Id.* at 39a, ¶ (17).

25. The responses to Delaware's Requests for Admissions indicate a similar distinction. For example, New Jersey responded that "the grants do not expressly specify the precise business that can be carried on at any point in time"²⁸ or "the precise cargo that can be loaded or unloaded at any specific point in time."²⁹ It also stated that the authorization or restriction of any particular activity to be conducted on a wharf, pier, or like structure "would be under other State, federal or local laws, and not by the establishment of pierhead and bulkhead lines."³⁰ A person wishing to conduct a particular business activity on a wharf, in addition to receiving a riparian grant, would still have to comply with all other "applicable New Jersey laws[] and local laws."³¹ To the best of my knowledge, the separation of authorities described in New Jersey's Responses to Requests for Admissions reflects the usual and traditional separation of the exercise of riparian rights from the exercise of state police power.

26. This distinction between riparian property law and general regulatory law has been drawn in many cases over the past century, though it has not arisen in the specific instance of two different states, one holding riparian jurisdiction and another holding general police power jurisdiction.³² *Cummings v. City of Chicago*,³³ a case in the United States Supreme Court decided in the same period the 1905 Compact in issue here was being drafted, illustrates the separateness of the riparian realm of jurisdiction and that of the general police power, though it formally involved jurisdiction over riparian rights in the federal government and a claim of federal preemption. In that case, the United States regulated riparian landowners' wharfing out. The landowner there had complied with all the requirements of the federal permitting scheme that dealt with the building of a dock in the river, only to find that its project was blocked because it did not have an additional required permit from the City of Chicago. The riparian landowner claimed that, having complied with the wharfing out law, the further regulatory demand of the city under the police power was a violation of its property right, and the federal permitting system for wharfing out should be viewed as preemptive. Otherwise, the riparian owner suggested, it would have met all the requirements of the jurisdiction that governed riparian developments in the river and have

²⁸ New Jersey's Responses to Delaware's First Requests for Admissions, No. 5 (filed Sept. 8, 2006).

²⁹ *Id.*, No. 9.

³⁰ *Id.*, No. 3.

³¹ *Id.*, No. 22.

³² Other than the instant case, the case of *Virginia v. Maryland*, 540 U.S. 56 (2003), and another New Jersey case involving an interstate compact with New York, see *People v. Central R.R. Co. of New Jersey*, 42 N.Y. 283, 1870 WL 7713 (1870), the division of jurisdiction between states over rivers appears to be unprecedented.

³³ 188 U.S. 410 (1903).

fully implemented its riparian rights, only to be frustrated by the separate police power standards of the local government. The Court held that, merely because a company that wanted to build a dock had complied with all the detailed federal riparian regulation of wharfing out that had been imposed on the Calumet River in that case, that did not mean that “no jurisdiction or authority whatever remains with the local authorities.”³⁴ The Court noted that, whatever the legitimate concerns of the federal government over the construction of wharves, the state also has its own **internal police power** to protect the interests of its citizens. Despite the extensive scope of the federal regulation there, and the claims that Congress had taken “possession” of the river, the Court indulged no such presumption, warning that the “river, it must be remembered, is entirely within the limits of Illinois, and the authority of the state over it is plenary.”³⁵ Emphasizing the importance to a state of retaining regulatory jurisdiction over activities within its territory, the Court said that any congressional determination to abolish such state authority “would have been manifested by clear and explicit language.”³⁶ One would expect the same standard to apply where a state is claimed to have divested itself of general police power jurisdiction over its territory.

27. The independence of the riparian and the police power realms is sharply drawn in the opinion of Justice Holmes in *Hudson County Water Co. v. McCarter*,³⁷ a case arising from New Jersey. The water company, a riparian landowner, sought to deliver to New York some water it was diverting from the Passaic River, in violation of a New Jersey law prohibiting such exports.³⁸ Justice Holmes characterized the case as one in which the water company was asserting that the anti-export law violated its riparian property rights.³⁹ The opinion is famous for its statement that

³⁴ *Id.* at 426. A similar point was made in a New Jersey case, where a municipality challenged a riparian landowner who was making a legitimate riparian use of the shore and who refused to obtain a city permit under the police power. The court said that “[t]he authority lodged in the [state] to make grants or leases of the state’s riparian lands is not . . . inconsistent with the existence of the police power in the municipality in respect thereof.” *Ross v. Mayor & Council of Edgewater*, 115 N.J.L. 477, 487, 180 A. 866, 872 (Sup. Ct. 1935).

³⁵ *Cummings*, 188 U.S. at 426-27.

³⁶ *Id.* at 430.

³⁷ 209 U.S. 349 (1908). The named plaintiff in that case, Robert McCarter, was both New Jersey’s Attorney General and one of the New Jersey commissioners who negotiated the 1905 Compact.

³⁸ Notably, water has had a special place under the so-called dormant Commerce Clause. See *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982). See also *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983).

³⁹ It had been strongly argued that what the company wanted to do was not within its riparian rights at all, see *McCarter v. Hudson County Water Co.*, 70 N.J. Eq. 695, 708, 65 A.

"[a]ll rights tend to declare themselves absolute to their logical extreme."⁴⁰ The decision centrally rests on a recognition of the separateness of the realms of the law of property and of the police power. Whatever the company's riparian rights may have been, the decision holds, they must nonetheless pass the independent test of the police power invoked to protect "the interests of the public."⁴¹ "[T]he private property of riparian proprietors cannot be supposed to have deeper roots. . . . The private right to appropriate is subject . . . to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health."⁴² Accordingly, the domain of property rights, whatever its scope, must nonetheless be tested against the distinct demands of the police power. As Justice Holmes thus made clear, the police power embodies a jurisdiction separate and apart from the head of jurisdiction that defines property rights.⁴³

28. In the same respect, riparian landowners who had established mills in full compliance with the riparian law⁴⁴ could be compelled at some later time, in response to regulatory laws designed to protect or restore fisheries, to install fish ladders to allow the passage of migratory species, because riparian landowners held their riparian rights subject to the restrictions imposed to protect public rights under police power jurisdiction.⁴⁵ Over the years, public interests of various

489, 494 (Ct. Errors & Appeals 1906), *aff'd*, 209 U.S. 349 (1908), but Justice Holmes ignored those claims and used the decision to emphasize the separateness of authority over property and the authority of the police power.

⁴⁰ 209 U.S. at 355.

⁴¹ *Id.*

⁴² *Id.* at 356.

⁴³ "And these rights of the 'riparian owner' are not *common* rights, for they do not belong to his neighbor, who lies behind him on the main land, nor are they mere rights of adjacency to land belonging to the State, for mere adjacency to a mud flat belonging to the State lying inland would give no right in or over it; they are therefore *private* rights of the 'riparian owner' in the lands of the State lying in front of him beyond the 'shore;' which rights are his by the local common law of the State by reason of his adjacency." Opinion Concerning Riparian Rights at 8, Hon. George M. Robeson, Attorney General of New Jersey (1867).

⁴⁴ A dam erected for reasonable mill purposes is an incident of riparian landownership. See John Norton Pomeroy, *A Treatise on the Law of Riparian Rights* § 11, at 13 (1887); *McCarter*, 70 N.J. Eq. at 708, 65 A. at 494. But mill rights were sometimes viewed quite restrictively in light of the traditional riparian right to benefit from the continued natural flow of the stream. See, e.g., *Delaney v. Boston*, 2 Del. (Harr.) 489, 1839 WL 165, at *4 (Super. Ct. 1839).

⁴⁵ See Gould § 187, at 358; Angell on Watercourses § 89, at 89; 1 Wiel § 905, at 945.

kinds have been imposed to restrict or prevent uses otherwise authorized pursuant to riparian landowners' proprietary rights.⁴⁶

29. A modern state case, citing both *Hudson County and Cummings*,⁴⁷ powerfully reinforces the distinction drawn in those decisions. In *Obrecht v. National Gypsum Co.*,⁴⁸ a riparian proprietor built a wharf in accord with its riparian rights and with the authority of the riparian permitting jurisdiction (also in that case the U.S. Corps of Engineers). But the use made of the wharf – loading and transporting gypsum rock – was challenged as a nuisance. The riparian landowner defended on the ground that it was operating pursuant to its duly permitted wharfing out riparian property right, and that the use it was making of the wharf could not be separately challenged under the state's nuisance or public trust laws. The court rejected that defense, noting the separate categories of riparian rights and public rights. Though the exercise of its riparian rights had received approval from the Corps of Engineers, which had jurisdiction to authorize “the construction of a massive and permanent loading dock . . . and the dredging of more than a mile deep channel,”⁴⁸ the riparian proprietor had to comply as well with state requirements for the protection of the public health and welfare. The *Obrecht* court also cited the Supreme Court's 19th-century decisions in *Yates v. Milwaukee*⁴⁹ and *Illinois Central Railroad v. Illinois*,⁵⁰ in which the Court observed that a riparian proprietor may access navigable waters and make a wharf or pier for that purpose, but nevertheless must also comply with general laws protecting public rights. *Obrecht* thus reiterates the firmly rooted principle that the entity with authority over riparian permitting deals with the limited issues of the property rights of the riparian owner and the physical extent of that right to the line of navigability, but not with the general scope of the police power.

30. The distinction between riparian rights and public rights drawn in *Obrecht*, as well as the importance to a state of issues affecting the public health and welfare, buttresses the likelihood that, insofar as the 1905 Compact may be construed as a transfer of any permanent authority by Delaware to New Jersey over waters within its boundaries, that authority would have been limited to administration of the property aspects of riparian landownership on the New Jersey shore, and

⁴⁶ See, e.g., *Colberg, Inc. v. State ex rel. Dep't of Public Works*, 67 Cal. 2d 408, 432 P.2d 3 (1967) (access to navigable waters cut off by highway bridge over navigable water); *Freed v. Miami Beach Pier Corp.*, 93 Fla. 888, 899, 112 So. 841, 845 (1927) (if they become a nuisance, wharves can be removed or abated); *State v. Central Vermont Ry., Inc.*, 153 Vt. 337, 351-52, 571 A.2d 1128, 1135-36 (1989) (wharves no longer meet public trust standard).

⁴⁷ 361 Mich. 399, 105 N.W.2d 143 (1960).

⁴⁸ 361 Mich. at 405, 105 N.W.2d at 145.

⁴⁹ 77 U.S. (10 Wall.) 497 (1871).

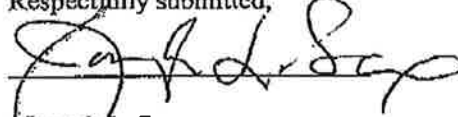
⁵⁰ 146 U.S. 387 (1892).

not to the far more extensive and significant administration of public rights and the general police power over the Delaware River and its environs as affected by activities related to use of wharves constructed, or to be constructed, from the New Jersey shore into the river.

Conclusion

31. For the above reasons, and assuming it was determined that New Jersey's "riparian jurisdiction" extended water-ward of the mean low-water mark on the easterly shore of the Delaware River within the Twelve-Mile Circle, it is my opinion that, in agreeing to the exercise of "riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights" on the part of New Jersey, those who drafted and approved the 1905 Compact did not intend to withdraw from Delaware regulatory or police power authority over uses or activities of those who might in the future use, or propose to use, wharves built out from the New Jersey shoreline beyond the territorial limits of New Jersey.

Respectfully submitted,



Joseph L. Sax

Date: Nov. 7, 2006

EXHIBIT A

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Admitted to Practice:

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Professional Experience:

Attorney, private practice, Washington, D.C. (1959-62)

Professor of Law, University of Colorado (1962-66)

Philip A. Hart Distinguished University Professor, University of Michigan (1966-86)

Counselor to the Secretary of the Interior, Deputy Assistant Secretary of the Interior (1994-1996)

Visiting Professor of Law:

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Honors and Awards (selected):

•Fellow, American Academy of Arts and Sciences

•Doctor of Laws (hon.), Illinois Institute of Technology

Chicago-Kent College of Law

•Professional Achievement Citation, University of Chicago Alumni Ass'n

•Elizabeth Haub Award, Free University Brussels, Gold Medalist

•Fellow, Center for Advanced Study in the Behavioral Sciences, Stanford

•Distinguished Water Attorney Award (Water Education Foundation, 2004)

- Cook Lecturer in American Institutions, University of Michigan
- Environmental Law Institute Award
- Wm. O. Douglas Legal Achievement Award, The Sierra Club
- Biennial Book Award, University of Michigan Press
- Conservationist of the Year, Audubon Society (Detroit)
- Resource Defense Award, National Wildlife Federation
- Distinguished Faculty Achievement Award, University of Michigan
- Environmental Quality Award, U.S. E.P.A.
- American Motors Conservation Award

Consultancies (selected)

In recent years, I have consulted/prepared reports/been an expert witness for: (1) United States Bureau of Reclamation; (2) Coachella Valley (California) Water District; (3) Los Angeles Department of Water and Power; (4) State of Mississippi; (5) County of Riverside, California; (6) City of Santa Cruz, California; (7) Council of Great Lakes Governors; (8) International Joint Commission (Great Lakes); (9) California State Water Resources Control Board; (10) City of Glendale, California; (11) Southern Nevada Water Authority; (12) County of Yolo, California; (13) State of Delaware (original jurisdiction suit in the U.S. Supreme Court); (14) United States (Department of State).

EXHIBIT B

Publications 1996-2006

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Revisited,” 33 Ecol. L.Q. 233 (2006).**

Carper. In December 2000, I returned to DNREC to serve in my current position, Director of Policy and Planning.

3. As part of my responsibilities as Director of Policy and Planning for DNREC, I supervise the administration of the Delaware Coastal Zone Act. Del. Code Ann. tit. 7, §§ 7001 *et seq.* (herein, the “DCZA” or the “Act”). I report directly to the Secretary of DNREC on all DCZA issues and applications.

4. The DCZA, adopted in 1971, begins with a statement of legislative policy and purpose declaring that “the coastal areas of Delaware are the most critical areas for the future of the State in terms of the quality of life in the State.” Del. Code Ann. tit. 7, § 7001. Under the Act, the “declared public policy” of Delaware is “to control the location, extent and type of industrial development in Delaware’s coastal areas.” *Id.* The Act specifically finds that “offshore bulk transfer facilities represent a significant danger of pollution to the coastal zone and generate pressure for the construction of industrial plants in the coastal zone, which construction is declared to be against public policy.” For these reasons, the Act declares that an absolute “prohibition against bulk transfer facilities in the coastal zone is deemed imperative.” *Id.* Section 7003, “uses absolutely prohibited in the coastal zone,” implements this policy by providing that “offshore gas, liquid or solid bulk product transfer facilities which are not in operation on June 28, 1971, are prohibited.” Del. Code Ann. tit. 7, § 7003. Delaware’s coastal zone consists of land, water, and subaqueous land within the territorial limits of Delaware in the Delaware River, including the water and subaqueous soil within a twelve-mile arc from the town of New Castle, Delaware, which is known as the twelve-mile circle. Del. Code Ann. tit. 7, § 7002(a).

5. In December 1971, the El Paso Eastern Company (“El Paso”) submitted a proposal to construct a liquefied natural gas (“LNG”) terminal in New Jersey, opposite Claymont, Delaware, which also proposed extending a pier into Delaware territory within the twelve-mile circle. On February 23, 1972, the State Planner, then charged with administering the DCZA, issued a status decision¹ rejecting El Paso’s proposed LNG terminal as a

¹ Under Delaware’s coastal zone act application process, an applicant may either apply for a permit or seek a status decision regarding whether a proposed use is permitted under the Act. Applicants, such as El Paso and Crown Landing LLC, often apply for a status decision before making a formal permit application.

prohibited use under the DCZA. DE App. 3483-3484. The State Planner apprised New Jersey officials of El Paso's proposal and Delaware's application of the DCZA to the proposal. Delaware's files indicate that New Jersey expressed no objection to Delaware's application of the DCZA to the El Paso proposal. DE App. 3487.

6. In 1972, the Federal government adopted the Coastal Zone Management Act ("CZMA") pursuant to which coastal states were authorized to develop a Coastal Zone Management Plan. 16 U.S.C. §§ 1451 *et seq.* The Office of Coastal Resource Management of the National Oceanic and Atmospheric Administration ("NOAA"), within the U.S. Department of Commerce, administers the CZMA. In 1979, NOAA approved Delaware's Coastal Zone Management Plan ("CZMP"), which includes the DCZA as part of Delaware's final Environmental Impact Statement under the Federal Coastal Zone Management Program. Delaware's CZMP was updated and approved in 1995, 1998, and 2003. Delaware's CZMP states that there is no site in Delaware suitable for the location of any LNG import-export facility.

7. In 1980, New Jersey submitted to NOAA a final environmental impact statement ("EIS") for New Jersey's proposed CZMP, which recognized Delaware's authority to apply its coastal zone laws to boundary-straddling projects. The 1980 New Jersey EIS reported that New Jersey and Delaware agencies had concluded that "any New Jersey project extending beyond mean low water must obtain coastal permits from both states. New Jersey and Delaware, therefore, will coordinate reviews of any proposed development that would span the interstate boundary to ensure that no development is constructed unless it would be consistent with both state coastal management programs." DE App. 2607-2626; *Id.* at 2619. New Jersey's 1980 CZMP also stated that it "considers decisions concerning the siting of LNG terminals to be an interstate matter." *Id.* at 261 (emphasis added).

Status decisions are binding decisions of DNREC that may be appealed to the Coastal Zone Industrial Control Board and through the state court system. *See Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1244 (Del. 1985). A coastal zone permit cannot issue for a proposed if a status decision has previously held that the proposed use is prohibited under the act.

8. On July 13, 1990, Keystone Cogeneration Systems, Inc. ("Keystone") (currently known as the Logan Generating Company) applied to DNREC for a status decision relating to its proposal to build a 200 megawatt coal-fueled cogeneration facility in Logan Township, New Jersey, including an 1,100 foot pier extending into Delaware waters. In a status decision issued November 19, 1990, DNREC determined that the project did not constitute a prohibited bulk product transfer facility under the DCZA because it fell within a statutory exception for a single use industrial or manufacturing facility. DE App. 3505. However, DNREC required Keystone to satisfy the permitting requirements under the DCZA. On September 24, 1991, New Jersey approved Keystone's permit on the express condition that Keystone, prior to construction, Keystone was required to obtain permits required by Delaware under its coastal zone regulations as well as its subaqueous lands regulations. DE App. 3549-3556.

