PUBLIC VERSION

No. 134, Original

IN THE
Supreme Court of the United States

STATE OF NEW JERSEY,
Plaintiff,
v.

STATE OF DELAWARE,
Defendant.

OPPOSITION OF STATE OF DELAWARE TO MOTION OF STATE OF NEW JERSEY TO STRIKE DELAWARE'S ISSUES OF FACT NOS. 1, 2, 6, 8, AND 9 AND TO PRECLUDE DISCOVERY ON THESE ISSUES

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May 5, 2006

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INTRODUCTION

This case arises from Delaware's rejection, pursuant to its Coastal Zone Act ("DCZA"), of an application filed by an affiliate of BP, p.l.c. ("BP") to construct a liquefied natural gas ("LNG") terminal with an offshore unloading facility in the Delaware River within Delaware's environmentally fragile coastal zone. In December 2004, BP sought a determination from Delaware's Department of Natural Resources and Environmental Control ("DNREC") that the LNG terminal would be a permitted use under the DCZA. In seeking this approval, BP noted — but repeatedly and affirmatively elected not to raise — its claim that the 1905 Compact between New Jersey and Delaware rendered the DCZA inapplicable to its LNG terminal. After DNREC held that the terminal was not a permitted use under the DCZA, and an administrative review board affirmed that decision, BP chose not to appeal further.

Instead, on information and belief, BP persuaded New Jersey to press in this Court BP's claims regarding the effect of the 1905 Compact on Delaware's authority to enforce the DCZA against its LNG terminal. For several decades, New Jersey had previously (and correctly) recognized Delaware's jurisdiction to apply its DCZA and other environmental and natural resources laws within the twelve-mile circle. Nonetheless, New Jersey agreed to bring such a claim, which it filed on July 28, 2005.

In opposing New Jersey's initial filing and in its Answer, Delaware alleged, based on the limited record available, that this Court lacks jurisdiction over this case because BP, not New Jersey, is the real party in interest in this matter, because of the availability of an alternative forum for these claims, and because this case is not ripe, given New Jersey's own failure to approve (or even to state that it will approve) BP's LNG terminal. Since that time, additional facts have come to light that support Delaware's claims and undermine assertions that New Jersey made in arguing that the exercise of this Court's original jurisdiction is proper here. New

Jersey's Motion to Strike seeks to block the discovery necessary to compile a complete record on Delaware's jurisdictional defenses. But the law is clear that Delaware has a right to this discovery and that the question of this Court's jurisdiction is not yet settled.

In addition, New Jersey improperly seeks to preclude Delaware from obtaining discovery relevant to one of its alternative legal theories in this case: even if the Court were to conclude that the 1905 Compact relinquished some of Delaware's sovereign authority over the twelve-mile circle to New Jersey, that relinquishment did not encompass a project of the nature and scope of BP's LNG terminal. There is no legitimate basis to preclude Delaware from obtaining discovery of facts relevant to that legal theory. New Jersey's motion cannot be squared with its own decision to submit, in support of its initial pleading in this Court, selected materials concerning the nature and scope of BP's project and a declaration from a BP executive. New Jersey's assertion that such materials are relevant to show why New Jersey should win on the merits, but not relevant to show why it should lose, is indefensible.

STATEMENT OF FACTS

1. The 1905 Compact between Delaware and New Jersey attempted to resolve a long-standing dispute over fishing rights in the Delaware River within the twelve-mile circle, which had triggered the first boundary suit between the States. *See New Jersey v. Delaware*, No. 1, Orig. (U.S. filed Mar. 13, 1877). The 1905 Compact led to the dismissal of No. 1, Original but left open the issue of where the boundary between the two States lies. *See* NJ Mot. to Strike at 3.

New Jersey maintained in No. 1, Original, that it had title and thereby "jurisdiction over the eastern half of the Delaware River." NJ Mot. to Strike at 2; *see also* NJ 1877 Bill of Complaint, No. 1, Orig., Record at 6 (reproduced in DE Lodging,[1] Tab 1) ("[Y]our orator's part

[1] Lodging for Brief of the State of Delaware in Opposition to the State of New Jersey's Motion to Reopen and for Supplemental Decree (filed Oct. 27, 2005) ("DE Lodging").

of the bed of said river extends from the New Jersey shore thereof to the middle of said river."). In resolving the fishing-related issues, the 1905 Compact adopted similar geographic terms, such as "eastern half" and "western half of said Delaware River," and "between low-water marks on each side of said river between the said States." 1905 Compact Arts. I, II, III (reproduced in NJ App.[2] 2a-4a). In contrast, Article VII, which is at issue in this case, defined the scope of each State's "riparian jurisdiction" by reference to each State's "own side of the river" (NJ App. 5a) — leaving open the location of the the line marking each State's "own side," in light of the then-still-outstanding boundary dispute.

Moreover, Article VII provided that, within that geographic area, each State may "*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." *Id.* (emphasis added). Article VII, therefore, simply preserved the *status quo* by permitting such past activities to continue in the absence of a definitive ruling as to each State's title and right.[3] Nor did this Article address whether New Jersey's past exercise of riparian jurisdiction created sovereignty and jurisdiction as a matter of right, a claim that Delaware emphatically denied. *See* DE 1901 Answer at 21-24 (DE Lodging, Tab 2).

2. In the 1920s, a dispute arose over rights to oyster beds, an issue that "had been left open by Article VI of the Compact of 1905." NJ Mot. to Strike at 4. New Jersey again sued Delaware to adjudicate the boundary between the States. After extensive proceedings before a special master (and after failed attempts by the States to settle the matter through another interstate compact), the Court ruled for Delaware in 1934 by holding that the boundary within

[2] Appendix to New Jersey's Motion To Reopen and for a Supplemental Decree (filed July 28, 2005) ("NJ App.").

[3] Also, by effectively "licensing" New Jersey's actions, Delaware insulated itself from additional claims of jurisdiction by prescription based on post-1905 actions.

the twelve-mile circle is at the low-water mark on the New Jersey shore — not in the middle of the river as New Jersey had contended. *See New Jersey v. Delaware*, 291 U.S. 361, 364-79 (1934) (Cardozo, J.); NJ Mot. to Strike at 4. The Decree adopted by the Court in a subsequent opinion was made "without prejudice to the rights of either state . . . by virtue of the compact of 1905." *New Jersey v. Delaware*, 295 U.S. 694, 699 (1935).[4]

3. As New Jersey notes, Delaware has exercised its sovereignty and jurisdiction multiple times within the twelve-mile circle on the eastern half of the river. *See* NJ Mot. to Strike at 6-10. In the 1960s, 1970s, and 1980s, Delaware adopted several laws regulating the use of its subaqueous soil under the Delaware River and its coastal environment and exercised jurisdiction on numerous occasions to the low-water mark on the New Jersey side of the Delaware River within the twelve-mile circle, as authorized by the Court's 1935 Decree. From the 1960s until BP's intervention in 2005, New Jersey recognized without objection Delaware's right to exercise jurisdiction over such matters. Indeed, Delaware has issued at least 11 leases of its subaqueous lands for projects that span the river between New Jersey and Delaware, without objection from New Jersey. *See* DE App. 3a-4a, 8a-14a, 66a-68a.[5] In 1996, a New Jersey agency applied to

[4] In its statement of facts, New Jersey (at 2-3) relies on the Court's issuance of a preliminary injunction in 1877, which the Court stated was based on "the allegations" in New Jersey's complaint. No. 1, Orig., Record at 53 (DE Lodging, Tab 1). In 1934, however, when the Court finally adjudicated the boundary dispute on the merits and rejected New Jersey's claims, it held that, "[f]rom acquiescence in these improvements of the river front, there can be no legitimate inference that Delaware made over to New Jersey the title to the stream up to the middle of the channel or even the soil under the piers. The privilege or license was accorded to the owners individually and even as to them was bounded by the lines of their possession." *New Jersey v. Delaware*, 291 U.S. at 375-76.

[5] Appendix to Brief of the State of Delaware in Opposition to the State of New Jersey's Motion To Reopen and for a Supplemental Decree (filed Oct. 27, 2005) ("DE App."). In 1961, Delaware adopted the first statute governing the leasing of subaqueous lands. *See* 53 Del. Laws ch. 34; Del. Code Ann. tit. 7, § 4520 (repealed 1966). In 1966, Delaware adopted a more comprehensive Underwater Lands Act containing provisions governing the lease of subaqueous lands by the State. *See* 55 Del. Laws ch. 442 § 1; Del. Code Ann. tit. 7, §§ 6151-6159 (repealed

Delaware for, and was granted, a lease to rehabilitate a pier and to construct a ferry dock on Delaware subaqueous soil near Fort Mott State Park in New Jersey. *See id.* at 67a-68a (¶ 11); *accord* NJ Mot. to Strike at 7-8. That has been a consistent course of conduct for decades.[6]

4. New Jersey did not object to Delaware's exercise of jurisdiction throughout the twelve-mile circle until 2005, following the denial of a DCZA permit to BP for a proposed LNG unloading facility. Unlike its previous efforts to resolve related disputes with Delaware prior to initiating litigation in this Court, New Jersey prepared immediately for this litigation. Before New Jersey filed suit, however, *BP's counsel* transmitted a Freedom of Information Act ("FOIA") request to gather information for New Jersey's suit in this Court and urged the New Jersey Department of Environmental Protection ("NJDEP") to "expedite its review" of the LNG terminal because BP needed "to determine in the very near future whether this project is viable in New Jersey" due to "business pressures." FOIA Request from S. Rewari, Hunton & Williams (Mar. 31, 2005); Letter from G.S. Roden, Esq., BP, to D. Risilia, NJDEP (May 11, 2005) (Attach. 1 hereto). **[Begin Confidential]**

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1986). In 1971, Delaware adopted the DCZA in order to "control the location, extent and type of industrial development in Delaware's coastal areas," which were declared "critical areas for the future of the State in terms of quality of life." Del. Code Ann. tit. 7, § 7001 *et seq.* In 1986, Delaware adopted its current Subaqueous Lands Act, 65 Del. Laws ch. 508, Del. Code Ann. tit. 7, ch. 72.

