

KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.

SUMNER SQUARE
1615 M STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20036-3209

(202) 326-7900

FACSIMILE:
(202) 326-7999

November 8, 2006

By E-Mail and First-Class Mail

Ralph I. Lancaster, Jr., Esquire
Pierce Atwood
One Monument Square
Portland, ME 04101

**Re: *New Jersey v. Delaware*, No. 134, Original:
Delaware's Ninth Progress Report**

Dear Mr. Lancaster,

Pursuant to the Case Management Plan as amended, we respectfully submit Delaware's ninth and final progress report on the status of the case.

Since the last progress report, filed on October 2, 2006, the parties have completed depositions of fact witnesses. Pursuant to an e-mail from the Special Master dated November 5, 2006, approving an agreement reached by the parties, certain adjustments to the schedule were made to allow Delaware to complete its review of 75 boxes of documents made available by New Jersey on Thursday, November 2, 2006. The Special Master also approved New Jersey's request to extend the time for exchange of expert reports to November 9, 2006.

Despite the parties' meet-and-confer efforts, one discovery dispute remains for resolution by the Special Master. For 53 documents listed on New Jersey's privilege log, Delaware has challenged New Jersey's assertion of the deliberative-process privilege, attorney-client privilege and work product protection, which have been asserted either alone or in combination. (A copy of the log is enclosed with this letter.) Delaware believes that, for most of the documents, the privilege or protection has not been properly asserted. We would like to submit this dispute orally for resolution pursuant to CMP § 10.1.2.a.

In brief, with respect to documents as to which New Jersey has invoked the attorney-client privilege, some have no apparent association with an attorney or are not communications for the provision of legal advice. With respect to documents claimed to fall within the deliberative-process privilege, New Jersey's log does not provide a proper record to support the assertion. As the party invoking the privilege, New Jersey bears the "burden of justifying the application of the governmental deliberative process." *Kaufman v. City of New York*, No. 98

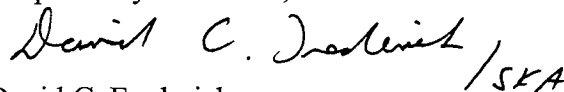
Ralph I. Lancaster, Jr., Esquire
November 8, 2006
Page 2

Civ. 2648 (MJL) (KNF), 1999 WL 239698, at *4 (S.D.N.Y. Apr. 22, 1999). As a qualified privilege, it “is not to be expansively construed” because the privilege “is in derogation of the search for truth.” *Id.* See also Kenneth S. Broun et al., *McCormick on Evidence* § 109 (3d ed. 1984) (“Nor may the government as plaintiff in a civil action proceed affirmatively against a defendant while at the same time seeking under the guise of privilege to deprive the defendant of evidence useful to the defense of the action.”). New Jersey fails to offer “‘precise and certain’” reasons for why the documents should remain confidential under the protection of the deliberative process privilege. *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 519 (D. Del. 1980) (quoting *Smith v. FTC*, 403 F. Supp. 1000, 1017 (D. Del. 1975)). New Jersey’s privilege log exhibits a “‘broad, undifferentiated . . . generalized interest in confidentiality,’” which is “insufficient to assert the deliberative-process privilege.” *Resolution Trust Corp. v. Diamond*, 773 F. Supp. 597, 604 (S.D.N.Y. 1991) (quoting *United States v. Nixon*, 418 U.S. 683, 706 (1974), and citing *United States v. O’Neill*, 619 F.2d 222, 227 (3d Cir. 1980)) (ellipsis in original).

In response to your letter dated October 30, 2006, regarding the location and timing of oral argument on the upcoming motions, Delaware and New Jersey have met and conferred, and are amenable to holding argument in either Philadelphia, Pennsylvania, or Portland, Maine. The parties would like to suggest that one day should be set aside for the hearing, with an equal division of time. Moreover, if you would be amenable to the suggestion, the parties would like to defer a further structuring of the oral presentations pending the completion of the briefing on the parties’ respective dispositive motions. The parties also would like respectfully to suggest that they be permitted to prepare a joint appendix in accordance with the general rules for deferred appendices by the United States Court of Appeals for the D.C. Circuit. This process would enable the parties efficiently to prepare a joint appendix without having to anticipate in advance all of the exhibits that might be included. Under this process, final briefs and the joint appendix would be due shortly after the filing of the reply briefs.

Delaware anticipates serving its expert reports on November 9 and completing expert depositions by December 1, and looks forward to briefing the dispositive motions due December 22, 2006.