9. In 2002, representatives of British Petroleum, through its wholly owned indirect subsidiary, Crown Landing LLC (herein, "BP") contacted DNREC regarding a proposal to construct an LNG terminal partially within Delaware waters. At that time, BP advised DNREC that the majority of the offshore unloading facility for the proposed project would be located in Delaware waters within the boundaries of New Castle County, Delaware. The related onshore facilities would be located in Logan Township, New Jersey. BP stated that approval under the DCZA would be required because the project is partially located in Delaware territory.

10. BP's representatives advised DNREC that one of the primary advantages of the proposed site is the proximity to natural gas transmission pipelines. BP, however, has alternate available sites where it could locate its proposed facility in the Delaware River outside Delaware's coastal zone (including sites in Logan Township, New Jersey, Greenwich Township, New Jersey, Paulsboro Borough, New Jersey, and West Deptford, New Jersey).

11. On September 27, 2004, BP submitted an application to DNREC for permission to perform approximately nineteen tests including geotechnical test borings in the Delaware River to gather information for the design of a receiving terminal to support the proposed LNG facility. DE App. 3785-3788. On October 29, 2004, after public comments were received on BP's application for geotechnical test borings in the Delaware River, Laura M. Herr, the Program Manager of DNREC's Wetland and Subaqueous Lands Section, advised BP that DNREC could not make a decision

on the application until a determination was made on whether construction of an LNG facility is an activity permitted in Delaware's coastal zone. DE App. 3789. On November 4, 2004, BP withdrew its geotechnical test boring application. DE App. 3791.

12. On December 7, 2004, BP filed a request under the DCZA seeking a status decision by the Secretary of DNREC as to whether the proposed LNG facility would be a permitted use under the DCZA.

13. BP's request stated that the proposed LNG terminal docking facility would consist of a 2,000 foot long pier and a single berth. The supertankers berthing at the docks would range from 914 to 1,056 feet in length and would transport from 138,000 to 200,000 cubic meters of LNG.

14. BP's unloading facility would require the dredging of 1.2 million cubic yards of Delaware subaqueous soil, covering an area larger than 30 acres. Thereafter, because of sedimentation, BP or others would be required to dredge 60,000 to 90,000 cubic yards per year of Delaware's subaqueous land to enable the supertankers to navigate the Delaware River.

15. BP's proposed LNG terminal would include a docking facility that would extend 2,000 feet from the New Jersey shore into Delaware territory and would be 50 feet wide. The facility would also include a 6,000 square foot unloading platform in Delaware territory. The trestle is designed to provide structural support for cryogenic piping, a containment trough, and utility lines from shore to berth. The trestle will also accommodate two travel lanes for light vehicles. This pier would be supported on approximately 80 steel pilings, each three feet in diameter and 100-120 feet long which are anchored into the riverbed.

16. The proposed LNG terminal would be expected to receive two to three ships per week. These ships would navigate up the Delaware River, by the Salem Nuclear Power Plant, under the Delaware Memorial Bridge (a major interstate bridge that connects New Jersey and Delaware), and past densely populated areas of New Castle County, Delaware, including its largest city, Wilmington, and the towns of New Castle, Delaware City, and

Claymont. These communities could be within a potential hazard area during the LNG supertanker transit.²

17. When the proposed LNG supertankers are in transit, a moving safety and security zone would restrict other vessels 3,000 feet ahead and behind and 1,500 feet on all sides of the supertanker. When docked, a temporary hazard area would exist around the unloading facility during the period when the ship is at the dock. The LNG supertankers would be docked at the BP facility approximately 30 to 40 percent of each year. The LNG supertankers would also be in close proximity to current gas pipelines in the Delaware River.


18. In January of 2005, DNREC published notices inviting public comment on BP's request for a coastal zone status decision. Over 200 public comments were received, all but one urging rejection of the proposal.

19. On February 3, 2005, John A. Hughes, Secretary of DNREC, issued DNREC's status decision on BP's application. In the status decision, Secretary Hughes concluded that the proposed LNG terminal represents a prohibited bulk product transfer facility which is prohibited under the DCZA. Secretary Hughes also held that the proposed facility exhibits characteristics sufficient to deem it heavy industry, which is also prohibited under the DCZA. DE App. 3811.


20. On February 15, 2005, BP filed an appeal of the status decision, which was heard by Delaware's Coastal Zone Industrial Control Board (the "Board") on March 30, 2005. After extensive briefing and a public hearing, the Board issued a decision on April 14, 2005, unanimously affirming the Secretary's determination that BP's proposed LNG terminal is a prohibited bulk transfer facility under the DCZA. DE App. 3813-3829. The Board's decision holds that "the proposed construction is absolutely prohibited by the" DCZA and "no permit therefor may be issued." *Id.* at 10.

² A December 2004 study by Sandia National Laboratories for the United States Department of Energy, titled "Guidance On Risk Analysis And Safety Implications Of A Large Liquefied Natural Gas (LNG) Spill Over Water," reported that a spill of LNG could create a fireball that would cause injuries and property damage over 1600 meters away. DE App. 3835-3837.

21. BP chose to not appeal this decision of the Board to Delaware's Superior Court, as permitted by the DCZA.


Philip Cherry

Subscribed And Sworn To
Before Me This 16th Day
Of December, 2006


Notary Public
Of The State Of Delaware

No. 134, Original

In the
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

**AFFIDAVIT OF SARAH W. COOKSEY
IN SUPPORT OF DELAWARE ON CROSS-
MOTIONS FOR SUMMARY JUDGMENT**

STATE OF DELAWARE :
 :
COUNTY OF NEW CASTLE :
 :

ss:

Sarah W. Cooksey, being duly sworn, deposes and says:

1. I have knowledge of the matters set forth herein, based upon my personal knowledge, based upon my review of the files maintained by my office and documents produced in this litigation.
2. I am employed as an Environmental Program Administrator for the Delaware Department of Natural Resources and Environmental Control ("DNREC"). Since 1992, I have directed the day to day operations of Delaware's Coastal Management Program, and in that position I am responsible for implementing Delaware and federal coastal management laws. The Delaware Coastal Management Program is a part of the Division of Soil and Water Conservation within DNREC.
3. In 1972, Congress passed what is known as the Coastal Zone Management Act. 16 U.S.C. §§ 1451 *et seq.* In passing the

Act, Congress stated that “[i]n light of . . . the urgent need to protect and to give high priority to natural systems in the coastal zone, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.” 16 U.S.C. § 1451(h). Congress stated that “[t]he key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.” 16 U.S.C. § 1451(i). Congress also declared it to be the national policy to “encourage the participation and cooperation of the public, state and local governments, and interstate and other regional agencies, as well as of the Federal agencies having programs affecting the coastal zone, in carrying out the purposes of” the Act. 16 U.S.C. § 1452(4).

4. Under the Coastal Zone Management Act, the coastal zone is defined as “the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches . . .” 16 U.S.C. § 1453(1).

5. As an inducement for States to develop a coastal zone management program pursuant to the Coastal Zone Management Act, the Act authorizes the Secretary of Commerce to make grants to states upon approval of a coastal zone management program by the Secretary of Commerce. 16 U.S.C. § 1454; 16 U.S.C. § 1455(b). Federal funding is an important incentive for coastal states to seek approval of a coastal zone management program.

6. For a state to obtain approval of a coastal management program, the Secretary of Commerce must find that the state has developed and adopted a management program for its coastal zone “with the opportunity of full participation by relevant Federal agencies, State agencies, local governments, regional organizations, port authorities, and other interested parties and individuals, public and private, which is adequate to carry out the purposes of this chapter and is consistent with the policy declared in section 1452 of this title.” 16 U.S.C. § 1455(d)(1). A state’s coastal zone management program must include, among other

things: (a) “[a]n identification of the boundaries of the coastal zone subject to the management program” and (b) “[a] description of the organizational structure proposed to implement such management program, including the responsibilities and interrelationships of local, areawide, State, regional, and interstate agencies in the management process.” 16 U.S.C. § 1455(d)(2)(A); 16 U.S.C. § 1455(d)(2)(F).

7. In the late 1970s, both Delaware and New Jersey worked on developing a coastal management program¹ under the federal Coastal Zone Management Act to take advantage of federal funding available under the Act. To obtain approval, each State was required to submit and receive approval of an environmental impact statement (“EIS”).

8. Delaware’s initial program and EIS was adopted over a period of four years. The program, which was approved in 1979, incorporated Delaware’s Wetlands Act, Delaware’s Beach Preservation Act, The Natural Areas Preservation System Act, Delaware’s Underwater Lands Law (now the Subaqueous Lands Act), Delaware’s State Coastal Zone Act, Delaware’s Environmental Protection Act, Delaware’s Land Use Planning Act, and Delaware’s Erosion and Sedimentation Control Act as elements of its management program. In Delaware’s approved Coastal Zone Management Program, Delaware’s coastal zone is considered as the entire State, due to the small size of the state and the state’s proximity to tidal waters. Delaware’s coastal zone management boundary includes the area known as the twelve-mile circle.

9. During the late 1970s, New Jersey similarly worked on the development of a coastal zone management program. In developing its program, New Jersey advised the federal government that, for activities occurring in the twelve-mile circle, both states would be required to regulate boundary straddling projects. Specifically, New Jersey represented in its final EIS submitted for approval of its coastal zone management program that:

¹ “The term ‘management program’ includes, but is not limited to, a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the state in accordance with the provisions of this chapter, setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone.” 16 U.S.C. § 1453(12).

In most of Salem County, the Delaware-New Jersey State boundary is the mean low water line on the eastern (New Jersey) shore of the Delaware River. The New Jersey and Delaware Coastal Management agencies have discussed this issue and have concluded that any New Jersey project extending beyond mean low water must obtain coastal permits from both states. New Jersey and Delaware, therefore, will coordinate review of any proposed development that would span the interstate boundary to ensure that no development is constructed unless it would be consistent with both state coastal management programs. DE App. 2657.

10. New Jersey's EIS also commented upon the siting of liquefied natural gas ("LNG") facilities, and represented to the Federal government that the siting of LNG facilities should be an interstate matter. Specifically, New Jersey's EIS states:

The New Jersey Coastal Program states that LNG terminals are discouraged unless they are constructed so as to neither unduly endanger human life nor property nor otherwise impair the public health, safety and welfare, and comply with the Coastal Resource and Development Policies. Because the tinkering of LNG could pose potential risk to life and property adjacent to New Jersey's waterways which also serve as boundaries with the states of Pennsylvania and Delaware along the Delaware River and the state of New York in the Port of New York and New Jersey, the state considers decisions concerning the siting of LNG terminals to be an interstate matter. DE App. 2891.

11. After each state's coastal zone management program was approved by the federal government, the states received funding from the federal government to support each state's federal coastal management programs. The National Oceanic Atmospheric Administration ("NOAA") has advised that New Jersey has received in excess of \$70,000,000.00 in federal funding for its coastal zone program since 1980. DE App. 3171.

12. If a state (such as New Jersey and Delaware) has an approved coastal zone management plan, that plan governs federally regulated activities within the State's coastal zone. Consequently, if an activity involves federal permitting, the applicant must obtain a state coastal zone consistency determination prior to engaging in the particular activity. Under Delaware's program, an applicant must demonstrate that it can meet all Delaware coastal zone laws, including, but not limited to, Delaware's Coastal Zone Act. Del. Code Ann. tit. 7, §§ 7001 *et*

seq. If an applicant cannot demonstrate that the proposed activity complies with Delaware's Coastal Zone Act, the proposed activity will be deemed inconsistent with Delaware's Coastal Management Program.

13. An applicant seeking a coastal zone management consistency determination is required to apply for and receive appropriate approvals from the relevant DNREC agencies which administer Delaware laws governed by Delaware's Coastal Zone Management Plan. The applicant submits its application for a consistency determination to the Delaware Coastal Management Program while seeking the required state approvals. After public notice, the Delaware Coastal Management Program Office will either concur with the applicant's statement of consistency or object to it. 16 U.S.C. A. § 1456(C)(3)(A).

14. Since the approval of Delaware's Coastal Management Program in 1980, Delaware has required that an applicant requiring federal consistency for a project crossing the boundary between New Jersey and Delaware in the twelve-mile circle must receive a coastal zone consistency determination from Delaware. Delaware consistency determinations were issued for the following projects on the easterly half of the Delaware River in the twelve-mile circle during my tenure as the administrator of Delaware's Coastal Management Program.

15. Salem River Navigation Project. The Salem River Navigation Project was submitted to the Delaware Coastal Management Program in November of 1994. The request was made to widen and deepen the existing Salem River navigation channel. The channel modifications were to produce a one-way channel that varies in width from 150 feet to 250 feet with a depth of 16 feet below the mean water line. The dredging and excavation from this project sought removal of approximately 700,000 cubic yards of material from the Salem River. In a January 10, 1995 consistency determination letter, the DCMP stated that it found the Salem River project to be consistent with Delaware policies. DE App. 3777.

16. Fort Mott Pier Rehabilitation. On October 16, 1995, the Delaware Coastal Management Program received a request from New Jersey to reconstruct the historically existing Fort Mott Pier in New Jersey. The proposed structure was to also consist of a floating ferry landing with pedestrian and handicap ramp access. The ferry landing was to be constructed within Delaware state waters. In a December 15, 1995 consistency determination letter,

the DCMP stated that it found the Fort Mott Pier Rehabilitation project to be consistent with Delaware policies. DE App. 3711.

17. Delmarva Power Fiber Optic Cable Crossing. In December of 1997, the Delaware Coastal Management Program received an application from Delmarva Power & Light to install a fiber optic cable under the Delaware River between Pigeon Point, Delaware and Deepwater Point, New Jersey. The fiber optic cable was to be placed at a depth of 20 feet below the authorized project channel depth of 60 feet below the mean low water line. The purpose of this project was to increase the communication network to better serve the public. In a February 24, 1998 consistency determination letter, the DCMP stated that it found the fiber optic cable installation beneath the Delaware River to be consistent with Delaware policies. DE App.3761.

18. Marcus Hook Maintenance Dredging. In June of 2003, Sunoco, Inc. submitted an application to the Delaware Coastal Management Program for hydraulic maintenance dredging of approximately 10,000 cubic yards of sediment material from a portion of Dock 3C and RW-7 intake structures at the Marcus Hook Refinery. The applicant's purpose for the project was to maintain safe berthing areas at the Marcus Hook Refinery. In a July 30, 2003 consistency determination letter, the DCMP stated that it found the Sunoco/Marcus Hook Refinery maintenance dredging project to be consistent with Delaware's policies. DE App. 3783.

19. Tosco Pipeline. In February 2001, Tosco Refining Corporation submitted an application to the Delaware Coastal Management Program to perform hydraulic maintenance dredging of approximately 140,000 cubic yards of material from the docks and berthing areas at the Trainer refinery. Dredged material was to be transported via pipeline into one of two disposal facilities, Pedricktown or Oldmans located in Oldmans Township, Salem County, New Jersey. The applicant's purpose was to maintain safe berthing areas at the refinery. In a March 7, 2001 consistency determination letter, the DCMP stated that it found the Tosco Refining, L.P.'s request for a temporary hydraulic dredging pipeline placement project to be consistent with Delaware's policies. DE App. 3781.

20. Logan Generating Plant. In January 2002, Logan Generating Plant submitted an application to the Delaware Coastal Management Program for periodic maintenance dredging of approximately 15,000-30,000 cubic yards of sediment material per

year from the coal unloading pier at the Logan Generating Plant on the Delaware River. Using a clamshell dredge, the coal unloading dock was to be dredged to its design depth of 25 feet below the mean low water line. In a March 14, 2002 consistency determination letter the DCMP stated that it found the Logan Generating Plant project to be consistent with Delaware's policies based upon the assumption that the necessary 401 Water Quality Certification and Subaqueous Lands permit from the State of Delaware would be obtained prior to the commencement of any dredging activity. DE App. 3629.

21. Sunoco, Inc., Marcus Hook Pipeline Dredging. In February 2001, Sunoco Inc. submitted an application to the Delaware Coastal Management Program for hydraulic maintenance dredging of 3,200 cubic yards of sediment material from a portion of Dock 3C at the Marcus Hook Refinery. Approximately 28,000 square feet of the dredge area was to be dredge in Delaware. The second portion of the project to occur in Delaware was for the temporary placement of approximately 11,000 feet of hydraulic dredging pipeline in the Delaware River. The purpose of the project was to return the docking areas associated with Marcus Hook Refinery to permitted depths. In a March 7, 2001 consistency determination letter, the DCMP stated that it found the Marcus Hook pipeline dredging project to be consistent with Delaware's policies. DE App. 3779.

22. Delaware's Coastal Management Program has always taken the position that a Delaware coastal zone consistency determination must be received for any qualifying project that straddles the boundary between Delaware and New Jersey. In addition, no project can receive a federal consistency determination unless the project is in compliance with Delaware's Coastal Zone Act.

Sarah W. Cooksey
Sarah W. Cooksey

Subscribed and Sworn To
Before Me This 19 Day
of December, 2006

Max B. Walters
Notary Public
Of The State Of Delaware

even though the outfall may cross the boundary of New Jersey into Delaware within the twelve-mile circle. Delaware does not require DNREC permits for such discharges because the United States Environmental Protection Agency (“EPA”) provides uniform minimum standards for discharges into the Delaware River under the federal Clean Water Act, 33 U.S.C.A. §§ 1251 *et seq.* (2005) (“CWA”) and the National Pollution Discharge Elimination System (“NPDES”) Program pursuant to 33 U.S.C.A. §§ 1311 and 1342(a) (2005).

3. Federally delegated discharge permitting authorities, such as Delaware and New Jersey, must obtain approval from the EPA to assure that minimum water quality discharge standards under the CWA are adopted as a component of any State permitting program that also serves as a Federal permit. *See* 40 C.F.R. § 123 *et seq.* Under federal regulations promulgated under NPDES, no state may issue a permit for discharge unless it can ensure compliance with the applicable water quality requirements of all affected States. 40 C.F.R. § 122.4(d) (“No permit may be issued . . . [w]hen the imposition of conditions cannot ensure the applicable water quality requirements of all affected States”). Therefore, under 40 C.F.R. § 122.4(d), New Jersey may not issue a permit for discharge into the Delaware River within the twelve-mile circle unless Delaware water quality requirements are satisfied. Consequently, there is no reason for Delaware to issue a separate permit for discharges within the twelve-mile circle when the EPA requires New Jersey to satisfy Delaware’s water quality standards.