[6] *See* Brief of the State of Delaware in Opposition to the State of New Jersey's Motion To Reopen and for a Supplemental Decree at 61-68 (filed Oct. 27, 2005) ("DE Opp."). In an effort to show a course of conduct contrary to that under Delaware's subaqueous lands statute and the DCZA, New Jersey (at 6) mistakenly relies on a December 2, 1957 letter that a private lawyer retained by the Delaware Highway Department sent to the Department, which concurred with an interpretation of the 1905 Compact put forward by DuPont's counsel. A private lawyer's letter is plainly of no significance in determining *Delaware's* course of conduct, and neither the Highway Department nor "Delaware" adopted the private lawyer's concurrence with DuPont's counsel's mistaken interpretation of the 1905 Compact. *See* DE Opp. at 67-68.

[End Confidential]

New Jersey filed its initial papers in this Court on July 28, 2005, asserting that Delaware's denial of BP's requested permit caused New Jersey to file suit. *See* NJ Mot. to Reopen ¶¶ 25-31. It claimed that "Delaware's imposition of a permit requirement for the Crown Landing project violates New Jersey's rights under Article VII of the Compact of 1905 because it interferes with New Jersey's exclusive State riparian jurisdiction over riparian improvements appurtenant to the New Jersey shore of the Delaware River." *Id.* ¶ 31; *see also id.* ¶ 36 ("Delaware[ ] . . . has effectively blocked the Crown Landing project."); NJ Br. at 13, 21.[7]

New Jersey also attached and relied on a declaration from a BP executive, Lauren B. Segal, with numerous exhibits, providing selective information on the scope and status of BP's proposed LNG terminal. *See* NJ App. 133a-154a. Ms. Segal discussed the scope of the project, reporting that the proposed pier would "extend from the New Jersey shoreline approximately 2,000 feet beyond the mean low water mark, which constitutes the boundary line between Delaware and New Jersey. . . . Construction of the pier will require dredging of approximately 800,000 cubic yards of sediment to provide the berth with adequate water depths for vessels to reach the navigable channel of the Delaware River." *Id.* at 134a-135a. Subsequently, Delaware

[7] New Jersey's Brief in Support of Motion To Reopen and for a Supplemental Decree (filed July 28, 2005) ("NJ Br."). New Jersey appears to suggest that Delaware improperly evaluated whether the proposed onshore portion of the LNG facility, "although located in New Jersey," contained "prohibited structures" under the DCZA. NJ Mot. to Strike at 9. It was BP, however, that specifically requested Delaware to evaluate those New Jersey facilities in arguing that the Delaware portion of the proposed project fell within a DCZA statutory exception for "a docking facility or pier for a single industrial or manufacturing facility." Del. Code Ann. tit. 7, § 7002(f); *see* Memorandum from D. Swayze, BP Counsel to DNREC at 3 (Dec. 7, 2004) (Attach. 3 hereto) (arguing that, "if the entire facility is a manufacturing facility that could qualify for a permit (*were it in Delaware*) then . . . the pier itself will be excluded from the definition of 'bulk product transfer facility' ") (emphasis added).

learned from BP's filings before FERC that this estimate of the scope of dredging of Delaware soil had increased by more than 50 percent, to 1.24 million cubic yards. *See* Berth Design Revision at 1-2, Docket No. CP04-411-000 (FERC filed Dec. 1, 2005).

Despite having thus relied on BP's Crown Landing project in its initial filings, New Jersey now moves to strike various issues concerning (1) whether subject-matter jurisdiction is proper and (2) the scope and status of the project.

ARGUMENT

I. NEW JERSEY'S MOTION TO STRIKE IMPROPERLY LIMITS DELAWARE'S RIGHT TO ENGAGE IN JURISDICTIONAL DISCOVERY

New Jersey's motion seeks to strike, and to preclude discovery on, Delaware's Issue of Fact No. 2, which states: "What is 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?"

A. New Jersey Cannot Meet The High Standard To Justify A Motion To Strike

On a motion to strike, a "court may order stricken from a[] pleading any insufficient defense." Fed. R. Civ. P. 12(f). But such a motion "will not be granted unless it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense," particularly where, as here, "there has been no significant discovery."[8] In attempting to eliminate Delaware's jurisdictional defenses without any discovery into them, New Jersey's motion is also analogous to a motion to dismiss under Rule 12(b)(6), as to which the movant's burden is similarly high. *See*, *e.g.*, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (noting the "accepted rule" that dismissal for failure to state a claim is not warranted "unless it appears beyond doubt that the [party] can prove no set of facts in support of his claim").

[8] *William Z. Salcer, et al. v. Envicon Equities*, 744 F.2d 935, 939 (2d Cir. 1984) (internal quotation marks omitted), *vacated and remanded on other grounds*, 478 U.S. 1015 (1986).

B. Delaware Has A Right To Jurisdictional Discovery And To Consideration Of The Court's Subject-Matter Jurisdiction On A Full Record

1. Facts supporting Article III jurisdiction must "appear[ ] affirmatively from the record." *King Iron Bridge & Mfg. Co. v. County of Otoe*, 120 U.S. 225, 226 (1887). That rule, "springing from the nature and limits of the judicial power of the united states, is inflexible and without exception, which requires [the Supreme Court], of its own motion, to deny its own jurisdiction." *Id.* (internal quotation marks omitted). Moreover, "it is the burden of the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (internal quotation marks and citation omitted). That burden — which rests here on New Jersey and "is much greater than that imposed upon a complainant in an ordinary suit between private parties"[9] — applies not only at the start of the case but also at every subsequent stage in the litigation: "'Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)). Accordingly, "[c]hallenges to subject-matter jurisdiction can of course be raised *at any time* prior to final judgment." *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 571 (2004) (citing *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804)) (emphasis added).[10]

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[9] *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); *see Alabama v. Arizona*, 291 U.S. 286, 292 (1934) ("The burden upon the plaintiff state fully and clearly to establish all essential elements of its case is greater than that generally required . . . [of] private parties.").

[10] Indeed, the Court often dismisses petitions for certiorari as improvidently granted when a jurisdictional defect later becomes apparent. *See, e.g.*, *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994) (agency lacked authority to file certiorari petition); *Gotthilf v. Sills*, 375 U.S. 79 (1963) (per curiam) (decision not rendered by highest state court); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 55 (1934) ("the record fails to show jurisdiction in this Court").

For these reasons, "the factual basis for a court's subject matter jurisdiction may remain an issue through trial, and, if and when doubts are resolved against jurisdiction, [those facts] warrant dismissal at that time." *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 121 n.1 (2d Cir. 1998); *see Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947) (holding that, when "a question of the District Court's jurisdiction is raised, . . . the court may inquire by affidavits or otherwise, into the facts as they exist"); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (holding that, when "allegations of jurisdictional facts are challenged," the plaintiff "must support them by competent proof"). Indeed, "a refusal to grant discovery constitutes an abuse of discretion" where, as here, "pertinent facts bearing on the question of [subject-matter] jurisdiction are controverted." *Sizova v. National Inst. of Standards & Tech.*, 282 F.3d 1320, 1326 (10th Cir. 2002).

Therefore, there is no merit to the claim that this Court's decision to grant New Jersey's "alternative motion for leave to file a bill of complaint," *New Jersey v. Delaware*, 126 S. Ct. 713, 713 (2005), conclusively resolved the subject-matter-jurisdiction question. Indeed, the Court itself has held that it "would not hesitate" to dismiss an original action if "convinced . . . that [it was] clearly wrong in accepting jurisdiction" initially. *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992). In that case, even after the Court *twice* rejected Oklahoma's jurisdictional challenges — in its opposition to the complaint and on a motion to dismiss, *see id.* at 441 — Oklahoma was permitted to litigate that issue before the Special Master and to present that issue to the Court on exceptions to the Special Master's determination. *See id.* at 446-47. Delaware cannot be foreclosed from reasserting its jurisdictional objections on a more complete record.[11]

[11] New Jersey's claim (at 1) that "Delaware should not be permitted to relitigate" the question of subject-matter jurisdiction — even on an expanded record after discovery — is irreconcilable with New Jersey's assertion that it may relitigate its own nonjurisdictional claim

2. New Jersey's assertion that "[n]o circumstances have changed in the months since Delaware made [its subject-matter jurisdiction] arguments to the Court," NJ Mot. to Strike at 16, is both wrong as a matter of fact and beside the point. Evidence has come to light already that calls into question the representations that New Jersey made in arguing that the Court should exercise original jurisdiction. Furthermore, New Jersey ignores that Delaware seeks to develop a factual record that *did not exist* when the Court granted New Jersey leave to file its bill of complaint. This case, therefore, is significantly different from *Wyoming v. Oklahoma*, where Oklahoma could not point to "any change of circumstance, whether of fact or law," and instead continued to press its jurisdictional argument on "the same facts, . . . the same cases, and . . . the same arguments" that the Court had previously rejected. 502 U.S. at 446.

Here, Delaware can already point to newly discovered evidence suggesting that New Jersey would not have sought to invoke the Court's original jurisdiction but for the insistence of BP and its offers of support in the litigation, and that this case was brought "in the name of the State but in reality for the benefit of particular individuals." *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 394 (1938). Delaware is also entitled to discovery on whether an alternative site for BP's LNG facility exists that would not necessitate encroachment on Delaware's soil. *See* DE Opp. 27-28. The Court has repeatedly refused requests for "resort to [its] original jurisdiction" in such cases, even where "the State asserts an economic interest in the claims and declares their enforcement to be a matter of state policy." *Id.*[12]

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that the 1905 Compact unambiguously requires a ruling in its favor, which New Jersey made at length both in its initial filings and in opposing Delaware's motion to appoint a Special Master.

