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

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STATE OF NEW JERSEY,

*Plaintiff,*

v.

STATE OF DELAWARE,

*Defendant.*

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

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**NEW JERSEY'S REPLY BRIEF AND APPENDIX IN SUPPORT OF ITS MOTION TO  
STRIKE DELAWARE'S ISSUES OF FACT NO. 1, 2, 6, 8, AND 9  
AND TO PRECLUDE DISCOVERY ON THESE ISSUES**

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## SUMMARY OF ARGUMENT

As New Jersey explained in its opening brief, Delaware has identified several issues of fact and law that are irrelevant to the matter before the Special Master, interpretation of the Compact of 1905, or necessarily intrude upon privileged areas. Delaware's brief in opposition to New Jersey's motion demonstrates that these issues do not relate to the Compact, but that Delaware intends to use the discovery process to collaterally attack the Supreme Court's decision to exercise original jurisdiction over this dispute. In so doing, Delaware fails to recognize the legal significance of the Supreme Court's decision and its resolution of the jurisdictional issues raised by Delaware in opposition to New Jersey's motion for leave to file an original action. Delaware also fails to recognize that its own motion for appointment of the Special Master was based solely on the need for development of the historical and factual record relevant to interpretation of the Compact. Further, Delaware's opposition makes it clear that Delaware also wishes to turn this case into a debate about the merits of the BP/Crown Landing project, rather than focusing, as it should, on the States' Compact rights.

It is not appropriate for Delaware to use the discovery process to relitigate issues previously decided by the Court, to distract from the bona fide matters at issue, or to turn this case into an examination of the BP/Crown Landing project. Thus, discovery on these issues should not be allowed.

## LEGAL ARGUMENT

### I. **DELAWARE SHOULD NOT BE ALLOWED TO RELITIGATE ISSUES DECIDED BY THE SUPREME COURT.**

In July 2005, New Jersey initiated this suit in the Supreme Court to resolve the controversy between New Jersey and Delaware concerning the rights of the respective States under the Compact of 1905. This current controversy between the States is actually just the latest dispute between the States over issues of sovereignty and jurisdiction in the Delaware River within the Twelve-Mile Circle. See *New Jersey v. Delaware II*, 291 U.S. 361 (1934); *New Jersey v. Delaware I*, 205 U.S. 550 (1907). In November 2005, the Supreme Court granted New Jersey leave to proceed, thus exercising its original jurisdiction over this matter. See *New Jersey v. Delaware III*, 126 S.Ct. 713 (2005).

By exercising its original jurisdiction, the Court resolved a number of underlying issues that had been argued at length in the briefs on New Jersey's motion. Most importantly, the Supreme Court's decision necessarily determined that New Jersey had articulated a real injury to its sovereign interests by alleging that Delaware's actions have violated New Jersey's contractual rights under the Compact. Thereafter, the Court appointed the Special Master in response to a motion by Delaware arguing that a special master was needed to oversee discovery concerning the historical and legal context of the 1905 Compact and that such discovery was required before a ruling could be made on the merits of the Compact dispute.

In the preliminary proceedings before the Special Master, Delaware made it clear that it intended to pursue discovery on matters unrelated to the interpretation of the 1905 Compact, and also intended to relitigate issues resolved by the Supreme Court's decision to hear this dispute. (See, e.g., DE Issues of Fact and Law, submitted on February 17, 2006). At the Special Master's

invitation, New Jersey filed a *motion requesting* that the Special Master determine that these issues are irrelevant and that discovery on these issues be precluded. (See NJ Brief<sup>1</sup> at 13).

Delaware's response to New Jersey's motion shows that Delaware has little inclination to discuss what is actually at issue in this case, interpretation of the Compact of 1905. Instead, Delaware intends to use the discovery process to collaterally attack the Supreme Court's decision to exercise original jurisdiction over this dispute. To justify this, Delaware places no legal significance on the Supreme Court's decision to grant New Jersey's motion for leave to file its complaint. In fact, Delaware goes so far as to suggest that New Jersey has the burden at this point to establish that the Court has jurisdiction to hear this dispute. (DE Brief<sup>2</sup> at 8).

Delaware's arguments ignore the fact that the Court exercises its original jurisdiction only "sparingly," *Maryland v. Louisiana*, 451 U.S. 725, 739 (2002) (quotations omitted), and that the Court's requirement that leave be sought to file a complaint in an original action "serves an important gatekeeping function" that "follows from [the Court's] traditional reluctance to exercise original jurisdiction in any but the most serious of circumstances." *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995).

Delaware's arguments also ignore the fact that it raised its several jurisdictional arguments with the Court in its Brief in Opposition to the State of New Jersey's Motion to Reopen and for a Supplemental Decree, filed on October 27, 2005 ("DE Opposition"). (See DE Opposition at 25-29 (arguing that the injury to New Jersey was purely speculative until all federal and state agencies had completed their reviews of the BP/Crown Landing Project); *id.* at

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<sup>1</sup> Citations to "NJ Brief" refer to "Brief of State of New Jersey in Support of its Motion to Strike Delaware's Issues of Fact No. 1, 2, 6, 8, and 9 and to Preclude Discovery on These Issues," filed on March 20, 2006.

<sup>2</sup> Citations to "DE Brief" refer to "Opposition of State of Delaware to Motion of State of New Jersey to Strike Delaware's Issues of Fact No. 1, 2, 6, 8, and 9 and to Preclude Discovery on These Issues," filed on May 5, 2006.

30-32 (arguing that BP, not New Jersey, was the real party in interest); *id.* at 32-35 (arguing that the Court should decline to exercise jurisdiction because an alternative forum was available to BP to challenge the Delaware permit denial)). Thus, by granting New Jersey's motion for leave to file, the Court resolved these challenges to the exercise of its jurisdiction against Delaware. *See Maryland v. Louisiana*, 451 U.S. at 741 n.16 ("By granting plaintiffs' motions for leave to file, we rejected Louisiana's motions that the case should be dismissed . . . . Usually, when we decline to exercise our original jurisdiction, we do so by denying the motion for leave to file.").

Finally, Delaware's arguments ignore the representations it made to the Court in its Motion for Appointment of Special Master, filed on December 28, 2005 ("DE Motion for Special Master"). In that motion, Delaware argued that the Court should appoint a special master because a full development of the facts was necessary to resolve this question of "high public importance" that is part of the "long-standing dispute between the two States." (DE Motion for Special Master at 4, 9). Delaware also argued that a special master would be best positioned to oversee discovery and to consider in the first instance a number of issues concerning the interpretation of the 1905 Compact. (*Id.* at 5-9). At no point, however, did Delaware assert that the special master should revisit the fundamental jurisdictional issues resolved by the Court's exercise of its original jurisdiction. Thus, Delaware should not now be allowed to reopen issues previously presented to and decided by the Court.