Respectfully submitted,

/SKA

David C. Frederick

Enclosure

cc: Rachel J. Horowitz, Esq.
Barbara Conklin, Esq.
Collins J. Seitz, Jr., Esq.

NEW JERSEY v. DELAWARE
 SUPREME COURT DOCKET NO. 22011 ORG
 PLAINTIFF'S PRIVILEGE LOG

| BATES STAMP | DATE | SENDER | REC(S) & CC | GENERAL SUBJECT | PRIVILEGE CLAIMED |
|-------------------------|-----------------------------------|--|--|---|---|
| Coastal Management Docs | | | | | |
| | 10/29/1991 Memo | Lawrence J. Baier, Principal Planner Office of Regulatory Policy | Steven C. Whitney, Asst. Director Office of Regulatory Policy | Delaware - New Jersey Coastal Management Plans | Deliberative Process |
| | 10/28/1991 Handwritten note | Trudie | Steve Whitney | Meeting | Deliberative Process |
| | 5/17/1994 Letter | Helen C. P. Farr, Program Specialist National Oceanic and Atmospheric Administration | Ernest Hahn Steve Whitney Laurie McGilvray Brett Joseph | Rules on Coastal Management | Handwritten Notes on Document, Deliberative Process |
| | 11/30/1994 Memo | Steven Whitney | Larry Schmidt Ernie Hahn Marty Bierbaum | Revision of OCS Policy within the rules of Coastal Zone Management | Deliberative Process |

NEW JERSEY v. DELAWARE
 SUPREME COURT DOCKET NO. 22011 ORG
 PLAINTIFF'S PRIVILEGE LOG

| | | | | | |
|--|---------------------|-----------------|-----------------|---|----------------------|
| | 7/18/1994 Email | Ruth Ehinger | Dorina Frizzera | t. fowler - marinas | Deliberative Process |
| | 7/19/1994 Email | Dorina Frizzera | Ruth Ehinger | DE/NJ Comp | Deliberative Process |
| | 7/21/1994 Email | JoAnn Cubberly | Steven Whitney | Draft MOA/NJ & DE | Deliberative Process |
| | 10/28/1993 Draft | None | None | Draft MOA between New Jersey Department of Environmental Protection and Delaware Department of Natural Resources and Environmental Control | Deliberative Process |

NEW JERSEY v. DELAWARE
 SUPREME COURT DOCKET NO. 22011 ORG
 PLAINTIFF'S PRIVILEGE LOG

| | | | | | |
|--|--|--|--|--|--|
| | 7/7/1994 Memo | Steven Whitney | Distribution: Sarah Cooksey, DNREC Robert Tudor, USEPA John Weingart, NJDEP Martin Bierbaum, NJDEP Ernest Hahn, NJDEP Ruth Ehinger, NJDEP Theresa Fowler, NJDEP Dennis Hart, NJDEP Bill O'Sullivan, NJDEP Tom Wells, NJDEP JoAnne Cubberly, NJDEP | New Jersey/Delaware Memorandum of Agreement, | Handwritten notes on document, Deliberative Process |
| | 10/18/1994 Letter | Vickie A. Allin, Chief Policy Coordination Division, National Oceanic and Atmospheric Administration | Robert c. Shinn, Commissioner, NJDEP Steven Whitney | Coastal Zone Management Act, | Handwritten Notes on Document, Deliberative Process. |
| | Dec. 05 (no year) handwritten notes | NJDEP Staff | none | Shoreline Master plan | 10 pages of handwritten notes, deliberative process |

NEW JERSEY v. DELAWARE
 SUPREME COURT DOCKET NO. 22011 ORG
 PLAINTIFF'S PRIVILEGE LOG

| | | | | | |
|--|----------------------------|---|---|---|---|
| | 7/17/1996 Letter | Helen C. P. Grady, Program Specialist National Oceanic and Atmospheric Administration | Dorina Frizzera, Environmental Specialist Office of Environmental Planning | FY96 Award Application | Handwritten notes on document, deliberative process |
| | 5/11/1995 email | Steven Whitney | Ernie Hahn | 312 Evaluation | Deliberative Process |
| | 11/16/1994 email | Marin Bierbaum | Dan Van Abs Steve Whitney Barry Chalofsky | Reorganization Memorandum | Deliberative Process |
| | 11/17/1994 | Steven Whitney | Martin Bierbaum | Reorganization Memorandum | Deliberative Process |
| | 11/30/1994 Memo | Steven Whitney | Larry Schmidt, Policy and Planning | Revision of OCS Policy within the Rules on Coastal Zone Management | Deliberative Process |
| | 7/14/1995 Email Memo | Martin Bierbaum | Ernie Hahn Leroy Cattaneo Bernie Moore | Coastal Planning Meeting 7/14/1995 | Deliberative Process |
| | 6/15/1995 Email Memo | Martin Bierbaum | Lewis Nagy Steven Whitney | CZM Program | Deliberative Process |