[12] *See Illinois v. Michigan*, 409 U.S. 36, 37 (1972) (per curiam) (original jurisdiction lacking where a State, "though nominally a party, is here 'in vindication of the grievances of particular individuals' ") (quoting *Louisiana v. Texas*, 176 U.S. 1, 16 (1900)); *Massachusetts v. Missouri*, 308 U.S. 1, 17 (1939) ("Massachusetts may not invoke our jurisdiction for the benefit of such individuals."); *North Dakota v. Minnesota*, 263 U.S. at 375-76 (explaining that a State

First, in its March 21, 2006 responses to Delaware's subpoenas, which sought "[a]ll Documents referring, reflecting, or relating to any agreements or contracts (formal or informal) with New Jersey relating to," *inter alia*, this litigation, BP stated only that it "has no *formal* agreement with New Jersey." BP Response to Rule 45 Subpoenas at 12-13 (Attach. 4 hereto) (emphasis added). Tellingly, and in a departure from other responses, BP refused to deny that it has an *informal* agreement with the State regarding the conduct of this litigation. *See id.*[13] Similarly, while BP states that "[n]o BP *affiliate* has proposed or promised any payment whatsoever to New Jersey in connection" with this litigation, BP does not deny that the company *itself* has any such arrangement. *Id.* (emphasis added). **[Begin Confidential]**

[End Confidential]

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cannot invoke the Court's original jurisdiction "to present and enforce individual claims of its citizens as their trustee against a sister state"); *Louisiana v. Texas*, 176 U.S. at 16 (holding that "to maintain [original] jurisdiction . . . it must appear that the controversy to be determined is a controversy arising directly between the state of Louisiana and the state of Texas, and not a controversy in vindication of the grievances of particular individuals").

[13] *Compare* BP Response to Rule 45 Subpoenas at 13 ("As to the Crown Landing Facility, neither Crown Landing nor any BP affiliate has *any* agreement or contract with New Jersey.") (emphasis added).

BP's attorneys have filed FOIA requests with the State of Delaware to gather information of assistance to New Jersey. *See, e.g.*, *supra* at 5. Counsel for BP also has been performing substantial historical research on behalf of New Jersey. *See* BP Response to Rule 45 Subpoenas at 4; **[Begin Confidential]**

[End Confidential]. Evidence of "informal" agreements between BP and New Jersey — under which BP offered 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 — is directly relevant to whether BP or New Jersey is the real party in interest. *See Kansas v. Colorado*, 533 U.S. 1, 8 (2001) (finding that original jurisdiction was properly invoked where "the record . . . discloses that the State of Kansas has been in *full control of this litigation since its inception*") (emphasis added).

Second, Delaware has recently learned that BP is invoking the "common interest" doctrine to justify its refusal to produce documents exchanged between BP and New Jersey, even though the sharing of such documents would normally vitiate any attorney-client or attorney work product privilege that might have attached. *See, e.g.*, BP Response to Rule 45 Subpoenas at 3. By invoking the common interest doctrine, BP is necessarily asserting that it has "*identical* legal interests" with New Jersey, and not merely that both BP and New Jersey had reasons for preferring that New Jersey prevail in this case.[14] Although BP has yet to substantiate its claim of

[14] *E.g.*, *Corning Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 189, 190 (D. Del. 2004) (holding that, to invoke the common interest doctrine, parties must "provide[ ] proof sufficient to establish that, at the time of [the document disclosure], [they] shared identical legal interests in the subject opinions of counsel"); *Denney v. Jenkens & Gilchrist*, 362 F. Supp. 2d 407, 415-16 (S.D.N.Y. 2004) (holding that, "to invoke the common interest doctrine, it is not enough merely to show, as the doctrine's name might suggest, that [parties] had interests in common," but instead the parties must demonstrate that they shared "an identical legal strategy") (internal

entitlement to invoke the common interest doctrine,[15] BP's refusal to produce documents on the ground that New Jersey's legal interests in this case are *identical* to BP's private interests strongly suggests that BP is, in fact, the real party in interest here. At a minimum, this new evidence calls into serious question New Jersey's prior assertion that it opposed appointment of a Special Master not "to facilitate the construction of the Crown Landing project" but instead "to avoid . . . delay and . . . [its own] expense[s]" in resolving the dispute about the meaning of the 1905 Compact. NJ Special Master Opp.[16] at 12.

Third, BP has recently informed Delaware that it "anticipates being a party to future litigation with the State of Delaware (*potentially prior to the resolution of [the Supreme Court] litigation*) in which BP will assert that Delaware lacks jurisdiction over the Crown Landing Facility under the Compact of 1905." BP Response to Rule 45 Subpoenas at 6 (emphasis added); *accord id.* at 7, 8, 11, 12, 13. New Jersey's Motion to Reopen, however, included a declaration by a Vice President of Crown Landing LLC, who asserted that "Crown Landing is not, and has never been, a party to any proceeding in which it has attempted to obtain a ruling concerning New Jersey's rights under the Compact of 1905." NJ App. 142a (Segal Decl. ¶ 23). New Jersey expressly relied on that assertion in arguing that original jurisdiction is appropriate

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quotation marks omitted); *Bank of America, N.A. v. Terra Nova Ins. Co.*, 211 F. Supp. 2d 493, 497 (S.D.N.Y. 2002) ("Because the interests of the parties were not identical, the common interest doctrine does not apply."); *Katz v. AT&T Corp.*, 191 F.R.D. 433, 437-38 (E.D. Pa. 2000) (observing that "[t]o take advantage of the common interest doctrine the plaintiffs must still satisfy their burden of proving . . . the parties had an identical legal, and not solely commercial, interest"); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974) ("A community of interest exists among different persons or separate corporations where they have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice. . . . The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial.").

[15] Delaware intends to seek a ruling from the Special Master compelling BP to produce the documents at issue.

[16] New Jersey's Brief in Opposition to Delaware's Motion for Appointment of Special Master (filed Jan. 4, 2006) ("NJ Special Master Opp.").

because "no alternative forum exists where the Compact question can be resolved." NJ Br. at 20; *see* NJ Reply[17] at 9-10 (citing NJ App. 142a).

This new evidence gives rise to the possibility that BP, with New Jersey's knowledge, refrained from filing its own litigation precisely so that New Jersey could represent to the Court that there was no pending action involving the interpretation of the 1905 Compact. Such evidence would distinguish this case from *Wyoming v. Oklahoma*, where the Court noted that, "[f]or reasons *unknown*," there was "no pending action . . . to which [it] could defer adjudication" of the dispute. 502 U.S. at 451-52 (emphasis added). Such gamesmanship, if proved, would independently warrant dismissal of this matter. As the Court has held — in a case alleging a violation of an interstate agreement with "the dignity of an interstate compact" — "original jurisdiction . . . is not an alternative to the redress of grievances which could have been sought in the normal appellate process." *Illinois v. Michigan*, 409 U.S. at 36-37.

C. Evidence That New Jersey Would Not Have Filed Suit But For BP's Urging or Offers of Support Is Compelling Evidence That This Court Lacks Subject-Matter Jurisdiction

The new information discussed above strongly suggests discovery would reveal further facts demonstrating that New Jersey would not have instituted or maintained this litigation but for the urging of BP and its promises of economic and other assistance. Indeed, New Jersey asserts that the injury for which it seeks redress has existed *since* 1971 — and, therefore, that it could have filed this suit at any time in the past 35 years — so the State's decision to bring this suit *now* because of BP's urging and assistance is of particular relevance to subject-matter jurisdiction. If discovery shows that BP was instrumental in causing New Jersey to institute this case, such as through arrangements to develop New Jersey's litigation strategy, shoulder its

[17] New Jersey's Reply Brief in Support of Motion To Reopen and for a Supplemental Decree (filed Nov. 8, 2005) ("NJ Reply")

workload, or otherwise direct the litigation, then dismissal for lack of jurisdiction would be proper. New Jersey's claim (at 16) that its own alleged injury and interests would be "sufficient . . . to support the exercise of original jurisdiction" would fail in the face of such evidence.

First, the mere fact that this case involves an interstate compact and a question of the rights of States with respect to a boundary line is insufficient to require the exercise of original jurisdiction. *See Illinois v. Michigan*, 409 U.S. at 36-37 (finding no original jurisdiction in a case alleging a violation of an interstate agreement with "the dignity of an interstate compact"); *Louisiana v. Mississippi*, 488 U.S. 990 (1988) (declining to exercise jurisdiction over a boundary dispute between two States). Nor is there any merit to New Jersey's claim that disputes about the 1905 Compact "can be enforced only by an original action" and that "no other forum is available." NJ Mot. to Strike at 17. The case on which New Jersey relies holds only that a state court cannot "have *final* power to pass upon the meaning . . . of compacts" and expressly recognizes that "compact questions [may] reach [the Supreme Court] *on a writ of certiorari* rather than by way of an original action." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28, 30 (1951) (emphases added). Indeed, the Supreme Court dismissed a prior original action to which New Jersey was a party because the proper interpretation of an interstate compact between New Jersey and Pennsylvania was resolved in another case on a writ of certiorari from a New Jersey state court. *See Pennsylvania v. New Jersey*, 310 U.S. 612 (1940) (per curiam) (citing *Delaware River Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419 (1940)).[18]

Second, although New Jersey initially claimed that it seeks to remedy "immediate impact[s] of Delaware's actions" — presumably through Delaware's refusal to issue a permit for

[18] In another original action, New Jersey relied on decisions of state courts interpreting an interstate compact between New Jersey and New York. *See* Report of Special Master at 76, *New Jersey v. New York*, No. 120, Orig. (filed Mar. 31, 1997), *available at* 1997 WL 291594, at *38.