## **II. THE SPECIAL MASTER SHOULD USE HIS DISCRETION OVER THE DISCOVERY PROCESS AND PRECLUDE DISCOVERY ON IRRELEVANT MATTERS.**

In response to New Jersey's motion, Delaware argues that the relief sought by New Jersey is akin to a motion to strike a party's pleadings. (DE Brief at 7). In reality, New Jersey's motion is a request to place reasonable limits on the discovery process in response to certain



Issues of Fact identified by Delaware that are irrelevant. New Jersey's motion simply requests that the Special Master exercise his discretion over the discovery process to expedite the resolution of the matters of Compact interpretation actually at issue in this case.

“While the Federal Rules of Civil Procedure unquestionably allow broad discovery, a right to discovery is not unlimited.” *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1322 (Fed. Cir. 1990). In particular, “[d]iscovery may not be had regarding a matter which is not ‘relevant to the subject matter involved in the pending action.’” *Id.* at 1323 (quoting Fed. R. Civ. P. 26(b)(1)). “[R]equested information is not relevant to ‘subject matter involved’ in the pending action if the inquiry is based on the party’s mere suspicion or speculation.” *Micro Motion*, 894 F.2d at 1326.

Under Federal Rule of Civil Procedure 26(c), a court may issue a protective order precluding discovery into certain matters for “good cause shown.” Such “good cause” arises when discovery is sought concerning irrelevant matters. *See, e.g., Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 501-03 (W.D. Mich. 2005); *Collens v. City of New York*, 222 F.R.D. 249, 254-55 (S.D.N.Y. 2004). Such “good cause” also exists when discovery is sought concerning privileged matters. *See, e.g., Lectrolarm Custom Sys., Inc. v. Pelco Sales, Inc.*, 212 F.R.D. 567, 573 (E.D. Ca. 2002) (granting motion for protective order to preclude discovery of information protected by attorney client, work product, and common interest privileges, finding that “discovery [was] sought for the improper and harassing purpose of obtaining opposing counsel’s opinions, strategies and conclusions”).

Trial courts have broad discretion in resolving matters relating to discovery. *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681 (7<sup>th</sup> Cir. 2002). As the Supreme Court has stated:

[T]he discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they “be construed

to secure the just, *speedy*, and *inexpensive* determination of every action.” (Emphasis added.) To this end, the requirement of Rule 26 (b)(1) that the material sought in discovery be “relevant” should be firmly applied, and the district courts should not neglect their power to restrict discovery where “justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .” Rule 26 (c). With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process.

*Herbert v. Lando*, 441 U.S. 153, 177 (1979).

Courts routinely use their discretion over the discovery process to preclude discovery when it is used by a party as a fishing expedition to seek factual support for speculative allegations. *See, e.g., Zuk v. Eastern Pa. Psychiatric Inst. of Med. College of Pa.*, 103 F.3d 294, 299 (3d Cir. 1996) (“[D]iscovery is not intended as a fishing expedition permitting the speculative pleading of a case first and then pursuing discovery to support it; the plaintiff must have some basis in fact for the action.”). As the Federal Circuit has explained:

The discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable *without discovery*, not to find out if it has any basis for a claim. That the discovery might uncover evidence showing that a plaintiff has a legitimate claim does not justify the discovery request.

*Micro Motion*, 894 F.2d at 1327 (citations omitted) (emphasis in original).

Here, New Jersey has established that this case merits the Court’s consideration. Thus, the Special Master should use his discretion over the discovery process to expedite the resolution of the matters actually at issue in this case. While a protective order may not be directly applicable, since New Jersey has not yet been served discovery by Delaware, New Jersey respectfully suggests that the Special Master should apply the “good cause shown” standard of Rule 26(c) to limit the scope of discovery that Delaware has stated it intends to seek.

As New Jersey explained in its opening brief, and explains further below, Delaware has identified several issues of fact and law that are irrelevant to the matters in this case or intrude

upon privileged areas. (See NJ Brief at 16, 21-24). New Jersey brought this case to assert its Compact rights and to preclude Delaware from exercising jurisdiction in conflict with those rights. Thus, the Supreme Court recognized when it granted New Jersey's motion for leave to file this action that New Jersey clearly is the real party in interest. Nevertheless, Delaware's opposition brief makes it clear that Delaware seeks to use the discovery process to turn this interstate dispute into a dispute between Delaware and BP, and engage in a fishing expedition to buttress speculation and suspicion. This is beyond the scope of the current proceedings and serves no purpose other than harassment and distraction. Moreover, Delaware's response to this motion reveals that it seeks to discover privileged information beyond the scope of anything that could relate to the basis for New Jersey's decision to file this action. Thus, the Special Master should use his discretion to place appropriate limits on discovery.

### **III. DELAWARE RAISES NO NEW ISSUES OF FACT THAT WARRANT REOPENING THE SUPREME COURT'S DECISION TO ACCEPT JURISDICTION.**

In response to New Jersey's motion, Delaware argues that it is entitled to discovery in order to probe the relationship between New Jersey and BP, to obtain information that Delaware contends will reveal that BP is the real party in interest in this action. Delaware's real party in interest argument is totally meritless. As the Supreme Court recognized, New Jersey is the real party in interest because New Jersey seeks to enforce its sovereign rights under the Compact.

Delaware claims that it is not precluded from reraising its real party in interest argument because BP's privilege log reveals new information that undermines the factual basis for the Supreme Court's ruling. (DE Brief at 10). However, none of Delaware's innuendos or suggestions identifies a potential relationship between the interests of New Jersey and those of

BP that is inconsistent with the Supreme Court's determination. The Special Master should therefore find that Delaware is not entitled to relitigate the question of whether New Jersey is the real party in interest in this action, or to pursue its extensive and intrusive discovery requests on this issue. *See Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992) (prior jurisdictional rulings "should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated.") (quoting *Arizona v. California*, 460 U.S. 605, 619 (1983)).

The "relationship of BP's commercial interests in obtaining regulatory approval of the Crown Landing project to New Jersey's decision to bring this action" (DE Issue of Fact No. 2), did not come to light as an issue only after the Supreme Court's ruling. New Jersey's interest in proceeding with review of the BP project was asserted by New Jersey, and challenged by Delaware on New Jersey's Motion for Leave to Reopen. (*See* NJ Motion to Reopen<sup>3</sup> at 11-15, 21-22). Indeed, New Jersey identified Delaware's denial of the Crown Landing proposal as an element of the economic harm caused by Delaware's violation of the Compact, included among the justiciable interests creating a controversy ripe for Supreme Court review. (*Id.*; *see also* Petition at 11-14). New Jersey further advised the Court that its Board of Public Utilities had expressed the view that, provided BP's project could be implemented consistent with New Jersey's environmental and other regulations, it would provide supplies of fuel beneficial to the people of the State of New Jersey. (*See* Motion to Reopen at 81a-82a (Affidavit of Jeanne Fox, President of the New Jersey Board of Public Utilities)).