NEW JERSEY v. DELAWARE
 SUPREME COURT DOCKET NO. 22011 ORG
 PLAINTIFF'S PRIVILEGE LOG

| | | | | | |
|--|---|--|------------------------------|---|----------------------|
| | 6/2/1995 Email Memo | Martin Bierbaum | Lewis Nagy Steven Whitney | Confidential Memorandum | Deliberative Process |
| | 5/18/1995 Memo | Ernest P. Hahn, Administrator Land Use Regulation Program | Management Team | Comments on NOAA Evaluation | Deliberative Process |
| | 3/12/1996 Memo | Kimberly Springer | Steven Whitney | Comments on Draft response to NOAA evaluation meeting and report | Deliberative Process |
| | 11/18/1994 Email and attached memo | Martin Bierbaum | Steven Whitney | Coastal Briefing | Deliberative Process |

NEW JERSEY v. DELAWARE
 SUPREME COURT DOCKET NO. 22011 ORG
 PLAINTIFF'S PRIVILEGE LOG

| | | | | | |
|--|---------------------------------|----------------|---|---|----------------------|
| | 11/22/1994 | Steven Whitney | Robert Shinn, Commissioner Mark Smith, Chief of Staff Catherine Cowan, Asst. Commissioner, Environmental Regulation Lewis Nagy, Asst. Commissioner, Policy & Planning Marten Dooley, Asst. Commissioner, Enforcement Ronald Tuninski, Asst. Commissioner, Management & Budget | Federal Evaluation of New Jersey's Coastal Management Program | Deliberative Process |
| | 6/2/1995 Email | Steven Whitney | Ernie Hahn | 312 Evaluation | Deliberative Process |
| | 4/26/1995 Memo | Ernest P. Hahn | Asst. Commissioner Cowan | Comments on NOAA Evaluation | Deliberative Process |
| | No date Handwritten Notes | DEP Staff | n/a | Chapter 69 Title 7, Beach Preservation Act | Deliberative Process |

NEW JERSEY v. DELAWARE
 SUPREME COURT DOCKET NO. 22011 ORG
 PLAINTIFF'S PRIVILEGE LOG

| | | | | | |
|--|-----------------------------------|---|---|--|----------------------|
| | April 1993 Draft Memo | Martin Bierbaum, Administrator Office of Land and Water Planning | Richard J. McMannus, Director Office of Legal Affairs | Public Notice - New Jersey Register Federal Approval on Routine Program Implementation Changes to N.J.'s Coastal Management Program | Deliberative Process |
| | 7/21/1994 Email | JoAnn Cubberley | Steven Whitney | Draft MOA/NJ & DE | Deliberative Process |
| | 7/19/1994 Email | Dorina Frizzera | Ruth Ehinger | DE/NJ Comp | Deliberative Process |
| | 7/18/1997 Email | Ruth Ehinger | Dorina Frizzera | t. fowler - marina | Deliberative Process |
| | 5/26/1994 Handwrite n Notes | none | none | MOA | Deliberative Process |
| | 8/11/1994 Email | Dorina Frizzera | Ruth Ehinger | DE/NJ Comp | Deliberative Process |
| | 1/12/1994 Handwrite n notes | NJDEP Staff | none | NJ/DE Management Programs | Deliberative Process |
| | | | | | |

NEW JERSEY v. DELAWARE
 SUPREME COURT DOCKET NO. 22011 ORG
 PLAINTIFF'S PRIVILEGE LOG

| | | | | | |
|--|--|------------------------------------|--------------------------------|---|----------------------|
| | 11/05/1993 Email | NJDEP Staff | Steve Whitney | DE/NJ Comparison | Deliberative Process |
| | 10/28/1993 Handwritten Notes | NJDEP Staff | none | Draft MOA between NJ Department of Environmental Protection and Energy and Delaware Department of Natural Resources and Environmental Control | Deliberative Process |
| | 8/3/1993 Memo | Terry Fowler | Steve Whitney | DE/NJ Comparison | Deliberative Process |
| | 7/2/1993 Letter w/Handwritten Notes | Clement Lewsey, Acting Chief, NOAA | State Coastal Program Managers | Final Statement of Purpose Between the Offices of Ocean and Coastal Resources Management and the Office of Wetlands, Oceans and Watersheds | Deliberative Process |
| | No Date Handwritten Notes | none | none | MOA NJ DEP Division of Coastal Resources and NJ Pinelands | Deliberative Process |