BP's LNG bulk transfer facility (NJ Reply at 7; *accord id.* at 6) — New Jersey now asserts that the source of its injury is Delaware's mere "attempt to assert jurisdiction over actual projects emanating from New Jersey's shore." NJ Mot. to Strike at 17-18; *accord id.* at 20 n.4 (claiming "injury by Delaware's assertion of jurisdiction, even where Delaware agrees to grant a permit"). But even New Jersey recognizes that Delaware has asserted such jurisdiction by statute at least "since 1971." NJ Reply at 7; NJ Mot. to Strike at 6. Because, on New Jersey's theory, it has allegedly been suffering harm for at least *35 years*, the reasons for its decision to file suit *now* are particularly relevant. That is because "[t]his [C]ourt may not be called on to give advisory opinions or to pronounce declaratory judgments." *Alabama v. Arizona*, 291 U.S. at 291; *see Massachusetts v. Missouri*, 308 U.S. at 17 ("Nor does the nature of the suit as one to obtain a declaratory judgment aid the complainant."). Moreover, the Court will not use its original jurisdiction "to consider abstract questions" — such as "questions respecting the right of the plaintiff state . . . to use the waters . . . in the indefinite future." *New York v. Illinois*, 274 U.S. 488, 489-90 (1927). Absent a decision by New Jersey to issue a permit for the BP project (or any other project that might create a conflict with Delaware), New Jersey's claimed injury from Delaware's decades-long assertion of jurisdiction is insufficiently substantial to warrant the exercise of this Court's original jurisdiction.

Third, New Jersey misreads (at 19) this Court's statement in *Arkansas v. Texas*, 346 U.S. 368 (1953), that it "determine[s] whether *in substance* the claim is that of the State, whether the State is indeed the real party in interest." *Id.* at 371 (emphasis added). The Court did not hold that evidence of a State's reasons for filing suit could not call into question whether the State was the real party in interest. Instead, the question in *Arkansas v. Texas* was whether the University of Arkansas was an instrumentality of the State, and therefore whether the claim was actually

that of the State. Even in that context, however, the Court made clear that "of course" it would "look behind and beyond the legal form in which the claim of the State is pressed." *Id.* Therefore, the Court's jurisdictional determinations cannot, as New Jersey asserts (at 19), "rest on its review of the actual claims presented" without considering the interests that New Jersey actually seeks to further and the reasons for initiating this litigation to further those interests.[19]

D. The Jurisdictional Discovery That Delaware Seeks Would Not Invade Any Legally Recognized Privilege

Delaware seeks discovery of documents exchanged between BP and New Jersey that address the jurisdictional issues addressed above. Delaware has already sought such documents by subpoena from BP, and intends to seek such documents from New Jersey at the appropriate time under the Case Management Orders. Because such documents were exchanged with third parties, New Jersey and BP cannot claim privilege under attorney-client or attorney work-product. *See, e.g., Hanson v. United States Agency for Int'l Dev.*, 372 F.3d 286, 294 (4th Cir. 2004) (holding that "waiver occurs when a party claiming the privilege has *voluntarily* disclosed confidential information on a given subject matter to a party not covered by the privilege").[20] In any event, even if New Jersey and BP had a viable claim to such privileges for the documents

[19] New Jersey's reliance (at 19 n.3) on *Digital Equipment Corp. v. System Industries, Inc.*, 108 F.R.D. 742 (D. Mass. 1986), is inapposite, for that case held only that discovery into the motive for initiating a lawsuit was irrelevant to "'the substance of the claim.'" *Id.* at 743 (quoting *Foremost Promotions, Inc. v. Pabst Brewing Co.*, 15 F.R.D. 128, 130 (N.D. Ill. 1953)). At issue here is not the substance of the claim itself, but whether BP is the real party in whose interest New Jersey has sued. Indeed, it is common to examine the motives of the named plaintiff in determining subject-matter jurisdiction. *See, e.g.*, 28 U.S.C. § 1359 ("A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."); *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 828 (1969) (dismissing for lack of jurisdiction because the plaintiff "admits that the assignment [of the claim to the plaintiff] was in substantial part motivated by a desire by [the assignor's] counsel to make diversity jurisdiction available") (internal quotation marks omitted).

[20] Although BP has asserted that such disclosures did not waive the privilege because of the common interest doctrine (an assertion Delaware disputes), New Jersey makes no such claim.

Delaware seeks, the documents must be identified in a privilege log, as required by § 8 of the Case Management Plan. New Jersey's attempt to preclude discovery at this stage by unsubstantiated assertions of privilege are premature and could not, in any case, demonstrate that the documents Delaware seeks lack relevance to the question of this Court's jurisdiction.

The only other basis that New Jersey identifies (at 20-21) for precluding discovery is a privilege protecting the State's deliberative processes. But New Jersey does not identify any federal or state law that protects from discovery discussions between state officials and *private parties*, such as BP.[21] New Jersey law recognizes a privilege for *inter*- and *intra*-agency documents, but it does not extend that privilege to communications exchanged with private parties *outside* the government. *See In re Liquidation of Integrity Ins. Co.*, 754 A.2d 1177, 1181-83 (N.J. 2000) (following *Sears, Roebuck & Co.*, 421 U.S. at 136). The New Jersey Open Public Records Act similarly exempts "inter-agency or intra-agency advisory, consultative, or deliberative material" — and not documents sent to or received from parties *outside* the agency — from the definition of those government records that are subject to disclosure. N.J. Stat. Ann. § 47:1A-1.1; *see Gannett New Jersey Partners, LP v. County of Middlesex*, 877 A.2d 330, 338 (N.J. App. Div. 2005). There is no recognized deliberative process privilege, therefore, that could preclude Delaware from obtaining through discovery documents exchanged between New Jersey and BP, which are the only documents that Delaware has sought to date from either BP or New Jersey.

Indeed, the deliberative process privilege that New Jersey courts recognize for *intra*-governmental documents is a limited one. To qualify, a document "must have been generated before the adoption of an agency's . . . decision" and must "contain[ ] opinions,

[21] The one case that New Jersey cites involved *intra*-agency documents. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975).

recommendations, or advice about agency policies." *Integrity Ins.*, 754 A.2d at 1182. "Purely factual material that does not reflect deliberative processes is not protected." *Id.* Therefore, any 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 — are not protected by the deliberative process privilege.

Finally, "a litigant may obtain deliberative process materials if his or her need for the materials and the need for accurate fact-finding override the government's significant interest in non-disclosure." *Id.* at 1182-83. Because this Court will exercise its original jurisdiction only "when the necessity [is] absolute and the matter in itself properly justiciable," *Louisiana v. Texas*, 176 U.S. at 15, New Jersey should not be permitted to use the deliberative process privilege to shield from discovery documents that would demonstrate that this Court's jurisdiction is not properly exercised here.

II. DELWARE'S ISSUES OF FACT 1, 6, 8, AND 9 ARE RELEVANT TO DELAWARE'S CLAIMS AND DEFENSES

New Jersey seeks to strike, and to preclude discovery into, four issues of fact that Delaware has identified as relevant to resolving the legal issues in this case. *See* NJ Mot. to Strike at 21-25. New Jersey's motion, therefore, is properly understood as a motion to strike the four issues as "immaterial," under Rule 12(f), and for a protective order, under Rule 26(c)(4), that matters related to those facts "not be inquired into." Fed. R. Civ. P. 12(f), 26(c)(4). A motion to strike matter as immaterial will "not be granted unless the matter sought to be stricken clearly can have no possible relation to the matter in controversy." *Mikropul Corp. v. DeSimone & Chaplin-Airtech, Inc.*, 599 F. Supp. 940, 945 (S.D.N.Y. 1984) (internal quotation marks omitted). Similarly, courts have held that it is an "abuse of discretion" to grant a protective order

that "preclude[s] the discovery of arguably relevant information." *E.g.*, *Coleman v. American Red Cross*, 23 F.3d 1091, 1097 (6th Cir. 1994). New Jersey has not met this high standard.

New Jersey's claim (at 22-23) that Article VII is "clear and unambiguous" and grants New Jersey "exclusive riparian jurisdiction over improvements extending from the New Jersey shoreline into the Delaware Rive within the Twelve-Mile Circle" generally cannot provide any basis for precluding consideration of, or discovery on, these four issues of fact. Instead, New Jersey continues to assert a clear right to a ruling in its favor. Contrary to New Jersey's claim (at 23), Delaware also has arguments based on the plain language of the 1905 Compact. *See* DE Opp. at 45-56. But a party's belief that it will prevail on its plain meaning arguments provides no basis to eliminate issues or to preclude discovery at this early stage of the proceeding.

As to the specific issues that are the subject of the Motion to Strike, New Jersey erroneously groups these four issues of fact and treats them as if they all address the same legal issue. The issues of fact, however, are distinct and are relevant to at least three different issues of law. Discovery is warranted as to all four issues of fact, because they are "relevant to [a] claim or defense" of Delaware, and the discovery Delaware has sought (and intends to continue seeking) is "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Moreover, New Jersey responded to Delaware's informal document requests by producing without objection certain documents relevant to these issues. *See* Opposition to Appointment of Special Master, App. 1a-7a (Jan. 4, 2006). New Jersey cannot reasonably object to providing more thorough discovery or to third-party discovery from BP on these issues.

Issue of Fact 1. This issue addresses projects "*other than* BP's Crown Landing project" that "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." Although Delaware maintains that New

Jersey has brought this litigation on behalf of BP, the relief New Jersey seeks goes well beyond BP's project. New Jersey seeks an injunction that would prevent Delaware "from requiring permits for the construction of *any* improvement appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle." NJ Mot. to Reopen at 17 (emphasis added). New Jersey's requested relief could, for example, preclude Delaware from regulating "a casino[ ] or slot machine parlor" that was located on Delaware's lands within the twelve-mile circle, simply because the structure was "built on [a] pier."[22] New Jersey does not deny that there are projects other than the Crown Landing facility that are currently being considered or are pending for approval in New Jersey and that implicate Articles VII or VIII of the 1905 Compact (at least on New Jersey's interpretation of those Articles). Nor does New Jersey suggest that Delaware has any reasonable way of obtaining this information without formal discovery.