4. Delaware also ensures compliance with Delaware’s water quality standards for discharges through its participation in the Delaware River Basin Commission (“DRBC”). The DRBC exists pursuant to an interstate compact between Delaware, New Jersey, New York, and Pennsylvania, which constitute the States bordering the Delaware River. Del. Code Ann. tit. 7 § 6501. As a signatory to the Delaware River Basin Compact, Delaware appoints a representative who serves as a voting member of the DRBC. The DRBC receives notice of, and provides its own approval for, proposed discharges within the Delaware River basin, including proposed discharges within the twelve-mile circle. If New Jersey were to issue a permit for discharges into the Delaware River within the twelve-mile circle that did not conform to Delaware’s water quality standards, Delaware could assure compliance with its water quality standards as an affected State through the DRBC permitting process.

5. In light of the avenues for assuring compliance with Delaware's water quality standards through federal law and the Delaware River Basin Compact, Delaware has chosen to avoid needless overregulation of water discharges from the New Jersey shore.

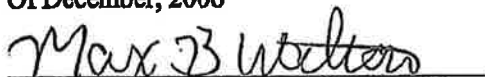
6. However, when Delaware has concerns regarding the effect of proposed discharges from New Jersey into Delaware waters, Delaware has participated in proceedings relating to such discharges. For example, by letter dated April 7, 2004, to the Acting Secretary of the Army, the Governors of Delaware and New Jersey jointly expressed concern regarding a proposal to ship wastewater resulting from the destruction of VX nerve agent to the Chambers Works site in New Jersey for treatment and disposal into the Delaware River. By letter dated April 19, 2004, to Army officials, DNREC Secretary John Hughes reported DNREC's response to a draft Environmental Impact Statement regarding the VX proposal.

7. DNREC staff has worked countless hours evaluating the scientific data for the VX proposal and have been heavily involved in the permitting process for this proposed discharge into the Delaware River. Delaware has also hosted meetings at DNREC's office with officials from DuPont, New Jersey, and federal regulatory agencies relating to the VX proposal to ensure that Delaware water quality standards are met.



R. Peder Hansen

Subscribed And Sworn To
Before Me This 20th Day
Of December, 2006



Notary Public
Of The State Of Delaware

No. 134, Original

In the
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

**AFFIDAVIT LAURA M. HERR IN SUPPORT
OF DELAWARE ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT**

STATE OF DELAWARE :
 :
 : ss:
COUNTY OF NEW CASTLE :

Laura M. Herr, being duly sworn, deposes and says:

1. I am the head of the Wetlands and Subaqueous Lands Section of the Delaware Department of Natural Resources and Environmental Control ("DNREC"). I have worked for DNREC since 1986, in the Wetlands and Subaqueous Lands Section since 1990, and was promoted to head of the section in 2005. I have knowledge of the matters set forth herein, based upon my personal knowledge, upon my review of the files maintained by DNREC, and upon documents produced in this litigation.

A. Delaware's Wetlands And Subaqueous Lands Program

2. In my capacity as the head of the Wetlands and Subaqueous Lands Section, I am responsible for administering Delaware's subaqueous lands law, codified at Title 7, Chapter 72 of the Delaware Code. In administering Delaware's subaqueous lands laws, I am also responsible for administering Delaware's regulations governing the use of subaqueous lands, adopted on

May 8, 1991, and amended on September 2, 1992 (hereinafter "1992 Regulations").

3. I am responsible for the review of all applications for use of subaqueous lands in the State of Delaware, including applications for uses that straddle the boundary between New Jersey and Delaware in the Delaware River in the area known as the twelve-mile circle.

4. Under Delaware's subaqueous lands laws and regulations, if an applicant desires permission to construct a pier or a dock, the structure is not permitted to interfere with "navigation, public, or other rights." 1992 Regulations at 3.02D. Generally, boat docking facilities are evaluated on site specific conditions, including location of the navigation channel, the proximity of existing structures, the proximity of aquatic habitats and with the orientation of the waterbody. 1992 Regulations at 3.03B. Generally, where adequate depths exist, no dock, structure, or mooring area is permitted to extend channelward more than ten percent of the waterbody at the proposed location. 1992 Regulations at 3.03B.5. In no case is a structure permitted to extend more than twenty percent of the waterbody, or seaward more than 250 feet, except under exceptional circumstances to provide access for needed commerce. *Id.*¹

5. While an application fee is charged by Delaware to an applicant that seeks permission to build a dock or a pier, since 1993 no lease fee has been charged by Delaware for the use of subaqueous lands for a dock or a pier. Generally, subaqueous lands are leased for a ten year period, and must be renewed thereafter.

6. Delaware's subaqueous lands laws and regulations also establish requirements for dredging projects, which are in many ways separate and distinct from the approval process for the construction of docks and piers. No person is permitted to extract material from submerged lands without first having obtained a permit, lease, or a letter of approval from the Wetlands and Subaqueous Lands Section. *See* Del. Code Ann. tit. 7, § 7205(a).

¹ Our office has always considered any pier built prior to the adoption of the July 14, 1969 regulations governing the use of water resources and public subaqueous lands as a grandfathered structure that does not require a subaqueous lands lease from the Wetlands and Subaqueous Lands Section unless the structure is modified.

In evaluating proposed dredging projects, our office considers several factors, including but not limited to, impacts to the navigation channel, environmental impacts of the disposal of the dredged material, water quality standards, the type of dredging equipment used, the depth of the proposed dredging, and whether the dredging will be performed in biologically productive areas. 1992 Regulations at 3.05. No person is permitted to remove any material from Delaware public subaqueous lands without the approval of DNREC. *Id.* at 3.05E. Full payment of the fee for the subaqueous material estimated to be removed must be submitted prior to the commencement of any dredging. *Id.*

7. Since I began my employment with DNREC in 1986, the Wetlands and Subaqueous Lands Section has exercised jurisdiction in the Delaware River within the area known as the twelve-mile circle to the mean low water mark on the New Jersey shore. During my tenure, our office has applied Delaware subaqueous lands laws and regulations to any project that straddled the boundary between New Jersey and Delaware, because the subaqueous lands act applies to “[c]onstruction or use of any structure on, in, under, or over public subaqueous lands, including, but not limited to, any convenience structures . . . or boat docking facilities.” 1992 Regulations 1.04B.1.

8. The Wetlands and Subaqueous Lands Section also regulates all pipeline crossings, utility crossings, maintenance dredging, and piers for any use that begins in New Jersey and enters into Delaware territory within the twelve-mile circle. For proposed activities that enter Delaware territory, an applicant must obtain the appropriate subaqueous land leases, permits, and letters of approval from Delaware for the proposed use. Del. Code Ann. tit. 7, § 7205(a). In addition, the applicant must comply “with the laws, rules, regulations and requirements imposed on the same lands, uses, structures, facilities or other appurtenances by local, state and federal government agencies or other divisions within” DNREC. 1992 Regulations 1.12.

B. Boundary Straddling Piers Within The Twelve-Mile Circle

9. During my career with the Wetlands and Subaqueous Lands Section, there have been at least four proposals to construct or rehabilitate large piers that straddle the boundary between Delaware and New Jersey in the twelve-mile circle: (1) Keystone Cogeneration, Inc. for the Logan Cogeneration Facility; (2) the Fort Mott State Park Pier; (3) the Pennsgrove Riverwalk and Pier

project; and (4) Crown Landing LLC's proposal to construct a liquefied natural gas ("LNG") facility.

Keystone/Logan Generating Station

10. In 1991, after a coastal zone act status decision was issued by DNREC's secretary, our office approved a subaqueous lands lease application by Keystone Cogeneration Systems, Inc. ("Keystone") to build a 200 megawatt coal fueled cogeneration facility. The proposed facility was located partially in Logan Township, New Jersey with the dock of the facility extending into Delaware territory within the twelve-mile circle. On September 30, 1991, DNREC issued a subaqueous lands lease permitting the construction of the coal unloading pier and permitting the dredging of 40,000 cubic yards of material from the Delaware River. A copy of the lease is included in Delaware's appendix. DE App. 3557-62.

11. On September 24, 1991, New Jersey also issued a waterfront development and wetlands permit for the Keystone facility, which required Delaware subaqueous land and coastal zone management approval prior to construction. A copy of the New Jersey permit, conditioning its permit on Delaware's approvals, is included in Delaware's appendix. DE App. 3549-56.

12. On May 28, 1993, Delaware issued additional approvals for the Keystone facility to allow for a modification of pier dimensions. On March 15, 1995, my office issued a letter of authorization for a one year extension of the subaqueous lands permit issued on September 30, 1991, and provided permission to dredge an additional 13,750 cubic yards of material. On November 12, 1997, my office issued a letter of authorization for maintenance dredging at the facility. On November 9, 2001, my office issued a renewal to maintain a pier, docks and dolphins at the facility. Copies of the supplemental approvals for the Keystone facility are included in Delaware's appendix. DE App. 3611-12, 3619, 3621-27.

Fort Mott State Park

13. On February 7, 1996, the Wetlands and Subaqueous Lands Section issued a subaqueous lands lease to the New Jersey Department of Parks and Forestry to rehabilitate the existing pier at Fort Mott. The lease permitted for the re-construction of a pier to include placement of a barge 30 feet by 100 feet and a pile supported platform 10 feet by 10 feet on the Delaware River in

New Castle County. The lease was for a period of ten years. A copy of the lease is included in Delaware's appendix. DE App. 3717-21.

14. On August 10, 2006, the New Jersey State Park Service applied to Delaware to renew its subaqueous lands lease for the Fort Mott pier. The renewal application and the required application fee were received by DNREC on August 16, 2006. DE App. 3731-34. The public notice for this renewal was published on December 13, 2006. DE App. 3735-38.

Fenwick Commons, LLC

15. On May 10, 2005, the Delaware Wetlands and Subaqueous Lands Section issued a subaqueous lands lease and a water quality certification to Fenwick Commons, LLC to construct a 40 foot wide by 750 foot long pier, a 6 foot wide by 95 foot long aluminum gangway, a 28 foot wide by 120 foot long floating dock and breakwater, 6 support pilings, 1,255 linear feet of steel bulkhead and permission to fill 1,882 square feet of public subaqueous lands near Penns Grove, New Jersey. This lease is for twenty years, and seeks to rehabilitate the dilapidated pier at the end of west main street in Penns Grove New Jersey. A copy of the lease is included in Delaware's appendix. DE App. 3839-44.

Crown Landing LLC/British Petroleum

16. On September 27, 2004, Crown Landing LLC requested permission from the Wetlands and Subaqueous Lands Section for permission to drill geotechnical test borings in the Delaware River for a proposed LNG facility. DE App. 3785-87. Crown Landing's proposed LNG facility, if built, would construct a 2,000 square foot pier extending into Delaware territory. Upon receipt of the application for geotechnical test borings, our office requested that the applicant withdraw the application until a coastal zone act determination was made. DE App. 3789. Crown Landing withdrew its application for geotechnical test borings and has not made any further applications to the Wetlands and Subaqueous Lands Section for approvals for the proposed LNG facility.

17. To my knowledge, these four projects are the only substantial pier construction projects submitted to our office that straddle the Delaware/New Jersey boundary in the twelve-mile circle during my employment with the Wetlands and Subaqueous Lands Section. I am unaware of any other applications for pier construction projects that straddle the boundary that have occurred

within the twelve-mile circle since 1986. To my knowledge, all other significant piers in the twelve-mile circle area were constructed prior to 1986.

C. Review Of Historical Structures In The Delaware River

18. On November 9, 2006 New Jersey served the expert report of Richard Castagna, entitled "New Jersey's Exercise of Regulatory Authority Over Waterfront Improvements in the Twelve Mile Circle Outshore of Low Water" ("Castagna Rep."). Mr. Castagna claims, "[b]ased on the record in *New Jersey v. Delaware II*, aerial photography on file in the New Jersey Bureau of Tidelands Management, Riparian Atlas Sheets available at the Bureau of Tidelands Management, and the Bureau's riparian grant files," that 23 structures or "other activity" have extended beyond the mean low water line (into Delaware territory) within the twelve-mile circle.

19. I have reviewed Mr. Castagna's report and affidavit, aerial photography, and other documents pertaining to this case, and have discovered errors and/or items that require clarification in Mr. Castagna's report, which are discussed below.

Three Docks Identified Were Never Built

20. Mr. Castagna's expert report does not support any claim that three of the alleged twenty three boundary straddling structures ever existed. *See* Castagna Rep. 3, 14, and 18.

- a. According to the Castagna report, an 1871 New Jersey law gave Robert Walker and others the right to build wharves, piers, and bulkheads in front of their lands in the Township of Upper Penns Neck (now Pennsgrove). Castagna Rep. 3; *see also* Castagna Aff. 8(3). Mr. Castagna makes no mention of an actual structure being built pursuant to this grant and does not identify a single aerial photograph that demonstrates the existence of a pier at this location. New Jersey previously admitted that no structure existed at this location, contradicting Mr. Castagna's report. *See* DE App. 4147-88. New Jersey's Responses to Delaware's First Requests for Admissions ("NJ Admission Response") No. 34(a). Mr. Castagna also admitted that no structure exists at his October 24, 2006 deposition. *See* DE App. 531-32, Castagna Dep. Tr. 201-02 (admitting that New Jersey has no evidence that a structure ever existed on the Walker grant at any point in time).

- b. The Castagna report also states that New Jersey awarded a grant to the DuPont Company on May 20, 1918. *See* Castagna Rep. 14; Castagna Aff. 8(18). Mr. Castagna cites aerial photography (DE App. 3979-92 (NJ10002, NJ10013, NJ10024, NJ10035, NJ10046, NJ10057, and NJ10068)) that he claims shows the existence of a “stone jetty” on this grant from 1940 to 2002. Although the quality of these photographs produced by New Jersey is not high, they do not appear to show definitive evidence of a man-made structure that enters Delaware territory below the mean low water line existing at this location. *See* DE App. 3981-92 (NJ10013, NJ10024, NJ10035, NJ100046, NJ10057, and NJ10068). Mr. Castagna’s description of the aerial photographs contradicts New Jersey’s previous admission that there was no evidence of a structure ever being built on this grant. *See* DE App. 4147-88, NJ Admission Response No. 34(h). Even if a jetty existed at this location at some time, the jetty would be considered a grandfathered structure under Delaware subaqueous lands laws if the structure was built prior to 1969.
- c. On September 13, 1943, New Jersey issued another grant to DuPont which allegedly provided permission to build beyond the mean low water mark. *See* Castagna Rep. 18; Castagna Aff. 8(37). Relying on aerial photographs (DE App. 3979-92 (NJ10002, NJ10013, NJ10024, NJ10035, NJ10046, NJ10057, and NJ10068)), Mr. Castagna claims that a “dock” was located on the granted area from at least 1930 to 2002. Although the quality of these photographs produced by New Jersey is not high, they do not appear to show definitive evidence of a man-made structure that enters Delaware territory below the mean low water line existing at this location. *See* DE App. 3981-92 (NJ10013, NJ10024, NJ10035, NJ100046, NJ10057, and NJ10068). Moreover, based upon the boundary maps produced by Delaware depicting the actual boundary between the states, this protrusion does not enter into Delaware territory. DE App. 4209 (DE28989).
21. Accordingly, Mr. Castagna’s claim of twenty-three structures that allegedly straddle the boundary must be reduced by three because there is no clear evidence that these structures ever existed.

Two Structures Are Not Docks

22. Two of the remaining twenty structures are not docks, piers, or wharves and therefore could not be used to load or unload cargo from a ship. *See* Castagna Rep. 13, and 16.

- a. New Jersey issued a riparian grant to William Acton on August 17, 1925. Mr. Sherman testified in 1929 that the granted land then contained a “y-shaped jetty.” *See* Castagna Rep. 13; Castagna Aff. 8(23). Mr. Castagna fails to identify a single overhead photo depicting this structure. According to testimony in *New Jersey v. Delaware II*, the structure was intended to protect the Riverview Beach Park from erosion rather than allow boats to dock at the location. *See* Testimony of Mr. Sherman, DE App. 2259 (Stip. Rec. at 272-273) (DE15086); Castagna Rep. 13. In any event, this jetty extended at most only 47 feet beyond the mean low water mark on the New Jersey shore (*see* Castagna Rep. 13 and fig. 8), and is a grandfathered structure under Delaware law.
- b. The Delaware River Power Company was awarded a license on October 21, 1929 purportedly providing permission to build submarine power cables and protective ice breakers. *See* Castagna Expert Rep. 16; Castagna Aff. 8(34). Ice breakers are not docks or piers, and the construction of ice breakers in 1929 is grandfathered under Delaware law.

23. Accordingly, of the twenty structures identified in Mr. Castagna’s affidavit, only eighteen could potentially be used for boat docking or unloading of cargo.

One Structure Does Not Cross The Boundary

24. At least one of the eighteen structures does not extend beyond the mean low water line into Delaware territory. William J. Bergmann, et al., was awarded a grant on January 11, 1999, later renewed on February 13, 2002, to build a dock at his private residence. *See* Castagna Rep. 22; Castagna Aff. 8(42). Mr. Castagna claims evidence of a “pier” at this location based on a 2002 aerial photograph. DE App. 3993 (NJ10071). Mr. Castagna’s affidavit claims that the applicant could build to a maximum of 25 feet beyond the mean low water line (Castagna Aff. 8(42)). There is, however, no evidence that this alleged structure crosses the mean low waterline as it existed in 1934 and

there is no evidence that this structure crosses the New Jersey/Delaware boundary in the twelve-mile circle. Indeed, there is no evidence of a pier crossing the actual boundary between the states as depicted by Delaware's boundary map. DE App. 4209-10 (DE28989-DE28990).²

The Castagna Report Double Counts Structures

25. Mr. Castagna has also counted three structures twice, apparently because they occupy an area covered by more than one riparian grant. Those three structures cover six separate grants. See Castagna Rep. at 1, 2, 8, 10, 20, and 21.