NEW JERSEY v. DELAWARE
 SUPREME COURT DOCKET NO. 22011 ORG
 PLAINTIFF'S PRIVILEGE LOG

| | | | | | |
|---------|---------------------------|--|--|--|--|
| | No Date Handwritten Notes | none | none | 309 Interstate grants | Deliberative Process |
| | 5/7/1993 Email | Steven Whitney | Ruth Ehinger | Navy Dredging/Salem Nuc. | Deliberative Process |
| | No Date Entire Folder | none | none | Boundary - Legal Decisions | Attorney-Client Privilege and Deliberative Process |
| BP Docs | | | | | |
| | No Date Email | David Risilia | Bradley Campbell, Commissioner | Crown Landing LNG Facility | Deliberative Process |
| | 6/8/05 and 6/9/05 Email | Rachel Horowitz, Deputy Attorney General | Catherine Torny, Counselor to the Commissioner | | Attorney-Client Privilege |
| | 4/20/05 Notes | | | Discussions with William Anderson, Deputy Attorney General, Rachel Horowitz, Deputy Attorney General and Jenny Bunk regarding BP Crown Landing | Attorney-Client Privilege |

NEW JERSEY v. DELAWARE
 SUPREME COURT DOCKET NO. 22011 ORG
 PLAINTIFF'S PRIVILEGE LOG

| | | | | | |
|--|----------------------|--|--|--|---------------------------|
| | No Date Email | David Risilia | Catherine Tormey, Counselor to the Commissioner | | Deliberative Process |
| | 8/3/05 Email | Tim Crowley, Deputy Attorney General | | Meeting with Coast Guard Captain of the Port | Attorney-Client Privilege |
| | No Date Email | | Lisa Jackson, Joanna Dunn-Sanson, Joseph Seebode, Gary Sondermeyer, Catherine Tormey | Summary Issues for BP Crown Landing | Deliberative Process |
| | 6/22/05 Email | Tim Crowley, Deputy Attorney General | | Update, US Coast Guard Meeting, | Attorney-Client Privilege |
| | 2/18/05 Facsimile | Rachel Horowitz, Deputy Attorney General | Suzanne Dietrick | Compact | Attorney-Client Privilege |
| | No Date Email | David Risilia | S. Dietrick | BP Crown Landing | Deliberative Process |
| | 7/6/05 Memo | Tim Crowley, Deputy Attorney General | Dennis Quinn | BP Crown Landing and USCG NVIC 5-05 | Attorney-Client Privilege |

NEW JERSEY v. DELAWARE
 SUPREME COURT DOCKET NO. 22011 ORG
 PLAINTIFF'S PRIVILEGE LOG

| | | | | | |
|---------------------------|-------------------------|---|---|---|--|
| Attorney General Opinions | | | | | |
| | Letter | William Andersen, Deputy Attorney General and Amy Donlon, Deputy Attorney General | Paul T. Fader, Chief Counsel to Governor | | Attorney-Client Privilege and Work Product |
| | Letter | William Andersen, Deputy Attorney General and Amy Donlon, Deputy Attorney General | Paul T. Fader, Chief Counsel to Governor | | Attorney-Client Privilege and Work Product |
| | Memo | | Catherine Tormey, Counselor to Commissioner | | Attorney-Client Privilege and Work Product |
| | Memo with attached memo | William Andersen, Deputy Attorney General | Richard Mroz, Counsel to the Governor | Tidelands Application No. 95-0306-T w/attached memo from William Andersen, Deputy Attorney General to Attorney General Farmer | Attorney-Client Privilege |

NEW JERSEY v. DELAWARE
 SUPREME COURT DOCKET NO. 22011 ORG
 PLAINTIFF'S PRIVILEGE LOG

| | | | | | |
|--|-----------|--|--|--|--|
| Privileged Pursuant to Confidentiality Agreement - Critical Energy Infrastructure Data | | | | | |
| | 4/18/05 | | | Waterway Suitability Assessment for LNG Marine Traffic with appendices A - J. | |
| | | | | Map, Waterfront Development Area, Environmental Sensitivity, Sheet B.. | |
| | 11/17/03 | | | Surveyed Wetlands, Sheet No. 1 | |
| | July 2004 | | | Draft Environmental Resource Report, Crown Landing LLC, Vol. II, Binder IIIA and Volumes IV and IVB. | |
| | | | | | |