The only claim in New Jersey's motion that arguably applies to Issue of Fact 1 is its assertion that "information concerning proposed projects" could not "clarify any ambiguity in the 1905 Compact." NJ Mot. to Strike at 24. But that is not our argument. Instead, we argue that the expansive relief New Jersey seeks here — which could prevent Delaware from regulating casinos, restaurants, heliports, amusement parks, or adult entertainment, to name a few, simply because New Jersey authorizes such facilities to be built on a wharf — requires a concrete understanding of the projects that New Jersey contends fall within its purportedly exclusive jurisdiction over "riparian" projects. Without testing New Jersey's claims against pending projects, any resolution of this litigation is likely to spawn further disputes about the scope of relief afforded to either party. Such concrete examples are likely to help address the legal issue

[22] *See* Christopher Weir, *P.G. Not Giving Up on Casino Idea*, NJ.com (Apr. 10, 2006) (describing proposed casino to be built on pier extending from New Jersey shore into the twelve-mile circle), *available at* http://www.nj.com/news/sunbeam/index.ssf?/base/news-1/1144657210292410.xml&coll=9&thispage=1.

— Delaware's Issue of Law 8 — of which activities are "riparian" within the meaning of Article VII of the 1905 Compact and in light of the contemporaneous legal context.

Issue of Fact 6. This issue addresses whether "*other projects* previously approved by New Jersey within the twelve-mile circle required the dredging of Delaware's submerged land" and, if so, whether "the dredging [has] been on a scale commensurate with BP's Crown Landing project." New Jersey has argued that its actions in approving projects within the twelve-mile circle both before and after the ratification of the 1905 Compact are relevant to the outcome of this case. *See, e.g.*, NJ Br. at 8-10, 26, 30-31; NJ Reply at 20-28; NJ Mot. to Strike at 6. Having thus put those previous projects at issue — indeed, having submitted detailed affidavits describing the nature and scope of those projects[23] — New Jersey has no reasonable ground for objecting to a comparison of those projects with the Crown Landing facility.

To determine whether the States' actions (or inactions) with respect to such projects are relevant to resolving whether the 1905 Compact divested Delaware of all jurisdiction to regulate a project such as the Crown Landing facility, it is necessary to determine the extent to which those other projects involved the dredging of Delaware's soil. If, as Delaware expects to be the case, dredging on the scope necessary for the Crown Landing facility is substantially different from the dredging (if any) necessary for projects pre- and post-dating the 1905 Compact that New Jersey cites, Delaware will be able to demonstrate that those other projects provide no support for New Jersey's assertions that Delaware voluntarily gave up the right to regulate a project of such magnitude. *See* Delaware Issue of Law 9. New Jersey does not assert that

[23] *See* App. 25a-53a (affidavit recounting in detail projects over which New Jersey asserted jurisdiction within the twelve-mile circle before and after the 1905 Compact); *id.* at 61a-65a (affidavit discussing New Jersey's regulation of water extraction projects within the twelve-mile circle); *id.* at 66a-72a (affidavit discussing New Jersey's regulation of other projects).

Delaware has access to information about the dredging (if any) involved in these other projects without formal discovery.

Issue of Fact 8. This issue addresses "the nature and scope of BP's Crown Landing . . . facility." Delaware raises this issue of fact because, for New Jersey to prevail, it will have to prove not only that, in the 1905 Compact, Delaware relinquished authority over projects built on Delaware's land within the twelve-mile circle, but also that a project of both the nature and the scope of the Crown Landing facility was within Delaware's contemplation when it was alleged to have relinquished its sovereign right to regulate activities on its lands. *See* Delaware Issues of Law 8, 9. For example, even if Delaware is held to have given to New Jersey some "riparian jurisdiction" over structures such as a 1905-era fishing pier or shipping dock, that would not necessarily mean that Delaware also gave to New Jersey the same authority over projects of a different nature or magnitude — such as gas-offloading facilities, casinos, or strip clubs.

Indeed, BP told FERC that Delaware "would provide fire and other emergency services on the portion of Crown Landing's pier within the State of Delaware." Response to FERC Jan. 18, 2005 Additional Info. Req. at 1 (FERC filed Jan. 21, 2005) (Attach. 5 hereto). That representation merely illustrates that, even if it were determined that the 1905 Compact confers some riparian jurisdiction on New Jersey over the portion of the LNG facility to be located in Delaware waters, the scope and extent of any such jurisdiction as applied to the activities to be conducted on the pier would remain to be determined. *Cf.* Report of the Special Master at 93, *Virginia v. Maryland*, No. 129, Orig. (filed Dec. 9, 2002) (citing report of Virginia's Attorney General "conclud[ing] that Virginians have the privilege of building piers so long as navigation is not obstructed, but that the sale of beer on such a pier would be regulated by Maryland"); Oral Arg. Tr. at 49, *Virginia v. Maryland*, No. 129, Orig., 2003 WL 22335915 (Oct. 7, 2003)

(Counsel for Virginia, Stuart Raphael: "There are a number of uses that, we'll agree, are non-riparian. Building a casino in the middle of the river. If there's a gray area in between and — and we've got an argument that it's riparian and Maryland has an argument it's not, that issue may have to be litigated if we can't resolve it.").

Discovery into the nature and scope of the Crown Landing facility — which BP has already agreed to provide to Delaware, at least in part — is therefore relevant to Delaware's argument that the Crown Landing facility is qualitatively different from the types of projects within the contemplation of each State at the time the 1905 Compact was drafted and ratified. New Jersey simply misunderstands the relevance of this evidence in claiming (at 24) that information about the Crown Landing facility is irrelevant to this litigation because it cannot be used to demonstrate "the contemporaneous understanding of the parties."

In addition, at an earlier stage of this litigation, New Jersey believed that the nature and scope of the Crown Landing facility was sufficiently relevant to this case that it described the facility in its initial pleadings and procured for inclusion in its appendix an affidavit by Crown Landing's Vice President, Lauren Segal. *See* NJ Br. at 13-14; NJ App. 133a-154a. New Jersey cites no rule — because there is none — that permits a plaintiff to submit facts in an affidavit to support the filing of its Complaint but precludes further inquiry into those facts by the defendant.

Finally, Delaware notes that BP is already producing documents relevant to this issue of fact, even as BP and Delaware continue to meet and confer over the scope of the documents BP has stated that it is willing to produce. New Jersey, however, is wrong in asserting (at 24-25) that Delaware has no need for formal discovery on this issue because of the existence of publicly available documents filed with federal or state regulatory agencies. The publicly available documents will not necessarily provide all of the information relevant to this case. Those

documents were filed as part of BP's attempt to convince regulators that the Crown Landing facility satisfies federal and state permitting requirements. Therefore, those documents were not designed to — and likely do not — address fully the question whether a project such as the Crown Landing facility is among the type of projects encompassed within whatever "riparian jurisdiction" (if any) that Article VII of the 1905 Compact confers to New Jersey on Delaware's "side of the river."

Issue of Fact 9. This issue addresses whether "BP [has] obtained all necessary New Jersey government permits for the Crown Landing project." That issue goes directly to whether this case is ripe and, therefore, whether this Court has jurisdiction over the dispute. Discovery could reveal that New Jersey would also deny BP the state permits necessary for it to construct and operate the Crown Landing facility. This Court's "extraordinary power under the Constitution to control the conduct of one state at the suit of another" is not properly invoked so that New Jersey — rather than Delaware — can vindicate its "right" to be the State that prevents BP from building the Crown Landing facility. *New York v. New Jersey*, 256 U.S. 296, 309 (1921). Indeed, in a comparable case, this Court agreed with New Jersey that New York, which had brought suit, had not yet suffered injury because New York could not show that "the operation of the sewer of [New Jersey] shall result in conditions which . . . require[d] the interposition of th[e] [C]ourt." *Id.* at 314; *see also Missouri v. Illinois*, 200 U.S. 496, 521 (1906). New Jersey has no independent arguments in favor of striking or precluding discovery on this issue of fact, and simply incorporates by reference its erroneous opposition to Delaware's pursuit of jurisdictional discovery. *See* NJ Mot. to Strike at 24 n.7.

CONCLUSION

The special master should deny New Jersey's motion and permit full discovery.

Respectfully submitted,

_____

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May 5, 2006

ATTACHMENT 1

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March 31, 2005

RECEIVED
MAR 31 2005
WETLANDS

VIA FACSIMILE

Directors Office - FOIA Staff
Attn: Laurie Moyer
Division of Water Resources
Department of Natural Resources & Environmental Control
89 Kings Highway
Dover, Delaware 19901

Freedom of Information Act Request

Dear Ms. Moyer:

Pursuant to the Delaware Freedom of Information Act, please provide copies of the following documents and records from the Delaware Department of Natural Resources & Environmental Control, or allow me to inspect the originals, within the next 20 business days:

All files and documents relating to any subaqueous lands permits requested by or issued to any person constructing any improvements from the New Jersey shore into the Delaware River within the twelve-mile circle around New Castle, Delaware.

Please include all documents created through the date of your response. We will pay any copying and administrative charges associated with your response to this request.

The records should be sent to my attention at the address provided above. Please do not hesitate to contact me if you have any questions regarding the scope of the documents requested

Very truly yours,

Sona Rewari

bp

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11 May 2005

Mr. David Risilia
New Jersey Department of Environmental Protection
Office of Dredging and Sediment Technology, for
Land Use Regulation Program
P.O. Box 439
Trenton, New Jersey 08625-0439

RE: Response to Deficiency Letter for Waterfront Development Application
File No. 0809-02-0011.1
Applicant: Crown Landing LLC
Project: Crown Landing LNG Import Terminal
Block: 101 Lot: 2
Location: Logan Township, Gloucester County

Dear Mr. Risilia:

Enclosed please find the information requested by NJDEP in its letter dated 4 February 2005 to address deficiencies in the Waterfront Development Permit Application for the Crown Landing LNG Import Terminal Project (File # 0809-02-0011.1). The information provided in this document is intended to supplement the Application so that NJDEP can complete its review of the Application pursuant to the Coastal Zone Management Rules.