- a. The subaqueous land grant to Thomas Broadway in 1854 in what is now Pennsville Township was later granted to William Acton in 1923 where a ferry pier was ultimately built. See Castagna Rep. 1 and 10; Castagna Aff. 8(1) ("This pier was . . . included within the 1923 State grant to William D. Acton"); Castagna Aff. (20). This structure was built prior to 1969 and is considered grandfathered by Delaware's subaqueous lands program.
- b. An 1855 law incorporated the Pennsgrove Pier Company and purportedly allowed that company to build a wharf or pier. See Castagna Rep. 2; Castagna Aff. 8(2). The land under this grant was granted again in 1916 to the Pennsgrove Pier Company and it was used by the Wilson Line and later the Delaware and New Jersey Ferry Company as a ferry dock. See Castagna Rep. 8; Castagna Aff. 8(12); see also Castagna Aff. 8(2) (noting that the 1855 grant was included within the 1916 grant for the Pennsgrove Pier Company). Yet Mr. Castagna counts this single ferry dock as two structures. See Castagna Rep. 2 and 8. While the existing structure was grandfathered under Delaware law, Fenwick Commons, LLC recently applied

² While not referenced in Mr. Castagna's expert report, Mr. Castagna's affidavit references a lease to the Township of Pennsville where he claims that the upland owner could develop to the maximum extent of 35 feet below the mean low water line. Castagna Aff. 8(43). There is no indication that the structure crosses the mean low water mark as it existed in 1934. (see DE App. 3995 (NJ10073)), Indeed, there is no evidence of a pier crossing the actual boundary between the states as depicted by Delaware's boundary map. DE App. 4209-10 (DE28989-DE28990).

for and received a subaqueous lands lease to rehabilitate this pier from the State of Delaware in 2005. DE App. 3839; *see also* Castagna Aff. 8(12).

- c. New Jersey issued two riparian grants to DuPont in March 1960 and September 1967 for adjacent lands on which DuPont constructed an “outfall line on a pier” that is protected by a manmade “dike” on the northern side. *See* Castagna Rep. 20-21; Castagna Aff. 8(39)-(40). These two grants are for a single structure.

26. Accordingly, because one structure clearly does not extend past low water and structures on another three grants were double-counted, Mr. Castagna at most has identified evidence of only fourteen potential structures over the last 150 years that at some point both extended into Delaware and were capable of being used to load or unload cargo from a boat or ship.

The Fourteen Remaining Structures Are Regulated By Delaware Or Grandfathered

27. A very few of the fourteen remaining structures extended more than a small distance into Delaware, and Delaware has regulated all structures of significance.

28. Only four structures ever built within the twelve-mile circle that cross the boundary can purport to extend 500 feet or more beyond the mean low water line. *See* Castagna Rep. 2 (Pennsgrove Pier Company), 6 (DuPont), 7 (Denny’s Wharf), and 19 (Keystone); Castagna Aff. 8(2), (10), (11), and (41). One pier appears to be no longer in existence, one structure is a grandfathered structure that is not currently a pier, and Delaware has regulated construction of the two other piers after 1969.

- a. The Pennsgrove Pier³ was constructed before *New Jersey v. Delaware II* was decided and is considered a grandfathered use under Delaware’s subaqueous lands laws. Now that the pier is being rehabilitated, Fenwick Commons, LLC applied to and received permission to rehabilitate the pier. DE App. 3839. Delaware’s subaqueous lands lease issued

³ According to the record in *New Jersey v. Delaware II*, the Pennsgrove Pier extends 600 to 700 feet beyond the mean low water mark. *See* DE App. 2263-66, *New Jersey v. Delaware II*, Plaintiff’s Exhibits 62-63.

to Fenwick Commons, LLC authorizes the construction and rehabilitation of the pier.

- b. The Keystone facility,⁴ built in the early 1990s, is subject to Delaware law. Delaware regulates the Keystone facility, and issued permits for the use of Delaware subaqueous lands for the facility. DE App. 3549-56, 3557-62, and 3611-12. Delaware's subaqueous lands lease issued to Keystone authorized the construction of the existing pier, and New Jersey's permit for the facility was conditioned on Delaware's approval. DE App. 3549-56.
- c. For Denny's wharf, Mr. Sherman testified in *New Jersey v. Delaware II* that this wharf extended 100 feet beyond the low water line (DE App. 2257, Stip. Rec. 131) (DE15014) but Exhibit 59 of the record purports that the wharf extends 550 from shore. See DE App. 2261, *New Jersey v. Delaware II*, Plaintiff's Exhibit 59. As of the date of Mr. Sherman's testimony, the pier was not in use. DE App. 2257, Stip. Rec. 131. Mr. Castagna's report does not identify any aerial photography identifying the location of this structure. Castagna Rep. 7. Presumably, this structure no longer exists and has not existed for many years.
- d. New Jersey issued a riparian grant to DuPont at the northern end of what is now called the DuPont Chambers Works complex on November 27, 1891. See Castagna Rep. 6; Castagna Aff. 8(10). Mr. Castagna claims to see in the cited photographs evidence of a "pier" at this location in 1940, 1977, 1979, and 2002 based on aerial photographs. DE App. 3979-91 (NJ10002, NJ10013, NJ10024, NJ10035, NJ10046, NJ10057, and NJ10068). While the exact length of this structure is unknown, it is possible that a man-made structure at one time extended more than 500 feet beyond the mean low water mark. Even if a man-made existed at this location at some time, such use would be grandfathered under Delaware's subaqueous lands law because it was constructed prior to 1969. Today, no pier is visible at this location and the structure appears to be nothing more than a land mass surrounded by rip-rap. Reuther Aff. 64.

⁴ Keystone's coal unloading dock was built in or after 1991. It extends approximately 550 feet beyond the mean low water mark. DE App. 3569 (DE02212). As Mr. Castagna notes, Delaware also issued permits for the Keystone project. See Castagna Rep. 19; Castagna Aff. 8(41).

29. Eight structures allegedly extend between 100 and 500 feet into Delaware territory. See Castagna Rep. 1 (Broadway), 5 (Barber), 9 (1916 DuPont), 11 (Fogg & Hires), 12 (Acton), 17 (Penn Beach), 20 (1960 DuPont), and 23 (Fort Mott); Castagna Aff. 8(1), (5), (15), (21), (22), (35), (39), and (44).

- a. The Broadway⁵ wharf (1854) was presumably built prior to the Court's decision in 1934 establishing the boundary between the states and prior to the adoption of Delaware subaqueous lands laws. Under Delaware law, this is a grandfathered structure.
- b. The Barber wharf⁶ (1871) was presumably built prior to the Court's decision in 1934 establishing the boundary between the states and prior to the adoption of Delaware subaqueous lands laws. If this structure exists, it is a grandfathered use under Delaware's subaqueous lands laws. Mr. Castagna, however, does not identify any aerial photographs depicting this alleged structure. Castagna Rep. 5.
- c. For the 1916 DuPont grant,⁷ the structure at this location was presumably constructed prior to the 1934 decision establishing the boundary between the states, and the structure would be grandfathered under Delaware's subaqueous lands law if constructed prior to 1969. Moreover, Delaware regularly regulates dredging

⁵ According to the record in *New Jersey v. Delaware II*, the Delaware New Jersey Ferry Line dock in Pennsville, originally granted to Thomas Broadway, extended approximately 350 feet beyond the mean low water mark. See DE App. 2273-75, *New Jersey v. Delaware II*, Plaintiff's Exhibit 91. As noted above, this grant was included within the 1923 grant of William Acton. Castagna Aff. 8(1) ("This pier was . . . included within the 1923 State grant to William D. Acton");

⁶ According to Mr. Sherman's testimony in *New Jersey v. Delaware II*, Henry Barber built a wharf 400 feet beyond the mean low water mark. See Sherman Testimony, DE App. 2260 (Stip. Rec. at 282 (DE15091)).

⁷ According to the record in *New Jersey v. Delaware II*, the pier at the DuPont Chamber works extends 325 to 375 feet beyond the mean low water mark. See DE App. 2267, *New Jersey v. Delaware II*, Plaintiff's Exhibit 69.

associated with the DuPont pier. DE App. 3431. Delaware also issued a lease for this pier in 1971. DE App. 3403.

- d. For the Fogg & Hires wharf,⁸ (1924) the structure at this location was presumably built prior to the Court's decision in 1934 establishing the boundary between the states and prior to the adoption of Delaware subaqueous lands laws. This structure is a grandfathered use under Delaware's subaqueous lands laws if constructed prior to 1969.
- e. For the Acton grant (1923),⁹ the structure at this location was presumably constructed prior to the 1934 decision establishing the boundary between the states, and the structure would be grandfathered under Delaware's subaqueous lands law if constructed prior to 1969. Again, Mr. Castagna's expert report fails to identify any aerial photographs that show the location of this structure which presumably no longer exists.
- f. For the Penns Beach grant (1929),¹⁰ the structure at this location was presumably constructed prior to the 1934 decision establishing the boundary between the states, and the structure would be grandfathered under Delaware's subaqueous lands law if constructed prior to 1969. Again, Mr. Castagna's expert report fails to identify any aerial photographs that show the location of this structure which presumably no longer exists.

⁸ The exact length of the wharf is unknown. However, according to the record in *New Jersey v. Delaware II*, this pier was adjacent to the Broadway wharf and appears to have at one time extended approximately the same distance as the Broadway wharf. See DE App. 2273-76, *New Jersey v. Delaware II*, Plaintiff's Exhibit 91.

⁹ According to Mr. Sherman's testimony in *New Jersey v. Delaware II*, the Riverview Beach pier, built on land granted to William Acton, extended 494 feet beyond the mean low water mark. See DE App. 2258, *New Jersey v. Delaware II*, Sherman Testimony, Stip. Rec. at 144-145 (DE15021).

¹⁰ According to the record in *New Jersey v. Delaware II*, a timber pier on this land leased to the Penn Beach Property Owners Association extended 280 to 330 feet beyond the mean low water mark. See DE App. 2277-78, *New Jersey v. Delaware II*, Plaintiff's Exhibit 96.

- g. For the 1960 DuPont grant,¹¹ the original outfall appears to be constructed prior to the adoption of the Delaware regulations in 1969 and appears to be a grandfathered use. If the location of the outfall pipe changes, a subaqueous lands lease from Delaware is required. *See* DE App. 3461.
 - h. For the Fort Mott project,¹² New Jersey applied to Delaware for permission to rehabilitate the pier in 1996. Delaware issued a subaqueous lands lease for the project, and as recently as August 16, 2006, New Jersey has applied to Delaware for renewal of the lease. *See supra* ¶¶ 13-14.
30. The remaining two structures are less than 100 and 25 feet beyond the mean low water line, respectively. *See* Castagna Rep. 4 (Guest Wharf) and 15 (Franklin/Conectiv); Castagna Aff. 8(4) and (27).
- a. The Guest Wharf (1870)¹³ was presumably constructed prior to the 1934 decision establishing the boundary between the states, and the structure would be grandfathered under Delaware's subaqueous lands law because it was constructed prior to 1969. Again, Mr. Castagna's expert report fails to identify any aerial photographs that show the location of this structure which presumably no longer exists.

¹¹ The outfall pipe at DuPont Chamber Works facility extends 500 feet from high water line according to the application for its repair, and certainly less than that from the mean low water mark. *See* DE App. 3409-12 (DUP0000776 – DUP0000779).

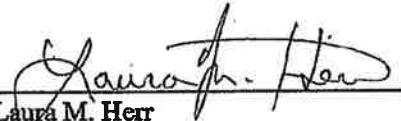
¹² The renovated pier at Fort Mott State Park extends approximately 300 feet beyond the mean low water mark. *See* DE App. 3649 (DE02020).

¹³ According to the record in *New Jersey v. Delaware II*, the Joseph Guest Wharf extends 100 feet below high-water line, and certainly less than that below the mean low water line. *See* DE App. 2279, *New Jersey v. Delaware II*, Plaintiff's Exhibit 134.

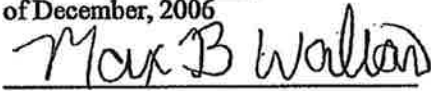
b. The Franklin/Conectiv grant (1928)¹⁴ was presumably constructed prior to the 1934 decision establishing the boundary between the states, and the structure is grandfathered under Delaware's subaqueous lands law because it was constructed prior to 1969. This structure barely crosses into Delaware territory within the twelve-mile circle. DE App. 4209 (DE 28989).

31. Many of the structures, if they still exist, are in a severely dilapidated state. There currently are only four structures extending into Delaware and capable of receiving a boat that are not in a dilapidated condition - Kcystone, DuPont, Franklin/Conectiv, and Fort Mott. Reuther Aff. 57, 65, 66, and 69. The remaining structures in the twelve-mile circle that are grandfathered structures are subject to Delaware regulation if repairs are made to the structure.

¹⁴ According to the record in *New Jersey v. Delaware II*, the dock built on a grant issued to the Franklin Real Estate Company is now used by a Pepco subsidiary (formerly Conectiv) for its power plant and extends less than 25 feet beyond the mean low water mark. See DE App. 2269, *New Jersey v. Delaware II*, Plaintiff's Exhibit 74; see also DE App. 4209 (DE 28989).


Laura M. Herr

Subscribed and Sworn To
Before Me This 20th Day
of December, 2006



Notary Public
Of The State Of Delaware

4. As Captain, I am responsible for seven full time employees and one reserve part time employee. These officers are all assigned to New Castle County and all have the law enforcement authority as the Delaware State Police. *See* Del. Code Ann. tit. 11, § 1911(a).

5. My office, stationed in Delaware City, is responsible for patrolling and responding to complaints and incidents occurring in the area known as the twelve-mile circle in the Delaware River. Our office handles police enforcement in the twelve-mile circle for fish and game, drownings, boating violations, boating while intoxicated and any other investigation or law enforcement action required by Delaware law. Major crimes on the water are handled jointly with the Delaware State Police. Our office also assists when needed for environmental emergencies and assists with narcotics enforcement.

6. During my thirty-two year career with the Division of Fish and Wildlife, our unit has always exercised jurisdiction over the entire twelve-mile circle area for law enforcement purposes. It has always been the responsibility of our office to enforce Delaware law to the low water mark on the easterly side of the River within the twelve-mile circle. Thus, any crime, investigation, or arrest occurring on the easterly half of the River, including an incident occurring on a dock, pier or structure straddling the boundary between New Jersey and Delaware is the responsibility of the Delaware State Police or my unit.

7. My unit regularly patrols on the easterly half of the Delaware River within the twelve-mile circle because that area is in the jurisdiction of the State of Delaware. To my knowledge, no New Jersey policing authority patrols this area, and New Jersey policing authorities do not respond to calls in this area unless they are providing mutual aid to Delaware authorities. If New Jersey law enforcement officers provide mutual aid, they are under the command of Delaware officers because the twelve-mile circle area is in the jurisdiction of my unit and the Delaware State Police.

8. During my career, I have issued citations and assisted boaters who have had their boats lodged on jetties and groins straddling the boundary between the states. My unit has also made many arrests and issued citations for fishing violations, hunting violations, boating violations, and other crimes on the easterly half of the Delaware River within the twelve-mile circle. Our office always enforces Delaware fishing, hunting, and boating laws and regulations in this area.

9. If an arrest is made on the easterly half of the Delaware River and the suspect is taken into custody, the suspect is placed in custody in Delaware. If a citation is used, the citation is for an appearance in a Delaware Justice of the Peace Court. If a boat is impounded, the boat is taken to our boat storage facility in Little Creek, Delaware.

10. I am not aware of any New Jersey policing authority that has disputed Delaware's enforcement jurisdiction within the twelve-mile circle during my tenure.

11. In fact, if a 911 call is received for an incident on the easterly side of the Delaware River within the twelve-mile circle, Delaware emergency responders (generally volunteer fire companies) are called to respond and our office also responds when police presence is required. If a call is received by Salem County 911 or Salem County Police for law enforcement in the twelve-mile circle, the call is directed to the New Castle County 911 center. Salem County directs the calls New Castle County office because all policing activity to the low water mark on the New Jersey shore within the twelve-mile circle is in Delaware's jurisdiction.

12. Similarly, the United States Coast Guard has consistently recognized Delaware's jurisdiction within the twelve-mile circle. The Coast Guard requests Delaware's assistance for policing events within the twelve-mile circle because the twelve-mile circle area is within Delaware's jurisdiction.

13. Our office regularly receives requests for assistance from New Jersey authorities for law enforcement on the easterly side of the River within the twelve-mile circle. For example, each year the Town of Pennsville holds a festival called the Septemberfest. Pennsville police request water assistance from Delaware officers for the Septemberfest because the River is part of Delaware's police jurisdiction. Our office has provided police assistance for Pennsville's Septemberfest for the past several years.

14. New Jersey officers have also deferred to Delaware's jurisdiction to investigate incidents that occur on or near Gull Island at the mouth of the Salem River. Because of the swift current near Gull Island, there have been many boating accidents and drownings over my career. Our office has always been responsible for investigation and law enforcement activities related to this location which is very close to the New Jersey shore. New

Jersey officers never questioned Delaware's jurisdiction for law enforcement activities at or near Gull Island.

15. I am aware that Crown Landing LLC, a subsidiary of British Petroleum ("BP"), desires to build a liquefied natural gas ("LNG") facility that will be located partially in Delaware in the twelve-mile circle near Claymont, Delaware. It is my understanding that DNREC, along with the Delaware State Police and the United States Coast Guard, would be responsible for law enforcement relating to any activity occurring on an LNG supertanker or on any dock connected with an LNG supertanker within the twelve-mile circle. My understanding of Delaware's law enforcement jurisdiction for the LNG facility is consistent with the law enforcement practice for the twelve-mile circle area that has been in place during my thirty-two year career with DNREC.

Robert W. Hutchins
Robert Hutchins

Subscribed and Sworn To
Before Me This 16th Day
of December, 2006

Max B. Walker

Notary Public
Of The State Of Delaware

No. 134, Original

In the
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

**AFFIDAVIT OF ALI MIRZAKHALILI
IN SUPPORT OF DELAWARE ON CROSS-
MOTIONS FOR SUMMARY JUDGMENT**

STATE OF DELAWARE :
 :
COUNTY OF NEW CASTLE :
 :

ss:

Ali Mirzakhali, being duly sworn, deposes and says:

1. I have knowledge of the matters set forth herein, based upon my personal knowledge and based upon my review of the files maintained by my office.
2. I am a registered professional engineer in Delaware and hold a Bachelor of Science in Civil Engineering from the University of Delaware. I am employed as the Environmental Program Administrator for the Air Quality Management Section, Delaware Department of Natural Resources and Environmental Control ("DRNEC"). I have served in this position since 2001.
3. For the past 22 years, I have been employed by DNREC. My entire career with DNREC has focused on air quality issues, including regulatory program development, planning, compliance and enforcement.