Moreover, it is clearly evident from New Jersey's inclusion in its Motion to Reopen of the Declaration of Lauren Segal, Vice President of Crown Landing, L.L.C., that BP was fully

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<sup>3</sup> Citations to "NJ Motion to Reopen" refer to New Jersey's Motion to Reopen and For a Supplemental Decree, filed on July 28, 2005.

supportive of acting together with New Jersey to support New Jersey's claims. (*See* Motion to Reopen at 131a-154a). This Declaration could not have been provided without some coordination between BP and New Jersey. Thus, Delaware's proposed inquiry into BP's interactions with New Jersey does not seek to probe new areas of factual inquiry, but rather to obtain evidence that is merely cumulative to the facts and issues already presented to the Court regarding New Jersey's interest in asserting jurisdiction over the BP project.

In short, BP's interest in the outcome of this case was identified to, and resolved by, the Supreme Court, whose jurisdictional ruling has become the law of the case. None of the factual allegations that Delaware seeks to pursue undermines the basis for the Supreme Court's ruling that New Jersey is the real party in interest. *See infra* at 9-17. To the contrary, cooperation between BP and New Jersey is not inconsistent with the conclusion that New Jersey is the real party in interest. Therefore, Delaware's proposed discovery into the relationship between New Jersey's interest in the proposed BP facility and its decision to file this action is irrelevant to the matters before the Special Master.

**IV. COOPERATION BETWEEN NEW JERSEY AND BP IN SUPPORT OF A COMMON INTEREST IS NOT INCONSISTENT WITH THE EXISTENCE OF THE JUSTICIABLE INTEREST THAT MAKES NEW JERSEY THE REAL PARTY IN INTEREST IN THIS CONTROVERSY.**

Following New Jersey's filing of this Motion to Strike Delaware's Issue of Fact No. 2 as irrelevant, BP produced to Delaware a privilege log identifying a number of communications between New Jersey and BP pertaining to the preparation and prosecution of this case. Delaware now responds to New Jersey's motion by arguing that the information revealed by this document illustrates its need for discovery regarding the possibility that New Jersey has entered agreements with BP "to perform substantial work on New Jersey's behalf or to make payments to New

Jersey in exchange for New Jersey agreeing to bring this litigation.” (DE Brief at 12). Delaware claims that such information would be “directly relevant to whether BP or New Jersey is the real party in interest.” (*Ibid.*). According to Delaware, if discovery shows that BP’s offer of litigation assistance was “instrumental in causing New Jersey to institute this case, . . . then dismissal for lack of jurisdiction would be proper.” (*Id.* at 14-15).

The information that Delaware seeks to discover is not relevant to the jurisdictional issue, or to any other issue in this case. The reasons for filing suit are not discoverable and do not confer or remove jurisdiction. Moreover, the fact that BP may benefit if New Jersey successfully enjoins Delaware’s assertion of jurisdiction does not undermine the Supreme Court’s conclusion that New Jersey is the real party in interest in this case. Any claim of regulatory jurisdiction necessarily involves the interests of private parties; indeed, the function of jurisdiction is to control or regulate private projects or activities. The benefits of jurisdiction over riparian projects include the right of the regulating state to choose the riparian improvements that it wants, according to its own laws and standards. A state’s desire to ensure that a particular project receives its own consideration does not somehow transform the state’s interest into one that belongs solely to the regulated party, and cancel out the state’s own jurisdictional and contractual interests guaranteed by a compact. Consequently, no amount of inquiry into whether New Jersey considered BP’s interests, or conferred with BP over litigation strategy, will eradicate New Jersey’s objectively identifiable interest. Therefore, Delaware’s Issue of Fact No. 2 should be stricken, and Delaware should be denied discovery on this issue.

New Jersey’s arguments are consistent with settled law, which establishes that the Supreme Court’s decision whether to exercise original jurisdiction is guided by its review of objective considerations pertaining to “the nature of the interest of the complaining State.”

*Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (quoting *Massachusetts v. Missouri*, 308 U.S. 1, 18 (1939)). To this end, the Court has established objective criteria for determining when it will exercise original jurisdiction. *Mississippi v. Louisiana*, 506 U.S. at 77 (the exercise of original jurisdiction requires a showing that the claims are of sufficient “seriousness and dignity” to warrant the Court’s attention, and that there is no alternative forum in which they can be fully resolved) (quotations omitted). As the Court has noted, “[t]he model case for invocation of this Court’s original jurisdiction is a dispute between States of such seriousness and magnitude that it would amount to a *casus belli* if the States were fully sovereign.” *Texas v. New Mexico*, 462 U.S. 554, 571, n.18 (1982)). New Jersey clearly has asserted such a claim.

Once a party has presented a cognizable claim under the appropriate jurisdictional standard, the Court has recognized that it is not appropriate to inquire into possible subjective motives for the suit. See *South Dakota v. North Carolina*, 192 U.S. 286, 311 (1904) (“If the law concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits.”) (quoting *Dickerman v. Northern Trust Co.*, 176 U.S. 181, 190 (1900) and citing *McDonald v. Smalley*, 26 U.S. (1 Pet.) 620, 624 (1828) (Marshall, C.J.)); see also *Lapides v. Board of Regents*, 535 U.S. 613, 621 (2002) (concluding that a State’s motivation for consenting to removal of a suit to federal court was not relevant to the determination of whether the State had waived its Eleventh Amendment immunity, and citing *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 426 (1916) (Holmes, J., concurring), for the proposition that “[m]otives are difficult to evaluate, while jurisdictional rules should be clear.”).

Delaware has not identified any case that supports the proposition that a state should be precluded from maintaining an original action to assert its own objectively identifiable interests,

merely because the state's action may also aid private parties wishing to have projects reviewed under that state's law.

Delaware relies on cases in which original jurisdiction was denied because states had no justiciable interests of their own, but rather asserted claims purely for the benefit of private parties. See *Illinois v. Michigan*, 409 U.S. 36, 36-37 (1972) (concluding that a suit by the Director of Insurance of the State of Illinois, acting as the liquidator of an Illinois provider of workmen's compensation insurance, did not call for the exercise of original jurisdiction because the only relief sought was reversal of a Michigan Supreme Court decision holding the private insurers liable for injuries to two Michigan workmen);<sup>4</sup> see also *Massachusetts v. Missouri*, 308 U.S. at 15-16 (declining jurisdiction over a dispute between two states as to which would be entitled to collect inheritance taxes, where there was no compact establishing contractual rights between the states, and where neither state would suffer economic harm because the estate was sufficiently large to cover the tax claims of both).