We have provided the information requested in your 4 February 2005 letter with few exceptions. In some cases, the information requested is not currently available, but will be forwarded to NJDEP when available. In other cases, certain information has not been provided due to FERC regulations and Crown Landing document security restrictions. Certain sensitive information filed with FERC as "Privileged" cannot be released without document control procedures, rules and agreements which can be established between Crown Landing and NJDEP. FERC cannot release Privileged information to any party under their regulations. Information filed with FERC as "Critical Energy Infrastructure Information" (CEII) can only be released by FERC after they conduct a security review of the request. NJDEP would have to make a request for CEII data directly to FERC. Several drawings provided with this response are classified as CEII, but have not yet been submitted to FERC. Once these documents are submitted to FERC as part of the NEPA process, they will become CEII classified and will be available only through a CEII request to FERC. These drawings are of low security sensitivity, but meet the threshold criteria as CEII under FERC regulations. We respectfully request that you not copy or distribute these documents or allow unrestricted viewing.

Also, in your letter of February 4, 2005, you advised that "activities taking place from the mean low water line (MLWL) outshore are in the State of Delaware and are therefore subject to Delaware Coastal Zone Management Regulations. Activities or associated impacts to New Jersey's coastal resources occurring from the MLWL landward are the subject of this application." As has been recently reiterated by various New Jersey officials, activities taking place in connection with the Crown Landing Import Terminal, whether outshore or landward of the MLWL are under the regulatory jurisdiction of the State of New Jersey by virtue of the Compact of 1905. Accordingly, we believe that the entire project is the subject of this application. To avoid any doubt, and notwithstanding any suggestions to the contrary contained in either the original application or this response, Crown Landing clarifies its position that it is submitting a Waterfront Development Application to NJDEP for the *entire* Crown Landing Import Terminal Project, including any portion situated outshore of the MLWL.

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rodegs@bp.com

We also respectfully urge that NJDEP expedite its review of this response and the additional data being submitted. We need to determine in the very near future whether this project is viable in New Jersey. Obtaining the necessary permits from New Jersey is critical in this effort. While we believe that the proposed terminal will bring great economic and environmental benefits to the State of New Jersey, we must also be cognizant of the business pressures requiring that we have some measure of certainty in our current planning efforts.

Please review this submission and advise us if you require any additional information or materials to complete your review of the application.

Sincerely,

Gregory S. Roden

Gregory S. Roden
Senior Attorney

cc: Laurie Beppler
Lauren Segal
Greg Roden
Gary Shute
Dave Blaha

ATTACHMENT 2

ATTACHMENT 2

THIS ATTACHMENT IS CONFIDENTIAL AND FILED SEPARATELY UNDER SEAL.

ATTACHMENT 3

Parkowski, Guerke & Swayze, P.A.

MEMORANDUM

TO: Secretary John A. Hughes
Department of Natural Resources and Environmental Control

FROM: David S. Swayze
Michael W. Teichman

DATE: December 7, 2004

RE: Crown Landing Project

Crown Landing LLC, ("Crown Landing") an affiliate of BP, p.l.c., ("BP") has proposed the placement of a Liquefied Natural Gas ("LNG") import facility and regasification plant (the "Crown Landing Facility" or the "Project") on the Delaware River in Logan Township, Gloucester County, New Jersey. The pier from which the LNG will be offloaded (the "Docking Facility") will be located largely in Delaware waters. The following is a discussion of the applicability of Delaware's Coastal Zone Act[1] ("CZA") to that portion of the Docking Facility within the State of Delaware, and thus inside the "coastal zone" as defined in the CZA.[2] This memorandum does not address, and is not intended to address, the impact of the New Jersey – Delaware Interstate Compact of 1905, nor is this memorandum intended to address the effect of § 3 of the Natural Gas Act of 1938. Accordingly, this memorandum does not reach the issue of the legal capacity of the State of Delaware to regulate the Crown Landing facility under the CZA.[3]

Description of the Project:

The Project, as presently proposed, is comprised of the following:

1. The Docking Facility. The Docking Facility consists of an approximately 2000-foot-long trestle pier, the end of which will provide capacity for a single berth designed to accommodate LNG carriers from 138,000m^3 to 200,000m^3 in capacity. The majority of this pier, and all of the berth, will be in the State of Delaware. The berth will include four breasting dolphins and five mooring dolphins, all with quick release hooks. The trestle will provide structural support of cryogenic piping, containment trough and utility lines from shore to berth. The pier will serve only the Crown Landing Facility regasification plant (discussed below), and is expected to receive one or perhaps two ships per week.

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1 7 *Del. C.* § 7001, *et seq.*

2 7 *Del. C.* § 7002(a).

3 Accordingly, Crown Landing and BP reserve any and all rights with respect to the relative ability of the State of Delaware to regulate within the riparian jurisdiction granted under the Compact to the state of New Jersey, or to assert jurisdiction over activities which are the exclusive regulatory province of the Federal Energy Regulatory Commission.

2. The Manufacturing Facility. A regasification plant (the "Manufacturing Facility") will be located entirely in the State of New Jersey, and will consist of three 158,000m^3 LNG storage tanks, an LNG pressurization and vaporization facility, a nitrogen injection system, a mercaptan injection system, six enclosed buildings and several steel shelters housing various plant equipment.[4] The regasification plant and all of its supporting facilities (with the exception of that portion of the pier that extends into Delaware) are in the State of New Jersey.

Once the Crown Landing facility is operational, LNG will be offloaded from ships through three 16-inch liquid unloading arms and will be transported from the pier through a 44-inch diameter liquid unloading line to the storage tanks. Boil-off gas (BOG) blowers will return part of the vapor generated during the unloading process from the LNG storage tanks to the ship through one 16-inch diameter vapor return arm. Once the LNG arrives in the storage tanks, power-driven mixers will circulate the LNG to prevent stratification and to uniformly blend the BTU content of the LNG in the storage tanks. The LNG will be pressurized with low and high pressure pumps and mechanically transformed using a closed loop shell and tube heat exchanger vaporization system. Seven vertical shell and tube exchangers will be used to meet the base load capacity of the terminal. Water - ethylene glycol (WEG) will be used as the primary vaporization heating medium. Gas-fired heaters will heat the WEG mix. Ten gas-fired water glycol heaters provide heating. The heaters will be installed with ultra-low NOx burners to minimize air emissions. The heaters will be vented through one approximately 150-foot-high stack. Four pumps will be available to pump the WEG from the heaters to the LNG vaporizers. Both low pressure and high pressure pumps are used to pressurize the LNG prior to gasification

Market conditions and pipeline quality specifications will make it necessary to inject nitrogen into the LNG prior to vaporization, thereby reducing its heating value to that compatible with regional gas quality. The nitrogen injection system will consist of a cryogenic air separation plant incorporating air filtration and dehydration, air and nitrogen compressors, heat exchangers, a turbo-expander, a distillation tower, and a liquid nitrogen storage tank. The gaseous nitrogen will be injected into the LNG streams at the BOG condenser.

Once the LNG is pressurized, vaporized and brought to the correct heating value, the high pressure gas will be odorized using mercaptan. The mercaptan will be injected into the gas using measuring injection pumps at a rate as agreed to with the pipeline companies receiving the natural gas. The mercaptan will be stored on site in the vicinity of the metering facilities.

Only after the LNG is vaporized, adjusted with Nitrogen injection to bring it into the correct heating range, and odorized with the introduction of mercaptan, is it a finished product ready for distribution. The finished product will be sent out to the pipeline grid at a maximum pressure of 1,200 psig and a minimum temperature of 40°F.

The tie-ins with the three pipelines will occur on the Crown Landing Site. The Project will have a maximum delivery capacity of 0.6 billion cubic feet per day ("BCFD") to Transcontinental Gas Pipe

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[4] The above described process is anticipated to be sufficient to meet the regional gas quality specifications given currently identified sources of LNG. If however additional manufacturing is required to ensure the natural gas manufactured by Crown Landing meets these specifications, the Manufacturing Facility process may be modified to include natural gas liquid extraction capability. Such modification would not effect the Docking Facility.

Line Corporation, 0.5 BCFD to Columbia Gas Transmission Company, and 0.9 BCFD to Texas Eastern Transmission, LP, providing operational flexibility for the planned terminal send-out capacity of 1.2 BCFD.

Permissibility Under the CZA:

Under the CZA, new "bulk product transfer facilities" are prohibited in the coastal zone.[5] "Bulk product transfer facility" is defined thusly:

> "Bulk product transfer facility" means 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.[6] (emphasis added).

Although the portion of the pier that protrudes into Delaware waters will transport bulk quantities of LNG, the pier and its associated berth will serve only one facility – the Crown Landing facility. Thus, if the entire facility is a manufacturing facility that could qualify for a permit (were it in Delaware) then, for the reasons advanced below, the pier itself will be excluded from the definition of "bulk product transfer facility" because it serves a single manufacturing use and is thus excluded from the CZA prohibition on new bulk product transfer facilities inside the coastal zone.

Before delving into the "manufacturing use" analysis under the CZA, it is useful to first dispose of an issue that arises out of the fact that the upland facility is in New Jersey, and thus could never receive a Delaware coastal zone permit. This issue was squarely addressed in the 1990 Coastal Zone permitting of the Logan (known at the time as "Keystone") Co-generation plant located just up-river from the proposed Crown Landing facility. The Logan facility is a 225 megawatt cogeneration facility fueled by pulverized coal. The coal is offloaded at a pier extending into Delaware waters.

Notwithstanding that the vast majority of the facility was in New Jersey, DNREC Secretary Edwin H. ("Toby") Clark, II found that the facility could be the subject of a coastal zone permit because portions of the facility (i.e., the pier itself and a water intake) were in the State of Delaware and thus subject to permitting based on the nature of the facility as a whole.[7] A coastal zone permit was issued and the single–use pier became, at that point, exempt from the bulk product transfer facility prohibition.