4. The Air Quality Management Section of DNREC is charged with, among other things, directing revisions to the State Implementation Plan ("SIP") as required under the Clean Air Act Amendments of 1990, promulgating and amending the State of Delaware's Regulations Governing the Control of Air Pollution, and tracking air quality status and attainment status.

5. Under the Clean Air Act Amendments of 1990, each state has the primary responsibility for assuring air quality within the entire geographic region comprising that state. 42 U.S.C. § 7407(a). This responsibility includes submission of the State SIP which provides the "manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such state." *Id.* The SIP "include[s] a program for the enforcement of [control] measures ... and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved...." 42 U.S.C. § 7410(a)(2)(C).

6. In compliance with the requirements of the Federal Clean Air Act Amendments, the Air Quality Management Section of DNREC has promulgated Regulations Governing the Control of Air Pollution. These regulations provide air quality management and permitting requirements applicable to stationary sources located in Delaware. A "stationary source" is defined as including "any ... waterborne craft ... deposited, parked, moored, or otherwise remaining temporarily in place, which emits or may emit any air contaminant." 7-1000-1101 *Del. Code Regs.* § 2. Thus, a boat fixed to a dock is a "stationary source" under Delaware air quality regulations. As such, a "stationary source" located in Delaware is required to comply with Delaware's air quality regulations pertaining to, among other things, permits, new source performance standards, emission standards for hazardous air pollutants, and requirements for preconstruction review. 7-1000-1102 *Del. Code Regs.* § 2.0; 7-1000-1120 *Del. Code Regs.* § 1.1; 7-1000-1121 *Del. Code Regs.* § 1.1; 7-1000-1125 *Del. Code Regs.* §§ 1.2-1.3, 4.0.

7. If the liquefied natural gas ("LNG") facility proposed by British Petroleum ("BP") were constructed, supertankers moored to the dock as well as onboard equipment used to transfer cargo would be required to satisfy the air quality requirements for stationary sources under Delaware's air quality regulations. The proposed BP facility would have to comply with all best available technology requirements for preconstruction review and all

relevant notification, recording, and monitoring provisions for new source performance standards. 7-1000-1120 *Del. Code Regs.* §§ 1.2, 1.3; 7-1000-1125 *Del. Code Regs.* § 4.0. The supertankers and the onboard equipment would also be required to comply with Delaware's regulation concerning emission standards for hazardous air pollutants. 7-1000-1121 *Del. Code Regs.* § 1.1. BP would be required to follow Delaware air quality standards because the supertankers would be moored in Delaware.


8. Stationary sources at the Keystone/Logan facility,¹ any other facility extending into Delaware from the New Jersey shore within the twelve-mile circle, and ships anchored at big stone anchorage for lightering are subject to all Delaware air quality standards and permit requirements because: (1) the ships and any onboard equipment are stationary sources under Delaware regulations; and (2) the docking facilities and any stationary sources housed on or connected with them are located in Delaware.

9. The Air Quality Management Section of DNREC has notified BP regarding Delaware's air permitting requirements. BP has submitted preliminary data to DNREC for air quality permitting review. Data submitted to DNREC by BP identifies emissions of nitrogen oxides, sulfur oxides, carbon monoxide, volatile organic compounds, total suspended particles, PM₁₀, PM_{2.5}, Acrolein, and formaldehyde stemming from the operation of LNG supertankers in quantities which trigger best available technology permit requirements. 7-1000-1102 *Del. Code Regs.* § 2.1; 7-1000-1125 *Del. Code Regs.* § 4.0. Because the best available technology requirements are triggered, and because the proposed LNG docking and transfer operations are located in Delaware territory, the LNG supertankers servicing the proposed LNG facility (if built) are subject to Delaware air quality standards and the air emission permitting requirements of DNREC.

¹ Our office issues air permits and performs air quality inspections for equipment at the dock for the Keystone/Logan facility.


Ali Mirzakhali

Subscribed and Sworn To
Before Me This 23rd Day
of December, 2006


Notary Public
Of The State Of Delaware
Attorney at Law
Pursuant to 29 Del C § 4323

In the
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

**AFFIDAVIT OF WILLIAM MOYER IN
SUPPORT OF DELAWARE ON CROSS-
MOTIONS FOR SUMMARY JUDGMENT**

STATE OF DELAWARE :
 :
 : ss:
COUNTY OF NEW CASTLE :

William Moyer, being duly sworn, deposes and says:

1. I have knowledge of the matters set forth herein, based upon my personal knowledge and based upon my review of the files maintained by DNREC.
2. In 2004, I retired from my position as the Manager of the Wetlands and Subaqueous Lands Section of the Delaware Department of Natural Resources and Environmental Control ("DNREC") after a thirty-one year career. I was the head of the Wetlands and Subaqueous Lands Section within DNREC from 1975-2004. In that position I implemented Delaware laws applicable to the coastal zone on a daily basis.
3. In 1966, Delaware passed a law known as the Underwater Lands Act. 55 Del. Laws 442. The Underwater Lands Act superseded other related Delaware subaqueous laws first passed in 1961. The Underwater Lands Act authorized the Air and Water Resources Commission ("Commission") (later DNREC) to

promulgate rules relating to the processing of applications for permission to use subaqueous lands. 55 Del. Laws 442 § 4657.

4. On or about July 14, 1969, Delaware adopted Regulations Governing the Use of Water Resources and Public Subaqueous Lands, as authorized by the Underwater Lands Act. (hereinafter "1969 Regulations"). In the 1969 Regulations, the Commission stated that in evaluating all applications for the use of Delaware subaqueous lands, the Commission would review applications with due regard for the general interest and welfare of the people of the State. 1969 Regulations § 1.07. The 1969 Regulations also required review by the appropriate State and Federal agencies having jurisdiction or interest in matters pertaining to water pollution, public health, fish and wildlife, planning, geology, or navigation before a project could be approved. 1969 Regulations § 1.08. Selected provisions of the 1969 Regulations are included in Delaware's appendix. DE App. 4023-24.

5. From the time that I became the head of DNREC's Subaqueous Lands Section in 1975, our office always treated any structure construed prior to the adoption of the 1969 Regulations as a grandfathered use. Our office did not require a new application for continued use of an existing pier or structure, so long as the structure was constructed prior to July 14, 1969. This grandfathering policy applied throughout Delaware's coastal areas along the Delaware River, from Delaware's northern boundary with Pennsylvania to its southern boundary. The policy also applied to structures on Delaware subaqueous lands within the twelve-mile circle, regardless of whether they began on fast land in Delaware or New Jersey.

6. The Underwater Lands Act (as amended) remained the law governing the use of Delaware's subaqueous lands until 1986 when the Delaware General Assembly passed the Subaqueous Lands Act. See Del. Code Ann. tit. 7, §§ 7201 *et seq.*¹

¹ The General Assembly describes the purpose of the Subaqueous Lands Act as:

Subaqueous lands within the boundaries of Delaware constitute an important resource of the State and require protection against uses or changes which may impair the public interest in the use of tidal or nontidal waters. The purposes of this chapter are to empower the Secretary to deal with or to dispose of interest in public subaqueous lands

Regulations Governing the Use of Subaqueous Lands were adopted pursuant to the Subaqueous Lands Act on May 8, 1991, and amended on September 2, 1992 (hereinafter "1992 Regulations").

7. The grandfathering of certain existing piers and structures was codified in the 1992 Regulations, which state: "[t]o the extent that any activity is commenced prior to the effective date of these Regulations, any previous regulation or law which applied to such activity prior to the effective date of these Regulations shall remain in force." 1992 Regulations at 1.02A.5. However, under the 1992 Regulations, a permit is required for a modification of any grandfathered use. 1992 Regulations at 1.02A.7; 1.04B.10.² ("[a]ny change or modification of a . . . grandfathered activity affecting subaqueous lands, which occurs after the effective date of these Regulations, shall be subject to these Regulations").

8. The Subaqueous Lands Act and its regulations authorize DNREC both to regulate any potentially polluting use made of Delaware's subaqueous lands³ and to grant or lease property

and to place reasonable limits on the use and development of private subaqueous lands., in order to protect the public interest by employing orderly procedures for granting interests in public subaqueous land and for issuing permits for uses of or changes in private subaqueous lands. To this end, this chapter empowers the Secretary to adopt rules and regulations to effectuate the purposes of the chapter, to apply to the courts for aid in enforcing this statute and the rules and regulations adopted pursuant hereto, and to convey interests in subaqueous lands belonging to the State.

Del. Code Ann. tit. 7, § 7201.

² A copy of the 1992 Regulations is included in Delaware's appendix. DE App. 4025-48.

³ See Del. Code Ann., tit. 7, § 7203(b) ("Owners of private subaqueous lands must obtain a permit from the Department before making any use of such lands which may contribute to the pollution of public waters, infringe upon the rights of the public, infringe upon the rights of other private owners or make connection with public subaqueous lands."); see also *id.* § 7201 ("Subaqueous lands within the boundaries of Delaware constitute an important resource of the State and require protection against

interests in those State lands.⁴ Thus, the Wetlands and Subaqueous Lands Section of DNREC evaluates the environmental impacts of any proposed project, including impacts relating to dredging and/or driving piles, and impacts to water quality, shell fisheries, aquatic vegetation, habitat, air quality (including noise, odors and hazardous chemicals), and the effects on aquatic ecosystems. The Wetlands and Subaqueous Lands Section also evaluates the public interest in any proposed project that may affect the use of subaqueous lands. An applicant is required to satisfy Delaware environmental standards before a lease or a permit can issue for a proposed use.

9. Approval from the Subaqueous Lands Section does not relieve an applicant from complying with the laws, rules, regulations and requirements imposed on the same lands, uses, structures, facilities or other appurtenances by local, State and federal government agencies or other divisions within DNREC. 1992 Regulations at 1.12. Other required approvals could include but are not limited to approvals for the proposed use under Delaware's State Coastal Zone Act (*See Del. Code Ann. tit. 7, § 7001 et seq.*), and/or obtaining a consistency determination through Delaware's Coastal Zone Management Program for projects that require federal authorization. Because additional DNREC permits, state permits, federal permits, and local permits are required from other divisions and agencies before an applicant can obtain permission for a particular use of Delaware subaqueous land, the Subaqueous Lands Section requires that the applicant describe the intended use of the proposed facility in the application process. No subaqueous lands lease, permit, or letter of authorization should issue unless the applicant can demonstrate compliance with all applicable laws and regulations relating to the proposed use.

10. An applicant is required to obtain a lease, permit, or letter of authorization from DNREC for construction or use of any structure on, in, under or over Delaware subaqueous lands. 1992

uses or changes which may impair the public interest in the use of tidal or nontidal waters. The purposes of this chapter are to empower the Secretary to deal with or to dispose of interest in public subaqueous lands and to place reasonable limits on the use and development of private subaqueous lands.

⁴ *See Del. Code Ann. tit. 7, § 7206* (“[T]he Secretary shall have exclusive jurisdiction and authority over all projects to convey a fee simple or lesser interest or to grant easements with respect to subaqueous lands belonging to the State.”).

Regulations at 1.04B.1; *see also* Del. Code Ann. tit. 7, § 7205. Because the twelve-mile circle area of the Delaware River is in Delaware territory, the Subaqueous Lands Section has required that a subaqueous lands lease, permit, or letter of authorization be issued for all docks and piers constructed on the easterly half of the River after 1969. Delaware's subaqueous lands laws also apply to projects that straddle the boundary between the states because any project that requires the use of Delaware subaqueous lands requires authorization from the subaqueous lands section. Since enactment of the 1969 Regulations, Delaware has regulated the uses of those lands, performed environmental review of projects, and has required leases, permits or letters of authorization for boundary-straddling projects regardless of whether New Jersey also regulates a project that extends from the New Jersey shore.

11. For any dredging activity, including activity occurring on the easterly half of the Delaware River in the twelve-mile circle, our office has required that the applicant receive a dredging permit or a letter of authorization. 1992 Regulations at 1.04B.2, 1.04B.8; 3.05; *see also* Del. Code Ann. tit. 7, § 7205. During my tenure, a subaqueous lands lease was not a prerequisite for dredging activity because dredging and pier construction were considered separate activities. Different regulations and standards apply to construction of piers and dredging activities. *Compare* 1992 Regulations at 3.02 and 3.03 (boat docking facilities) with 1992 Regulations at 3.05 (dredging requirements). For example, an applicant with a pier that was either constructed pursuant to a valid subaqueous lands lease or grandfathered as a pre-1969 structure is nevertheless required to obtain all applicable approvals for any subsequent dredging.

12. During my twenty-nine year career as Manager of the Wetlands and Subaqueous Lands Section, my office issued numerous approvals for activities on Delaware subaqueous lands on the easterly side of the Delaware River within the twelve-mile circle. A summary of the approvals granted by the Wetlands and Subaqueous Lands Section for activities occurring on the easterly half of the Delaware River within the twelve-mile circle during my DNREC career and after my retirement are outlined below.

DuPont Approvals

13. On March 18, 1982, my office issued a Letter of Authorization to S.T. Hudson Engineers, Inc. to repair and replace an existing 36-pile cluster with a filled steel sheet structure at the

E.I. DuPont de Nemours & Co., Inc. facility in Deepwater, New Jersey. DE App. 1329.

14. On October 15, 1982, my office issued a Letter of Authorization to E.I. DuPont de Nemours & Co., to conduct maintenance dredging of 85,000 square yards of material from the Delaware River at Deepwater, New Jersey. DE App. 3431.

15. On January 5, 1987, my office issued a Letter of Authorization to S.T. Hudson Engineers, Inc. to repair and replace timber docking and stringers on the approachway at the Chambers Works, Delaware River, Deepwater, New Jersey facility. DE App. 3433.

16. On February 9, 1988, my office issued a letter of authorization to E.I. DuPont de Nemours & Co. to conduct maintenance dredging of 80,000 cubic yards of material from the Delaware River at the Chambers Works, Delaware River, Deepwater, New Jersey facility. DE App. 3435.

17. On May 4, 2001, my office issued a Subaqueous Lands Permit to DuPont Chambers Works to dredge approximately 4,650 cubic yards of material and to backfill to existing elevations in the Delaware River. DE App. 3439.

18. On March 7, 2006, the Subaqueous Lands Section issued a Subaqueous Lands Permit to the E.I. DuPont de Nemours and Company to dredge 1,800 cubic yards of material beyond the mean low water mark on the Delaware River adjacent to DuPont Chambers Works. DE App. 3455.

Delmarva Power Approvals

19. On April 6, 1987, my office issued a letter of authorization to Delmarva Power for the reconstruction of a 500 KV power line, fender system and related electric transmission facilities crossing the Delaware River. DE App. 3739.

20. On December 9, 1997, my office issued a Subaqueous Lands Lease to Delmarva Power and Light Company for the installation of 3755 linear feet of submarine fiber optic cable in the Delaware River extending from Pigeon Point in New Castle County to Deep Water Point in Sussex County, New Jersey. DE App. 3755.

Colonial Pipeline Approvals

21. On August 3, 1987, my office issued a Subaqueous Land Lease to Colonial Pipeline Company to conduct pipeline construction activity in the Delaware River. DE App. 3357-62.

22. On January 26, 1995, my office issued Subaqueous Land Lease to Colonial Pipeline Company to renew a lease to maintain 8000 feet of 30 inch diameter pipeline across the Delaware River between Marcus Hook and New Castle County. DE App. 3375-80.

Keystone Approvals

23. On September 30, 1991, my office issued a Subaqueous Lands Lease to Keystone Cogeneration Systems, Inc. to construct a coal unloading pier and to dredge 40,000 cubic yards of material from the Delaware River and to create a 910 feet by 150 feet barge berth. DE App. 3557-62.

24. On April 6, 1992, my office issued a Supplemental Approval to Keystone Energy Service Company, L.P. to allow for a change in leaseholder from Keystone Cogeneration Systems, Inc. to Keystone Energy Service Company, L.P. DE App. 3609-10.

25. On May 28, 1993, my office issued a supplemental approval to Keystone Energy Service Company for a modification of pier dimensions. DE App. 3611-12.

26. On November 12, 1997, my office issued a Letter of Authorization to Logan Generating Company, L.P. to conduct maintenance dredging of 15,000 cubic yards of material from a barge mooring facility on the Delaware River in Gloucester County, New Jersey. DE App. 3621.

27. On November 9, 2001, my office issued a Subaqueous Lands Lease renewal to Logan Generating Company, L.P. to maintain a pier, docks and dolphins in the Delaware River. DE App. 3623-27.

Army Corps Approvals

28. On April 7, 1992, my office issued a Letter of Authorization to the U.S. Army, Corps of Engineers to conduct maintenance dredging in the Salem River of 100,000 cubic yards of material. DE App. 3767-68.

29. On December 15, 1994, my office issued a Letter of Authorization to the U.S. Army, Corps of Engineers for maintenance dredging of 350,000 cubic yards of material from the Salem River to maintain the navigational channel. DE App. 3773-74.

Fort Mott Approvals

30. On February 7, 1996, my office issued a Subaqueous Lands Lease to the New Jersey Department of Environmental Protection, Department of Parks and Forestry for rehabilitation of the Fort Mott pier. New Jersey applied for permission to re-construct a pier to include placement of a barge 30 feet by 100 feet and a pile supported platform 10 feet by 10 feet on the Delaware River. DE App. 3717-21.

William Moyer
William Moyer

Subscribed and Sworn To
Before Me This 15 Day
of December, 2006

Max B. Watson
Notary Public
Of The State Of Delaware

No. 134, Original

In the
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

**AFFIDAVIT OF KURT REUTHER
IN SUPPORT OF DELAWARE ON CROSS-
MOTIONS FOR SUMMARY JUDGMENT**

STATE OF DELAWARE :
 :
 : ss:
COUNTY OF NEW CASTLE :
 :

Kurt Reuther, being duly sworn, deposes and says:

1. I have knowledge of the matters set forth herein, based upon my personal knowledge and based upon my review of the files maintained by my office.
2. I am employed as the Chief of Enforcement, of the Division of Air and Waste Management for the Delaware Department of Natural Resources and Environmental Control ("DNREC"). I have been employed by DNREC since 1984.
3. In Delaware, the Division of Air and Waste Management is responsible for enforcement of environmental laws and for responding to environmental spills and emergencies. The DNREC emergency response team consists of two main components: (1) the enforcement component, which is responsible for enforcing environmental laws, prosecuting violations of environmental laws and receiving release and discharge notifications; and (2) the

scientific component, which is responsible for providing scientific and technical support in responding to environmental emergencies.