In each of the cases cited by Delaware, the Court declined jurisdiction because the state claimants had failed to assert any interests other than those of private parties. In contrast, New Jersey asserts a claim to enforce its contractual rights under the Compact of 1905 that will inure directly to it, and does not assert any separate claims on behalf of BP. Rather, BP's interest is that it may benefit if its application is reviewed under New Jersey law, which is somewhat more favorable than Delaware law.

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<sup>4</sup> Delaware has cited this case for the proposition that "the mere fact that this case involves an interstate compact and a question of the rights of states with respect to a boundary line" does not necessarily support original jurisdiction (DE Response at 15). The Court, however, did not adopt Illinois' characterization of the Uniform Insurers Liability Act, adopted by both states and containing reciprocal features, as having "the dignity of an interstate compact." See *Illinois v. Michigan*, 409 U.S. at 36-37. Thus, *Illinois v. Michigan* did not present a claim that Michigan interfered with compact rights or state interests.



Delaware's reliance on *Kansas v. Colorado*, 533 U.S. 1 (2001), to establish the relevance of a State's sole control over its own litigation to its status as the real party in interest, is similarly misplaced. The Supreme Court concluded in that case that Kansas properly invoked its original jurisdiction to recover monetary damages for injuries to Kansas farmers, caused by a depletion of water supply allegedly resulting from Colorado's violation of an interstate Compact with Kansas. *Id.* at 5-6. This ruling clearly supports New Jersey's position. In accepting Kansas's suit, the Court found that the "enforcement of an interstate water compact by means of a recovery of money damages can be within a State's proper pursuit of 'the general public interest' in an original action." *Id.* at 8 (quoting *Texas v. New Mexico*, 482 U.S. 124, 132 n.7 (1987) (emphasis supplied)). Further, the Court went on to note that Kansas was the real party in interest because

[t]he injury to individual farmers is but one component of the formula adopted by the Special Master to quantify the damages caused by Colorado's violation of its contractual obligations. In short, there is simply nothing in the record to suggest that the State of Kansas is merely a "nominal party" to this litigation or that the individual parties are "the real parties in interest."

*Id.* at 8-9. Thus, *Kansas v. Colorado* not only recognizes that a state is the real party in interest with respect to claims to enforce its contractual rights under a Compact, but also that this interest is not vitiated by the fact that the state's claims also will benefit private parties.

Delaware relies on *Kansas v. Colorado* for the proposition that the Court's conclusion that Kansas was the real party in interest depended on the fact that "the record . . . discloses that the State of Kansas has been in *full control of this litigation since its inception.*" (DE Brief at 12) (quoting *Kansas v. Colorado*, 533 U.S. at 8). Delaware fails to point out, however, that the Court attributed significance to this control because it meant that Kansas' "right to control the disposition of any recovery of damages [for injuries to private parties] is entirely

unencumbered." *Kansas v. Colorado*, 533 U.S. at 8. *Cf. North Dakota v. Minnesota*, 263 U.S. 365, 374-75 (1923) (denying original jurisdiction over a suit by North Dakota to recover monetary damages for flooding that it expected to pay directly to farmers because North Dakota asserted no compact or other state interest, but asserting jurisdiction over related claims for injunctive relief). In contrast, in this case New Jersey is asserting its own Compact rights and is not seeking any monetary or other relief that it could turn over to BP.

Delaware further identifies the timing of New Jersey's suit as evidence that this action was precipitated by the BP project. According to Delaware, any injury suffered by New Jersey has been occurring for at least thirty-five years, beginning with Delaware's unrealized enforcement action against DuPont in 1971, (*see* DE Brief at 16), which suggests that New Jersey filed its suit now only to advance BP's interest.

New Jersey filed this action, however, following the first adverse action taken by Delaware on a permit for riparian improvements on the New Jersey side of the Delaware River. The prior actions to which Delaware refers commenced with its attempt to require Dupont to obtain a Delaware subaqueous lease in 1971. Delaware's attempt to regulate Dupont, however, was not successful. Dupont contested Delaware's authority and never paid Delaware for the subaqueous lease it had demanded. Delaware's action in 1991 resulted in the issuance of a permit to Keystone, as it did with Fort Mott in 1996 and Fenwick Commons in 2005. It was not until its denial of BP's application in 2005 that Delaware took formal adverse action on any permit application for an improvement on New Jersey's side of the River, thus prompting New Jersey to act.

In short, although New Jersey submits that any attempt by Delaware to regulate riparian improvements adjacent to the New Jersey waterfront would present a justiciable violation of the

Compact, it is neither unreasonable nor surprising that New Jersey would not have acted earlier. Consequently, no inference supporting Delaware's claims for discovery can be drawn from New Jersey's action. Indeed, it is ironic that Delaware claims that New Jersey should have brought an action in response to one of these earlier events, since Delaware also argues that even New Jersey's current cause of action will not become ripe unless New Jersey grants BP a permit. (See DE Brief at 16).

Delaware argues that information regarding New Jersey's interactions with BP is also relevant to the question of whether there is an alternative forum in which this case can be resolved because, it claims, "New Jersey expressly relied" on the lack of any pending action by BP to argue that original jurisdiction is appropriate. (DE Brief at 13). According to Delaware, it is necessary to examine the relationship between New Jersey and BP in order to determine whether BP refrained from filing an action to assist New Jersey's claim for original jurisdiction. This, Delaware argues, would constitute "gamesmanship" that, if proven, "would independently warrant dismissal of this matter." (*Id.* at 14).

Delaware misconstrues the nature of New Jersey's argument that there was no alternative forum in which its Compact claims could be resolved. New Jersey's reply brief in support of its Motion for Leave to file correctly stated that "[i]t is undisputed . . . that New Jersey was not a party to Crown Landing's permit proceeding and Crown Landing did not litigate the Compact question." (NJ Reply Brief <sup>5</sup> at 9-10). Delaware, however, conveniently ignores the fact that New Jersey followed this statement by arguing that the existence of a pending action was irrelevant, because requiring New Jersey to litigate its compact questions in a Delaware court would "defeat the purpose of Article VII" by allowing one state to "unilaterally nullif[y]" the

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<sup>5</sup> Citations to "NJ Reply Brief" refer to "Reply Brief and Supplemental Appendix in Support of Motion to Reopen and for a Supplemental Decree," filed on November 8, 2005.

Compact.” (New Jersey Reply Brief at 10 (citing *West Virginia ex rel Dyer v. Sims*, 341 U.S. 22, 28 (1951))). New Jersey further relied on *Wyoming v. Oklahoma*, 502 U.S. at 451-52, for the proposition that the suggestion that there may be another, more convenient forum “does not apply here as New Jersey asserts a violation of its own Compact rights.” (NJ Reply Brief at 10).