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5 7 *Del. C.* § 7003.

6 7 *Del. C.* § 7002(f).

7 Secretary Clark appears to have relied on a status decision from 1973, respecting a proposed nuclear power plant to be built near the Summit bridge. Although the power plant was not to be built in the Coastal Zone, the proposal did include the placement of water intakes and a pumping station that would be located in the Coastal Zone. In two 1974 Attorney General opinions, Deputy Attorney General Lester J. Taufan opined that because the water pipes and pumping station were an "integral part" of the proposed power plant, the State Planning Office could consider the category (*i.e.*, heavy industry, manufacturing, etc.) of the power plant as a whole. However, Mr. Taufan cautioned that the permits "should be required only for the part of the cooling system located within the zone and not for the whole plant."

The Logan/Keystone precedent is directly applicable to the Crown Landing facility. The pier is an integral part of the Crown Landing facility and serves only this facility. As in Logan/Keystone, if the facility can be granted a permit, the pier will no longer be subject to the bulk product transfer facility prohibition.

Nine years after Logan/Keystone, the Coastal Zone Industrial Control Board ("CZICB") adopted a comprehensive set of regulations, the 1999 *Regulations Governing Delaware's Coastal Zone* (the "1999 Regulations"), designed to implement the CZA. Reflecting the Logan/Keystone precedent, § F.1. of the 1999 Regulations describes the following as an activity permissible in the Coastal Zone under a coastal zone permit:

> The construction of pipelines or docking facilities serving as an offshore bulk product transfer facilities if such facilities serve only one on-shore manufacturing or other facility. To be permissible under these regulations, the materials transferred through the pipeline or docking facilities must be used as a raw material in the manufacture of other products, or must be finished products being transported for delivery.[8]

Crown Landing will seek a coastal zone status decision and permit based, in part, upon this section of the 1999 Regulations.[9]

Manufacturing Use:

A "manufacturing use" under the CZA is defined as:

> (d) "Manufacturing" means the mechanical or chemical transformation of organic or inorganic substances into new products, characteristically using power-driven machines and materials handling equipment, and including establishments engaged in assembling component parts of manufactured products, provided the new products are not a structure or other fixed improvement.[10]

The Manufacturing Facility falls well within this definition. The LNG is a raw material[11] that is not ready for use by an end user. First, nitrogen will be injected into the LNG in its liquid state to adjust the heating value of the subsequent manufactured natural gas in order to meet marketing conditions or pipeline gas quality specifications. The LNG is then processed in a heat exchanger in order to

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8 Note that this permissible activity does *not* require the docking facility to serve another facility "for which a permit is granted."

9 Delaware must be careful not to run afoul of "dormant commerce clause" principles arising under the U.S. Constitution by interpreting the CZA in a way that would allow the permitting of a facility constructed on the Delaware side of the river, yet prohibit the identical facility if constructed on the New Jersey side of the river. *See generally City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 – 627, 57 L.Ed.2d. 475, 98 S.Ct. 2531 (1978). *See also Maharg, Inc. v. Van Wert Solid Waste Management Dist.*, 249 F.3d 544, 552 (6th Cir. 2001)

10 7 *Del. C.* § 7002(d).

11 Webster's New Collegiate Dictionary defines raw material as "material whether crude or processed that can be converted by manufacture, processing or combination, into a new and useful product."

mechanically transform its physical state. The heat exchanger utilizes gas-fired heaters and pumps (both, "power driven machines") as well as a system of valves, piping and metering equipment in order to vaporize the LNG. As discussed above, the resulting gas is still not a finished product. Mercaptan is injected into the gas in order to give it the required odor. Both processes of injecting nitrogen and mercaptan require the use of pumps and other machinery, and alter the chemical composition of the delivered product. These processes must be completed before the gas is a finished product ready for distribution.

Similar processes have previously been found to be "manufacturing uses" for purposes of the CZA. Relying on the legislative purpose set forth in 7 *Del. C.* § 7001 the Delaware Supreme Court, in *Wilmington v. Parcel of Land*, 607 A.2d 1163 (Del. Super. 1992), determined that the CZA should be construed liberally to effectuate its purpose.[12] With this principle in mind, the Court held that the mere recycling of Fluorspar tailings into marketable Fluorspar was "manufacturing" for purposes of the CZA:

> Far from being outside the scope of the Act, we believe such an operation is precisely the type of industrial use the General Assembly intended to regulate. It is a mechanical and chemical transformation of an inorganic substance (Fluorspar tailings) into a new product (saleable grade Fluorspar) through the use of "power driven machines and materials handling equipment." We, therefore, hold that the fluorspar processing operation envisioned here, if put into practice, would be a "manufacturing" activity as defined in the Coastal Zone Act and thus subject to the Act's permit procedures. [13]

A number of status decisions bore similar results:

- Project No. 71 – 1975: Applicant sought status decision on plan to operate a fish packing operation in Lewes. The process was to be limited to fish washing and boxing, or fish washing, filleting and boxing. Notwithstanding that fish was the input as well as the output, the State planner found this to be a manufacturing operation.

- Project Nos. 80, 86 and 108 -- 1976 through 1979: Three status decisions respecting plans to capture gaseous CO_2 at the Sun Olin plant in Claymont, and to purify it, liquefy it and ship it offsite as "chemical feedstock." Again, notwithstanding that the input was CO_2 and the output was CO_2 this was found to be a manufacturing use.

In sum, the Manufacturing Facility will include three 150' X 250' storage tanks, and will require water pumping apparatus, heat exchangers, and nitrogen and mercaptan injection systems. It takes an organic substance (LNG) and transforms it into a new product (natural gas at the proper BTU level for distribution and use). Given the foregoing, one is hard-pressed to imagine, were a similar regasification plant to be erected on the Delaware side of the river, that such a plant would be found not to be a manufacturing use.

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12 *Wilmington v. Parcel of Land*, 607 A.2d 1163, 1166 (Del. Super. 1992).

13 *Parcel of Land*, 607 A.2d at 1167 (Del. Super. 1992)

A strikingly similar plan to what Crown Landing has proposed (LNG facility on the NJ side extending into the Delaware river opposite Claymont) was the subject of a status decision request by El Paso Eastern Company in 1972. As one would expect, the applicant argued that the proposal fit into the "single industrial or manufacturing" exception. Attorney General Laird Stabler, Jr., issued a sparse, informal opinion to the State Planning Office expressing his view that, in order for this exception to apply, the bulk product transfer facility/pier had to benefit a manufacturing facility that itself was (or could be) granted a permit.[14] General Stabler did not delve into the details of the El Paso proposal in order to consider whether the El Paso facility would be the type of single manufacturing or industrial facility for which a permit could be granted. Instead, based largely upon the express assumption that the El Paso facility would *not* be the type of facility that would be granted a permit under the statute, General Stabler opined that the El Paso pier would not be permissible. As discussed at length herein, however, the Crown Landing Facility is, in fact, a facility for which a permit could be granted, and thus, consistent with §F.1 of the Regulation and the weight of precedent, the pier is serving a single use for which a permit could be granted.

General Stabler also expressed his view, from the El Paso materials supplied to him, that the proposed terminal was merely a "way station in the natural gas transportation system that El Paso was trying to develop" and that the El Paso pier was "more important" than the upland facility. General Stabler was not clear as to why these facts were important to his decision, but suffice to say that the same cannot be said of the Crown Landing facility. Far from being a "way station," the Crown Landing Facility will be an endpoint at which LNG is processed into a final product and distributed to pipeline companies.

It must be emphasized that opinions of the Attorney General, such as General Stabler's opinion, are not binding authority as a matter of Delaware law.[15] More importantly, in his opinion General Stabler beseeches the State Planner to develop regulations that would "more clearly define 'single industrial or manufacturing facility'" in order to evaluate applications for construction on the New Jersey shore. Comprehensive regulations (the 1999 Regulations) are now in place, and their existence eclipses the precedental value of General Stabler's opinion, if any there was.

Heavy Industry:

The Docking Facility, of course, does not possess any of the characteristics of "heavy industry" set forth in the CZA. Furthermore, although the Manufacturing Facility is certainly a "manufacturing use" under the CZA, it is equally certain that it, too, is not a "heavy industry use" prohibited in the coastal zone. The CZA defines heavy industry use as follows:

> (e) "Heavy industry use" means a use characteristically involving more than 20 acres, and characteristically employing some but not necessarily all of such equipment such as, but not limited to, smokestacks, tanks, distillation or reaction columns, chemical processing equipment, scrubbing towers pickling equipment and waste-treatment lagoons; which industry, although conceivably operable without polluting the environment, has the potential to pollute when equipment malfunctions or human error occurs. Examples of heavy industry are oil refineries,

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[14] General Stabler did *not* express the view that the phrase "for which a permit is granted" served as a bar to the single purpose exemption.

[15] *See Council 81, AFSCME v. State*, 288 A.2d 453, 455 (Del. Ch. 1972).