Hazardous Substances Reporting Requirements.

4. Under the Emergency Planning and Community Right to Know Act ("EPCRA") (42 U.S.C. §§ 11001 *et seq.*), Congress has required states to establish state emergency response commissions ("SERCs") and local emergency planning committees ("LEPCs"). 42 U.S.C. § 11001(a)(c). The LEPCs are required under EPCRA to develop comprehensive emergency response plans to deal with, among other things, emergency responses for extremely hazardous substances. 42 U.S.C. § 11003(a). Once established, the SERCs review the plans prepared by the LEPCs. 42 U.S.C. § 11003(e).

5. EPCRA mandates industry reporting requirements for extremely hazardous substances above a certain threshold quantities. The list of extremely hazardous substances and reportable quantities of extremely hazardous substances under EPCRA is at 40 C.F.R. Part 355.

6. Under EPCRA, if a release of an extremely hazardous substance occurs from a facility at which a hazardous chemical is produced, used, or stored, the facility must provide notification of the release, identifying the chemical name of the substance involved in the release, an indication of whether the substance is on the list of extremely hazardous substances, an estimated quantity of any such substance that was released, the time and duration of the release, the medium or media into which the release occurred, the known or anticipated acute or chronic health risks associated with the emergency, the proper precautions to be taken as a result of the release, and the contact information for the facility. 42 U.S.C. § 11004(a)(2), (b)(2). 42 U.S.C. § 11004 (a)(2). Delaware law has similar reporting requirements. Del. Code Ann. tit. 16, § 6304(a); Del. Code Ann. tit. 7, § 6028(a).

7. Under EPCRA, notice is required to be provided by the owner or operator of a facility immediately after a release of an extremely hazardous substance above a reportable quantity. The notice must be provided "to the community emergency coordinator for the local emergency planning committees . . . for any area likely to be affected by the release and to the State emergency planning commission of any State likely to be affected by the release." 42 U.S.C. § 11004(b)(1); 40 C.F.R. § 355.40(b)(1). Delaware law requires that notification must be provided to DNREC. *See* Del. Code Ann. tit. 16, § 6304(c).

8. EPCRA imposes stringent penalties for failure to notify LEPCs and SERCs likely to be affected by any EPCRA qualified release. Pursuant to 42 U.S.C. § 11045(b), a party failing to notify of a qualified release can receive a fine of up to \$25,000.00 per day for each day that the violation continues, and can be fined up to \$75,000.00 per day for a subsequent violation. In addition, if an owner or facility operator knowingly and willfully fails to provide notice, the person can be fined not more than \$25,000.00 and be imprisoned for not more than two years. 42 U.S.C. § 11045(B)(4); 40 C.F.R. § 355.50(c). For a second violation, a person could be fined up to \$50,000.00 and be imprisoned for up to five years. 40 C.F.R. § 355.50(c).

9. Under the Federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") the Federal government also requires notification for release of hazardous substances beyond a threshold quantity limit. The CERCLA list of hazardous substances and designated reportable quantities are codified at 40 C.F.R. § 302.4, Table 302.4.

10. Under CERCLA, any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than the reportable quantities established by 40 C.F.R. § 302.4, Table 302.4, must immediately notify the National Response Center established under the Clean Water Act of such release. 42 U.S.C. § 9603(a). The National Response Center is then required to convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State. *Id.* Delaware law also requires that a similar notification be made to DNREC for CERCLA qualified releases. *See* Del. Code Ann. tit. 7, § 6028 (a).

11. Under CERCLA, any person subject to the act that fails to notify "immediately the appropriate agency of the United States Government as soon as he has knowledge" of a release of a hazardous substance above a reportable quantity or "who submits in such a notification any information which he knows to be false or misleading" may be fined "in accordance with the applicable provisions of Title 18 or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both." 42 U.S.C. § 9603(b). Under Delaware law, any person who willfully or negligently violates the reporting requirements for CERCLA qualified releases can be punished with

a fine up to \$25,000.00 per day for each day of the violation. Del. Code Ann. tit. 7, § 6028(f); Del. Code Ann. tit. 7, 6013(a).

12. During my tenure with the Enforcement Division of Air and Waste Management within DNREC, our office has always assumed jurisdiction for any release of an EPCRA qualified release or a CERCLA qualified release in the Delaware River within the twelve-mile circle. Our office has always assumed jurisdiction to the mean low water mark on the New Jersey shore within the twelve-mile circle.

13. Consequently, if a facility has an EPCRA qualified release of an extremely hazardous substance on the easterly side of the Delaware River within the twelve-mile circle (including an event occurring on a pier that straddles the boundary), the facility is required to notify Delaware of the release under EPCRA's notification requirements and under Delaware law. 42 U.S.C. § 11004(b)(1); 40 C.F.R. § 355.40(b)(1); Del. Code Ann. tit. 16, § 6304(c). Once notified, my office is responsible for responding to the incident and activating the necessary Delaware emergency responders to assist with the response.

14. Similarly, if a person causes qualified release of a CERCLA hazardous substance on the easterly half of the Delaware River within the twelve-mile circle (including an event occurring on a pier straddling the boundary), DNREC and the National Response Center must be notified because the release is in Delaware's jurisdictional limits. 42 U.S.C. § 9603(a); Del. Code Ann. tit. 7, § 6028(a). If the National Response Center receives a notification of a CERCLA qualified release on the easterly half of the Delaware River within the twelve-mile circle, the National Response Center immediately notifies our office, as well as other affected agencies, of the release by flash fax. If the event is reported in the twelve-mile circle, the Delaware Emergency Management Agency, the Delaware State Police, and DNREC are all considered to be primary responding agencies.

15. If the EPCRA or CERCLA qualified release emanated from a pier straddling the border between New Jersey and Delaware in the twelve-mile circle, DNREC would have jurisdiction to respond to the release, and would have jurisdiction to enforce criminal penalties for the release.

16. If DNREC discovered that an EPCRA or CERCLA qualified release occurred on the eastern half of the Delaware River within the twelve-mile circle, and the release was not

reported to DNREC, the appropriate Delaware LEPC, the SERC for Delaware, or the National Response Center as required by law, DNREC would institute applicable fines and criminal proceedings for failure to report the release.

Delaware Hazardous Material Responses In The Twelve-Mile Circle

17. Included in Delaware's Appendix (DE App. 4015-4022) is a list of hazardous materials responses in the Delaware River since 1986 for which Delaware responded. Outlined below are the hazardous material responses or investigations performed by our office on the easterly half of the Delaware River within the twelve-mile circle since 1986.

18. On October 1, 1986, Environmental Protection Officer No. 51 responded to an oil spill located on the Delaware River across from Delmarva Power and Light in Edgemoor, identified as complaint number 10687.

19. On June 24, 1989, Environmental Protection Officer No. 703 responded to an oil spill located on the Delaware River off Claymont, identified as complaint number 2145.

20. On August 7, 1990, Environmental Protection Officer No. 707 responded to an oil spill located on the Delaware River across from Claymont to the Delaware Memorial Bridge, identified as complaint number 10474.

21. On August 25, 1990, Environmental Protection Officer No. 704 responded to a discharge call located on the Delaware River at DuPont Chambers Works, identified as complaint number 10720.

22. On May 6, 1991, Environmental Protection Officer No. 707 responded to an oil spill located on the Delaware River at the Delaware/Pennsylvania Border, identified as complaint number 1250.

23. On January 10, 1992, Environmental Protection Officer No. 709 responded to a call regarding abandoned drums located on the Delaware River off Pennsville, identified as complaint number 133.

24. On March 25, 1993, Environmental Protection Officer No. 701 responded to a discharge call located on the Delaware River at Pennsville, identified as complaint number 1463.

25. On January 23, 1996, Environmental Protection Officer No. 704 responded to call regarding abandoned drums located on the Delaware River near Fox Point in the channel, identified as complaint number 209.
26. On June 15, 1996, Environmental Protection Officer No. 704 responded to a spill located on the easterly half of the Delaware River north of Reedy Island at Port Penn, identified as complaint number 3102.
27. On July 26, 1996, Environmental Protection Officer No. 702 responded to a spill located on the Delaware River in Gloucester, New Jersey, identified as complaint number 4139.
28. On November 26, 1996, Environmental Protection Officer No. 705 responded to a spill located on the Delaware River near Penns Grove, New Jersey, identified as complaint number 6490.
29. On May 13, 1998, Environmental Protection Officer No. 707 responded to a spill located on the Delaware River near Camden, New Jersey, identified as complaint number 2192.
30. On January 28, 1999, Environmental Protection Officer No. 707 responded to a spill located on the Delaware River near Gloucester, New Jersey, identified as complaint number 382.
31. On September 20, 1999, Environmental Protection Officer No. 711 responded to a spill located on the Delaware River near Swedesboro, New Jersey, at mile marker 81, identified as complaint number 4488.
32. On October 3, 1999, Environmental Protection Officer No. 709 responded to a spill located on the Delaware River near Deptford, New Jersey, identified as complaint number 4764.
33. On November 1, 1999, Environmental Protection Officer No. 709 responded to a spill located on the Delaware River near Deptford, New Jersey, identified as complaint number 5207.
34. On January 14, 2001, Environmental Protection Officer No. 702 responded to a spill located on the Delaware River at the Pennsylvania State Line, identified as complaint number 204.

35. On October 8, 2003, Environmental Protection Officer No. 711 responded to a spill located on the Delaware River at the Pennsylvania State Line, identified as complaint number 4328.

36. On November 27, 2004, Environmental Protection Officer No. 711 responded to a spill located on the Delaware River, identified as complaint number 4741.

37. On December 9, 2004, Environmental Protection Officer No. 711 responded to a spill located on the Delaware River, identified as complaint number 4889.

38. On February 20, 2005, Environmental Protection Officer No. 709 responded to a spill located on the Delaware River at Premcor's Pier, identified as complaint number 483.

39. On March 6, 2005, Environmental Protection Officer No. 711 responded to a discharge call located on the Delaware River at DuPont Chambers Works, identified as complaint number 590.

40. On May 6, 2005, Environmental Protection Officer No. 711 responded to a spill located on the Delaware River at Paulsboro, New Jersey, identified as complaint number 1284.

41. On June 21, 2005, Environmental Protection Officer No. 711 responded to a spill located on the Delaware River at Paulsboro, New Jersey, identified as complaint number 1888.

42. On June 28, 2005, Environmental Protection Officer No. 711 responded to a spill located on the Delaware River at Gloucester County, New Jersey, identified as complaint number 1997.

43. On July 11, 2005, Environmental Protection Officer No. 711 responded to a spill located on the Delaware River at Salem, New Jersey, identified as complaint number 2123.

44. On December 7, 2005, Environmental Protection Officer No. 711 responded to a spill located on the Delaware River at Salem, New Jersey, identified as complaint number 3793.

45. On December 20, 2005, Environmental Protection Officer No. 711 responded to a spill located on the Delaware River at Paulsboro Beach, New Jersey, identified as complaint number 3928.

46. On January 11, 2006, Environmental Protection Officer No. 711 responded to a spill located on the Delaware River at West Deptford, New Jersey, identified as complaint number 101.
47. On May 4, 2006, Environmental Protection Officer No. 711 responded to a spill located on the Delaware River at Logan Township, New Jersey, identified as complaint number 1385.
48. On May 10, 2006, Environmental Protection Officer No. 711 responded to a discharge call located on the Delaware River at Artificial Island, New Jersey, identified as complaint number 1439.
49. On May 15, 2006, Environmental Protection Officer No. 711 responded to a discharge call located on the Delaware River at Lower Alloway Township, New Jersey, identified as complaint number 1490.
50. On July 11, 2006, Environmental Protection Officer No. 711 responded to a spill located on the Delaware River at Paulsboro, New Jersey, identified as complaint number 2152.
51. On July 12, 2006, Environmental Protection Officer No. 711 responded to a miscellaneous call located on the Delaware River at West Deptford, New Jersey, identified as complaint number 2169.
52. The enforcement section of the Division of Air and Waste Management of DNREC investigated and responded to these incidents on the easterly half of the River within the twelve-mile circle because the incidents/releases occurred in Delaware territory and fell under the jurisdiction of my office.

Facilities That Straddle The Boundary Between Delaware And New Jersey In The Twelve-Mile Circle

53. In addition to responding to hazardous material spills on the Delaware River, our office also performs patrols along the River for wetlands and subaqueous lands violations, such as illegal docks, piers, and/or wetlands filling.
54. If our office located a new dock or pier on the easterly half of the Delaware River within the twelve-mile circle, our office would first use GPS technology to determine whether the new structure actually crosses into Delaware territory. If the structure actually crosses into Delaware territory, we would check with the

appropriate agencies within DNREC to determine if the appropriate permits were issued for the structure.

55. There are very few structures that straddle the boundary between Delaware and New Jersey in the twelve-mile circle.

56. On September 15, 2006, I accompanied Michael Lehm, a photographer hired by the State of Delaware, on a boating trip for the purpose of cataloging every structure that crosses the boundary between New Jersey and Delaware within the twelve-mile circle. We determined the actual boundary between the states by using aerial photographs of the River with the boundary line superimposed upon the photograph. DE App. 4207-4212 (DE28987-DE28992). Photographs of the structures that cross the boundary are listed below.

57. Photographs identified as DE29001, DE29007, DE29014, DE29031, DE29033, and DE29037, included in Delaware's appendix at DE App. 3885-3895, are of the Keystone/Logan Generating Facility. According to the aerial boundary maps (DE App. 4207-4212, (DE28987-DE28992)), the pier of this facility crosses into Delaware territory.

58. Photograph DE29044, included in Delaware's appendix at DE App. 3897, depicts pilings south of the Keystone/Logan Pier on the easterly side of the Delaware River. According to the aerial boundary maps (DE App. 4207-4212, (DE28987-DE28992)), these pilings are partially located in Delaware territory.

59. Photographs DE29050, DE29052, and DE29058, included in Delaware's appendix at DE App. 3899-3903 are signs depicting the pipeline crossing north of Old Man's Creek. I understand that the proposed Crown Landing liquefied natural gas ("LNG") facility, if built, would be located very near this pipeline crossing.

60. Photographs identified as DE29068, DE29077, DE29080, DE29081 and DE29096, included in Delaware's appendix at DE App. 3905-3913, depict a broken pier on the easterly side of the Delaware River south of boundary marker 2, approximately across from Bellevue, Delaware. According to the aerial boundary maps (DE App. 4207-4212, (DE28987-DE28994)), this dilapidated pier is partially located in Delaware territory.

61. Photographs identified as DE29103 and DE29111, included in Delaware's appendix at DE App. 3915-3918, depict a stone groin the on the easterly side of the Delaware River approximately

across from Bellevue, Delaware. According to the aerial boundary maps (DE App. 4204-4212, (DE28987-DE28992)), this dilapidated groin is partially located in Delaware territory.

62. Photographs DE29122, DE29127, DE29129, and DE29136, included in Delaware's appendix at DE App. 3919-3926, depict pilings on the easterly side of the Delaware River south of the stone jetty, approximately across from Bellevue, Delaware. According to the aerial boundary maps (DE App. 4207-4212, (DE28987-DE28992)), these pilings are partially located in Delaware territory.

63. Photographs DE29152, DE29153, DE29173, DE29178, DE29182, and DE29194, included in Delaware's appendix at DE App. 3927-3938, depict the remnants of the Pennsgrove Pier on the easterly side of the Delaware River. According to the aerial boundary maps (DE App. 4207-4212, (DE28987-DE28992)), this dilapidated pier is partially located in Delaware territory.

64. Photograph DE29213, included in Delaware's appendix at DE App. 3939, depicts a jet of land on the easterly side of the Delaware River south of Pennsgrove Pier north of DuPont Chambers Works. According to the aerial boundary maps (DE App. 4207-4212, (DE28987-DE28992)), this jet of land is partially located in Delaware territory.

65. Photographs DE29225, DE29243, DE29248, DE29254, and DE29261, included in Delaware's appendix at DE App. 3941-3950, depict the DuPont Chambers Works outfall and pier on the easterly side of the Delaware River. According to the aerial boundary maps (DE App. 4207-4212, (DE28987-DE28992)), the outfall and the pier are partially located in Delaware territory.

66. Photographs DE29276, DE29278, and DE29280, included in Delaware's appendix at DE App. 3951-3956, depict the power company formerly known as Conectiv on the easterly side of the Delaware River. According to the aerial boundary maps (DE App. 4207-4212, (DE28987-DE28992)), a few feet of this pier is located in Delaware territory.

67. Photographs DE29290, DE29294, and DE29295, included in Delaware's appendix at DE App. 3957-3962, depict a groin on the easterly side of the Delaware River, south of Conectiv and North of Pennsville. According to the aerial boundary maps (DE App. 4207-4212, (DE28987-DE28992)), this groin is partially located in Delaware territory.

68. Photographs DE29312, DE29314, DE29317, DE29328, DE29336, and DE29344, included in Delaware's appendix at DE App. 3963-3974, depict the remnants of the Pennsville Pier on the easterly side of the Delaware River. According to the aerial boundary maps (DE App. 4207-4212, (DE28987-DE28992)), portions of this dilapidated pier are located in Delaware territory.

69. Photographs identified as DE29351 and DE29362, included in Delaware's appendix at DE App. 3975-3978, depict the pier at Fort Mott on the easterly side of the Delaware River. According to the aerial boundary maps (DE App. 4207-4212, (DE28987-DE28992)), portions of this pier are located in Delaware territory.

70. Beyond these structures, there are no other piers or groins that straddle the boundary between Delaware and New Jersey within the twelve-mile circle. There are only three active piers that straddle the boundary between the states to any significant degree – Keystone Logan, DuPont Chambers works, and Fort Mott. The Conectiv pier barely crosses the boundary between the States.