Even the case cited by Delaware in support of its contention that an action by BP would have provided an alternative forum recognizes that states are entitled to have justiciable controversies arising under an interstate compact decided by the Supreme Court. See *West Virginia ex rel. Dyer v. Sims*, 341 U.S. at 28 (“It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States . . . can be unilaterally nullified, or given final meaning by an organ of one of the contracting States.”).<sup>6</sup> This legal principle was clearly the basis which New Jersey presented to the Court in support of its contention that there was no adequate alternative forum in which to resolve its grievance. Therefore, Delaware’s allegation that New Jersey misrepresented the possible existence of an alternative forum rests on an incorrect characterization of New Jersey’s arguments, and should be rejected.

Finally, a review of the documents identified as relevant by Delaware’s response to this motion reveals that Delaware seeks to discover privileged information beyond any that could possibly be pertinent to New Jersey’s decision to file this action. Among the “relevant” items identified in Delaware’s brief are “internal governmental documents (or portions of documents) that post-date New Jersey’s filing of its suit and any that describe facts about, for example, offers of assistance by BP to New Jersey -- or BP’s advice about how to prosecute this action,” (DE

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<sup>6</sup> In *West Virginia ex rel. Dyer v. Sims*, the state was a party to a pending action and therefore could have brought its claims on a petition for certiorari. See also *Illinois v. Michigan*, 409 U.S. at 37.

Brief at 19, emphasis supplied), which Delaware claims are not protected by the government's deliberative process privilege because they postdate New Jersey's decision to file the action. Aside from revealing New Jersey's strategic determinations as to how to proceed with this action, it is difficult to see how the manner in which New Jersey drafted its briefs or proceeded with its litigation is relevant to the jurisdictional question. Indeed, it is hard to discern any motive for Delaware's suggested discovery, other than an attempt to avoid examination of the merits of this dispute and to distract from the real issue in this case, interpretation of the Compact of 1905.

#### **V. DISCOVERY ON ISSUES OF FACT 1, 6, 8, AND 9 SHOULD BE PRECLUDED.**

In addition to its attempt to relitigate the issue of the Court's jurisdiction over this matter, Delaware also intends to seek discovery on a number of other issues of fact that are irrelevant to the matters at issue in this case. These are addressed below:

DE Issue of Fact No. 1: What projects, other than BP's Crown Landing project, are under consideration or pending for approval in New Jersey within the twelve-mile circle and implicate Article VII or VIII of the 1905 Compact?

New Jersey claims that this issue is irrelevant because any pending or future projects are not relevant to the meaning of the 1905 Compact. (NJ Brief at 21-24). Delaware dismisses this argument and states that it does not seek discovery on this issue to interpret the Compact, but instead to avoid further disputes about the scope of relief the Court may award. Yet, Delaware then suggests that "concrete examples" of currently contemplated projects will assist with an understanding of the term "riparian" in the 1905 Compact "in light of the contemporaneous legal context." (DE Brief at 21-22). Thus, Delaware admits that it seeks this discovery, at least in part, to aid the interpretation of the 1905 Compact, without explaining how projects

contemplated over a century later are relevant to the Compact's "contemporaneous legal context."

Further, Delaware is incorrect that the Court's ruling requires "concrete examples" of pending projects in order to avoid future litigation. To the contrary, a narrow ruling based on a few concrete examples is more likely to leave uncertainty about the States' respective rights under the Compact and spawn further disputes than a broad ruling focused on the Compact itself.

Finally, Delaware claims that it has no reasonable way of obtaining information about pending projects without formal discovery. (DE Brief at 21). It is New Jersey's understanding that Delaware is aware of all pending projects in the Twelve-Mile Circle, either through the informal discovery provided by New Jersey earlier in this case or through contacts between state agencies and the private parties contemplating projects in this area. Moreover, if Delaware truly is concerned about notice, it should confer with New Jersey on a method of providing such notice. However, Delaware has never tried to do this.

DE Issue of Fact No. 6: Have the other projects previously approved by New Jersey within the twelve-mile circle required the dredging of Delaware's submerged land? If so, has the dredging been on a scale commensurate with BP's Crown Landing project?

New Jersey does not object to this issue, to the extent that it contemplates discovery concerning other projects previously approved by New Jersey within the Twelve-Mile Circle that have involved dredging. Clearly, such projects are part of the States' course of performance under the 1905 Compact and are already covered by Delaware's Issue of Fact No. 5: "What were the scope and type of projects previously approved by New Jersey within the twelve-mile circle?"

Rather, New Jersey's objection to Delaware Issue of Fact No. 6 is that it further illustrates Delaware's attempt to focus this lawsuit on the BP/Crown Landing project and distract from the main issue in this case: the scope of the States' jurisdiction under the 1905 Compact. Further, to the extent that Delaware seeks information on the dredging associated with the BP Crown Landing project, Delaware fails to establish why it needs formal discovery on this issue. The BP/Crown Landing project is the subject of voluminous public filings containing detailed information on the scope and status of the project. *See* Fed R. Civ. P. 26(b)(2) (empowering courts to limit the scope of discovery if "the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive"). Further, BP has now provided voluminous documents to Delaware regarding the Crown Landing project. (See BP Motion to Quash at 11).

DE Issue of Fact No. 8: What is the nature and scope of BP's Crown Landing liquefied natural gas unloading facility?

This issue of fact again illustrates Delaware's attempt to distract from the main issue in this case and instead focus this lawsuit on the BP/Crown Landing project. And Delaware again fails to establish why it needs formal discovery on this issue, in light of the fact that the BP/Crown Landing project is the subject of voluminous public filings containing detailed information on the scope and status of the project. (*See, e.g.*, DE Opposition at 9-11, 17-21, 139a-143a (discussing the scope and status of the BP Project); DE Brief at 23 (quoting documents submitted to the Federal Energy Regulatory Commission (FERC) by BP)).<sup>7</sup>

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<sup>7</sup> *See also* FERC Final Environmental Impact Statement on the Crown Landing LNG and Logan Lateral Projects (Docket Nos. CP04-411-000 and CP04-416-000), issued on April 28, 2006, available at <http://www.ferc.gov/industries/lng/enviro/eis/04-28-06-eis-crown.asp#skipnavsub> ("FERC Final EIS").

Delaware asserts that “[t]he publicly available documents will not necessarily provide all the information relevant to this case,” (DE Brief at 24), yet Delaware fails to justify the need for formal discovery by explaining what additional information it needs that is not readily available. See Fed R. Civ. P. 26(b)(2).

Delaware correctly notes that New Jersey included information about the BP/Crown Landing project in its initial pleadings to the Court. However, New Jersey discussed the project in its initial filings with the Court to explain the context of the dispute between the States justifying the Court’s exercise of its original jurisdiction. Moreover, New Jersey’s discussion of the scope and status of the project, including the Declaration of Lauren Segal, Crown Landing’s Vice President, was derived from publicly available documents concerning the permit application process, including exhibits that consisted of correspondence between BP/Crown Landing and Delaware. Nothing offered by New Jersey justifies the expansive discovery that Delaware clearly seeks to pursue on this issue.