71. There are only three facilities that begin in New Jersey and that straddle the Delaware boundary which could be subject to material reporting requirements under EPCRA – the Keystone Facility, the DuPont Chambers Works Facility, and the Conectiv Facility. These facilities are not required to provide hazardous material reports to Delaware because no hazardous or extremely hazardous materials are stored in Delaware territory. If, however, there is a spill or release of hazardous material or extremely hazardous material that reaches Delaware territory in the twelve-mile circle, that release must be reported to DNREC. 42 U.S.C. § 9603(a); 42 U.S.C. §11004(b)(1); 40 C.F.R. § 355.40(b)(1); Del. Code Ann. tit. 7, § 6028 (a); CERCLA; Del. Code Ann. tit. 16, § 6304(c). Our office is the lead agency for the response in the twelve-mile circle unless the coast guard takes command of the response.

72. Similarly, if the proposed Crown Landing LNG facility were built, our unit would be the lead agency for any hazardous materials response occurring in Delaware Territory for any event occurring on the supertanker, on the pier, or in the River unless the Coast Guard took command of the response.

Kurt Reuther
Kurt Reuther

Subscribed and Sworn To
Before Me This 19th Day
of December, 2006

Max B. Walter
Notary Public
Of The State Of Delaware

In the
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

**AFFIDAVIT OF WILLIAM S. SCHENCK
IN SUPPORT OF DELAWARE ON CROSS-
MOTIONS FOR SUMMARY JUDGMENT**

STATE OF DELAWARE :
 :
 : ss:
COUNTY OF NEW CASTLE :

William S. Schenck, being duly sworn, deposes and says:

1. I have knowledge of the matters set forth herein, based upon my personal knowledge and based upon my review of the files maintained by my office.
2. I am employed as a Scientist for the Delaware Geological Survey. I have been employed by the Delaware Geological Survey since 1980.
3. From approximately the beginning of my employment with the Delaware Geological Survey until 2001, Dr. Robert Jordan, the former Director of the Delaware Geological Survey and the former State geologist for the State of Delaware, served as the chair of the Delaware Boundary Commission. Throughout my employment with the Delaware Geological Survey, I assisted Dr. Jordan and the Delaware Boundary Commission in working with the states of Maryland, Pennsylvania, and New Jersey to reestablish the

boundary monuments that mark the exact boundaries between the states.

4. In 1987, the Delaware State Boundary Commission began working with New Jersey and the National Geodetic Survey in attempt to restore six boundary reference monuments establishing the boundary between Delaware and New Jersey in the twelve-mile circle, as established by the United States Supreme Court in 1934. See *New Jersey v. Delaware*, 291 U.S. 361 (1934); *New Jersey v. Delaware*, 295 U.S. 694 (1935) (Decree). This work continued between 1987 and 1996.

5. Because the boundary point markers from 1934 had not been maintained, some of the boundary markers were dilapidated, some of the boundary markers could not be located, and some of the boundary markers were underwater due to erosion of the shoreline. Consequently, the states established positions for the location of new boundary reference markers, and worked with a private survey company and the National Geodetic Survey to establish the distances and directions to establish the official boundary between the states as it existed in 1934. DE App. 4049-4054 (DE20119-DE20124).

6. Based on distances and coordinates verified by the National Geodetic Survey, a boundary agreement was drafted between the states. The agreement was drafted for the purpose of establishing as the official boundary between the states in the twelve-mile circle area as the mean low water mark as it existed in 1934. In 2001, New Jersey and Delaware signed the boundary agreement establishing the boundary in the twelve-mile circle area as the mean low water line as it existed in 1934.

7. In 2003, the Delaware Geological Survey requested that the United States Geological Survey ("USGS") create a digital boundary line between the states, including the twelve-mile circle area, based upon the turning points and azimuths in the boundary agreement.

8. When the USGS attempted to map the coordinates in the 2001 boundary agreement, the USGS found errors in the distances and directions in certain of the newly established boundary reference markers. Thereafter, the National Geodetic Survey provided corrected distances and directions for the boundary point markers in question. With the revised calculations from the National Geodetic Survey, the USGS was able to align the 1934


shoreline to fit the corrected boundary point markers and to digitally map the mean low water mark as it existed in 1934.

9. In December 2004, Delaware signed an amendment to the 2001 boundary agreement confirming the corrected boundary reference points for the boundary. New Jersey signed the amendment in February 2005. DE App. 4055-4058 (DE26046-DE26049). Thus, the boundary agreement between the states confirms that the official boundary in the twelve-mile circle is the mean low water mark on the easterly side of the River as it existed in 1934.


10. The USGS then created a digital boundary line between the State of Delaware and the State of New Jersey. The digital boundary line between the states in the twelve-mile circle prepared by the USGS is depicted on aerial photography of the Delaware River. DE App. 4207-4212 (DE28987-DE28992). This depiction of the 1934 mean low water mark boundary between the states is digitized from the revised boundary agreements between the states and the map attached to the United States Supreme Court decree in *New Jersey v. Delaware*, 295 U.S. 694 (1935). This depiction can be located online at <http://datamil.delaware.gov>.

11. Also located online are aerial photographs of the Delaware River within the twelve-mile circle dating back to 1937. Starting in 1961, the aerial photographs contain images of the eastern and western shore of the River in the area of the twelve-mile circle.

12. I have compared the aerial photographs of the Delaware River from 1961, 1968 and 2002 that are maintained by my office and can be found online at <http://datamil.delaware.gov>. In comparing the 1961, 1968 and 2002 aerial photography, I have located only three structures that were constructed or expanded since 1968 that straddle the boundary between the New Jersey and Delaware. One new structure is a large pier located across from Claymont Delaware which is known as the Keystone facility. The second structure is just north of the Delaware Memorial Bridge at DuPont. The aerial photographs appear to show that some minor modifications of the DuPont pier area have occurred since 1968. The third structure is Fort Mott pier located south of Killcohook National Wildlife Refuge, which appears to have expanded between 1968 and 2002. No other structures appear to cross the boundary.


William S. Schenck

Subscribed and Sworn To
Before Me This 18th Day
of December, 2006


Mark B. Walker
Notary Public
Of The State Of Delaware

No. 134, Original

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

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

**AFFIDAVIT OF DAVID SMALL
IN SUPPORT OF DELAWARE ON
CROSS MOTIONS FOR SUMMARY JUDGMENT**

STATE OF DELAWARE :
: SS
COUNTY OF KENT :

David Small, being duly sworn, deposes and says:

1. Since July 2001, I have served as Deputy Secretary for the Delaware Department of Natural Resources and Environmental Control ("DNREC") within the Office of the Secretary. In that capacity I assist Secretary John A. Hughes in providing overall direction, management, and policy within DNREC. Among other things, I have participated in DNREC's evaluation of BP/Crown Landing's application to construct a liquefied natural gas facility partially within Delaware territory. I have knowledge of the matters set forth herein based upon my personal knowledge, my review of the files maintained by DNREC, and my review of documents produced in discovery in this litigation.

2. The mission of DNREC is to ensure the wise management, conservation, and enhancement of the State's natural resources, protect public health and the environment, provide quality outdoor

recreation, improve the quality of life, and educate the public on historic, cultural and natural resources, use requirements and issues. DNREC carries out its responsibilities through six divisions: (i) the Office of the Secretary; (ii) the Division of Air and Waste Management; (iii) the Division of Fish and Wildlife; (iv) the Division of Parks and Recreation; (v) the Division of Soil and Water Conservation; and (vi) the Division of Water Resources. All of these divisions have management responsibilities with regard to activities that occur within Delaware's twelve-mile circle, including structures within the twelve-mile circle.

3. The Office of the Secretary is responsible for policy development and program coordination and management. Among other things, the Secretary administers Delaware's Coastal Zone Act ("DCZA"), adopted in 1971. Recognizing that "the coastal areas of Delaware are the most critical areas for the future of the State in terms of the quality of life in the State," the DCZA declares that it is the "public policy of the State to control the location, extent and type of industrial development in Delaware's coastal areas" in order to "better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism." 7 Del. Code Ann. tit. 7, § 7001. Under the DCZA, certain activities in the coastal zone are absolutely prohibited, including the construction of heavy industry and offshore gas, liquid, or solid bulk product transfer facilities. Other activities are allowed in the coastal zone only by permit. A permit must be obtained prior to any land disturbing or construction activity. DNREC's implementation of the DCZA is described in more detail in an affidavit from Philip Cherry, DNREC's Director of Policy and Planning.

4. The Division of Air and Waste Management monitors Delaware's air quality, plans for and responds to environmental incidents, and regulates the handling, transfer, storage and disposal of solid, infectious, and hazardous waste. Through its Air Quality Management Section (Ali Mirzakhali, Manager), the Division monitors compliance with Delaware's air quality standards, including compliance by ships docked within Delaware's twelve-mile circle. Through its Enforcement Section (Kurt Reuther, Chief), the Division performs emergency response, investigative and criminal enforcement relating to air quality, regulated and hazardous substances, and also provides enforcement for the Divisions of Soil and Water Conservation and Water Resources. The Division also carries out Federal reporting requirements under the Emergency Planning and Community Right to Know Act ("EPCRA") and the Federal Comprehensive Environmental

Response, Compensation and Liability Act of 1980 ("CERCLA"). DNREC's activities in these areas are set forth in greater detail in affidavits from Messrs. Mirzakhali and Reuther.

5. The Division of Fish and Wildlife carries out public safety services in the areas of boating, hunting, fishing, shell fishing, and disaster response. Enforcement activities in these areas are described in more detail in an affidavit from Captain Robert Hutchins, an enforcement officer with many years experience patrolling the twelve-mile circle.

6. The Division of Parks and Recreation operates and maintains fifteen state parks and related preserves and greenways throughout Delaware, including historic Fort Delaware State Park, located on Pea Patch Island in the Delaware River within the twelve-mile circle.

7. The Division of Soil and Water Conservation is responsible for preserving and protecting the state's soil, water, and coastal resources by managing the state's shoreline, coastal zone, and navigable waterways, by regulating coastal and urban land use and construction activities and by promoting agricultural land management practices. The Division houses the Delaware Coastal Management Program, established in 1979 pursuant to the federal Coastal Zone Management Act. This Program works to protect and enhance the coastal resources of the state through the review of federal and state projects to ensure that they are consistent with state coastal policies. Under the Coastal Zone Management Act, an applicant for a Federal license or permit to conduct an activity affecting the coastal zone of a state must provide a certification that the proposed activity complies with the policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. Applicants whose proposed projects that qualify under the Coastal Zone Management Act and would affect Delaware's coastal zone must obtain Federal consistency certifications through Delaware's Coastal Management Program. Delaware's activities under the Program are set forth in more detail in the affidavit of Sarah W. Cooksey, Program Administrator.

8. The Division of Water Resources monitors, manages and protects Delaware's ground and surface waters, tidal wetlands, and underwater lands. The Division is a link to the Delaware Estuary Program, Inland Bays Estuary Program and the Delaware River Basin Commission. The Division's Wetlands and Subaqueous Lands Section (Laura M. Herr, Manager) provides permitting

services for activities that affect subaqueous lands and tidal wetlands, including the dredging of Delaware subaqueous lands. The Division's Surface Water Discharges Section (R. Peder Hansen, Manager) issues permits for industrial and municipal wastewater treatment systems (including storm water) and sludge management. With regard to projects entering Delaware from the New Jersey shore, compliance with Delaware's water quality standards for discharges is assured through the uniform minimum standards for discharges established under the federal Clean Water Act, and the National Pollution Discharge Elimination System Program, as well as through Delaware's participation in the Delaware River Basin Commission. The Division's activities within the twelve-mile circle are set forth in greater detail in the affidavits of Mr. Hansen and Ms. Herr.


9. In order to obtain a right to construct and operate a pier within Delaware territory, applicants must obtain a variety of permits and approvals from DNREC, including: a subaqueous lands lease, a permit under the Delaware Coastal Zone Act, a Federal consistency determination under Delaware's Coastal Zone Management Program, and approvals regarding any effect of the proposed project on wetlands, fisheries and historical locations.

10. With regard to any pier or wharf in Delaware territory within the twelve-mile circle, DNREC provides public safety, monitoring, and enforcement services. These services include emergency response, police enforcement, fish and wildlife enforcement, and air quality monitoring.

11. As set forth above, during my entire tenure, DNREC has consistently exercised jurisdiction within the twelve-mile circle, both as a general proposition and specifically with regard to structures entering Delaware territory from the New Jersey shore.


David Small

Subscribed And Sworn To
Before Me This 20th Day
Of December, 2006


Notary Public
Of The State Of Delaware

No. 134, Original

In the
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

**AFFIDAVIT OF WILLIAM F. STREETS IN
SUPPORT OF DELAWARE ON CROSS-
MOTIONS FOR SUMMARY JUDGMENT**

STATE OF DELAWARE :
 :
 : ss:
COUNTY OF NEW CASTLE :

William F. Streets, being duly sworn, deposes and says:

1. I have knowledge of the matters set forth herein, based upon my personal knowledge and based upon my review of the files maintained by my office.

2. I am employed by the New Castle County, Delaware, Department of Public Safety, Emergency Communications Division. I am one of two team leaders in the Emergency Communications Division.

3. I have been employed by New Castle County for the past thirty-one years. For the past seventeen years, I have acted as the custodian of records for the New Castle County Emergency Communications Division and the New Castle County 911 Center. Prior to acting as custodian of records for the 911 Center, I worked as fire supervisor. Prior to that, I worked as a dispatcher for the 911 Center.

4. The New Castle County Emergency Communications Division handles all 911 emergency response calls in New Castle County relating to fire and emergency services, with the exception of 911 calls from the City of Wilmington. The City of Wilmington maintains its own 911 call center.

5. The New Castle County Emergency Communications Division also handles 911 calls for the Delaware State Police, the New Castle County Police, and most municipalities within the County. Police calls occurring in the City of Newark and in the City of Wilmington are processed by the local municipality and are not processed by our office, unless assistance is requested from Wilmington or Newark.

6. When a 911 call is received by our office for police, fire, or other emergency, the call is logged into the computer system by a call operator. The call operator determines whether the call is for police, fire, or rescue. If it is a fire or rescue call, it is transferred into the fire communications section. If it is a police related incident, the call operator processes the entire complaint. If the call is received from a land-based telephone line, the location of the incident is automatically loaded into the computer system. If the call is received from a cell phone, the dispatcher logs the location of the incident. Once the location of the incident is logged, the 911 computer system automatically determines the appropriate jurisdictional responder for the incident and the appropriate police agency or fire company is dispatched to respond to the call. The location of the call and the dispatch information is recorded by our computer system.

7. All of New Castle County is divided into fire districts. Most fire and emergency responses in New Castle County are handled by local volunteer fire companies, which have some paid personnel. The City of Wilmington fire company is fully staffed by paid personnel.

8. There are nine New Castle County fire companies that border the Delaware River. Those fire companies are the Claymont Fire Company (Station 13), the Brandywine Hundred Fire Company (Station 11), the Wilmington Fire Department, the Holloway Terrace Fire Company (Station 20), the Goodwill Fire Company (Station 18), the Delaware City Fire Company (Station 15), the Port Penn Fire Company (Station 29), the Odessa Fire Company (Station 24), and the Townsend Fire Company (Station 26). Stations 11, 24, and 26 do not have marine units. If a water

response is required in these districts, the fire companies closest to the district with marine units handle the water response.

9. A map showing the fire company districts for districts with River jurisdiction is included in Delaware's appendix. DE App. 3997. A map of the County fire districts is loaded into the 911 computer system maintained by our office, and a printed copy of the fire district map hangs in my office and in the fire communications section. As shown on the fire district maps, the jurisdiction for Delaware fire companies adjoining the Delaware River within the twelve-mile circle extend to the mean low water mark on the easterly half of the River. Throughout my entire career with the New Castle County Emergency Communications Division, Delaware fire companies and police agencies have considered any matter west of the mean low water line in the Delaware River in Delaware's jurisdiction. Delaware police and fire agencies have always been dispatched and responded to police, fire or emergency calls in the Delaware River during my thirty-one years of service with the County.

10. If a call is received by New Castle County's 911 Center for a fire or an emergency response in Delaware River west of the mean low water mark, the appropriate jurisdictional fire company is dispatched to command the response. Most Delaware fire companies that adjoin the River have emergency response boats and have trained personnel to respond to the incident. The Wilmington Fire Company marine unit commands a fire boat that is sent to fight any fires on the River. The Wilmington fire boat is moored at the 7th street marina in Wilmington and has a crew available at all times to respond to fires and emergencies in the Delaware River. If a call is received for an event on the River, our office alerts Wilmington Station 2 and the captain of the fire boat and the Wilmington fire boat responds to emergencies along with volunteer fire company responders.

11. I am only aware of two Salem County municipalities adjoining New Castle County that maintain any emergency response boats – Salem City and Lower Alloway Creek Township. To my knowledge, no other New Jersey municipality that borders the twelve-mile circle maintains any emergency response boat.

12. The protocol for a River response is that there is always a three boat response for any emergency call on the River. Consequently, multiple Delaware fire companies generally respond to emergency response calls for fire and rescue on the River. If Lower Alloway Creek Township or Salem City has a boat

available to assist in the response, those agencies will provide mutual aid as part of the three boat response. However, Delaware's emergency responders command and are in charge of the response for all River calls within the twelve-mile circle because the response is in Delaware's jurisdiction, unless the Coast Guard takes control of the response. Our office notifies the Coast Guard of fire or emergency calls in the River.

13. If a 911 call is made from a cell phone on the Delaware River, the cell phone call is routed to the closest available cell phone tower. Thus, the 911 call may be received by Salem County or the call may be received by New Castle County. If Salem County New Jersey receives a 911 call for an emergency response on the Delaware River, Salem County 911 transfers the call to New Castle County's fire communications section. Salem County transfers the call for a River response to New Castle County's fire communications section because, for any incident occurring west of the mean low water line in the River, the event occurs in Delaware's police, fire, and emergency response jurisdiction. Included in Delaware's appendix (DE App. 3999-4002) are three emergency response reports whereby Salem County 911 transferred a River emergency response call to New Castle County.

14. If a call is received by New Castle County's 911 center for law enforcement purposes on the easterly half of the Delaware River, our office notifies the Delaware State Police and/or the Delaware Fish and Wildlife officers (commonly called the marine police) of the event. In addition, certain municipalities, such as the Delaware City Police, have police boats. Generally, however, policing activity on the Delaware River falls under the jurisdiction of the State Police or the marine police. Salem County also refers law enforcement 911 calls to the New Castle County because the response is in Delaware's jurisdiction.

15. Included in Delaware's appendix (DE App. 4003-4014) is a summary of all Delaware River emergency response calls received by my office and handled by Delaware volunteer fire companies between July 3, 1994 and September 18, 2006. The first column of the chart describes the incident number. The second column of the report describes the date of the incident. The first two digits of the third column identify the fire company making the response. The second two digits of the third column demonstrate that the call is a River response, as calls coded with a 33 or a 34 are River responses. The last column states a description of the location of the response, as provided to the dispatcher handling the call.

16. While it is difficult to pinpoint where the exact location of the emergency responses on the Delaware River occur because no latitude or longitude lines are kept and no street address can be assigned to River responses, it appears that, based upon the descriptions provided by the dispatchers in DE App. 4003-4014, Delaware emergency responders (excluding calls received and handled by the City of Wilmington) responded to approximately 155 calls on the easterly half of the Delaware River within the twelve-mile circle between July 1994 and September 2006. A description of each call is outlined below.

17. On July 3, 1994, Fire Company No. 15 (Delaware City) responded to an emergency call located on the north end of Pea Patch Island, identified as run number 94018554.

18. On August 14, 1994, Fire Company No. 29 (Port Penn) responded to an emergency call located on the New Jersey side of the jetty, identified as run number 94022797.

19. On August 23, 1994, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 94023642.

20. On September 18, 1994, Fire Company No. 18 (Goodwill) responded to an emergency call located off Kelly Point, identified as run number 94026042.

21. On September 25, 1994, Fire Company No. 29 (Port Penn) responded to an emergency call located at Hope Creek, identified as run number 94026758.

22. On March 25, 1995, Fire Company No. 18 (Goodwill) responded to an emergency call located off the Pennsville ramp, identified as run number 95008022.

23. On March 28, 1995, Fire Company No. 15 (Delaware City) responded to an emergency call located near Fort Mott, identified as run number 95008339.

24. On May 12, 1995, Fire Company No. 29 (Port Penn) responded to an emergency call located near Elsinboro Point, identified as run number 95012848.

25. On June 23, 1995, an incident was reported in Fire District 24 (Odessa) and Delaware emergency responders responded to the

call located near of Artificial Island, identified as run number 95017137.

26. On July 5, 1995, an incident was reported in Fire District 24 (Odessa) and Delaware emergency responders responded to the call located near of Artificial Island, identified as run number 95018257.

27. On July 13, 1995, Fire Company No. 18 (Goodwill) responded to an emergency call located at buoy 1D-Deepwater Range, identified as run number 95018998.

28. On July 15, 1995, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 95019336.

29. On August 15, 1995, Fire Company No. 29 (Port Penn) responded to an emergency call located off Oakwood Beach Elsinboro, identified as run number 95022916.

30. On September 23, 1995, Fire Company No. 18 (Goodwill) responded to an emergency call located off Pennsville boat docks, identified as run number 95026845.

31. On September 30, 1995, Fire Company No. 15 (Delaware City) responded to an emergency call located north of Pea Patch Island, identified as run number 95027620.

32. On October 1, 1995, Fire Company No. 15 (Delaware City) responded to an emergency call located one-half mile north of Pea Patch Island, identified as run number 95027684.

33. On October 3, 1995, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 95027878.

34. On November 23, 1995, Fire Company No. 15 (Delaware City) responded to an emergency call located on the Salem River, identified as run number 95033274.

35. On June 8, 1996, Fire Company No. 15 (Delaware City) responded to an emergency call located off Fort Mott, identified as run number 96016909.

36. On July 5, 1996, Fire Company No. 18 (Goodwill) responded to an emergency call located opposite of Deemers Beach at buoy 4-D, identified as run number 96019707.
37. On August 4, 1996, an incident was reported in Fire District 24 (Odessa) and Delaware emergency responders responded to the call located opposite of the Salem Nuclear Power Plant, identified as run number 96022677.
38. On August 11, 1996, Fire Company No. 15 (Delaware City) responded to an emergency call located between power lines and Fort Mott, identified as run number 96023483.
39. On August 18, 1996, Fire Company No. 15 (Delaware City) responded to an emergency call located between Salem Cove and Pea Patch Island, identified as run number 96024209.
40. On August 18, 1996, Fire Company No. 15 (Delaware City) responded to an emergency call located south of Pea Patch Island, identified as run number 96024216.
41. On September 28, 1996, Fire Company No. 15 (Delaware City) responded to an emergency call located at Fort Delaware on the easterly half of the Delaware River, identified as run number 96028350.
42. On October 18, 1996, Fire Company No. 18 (Goodwill) responded to an emergency call located off Pennsville, identified as run number 96030618.
43. On October 27, 1996, an incident was reported in Fire District 24 (Odessa) and Delaware emergency responders responded to the call located off Salem Nuclear Power Plant, identified as run number 96031596.
44. On October 29, 1996, Fire Company No. 29 (Port Penn) responded to an emergency call located off Artificial Island, identified as run number 96031856.
45. On February 12, 1997, Fire Company No. 15 (Delaware City) responded to an emergency call located in the area of Pea Patch Island, identified as run number 97004390.
46. On June 21, 1997, Fire Company No. 15 (Delaware City) responded to an emergency call located one-quarter mile north of Pea Patch Island, identified as run number 97018783.

47. On June 23, 1997, Fire Company No. 18 (Goodwill) responded to an emergency call located off Pennsville, identified as run number 97019097.
48. On July 5, 1997, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 97020413.
49. On July 26, 1997, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 97022880.
50. On August 17, 1997, Fire Company No. 15 (Delaware City) responded to an emergency call located near the Salem River, identified as run number 97025305.
51. On August 19, 1997, Fire Company No. 18 (Goodwill) responded to an emergency call located off of Pennsville, identified as run number 97025453.
52. On September 2, 1997, Fire Company No. 15 (Delaware City) responded to an emergency call located north of Pea Patch Island, identified as run number 97027043.
53. On September 14, 1997, Fire Company No. 15 (Delaware City) responded to an emergency call located opposite of the Salem River, identified as run number 97028259.
54. On September 16, 1997, Fire Company No. 15 (Delaware City) responded to an emergency call located north of Pea Patch Island, identified as run number 97028444.
55. On October 6, 1997, Fire Company No. 18 (Goodwill) responded to an emergency call located at the Pennsville boat ramp, identified as run number 97030859.
56. On October 6, 1997, Fire Company No. 29 (Port Penn) responded to an emergency call located off Artificial Island, identified as run number 97030914.
57. On November 17, 1997, Fire Company No. 13 (Claymont) responded to an emergency call located opposite to Captain's Deck, identified as run number 97035828.

58. On December 3, 1997, Fire Company No. 20 (Holloway Terrace) responded to an emergency call located at Pennsgrove, identified as run number 97037526.
59. On March 3, 1998, Fire Company No. 15 (Delaware City) responded to an emergency call located near Pea Patch Island, identified as run number 98007025.
60. On March 14, 1998, an incident was reported Fire District No. 11 (Brandywine Hundred) and Delaware emergency responders responded to the call located at Oldmans Township, identified as run number 98008191.
61. On June 3, 1998, Fire Company No. 18 (Goodwill) responded to an emergency call located north of the jetty, Opposite Riverview Beach, identified as run number 98017545.
62. On July 6, 1998, Fire Company No. 18 (Goodwill) responded to an emergency call located off Pennsville, identified as run number 98021387.
63. On July 26, 1998, Fire Company No. 15 (Delaware City) responded to an emergency call located near Pea Patch Island, identified as run number 98023599.
64. On July 26, 1998, Fire Company No. 15 (Delaware City) responded to an emergency call located near Pea Patch Island, identified as run number 98023685.
65. On August 1, 1998, Fire Company No. 15 (Delaware City) responded to an emergency call located near the northern tip of Pea Patch Island, identified as run number 98024365.
66. On August 9, 1998, Fire Company No. 15 (Delaware City) responded to an emergency call located on Pea Patch Island, identified as run number 98025332.
67. On August 20, 1998, Fire Company No. 20 (Holloway Terrace) responded to an emergency call located on the Delaware River opposite Pennsville, identified as run number 98026641.
68. On September 6, 1998, Fire Company No. 18 (Goodwill) responded to an emergency call located on the easterly half of the Delaware River at the jetty north power line, identified as run number 98028501.

69. On October 12, 1998, Fire Company No. 29 (Port Penn) responded to an emergency call located at the Salem Nuclear Power Plant, identified as run number 98032933.
70. On November 2, 1998, Fire Company No. 20 (Holloway terrace) responded to an emergency call located at the Delaware River opposite DuPont Chambers Works, identified as run number 98035470.
71. On May 14, 1999, Fire Company No. 29 (Port Penn) responded to an emergency call located off Artificial Island, identified as run number 99016693.
72. On June 12, 1999, Fire Company No. 29 (Port Penn) responded to an emergency call located off Artificial Island, identified as run number 99020322.
73. On July 2, 1999, Fire Company No. 29 (Port Penn) responded to an emergency call located on at Oakwood Beach, identified as run number 99022681.
74. On August 21, 1999, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 99029179.
75. On September 6, 1999, Fire Company No. 18 (Goodwill) responded to an emergency call located at Riverview Beach, identified as run number 99031191.
76. On September 11, 1999, Fire Company No. 18 (Goodwill) responded to an emergency call located at Pennsville Beach, identified as run number 99031790.
77. On September 17, 1999, Fire Company No. 18 (Goodwill) responded to an emergency call located off Penns Beach, identified as run number 99032883.
78. On October 11, 1999, Fire Company No. 18 (Goodwill) responded to an emergency call located opposite Pennsville, identified as run number 99036030.
79. On October 12, 1999, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 99036209.

80. On March 7, 2000, Fire Company No. 29 (Port Penn) responded to an emergency call located on Artificial Island, identified as run number 8659.

81. On June 4, 2000, Fire Company No. 29 (Port Penn) responded to an emergency call located on Artificial Island, identified as run number 20549.

82. On June 15, 2000, Fire Company No. 15 (Delaware City) responded to an emergency call located at the mouth of the Salem River, identified as run number 22037.

83. On June 20, 2000, Fire Company No. 18 (Goodwill) responded to an emergency call located at Penns Beach, identified as run number 23030.

84. On June 23, 2000, Fire Company No. 15 (Delaware City) responded to an emergency call located at the Salem River, identified as run number 23411.

85. On June 24, 2000, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 23563.

86. On July 1, 2000, Fire Company No. 15 (Delaware City) responded to an emergency call located north of Pea Patch Island, identified as run number 24499.

87. On July 8, 2000, Fire Company No. 18 (Goodwill) responded to an emergency call located at Riverview Beach, identified as run number 25420.

88. On September 4, 2000, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 33110.

89. On September 17, 2000, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 34838.

90. On September 19, 2000, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 35118.

91. On October 20, 2000, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 39288.
92. On January 3, 2001, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 1000413.
93. On April 30, 2001, Fire Company No. 29 (Port Penn) responded to an emergency call located at Pea Patch Island, identified as run number 1015777.
94. On June 23, 2001, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 1023595.
95. On July 1, 2001, Fire Company No. 13 (Claymont) responded to an emergency call located at Oldmans Creek, identified as run number 1024728.
96. On July 10, 2001, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 1025971.
97. On July 11, 2001, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 1026142.
98. On July 14, 2001, an incident was reported in Fire District 11 (Brandywine Hundred) and Delaware emergency responders responded to the call located at Oldmans Point, identified as run number 1026516.
99. On August 31, 2001, Fire Company No. 18 (Goodwill) responded to an emergency call located at Riverview Beach, identified as run number 1033302.
100. On September 7, 2001, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 1034362.
101. On September 8, 2001, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 1034410.

102. On October 4, 2001, Fire Company No. 18 (Goodwill) responded to an emergency call located at Penns Beach, identified as run number 1038160.

103. On October 10, 2001, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 1039053.

104. On October 11, 2001, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 1039145.

105. On November 3, 2001, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 1042571.

106. On June 2, 2002, an incident was reported in Fire District 11 (Brandywine Hundred) and Delaware emergency responders responded to the call located at Oldmans Point, identified as run number 2021680.

107. On June 5, 2002, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 2022217.

108. On June 5, 2002, Fire Company No. 13 (Claymont) responded to an emergency call located at Oldmans Creek, identified as run number 2022739.

109. On June 25, 2002, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 2025017.

110. On June 26, 2002, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 2025058.

111. On July 5, 2002, Fire Company No. 18 (Goodwill) responded to an emergency call located at Riverview Beach, identified as run number 2026558.

112. On July 9, 2002, Fire Company No. 15 (Delaware City) responded to an emergency call located within the Salem River, identified as run number 2027004.

113. On July 14, 2002, Fire Company No. 18 (Goodwill) responded to an emergency call located at Riverview Beach, identified as run number 2027875.
114. On July 15, 2002, Fire Company No. 15 (Delaware City) responded to an emergency call located at Salem Cove, identified as run number 2027961.
115. On July 22, 2002, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 2029008.
116. On August 8, 2002, Fire Company No. 15 (Delaware City) responded to an emergency call located at Salem Cove, identified as run number 2031643.
117. On August 10, 2002, Fire Company No. 18 (Goodwill) responded to an emergency call located at Riverview Beach, identified as run number 2031979.
118. On September 28, 2002, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 2039157.
119. On November 9, 2002, Fire Company No. 15 (Delaware City) responded to an emergency call located at Salem Cove, identified as run number 2045255.
120. On December 18, 2002, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 2050759.
121. On June 2, 2003 Fire Company No. 29 (Port Penn) responded to an emergency call located at Elsinboro Point, identified as run number 3021525.
122. On June 7, 2003, Fire Company No. 15 (Delaware City) responded to an emergency call located at Branch Channel, identified as run number 3022105.
123. On June 8, 2003, Fire Company No. 29 (Port Penn) responded to an emergency call located at Riverview Beach, identified as run number 3022254.

124. On June 15, 2003, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 3023455.

125. On July 4, 2003, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 3026415.

126. On July 6, 2003, Fire Company No. 15 (Delaware City) responded to an emergency call located at Cedar Point, identified as run number 3026723.

127. On July 29, 2003, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 3029974.

128. On August 14, 2003, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 3032328.

129. On August 18, 2003, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 3032834.

130. On August 21, 2003, Fire Company No. 29 (Port Penn) responded to an emergency call located at Oakwood Beach, identified as run number 3033383.

131. On August 24, 2003, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 3033902.

132. On May 23, 2004, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 4020506.

133. On May 23, 2004, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 4020528.

134. On May 29, 2004, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 4021364.

135. On June 19, 2004, Fire Company No. 20 (Holloway Terrace) responded to an emergency call located at DuPont Chambers Works, identified as run number 4024615.
136. On July 3, 2004, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 4026648.
137. On July 24, 2004, Fire Company No. 18 (Goodwill) responded to an emergency call located off Penns Beach, identified as run number 4029787.
138. On July 31, 2004, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 4030793.
139. On August 6, 2004, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 4031587.
140. On August 22, 2004, Fire Company No. 15 (Delaware City) responded to an emergency call located within the Salem River, identified as run number 4033851.
141. On August 28 2004, Fire Company No. 15 (Delaware City) responded to an emergency call located within the Salem River, identified as run number 4034666.
142. On August 28 2004, Fire Company No. 29 (Port Penn) responded to an emergency call located at Oakwood Beach, identified as run number 4034685.
143. On August 29, 2004, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 4034771.
144. On September 10, 2004, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 4036548.
145. On December 1, 2004, Fire Company No. 20 (Holloway Terrace) responded to an emergency call located opposite Pennsville, identified as run number 4048585.

146. On December 11, 2004, Fire Company No. 18 (Goodwill) responded to an emergency call located at Penns Beach, identified as run number 4050030.

147. On December 27, 2004, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 4052213.

148. On December 28, 2004, Fire Company No. 29 (Port Penn) responded to an emergency call located at Mill Creek Cove, identified as run number 4052449.

149. On April 17, 2005, Fire Company No. 29 (Port Penn) responded to an emergency call located at Oakwood Beach, identified as run number 5018098.

150. On May 5, 2005, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 5020902.

151. On May 8, 2005, Fire Company No. 15 (Delaware City) responded to an emergency call located at Salem Cove, identified as run number 5021605.

152. On May 13, 2005, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 5022457.

153. On June 4, 2005, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 5026221.

154. On June 25, 2005, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 5029712.

155. On June 30, 2005, Fire Company No. 15 (Delaware City) responded to an emergency call located within the Salem River, identified as run number 5030596.

156. On July 31, 2005, Fire Company No. 29 (Port Penn) responded to an emergency call located across from Artificial Island, identified as run number 5035825.

157. On August 28, 2005, Fire Company No. 18 (Goodwill) responded to an emergency call located at Penns Beach, identified as run number 5040573.

158. On August 29, 2005, Fire Company No. 15 (Delaware City) responded to an emergency call located within the Salem River, identified as run number 5040639.

159. On September 9, 2005, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 5042588.

160. On September 23, 2005, an incident was reported in Fire District 11 (Brandywine Hundred) and Delaware emergency responders responded to the call located at Oldmans Point, identified as run number 5045097.

161. On September 25, 2005, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 5045448.

162. On October 1, 2005, Fire Company No. 15 (Delaware City) responded to an emergency call located at Pea Patch Island, identified as run number 5046481.

163. On October 24, 2005, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 5050206.

164. On April 11, 2006, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 6017099.

165. On June 13, 2006, Fire Company No. 29 (Port Penn) responded to an emergency call located at Artificial Island, identified as run number 6028513.

166. On July 9, 2006, Fire Company No. 18 (Goodwill) responded to an emergency call located at Riverview Beach, identified as run number 6033353.

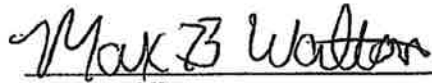
167. On July 18, 2006, Fire Company No. 18 (Goodwill) responded to an emergency call located at Penns Beach, identified as run number 6034983.

168. On July 25, 2006, Fire Company No. 29 (Port Penn) responded to an emergency call located at Mill Creek Cove, identified as run number 6036258.

169. On September 18, 2006, Fire Company No. 29 (Port Penn) responded to an emergency call located at Oakwood Beach, identified as run number 6045912.


William F. Streets

Subscribed and Sworn To
Before Me This 19 Day
of December, 2006


Notary Public
Of The State Of Delaware