DE Issue of Fact No. 9: Has BP obtained all necessary New Jersey government permits for the Crown Landing project?

Delaware argues that this issue is relevant to “whether this case is ripe and, therefore, whether this Court has jurisdiction over this dispute.” (DE Brief at 25). However, Delaware raised the issue of ripeness in its opposition to New Jersey’s motion to leave to file. (See Delaware Opposition to Motion to Reopen at 25-29) (arguing that New Jersey had failed to establish a case or controversy because the injury to New Jersey was purely speculative until all federal and state agencies had completed their reviews of the BP/Crown Landing Project). The



Supreme Court rejected this argument, and there is no basis for Delaware to relitigate it now.<sup>8</sup>

Thus, discovery on this issue is unnecessary and inappropriate.

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<sup>8</sup> In fact, the ripeness of this dispute has been confirmed by FERC's issuance of its Final EIS concerning the BP/Crown Landing project. In the Final EIS, FERC recommends that BP/Crown Landing obtain approval from both New Jersey and Delaware, while recognizing the ongoing dispute between the States over the permitting authority over the project. (See Appendix at 3a-7a, FERC Final EIS at 4-97 to -101).

## CONCLUSION

For the reasons stated above, New Jersey respectfully requests that the Special Master grant New Jersey's motion to strike Delaware's Issues of Fact No. 1, 2, 6, 8, 9 and to enjoin discovery related to those issues.

Respectfully submitted,

STATE OF NEW JERSEY

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May 22, 2006

## **APPENDIX**

FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, D.C. 20426  
OFFICE OF ENERGY PROJECTS

U.S. ARMY CORPS OF ENGINEERS  
PHILADELPHIA DISTRICT  
PHILADELPHIA, PA 19107

In Reply Refer To:

OEP/DG2E/Gas Branch 1  
Crown Landing LLC  
Texas Eastern Transmission, L.P.  
FERC Docket Nos.  
CP04-411-000  
CP04-416-000

(COE Application Nos.  
CENAP-OP-R-200500145  
CENAP-OP-R-200500146)

TO THE PARTY ADDRESSED:

The staff of the Federal Energy Regulatory Commission (FERC or Commission) in cooperation with the U.S. Army Corps of Engineers (COE), U.S. Coast Guard, U.S. Environmental Protection Agency (EPA), and National Oceanic and Atmospheric Administration Fisheries has prepared a final Environmental Impact Statement (EIS) for a liquefied natural gas (LNG) import terminal (referred to as the Crown Landing LNG Project) proposed by Crown Landing LLC (Crown Landing), a BP Energy Company (BP) affiliate, and natural gas pipeline facilities (referred to as the Logan Lateral Project) proposed by Texas Eastern Transmission, L.P. (Texas Eastern) in the above-referenced dockets.

The final EIS was prepared to satisfy the requirements of the National Environmental Policy Act (NEPA). The staff concludes that approval of the proposed projects with appropriate mitigating measures as recommended, would have limited adverse environmental impact. The final EIS also evaluates alternatives to the proposal, including system alternatives, alternative sites for the LNG import terminal, and pipeline alternatives.

The proposed LNG terminal would be located on the shoreline of the Delaware River in Logan Township, Gloucester County, New Jersey, and would consist of facilities capable of unloading LNG ships, storing up to 450,000 cubic meters (m<sup>3</sup>) of LNG (9.2 billion cubic feet of natural gas equivalent), vaporizing the LNG, and sending out natural gas at a baseload rate of 1.2 billion cubic feet per day (Bcfd) and a maximum rate of 1.4 Bcfd (using spare equipment). Crown Landing proposes to interconnect the LNG facilities onsite with three pipelines. One interconnect would be with the new pipeline that Texas Eastern proposes to construct and operate (i.e., Logan Lateral) between its

[MATERIAL OMITTED]

proposed pipeline route would be about 500 feet south of the building but Texas Eastern is planning to utilize the property surrounding the school for a staging area. The staging area would be used temporarily during construction and should not interfere with future development plans.

The existing PECO Chester Generating Station located adjacent to the Delaware River is currently being renovated for "Class A" office space by Rivertown Developers LP. A parking lot associated with the building is currently under construction. The proposed pipeline would cross the Delaware River adjacent to the office building and would cross the associated parking lot, which would be completed before pipeline construction. As a result, the installation of the pipeline would impact the newly constructed parking lot. To minimize parking-related impacts, Rivertown Developers LP has indicated that they could provide a vacant lot that Texas Eastern could asphalt in order to provide alternate parking for tenants during construction. Texas Eastern would repair any construction-related damage to the permanent parking lot after completion of construction. The portion of the development referred to as the Wharf on the Boardwalk would not be directly affected by pipeline construction or operation. Prior to construction, Texas Eastern would work with Rivertown Developers LP to minimize noise and traffic-related impacts on the development. We also evaluated alternative Delaware River crossing locations that would avoid this new development. However, these alternatives were not considered to be environmentally preferable to the proposed pipeline route (see section 3.5.2).

Within Logan Township, Gloucester County, New Jersey, a project proposal championed by the County Improvement Authority is in the final planning stages and would include conversion of a dredge spoil area to a proposed equestrian park south of Raccoon Creek and west of U.S. Route 130. The park, referred to as the Delaware River, Equine, Agriculture, and Marine Park would encompass 1,400 acres of land extending from the Delaware River to U.S. Route 130, and from Raccoon Creek to Birch Creek. Construction could begin on the equestrian park in 2006 (Gloucester County Improvement Authority, 2005). The proposed pipeline would cross the property under consideration for the equestrian park; however, no conflicts have been identified.

In addition to these planned developments, two dredge disposal sites proposed by the COE for its Delaware River Main Channel Deepening Project could be affected by the proposed Logan Lateral Project. One of the dredge disposal sites is located on Raccoon Island. The portion of the proposed pipeline route along Ferry Road on the island crosses this proposed disposal site. The other dredge disposal site is located west of Raccoon Creek adjacent to U.S. Route 130 (Site 15D). Texas Eastern met with the COE to discuss the proposed dredging of the Delaware River and the use of the proposed Raccoon Island Site and Site 15D for the disposal of dredged material. Texas Eastern is currently evaluating several options discussed with the COE to accommodate both the proposed dredging project and the Logan Lateral Project.

#### 4.8.3 Coastal Zone Management

In 1972, Congress passed the CZMA to "preserve, protect, develop, and where possible, to restore or enhance, the resources of the nation's coastal zone for this and succeeding generations" and to "encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone" (16 USC 1452, section 303 (1) and (2)).

Section 307 (c)(3)(A) of the CZMA states that "any applicant for a required federal license or permit to conduct an activity, in or outside the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program." In order to participate in the coastal zone management program, a

state is required to prepare a program management plan for approval by the NOAA, Office of Coast and Ocean Resource Management (OCRM). Once the OCRM has approved a plan and its enforceable program policies, a state program gains "federal consistency" jurisdiction. This means that any federal action (e.g., a project requiring federally issued licenses or permits) that takes place within a state's coastal zone must be found to be consistent with state coastal policies before federal action can take place.

The Crown Landing LNG and Logan Lateral Projects are subject to a federal Coastal Zone Consistency Review because they would 1) involve activities within the coastal zones of New Jersey, Delaware, and Pennsylvania as described in sections 4.8.3.1, 4.8.3.2, and 4.8.3.3, respectively; and 2) require several federal permits and approvals (see tables 1.3-1 and 1.3-2). New Jersey, Delaware, and Pennsylvania all have approved coastal zone management programs administered by the NJDEP, the DNREC, and the PADEP, respectively. A description of each state's program, the applicable project activities, and information provided by Crown Landing in its FERC section 3(a) application and Texas Eastern in its FERC section 7(c) application regarding consistency of the projects with state policies is provided below. NOAA has indicated that because neither Delaware, New Jersey, nor Pennsylvania have completed the interstate consistency consultation and program change processes described in 15 CFR 930 subpart I, New Jersey can only review that part of the Crown Landing LNG and Logan Lateral Projects located in New Jersey, Delaware can only review that part of the Crown Landing LNG Project located in Delaware, and Pennsylvania can only review that part of the Logan Lateral Project located in Pennsylvania. However, the NJDEP claims that the Compact of 1905 between New Jersey and Delaware gives New Jersey exclusive riparian jurisdiction of every kind and nature on its side of the Delaware River (see section 4.8.3.2).

#### 4.8.3.1 New Jersey

The New Jersey Coastal Management Program (NJCMP) was approved by the OCRM in 1980 and updated in 2000. Federal consistency reviews are conducted by the NJDEP using the Coastal Zone Management rules, which contain several state laws that are the primary implementing authorities for the NJCMP. These laws included the Coastal Area Facility Review Act (CAFRA), the Waterfront Development Law, and the Wetlands Act of 1970, Tidelands Statues, and the Hackensack Meadowlands Reclamation and Development Act (NJDEP, 2002b). In addition to its coastline along the Atlantic Ocean, New Jersey's coastal zone includes, among other areas, the Delaware River and Bay and other tidal streams of the Atlantic Coastal Plain. New Jersey defines its coastal management area as including all lands up to 500 feet from mean high water.

The activities associated with the Crown Landing LNG and Logan Lateral Projects within the coastal zone of New Jersey and subject to the policies of the NJCMP include:

- LNG ship transit in New Jersey waters;
- the portion of the pier associated with the LNG terminal in New Jersey waters;
- the LNG terminal and associated transmission line facilities; and
- approximately 0.9 mile of the pipeline adjacent to and within the Delaware River, Raccoon Creek, Birch Creek, and two unnamed tidal waterways.

Although only a portion of the pier would be located in New Jersey waters, the NJDEP has stated that construction of the entire pier and any associated dredging would be subject to New Jersey's exclusive review and permitting authority (see section 4.8.3.2).

The Crown Landing LNG Project is not subject to the CAFRA or the Hackensack Meadowlands Reclamation and Development Act because the project facilities are not located within the areas subject to these laws<sup>6</sup>; however, it is subject to the other laws associated with the NJCMP. On January 7, 2005, Crown Landing filed a compliance statement for coastal zone management rules as part of its Waterfront Development Permit application. The compliance statement indicated that the Crown Landing LNG Project was designed to comply with the coastal zone rules; however, on February 4, 2005, the NJDEP indicated that Crown Landing's Waterfront Development Permit application was deficient and requested additional information. Crown Landing provided the additional information on May 11, 2005 but received a second notice of deficiency from the NJDEP on July 15, 2005. On August 23, 2005, Crown Landing provided the NJDEP with additional information requested in the second notice of deficiency.

On June 10, 2005, Texas Eastern filed a compliance statement for coastal zone management rules as part of its Waterfront Development Permit application. Texas Eastern indicated that the Logan Lateral Project would be in compliance with all applicable coastal zone rules; however, in late September 2005, the NJDEP requested that Texas Eastern withdraw its Waterfront Development Permit application because it was approaching the time limit for department review under New Jersey's 90-day Construction Law. The NJDEP indicated that Texas Eastern could not adequately justify the purpose and need for the Logan Lateral Project until the issues associated with the Crown Landing LNG Project were resolved (see section 4.8.3.2). Texas Eastern withdrew its permit application on October 7, 2005.

If the Crown Landing LNG and Logan Lateral Projects are approved by the Commission, concurrence from the NJDEP that the projects are consistent with the NJCMP must be received prior to any issuance of a Notice to Proceed with construction from the Secretary of the FERC. Therefore, we recommend that:

- **Crown Landing and Texas Eastern file documentation of concurrence from the NJDEP that the projects are consistent with the NJCMP with the Secretary prior to construction.**

#### 4.8.3.2 Delaware

The agency responsible for implementing Delaware's coastal zone management program is the DNREC. The Delaware Coastal Management Program (DCMP) was approved by the OCRM in 1979 and updated in 1993 and 1998. Delaware differentiates between the 'coastal zone' and the 'coastal strip' of the state. The coastal zone includes the entire state, which is managed by the DCMP through several state laws and authorities, including the federal CZMA. The coastal strip was defined by the Delaware State Coastal Zone Act of 1971 (DSCZA) as a band of land approximately 4 miles wide that parallels the entire Delaware coastline. The DSCZA is the primary authority for regulating heavy industry, manufacturing, and bulk transfer facilities in the coastal strip (DNREC, 2004b). The DSCZA is also incorporated into the DCMP.

The offshore facilities of the Crown Landing LNG Project would be located within the coastal zone of Delaware, which extends to the New Jersey shoreline. The offshore facilities would also be located within the coastal strip as defined by the DSCZA. For these reasons, the State of Delaware has claimed permitting authority for these facilities.

<sup>6</sup> The CAFRA area begins where the Cheesapeake Creek enters Raritan Bay in Old Bridge in Middlesex County and extends south along the coast around Cape May and north along Delaware Bay to the Kilchook National Wildlife Refuge in Salem County, about 15 miles downstream of the proposed LNG terminal site. The Hackensack Meadowlands District is a 19,730-acre area of water, wetlands, and associated uplands in Hudson and Bergen Counties.



According to the DSCZA, "heavy industry uses of any kind not in operation on June 28, 1971, are prohibited in the coastal zone and no permits may be issued therefore. In addition, offshore gas, liquid or solid bulk product transfer facilities which are not in operation on June 28, 1971, are prohibited in the coastal zone, and no permit may be issued therefore" (7 Del. C. 1953, § 7003; 58 Del. Laws, c. 175; 64 Del. Laws, C. 240, § 6; 66 Del. Laws, c. 256, § 1; 71 Del. Laws, c. 348, § 2). Bulk product transfer facilities are defined as "any port or dock facility, whether an artificial island or attached to shore by any means, for the transfer of bulk quantities of any substance from vessel to onshore facility or vice versa. Not included in this definition is a docking facility or pier for a single industrial or manufacturing facility for which a permit is granted or which is a nonconforming use. Likewise, docking facilities for the Port of Wilmington are not included in this definition" (7 Del. C. 1953, § 7002; 58 Del. Laws, c. 175; 61 Del. Laws, c. 116, § 88(a); 62 Del. Laws, c. 119, § 1,2; 63 Del. Laws, c. 191, § 1(a); 71 Del. Laws, c. 348, §).

Because the Crown Landing LNG Project would involve transit of LNG ships and construction of a new pier and other facilities within Delaware's coastal zone to convey LNG from ships to the terminal, a determination on whether the facilities would be a permissible use under the DSCZA is required. On December 7, 2004, Crown Landing submitted an application to the DNREC for a status determination on the new pier within Delaware's coastal zone. The application is the first step in determining whether the pier would be permitted under the DSCZA. In its application, Crown Landing claimed that the construction of the proposed pier is a permissible use under the DSCZA pursuant to the provisions of § 7002(f) of title 7 because it would exclusively support a single facility that meets the definition of "manufacturing" pursuant to § 7002(d).

In a letter dated February 3, 2005 from DNREC to Crown Landing, the DNREC issued a Coastal Zone Act Status Decision, which determined that the proposed LNG off-loading pier in the Delaware River is prohibited by the State's Coastal Zone Act. On February 15, 2005, Crown Landing filed an appeal of the February 3, 2005 ruling with the State Coastal Zone Industrial Control Board. The State Coastal Zone Industrial Control Board held a public hearing on March 30, 2005 to consider Crown Landing's appeal. The DNREC's ruling was upheld by the State Coastal Zone Industrial Control Board at the March 30, 2005 hearing. Crown Landing had 20 days to appeal the State Coastal Zone Industrial Control Board's decision to the Delaware Superior Court but no appeal was made.

Because the DSCZA is incorporated into the DCMP, Crown Landing has not filed a draft federal consistency certification with the DNREC. The DNREC's decision on the DSCZA would likely result in its objection to a consistency certification for the project. If the DNREC did object to a federal consistency certification, Crown Landing could appeal Delaware's decision to the U.S. Department of Commerce. The provisions of 15 CFR Part 930, Subpart H, outline procedures by which the Secretary of Commerce may override a state's objection if the Secretary of Commerce finds that a federal license or permit activity, which is inconsistent with the DCMP, may be federally approved because the activity is consistent with the objectives or purposes of the federal CZMA or is necessary in the interest of national security (DCMP, 2004). In order to be consistent with the objectives or purpose of the federal CZMA, an activity determined to be inconsistent with the DCMP must be found by the Secretary of Commerce to be permissible because it satisfies the following four requirements:

- the activity furthers one or more of the competing national objectives or purposes contained in sections 302 or 303 of the CZMA;
- when performed separately or when its cumulative effects are considered, it would not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest;
- the activity would not violate any requirement of the CAA or CWA as amended; and

- there is no reasonable alternative available that would permit the activity to be conducted in a manner consistent with the DCMP.

In another development, the NJDEP in a letter dated May 24, 2005 stated that although a portion of the pier would be located in Delaware waters, construction of the entire pier and any associated dredging would be subject to New Jersey's exclusive review and permitting authority and not that of the State of Delaware. The NJDEP cited the Compact of 1905 between New Jersey and Delaware, which was approved by the legislatures of both states and the United States Congress and gives New Jersey exclusive riparian jurisdiction of every kind and nature on its side of the Delaware River. The State of New Jersey has advised the State of Delaware that Article VII of the Compact of 1905 prohibits Delaware from using its DSCZA authority or any other state permitting authority to block the construction of projects appurtenant to the New Jersey shoreline. In July 2005, New Jersey asked the U.S. Supreme Court to hear the case and in November 2005 the U.S. Supreme Court agreed (*New Jersey v. Delaware*, 126 S. Ct. 713 (U.S. Nov. 28, 2005)).

At the present time, this issue is not resolved. Therefore, we recommend that:

- **Crown Landing file documentation of concurrence from the DNREC that the projects are consistent with the DCMP with the Secretary prior to construction:**

#### 4.8.3.3 Pennsylvania

Pennsylvania's coastal zone management program is administered by the PADEP and its Coastal Zone Management Plan (PCZMP) was approved by the OCRM in 1980. The PCZMP is based on a network of regulatory and non-regulatory policies that require specific coastal activities to comply with performance standards defined in the plan and in the regulations of other state authorities (PADEP, 2002). Pennsylvania's coastline along the Delaware River is 57 miles long and includes land in Bucks, Philadelphia, and Delaware Counties. The coastal zone along this area varies from about 0.1 mile wide in urban areas to over 3.5 miles in rural areas and extends to the boundary with New Jersey in the middle of the Delaware River. In the proposed project area, the coastal zone parallels the active Amtrak/SEPTA rail line running north to south. About 0.8 mile of the pipeline associated with the Logan Lateral Project would be located within the coastal zone of Pennsylvania and subject to the policies and performance standards of the PCZMP.

On October 4, 2005, Texas Eastern submitted its Commonwealth of Pennsylvania/COE Joint Permit Application, which was sent to the PADEP for a federal consistency determination. The PADEP provided its determination that the project is consistent with the PCZMP on February 17, 2006.

#### 4.8.4 Hazardous Waste Sites

No hazardous waste sites have been identified within the proposed LNG terminal site; however, eight potential areas of concern were identified through site reconnaissance and a prior Phase I Environmental Site Assessment. Soils around two of the sites contained elevated concentrations of total petroleum hydrocarbons and one site contained elevated concentrations of arsenic. No contamination was found at the remaining five sites. Additional information on potential contamination of soils and groundwater within the LNG terminal site are provided in sections 4.2.1 and 4.3.1, respectively, and potential contamination of sediments within the Delaware River is provided in section 4.2.2.

A search of several databases was conducted to identify hazardous waste sites within 0.25 mile of the proposed pipeline facilities. The databases identified a total of 30 hazardous, potentially hazardous,

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

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STATE OF NEW JERSEY,

*Plaintiff,*

v.

STATE OF DELAWARE,

*Defendant.*

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

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 22nd day of May 2006, counsel for the State of New Jersey caused New Jersey's Reply Brief in Support of its Motion to Strike Delaware's Issues of Fact No. 1, 2, 6, 8 and 9 and to Preclude Discovery on These Issues to be served upon counsel for the State of Delaware in the manner indicated below:

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