> basic steel manufacturing plants, basic cellulosic pulp-paper mills, and chemical plants such as petrochemical complexes. An incinerator structure or facility which, including the incinerator, contains 5,000 square feet or more, whether public or private, is "heavy industry" for purpose of this chapter. Generic examples of uses not included in the definition of "heavy industry" are such uses as garment factories, automobile assembly plants and jewelry and leather goods manufacturing establishments, and on-shore facilities, less than 20 acres in size, consisting of warehouses, equipment repair and maintenance structures, open storage areas, office and communications buildings, helipads, parking space and other service or supply structures required for the transfer of materials and workers in support of off-shore research, exploration and development operations; provided, however, that on-shore facilities shall not include tank farms or storage tanks.[16]

The Manufacturing Facility will not possess the majority of characteristics that are set forth in this definition. It will have storage tanks, one distillation tower (for the nitrogen injection system) and one small (150ft) stack for the WEG heaters, but it will not have reaction columns, significant chemical processing equipment, scrubbing towers, pickling equipment or waste treatment lagoons. Furthermore, the facility cannot be easily classified as any of the examples of heavy industry set forth in the definition, *e.g.*, oil refineries, basic steel manufacturing plants, basic cellulosic pulp-paper mills, and chemical plants such as petrochemical complexes. Finally, and perhaps most important, it will have little or no potential to pollute when a malfunction or human error occurs.[17]

Early in the life of the Coastal Zone Act, the Superior Court had the opportunity to consider the determination of the State Planning Board, and the CZICB, that a proposed installation of an electric generating station was not a "heavy industry use." See *Kreshtool v. Delmarva Power and Light Co.*, 310 A.2d 649 (Del. Super. 1973). The Court noted that, while some of the indices of "heavy Industry" were present in the proposal, *i.e.*, smoke stacks and a petroleum storage tank, other indices were not present. The Court also noted that the planning commission and the CZICB, in determining that the proposed use was not "heavy industry," had evidence that the proposed use was not one of the examples of "heavy industry" set forth in the CZA, and that the proposed use under local zoning ordinances was classified as "general industrial" rather than "heavy industrial."[18] As noted, the only characteristics of "heavy industry" possessed by the Crown Landing facility are storage tanks, one distillation tower and a small smoke stack. Furthermore, the New Jersey property on which the regasification plant would be located, Block 101 Lot 2, is zoned "Light Industrial" by Logan Township NJ.

Conclusion

The Project will consist of a 2000 foot pier and a LNG regasification plant consisting of storage tanks and equipment that will process and transform the LNG from a raw material into a natural gas

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16 7 *Del. C.* § 7002(e).

17 As will be discussed in detail in the forthcoming status decision request, spilled LNG will not mix with water but will, instead, pool on top until it boils off; thus the only risk to aquatic plants and animals comes from the temporary drop in water temperature that occurs as a result of the LNG pooling at the surface. As it boils off, the LNG in its gaseous state will dissipate into the atmosphere without causing harm to the environment.

18 *Kreshtool v. Delmarva Power and Light Co.*, 310 A.2d 649, 653 (Del. Super. 1973).

product suitable for commercial distribution as a finished product. As such, the Crown Landing Facility is a "manufacturing use" as defined in the CZA. The pier, which is the only part of the Project that will extend into the State of Delaware, is an integral part of the Crown Landing Facility and, importantly, will serve only the needs of the Manufacturing Facility.

Given the foregoing, the Docking Facility is not a prohibited "bulk product transfer facility," but is, instead, a docking facility serving a single on-shore manufacturing facility that may be granted a permit pursuant to Section F.1 of the 1999 Regulations.[19]

[19] While Delaware may consider the purpose to which the upland portion of the Crown Landing facility is to be put for purposes of making a status decision under 7 *Del. C.* § 7005(a), Delaware should not, in ruling on a coastal zone permit request, attempt to regulate the facility as a whole. To the contrary, Delaware should limit its inquiry respecting the propriety of such permit, and any conditions imposed thereunder, to that portion of the facility that is inside the State of Delaware.

ATTACHMENT 4

No. 134, Original

In the

Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

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

RESPONSE TO
RULE 45 SUBPOENAS SERVED ON BP AMERICA INC. AND AFFILIATES

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RESPONSE TO
RULE 45 SUBPOENAS SERVED ON BP AMERICA INC. AND AFFILIATES

BP America Inc., BP Corporation North America Inc., BP Company North America Inc., BP America Production Company, BP Energy Company, and Crown Landing LLC (collectively referred to as "BP"), by counsel and pursuant to Rule 45 of the Federal Rules of Civil Procedure, respond to the identical subpoenas *duces tecum*, served by Defendant State of Delaware, as follows:

GENERAL RESPONSE AND OBJECTIONS

1. BP understands, pursuant to CMO 1 and CMO 2, that the State of New Jersey has filed a motion objecting to the scope of discovery sought by the State of Delaware relating to the "Crown Landing Facility" (as defined in Definition G of the subpoenas). Notwithstanding that motion, on the return date of the subpoenas, or as soon thereafter as is feasible, BP will produce non-privileged documents describing the portion of the Crown Landing Facility extending below the mean-low water line on the New Jersey side of the Delaware River, provided that an appropriate protective order can be entered concerning: BP's confidential and proprietary business documents; documents that have been designated as "privileged" or "CEII" under the Federal Energy Regulatory Commission's rules, *see* 18 C.F.R. §§ 388.112(a), 388.113(c)(iii); or documents classified as "SSI" under the rules of the Department of Homeland Security or the United States Coast Guard, *see* 49 C.F.R. § 1520.9. Please note that federal law prohibits disclosure of SSI except in accordance with 49 C.F.R. Part 1520, and that the Coast Guard and the Department of Homeland Security may have specific requirements with respect to access to such SSI that make a protective order insufficient.

2. BP objects to the balance of the subpoena to the extent it would require the production of documents unrelated to those describing the portion of the Crown Landing Facility

that extends below the mean-low water line on the New Jersey side of the Delaware River. Such documents are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

3. BP objects to producing documents requested in the subpoena that are protected from disclosure by the attorney-client privilege, work-product doctrine, common interest rule, and/or any other applicable privilege. Based on discussions with counsel for Delaware, BP understands that Delaware is not requesting BP to produce a privilege log with respect to documents protected by the attorney-client privilege or work-product doctrine unless such documents passed between BP and New Jersey. To the extent that such documents are also the subject of (i) a relevance objection by BP or (ii) New Jersey's pending motion to limit discovery, BP objects to the burden of having to produce a privilege log with respect to such documents until a reasonable time following the Court's ruling (or agreement between BP and the parties), that the subject matters in question are proper for discovery.

4. BP objects to the "Definitions" contained in the subpoena to the extent that they impose or attempt to impose undue burdens that are not permitted under Fed. R. Civ. P. 45. For instance, but not by way of any limitation, BP objects to: producing multiple, identical copies of the same document (Def. A); the unnatural grammatical instructions in Definitions C-E; and Definitions B, K, and N, to the extent they would purport to reach documents with respect to which the subpoenaed BP entities have no possession, custody or control.

5. The document requests contained in the subpoenas cover a vast quantity of records. Consistent with the discovery obligations in Fed. R. Civ. P. 26(g)(2), BP is conducting a reasonable inquiry in searching for responsive documents. As of the date of this response, it has not yet been able to fully compile such records and counsel for BP has not yet had an

opportunity to review such records for privilege in the 14 days permitted for an objection under Rule 45. Accordingly, BP reserves the right to supplement these objections as categories of records are identified that may be responsive to the subpoenas.

SPECIFIC RESPONSES

1. All Documents referring, reflecting, or relating to the Declaration of Lauren B. Segal, Vice President of Crown Landing LLC, dated June 27, 2005 ("Segal Declaration"), which New Jersey attached to its initial filing of July 28, 2005 in *New Jersey v. Delaware*, including but not limited to drafts of the declaration and memoranda, correspondence, and communications, whether internal to BP, between BP and a Third Party, or between BP and New Jersey, and whether they occurred before or after *New Jersey v. Delaware* was filed.

RESPONSE:

In addition to its general objections, BP objects to this Request because drafts of the Declaration of Lauren Segal are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. In addition, because the declaration was prepared with advice of counsel in connection with this litigation, the drafts are protected from disclosure by the attorney-client privilege and work-product doctrine. Communications between BP and New Jersey about the declaration were conducted through counsel for BP and New Jersey, respectively, and are likewise protected by the attorney-client privilege, work-product doctrine and common interest rule.

2. All Documents referring, reflecting, or relating to *New Jersey v. Delaware*, the 1905 Compact, the proposed Crown Landing Facility, any other proposed BP LNG Facility to be located in any way in Delaware Territory, including but not limited to any and all legal briefs, drafts, memoranda, other declarations, affidavits, correspondence, and communications whether internal to BP, between BP and a Third Party, or between BP and New Jersey, and whether they occurred before or after *New Jersey v. Delaware* was filed.

RESPONSE:

Subject to its general objections:

(a) BP will produce non-privileged documents describing the portion of the Crown Landing Facility extending below the mean-low water line on the New Jersey side of the Delaware River pursuant to an appropriate protective order as described above;

(b) BP objects to producing documents relating to the portion of the Crown Landing Facility located entirely within New Jersey, above the mean-low water line on the New Jersey side of the River. Such documents are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. In addition, this request would impose an undue burden on BP;

(c) To the best of BP's knowledge, there is no "other proposed BP LNG Facility to be located in any way in Delaware Territory," so BP is unaware of any documents responsive to that part of the request;

(d) BP objects to producing documents "referring, reflecting or relating to *New Jersey v. Delaware* [or] the 1905 Compact . . . ." Such documents are protected from disclosure by the attorney-client privilege, work-product doctrine, and common interest rule. In addition, although counsel for BP has collected certain primary and secondary source documents concerning *New Jersey v. Delaware* and the 1905 Compact, such documents were selected or culled solely from public sources available equally to counsel for the State of Delaware. The selection of particular documents to be collected reflects counsel's thought-processes and judgment as to which documents are significant or important, and therefore is protected by the attorney work product doctrine.

3. All Documents referring, reflecting, or relating to the nature and amount of dredging of submerged lands of the Delaware River, all facilities used to transfer liquefied natural gas from ship to shore, and any activity that would occur on, in, over, or under Delaware Territory if the proposed Crown Landing Facility were permitted and/or constructed, including but not limited to the assertions made in paragraph 4 of the Segal Declaration.

RESPONSE:

Subject to its general objections, BP will produce non-privileged documents describing the portion of the Crown Landing Facility extending below the mean-low water line on the New Jersey side of the Delaware River pursuant to an appropriate protective order as described above.

4. All Documents referring, reflecting, or relating to the following statement in paragraph 20 of the Segal Declaration, including but not limited to any communications and correspondence with New Jersey preceding the events described herein: "Officials of the State of New Jersey have recently informed BP that New Jersey objects to the efforts of the State of Delaware to apply its permitting requirements to th[e] [Crown Landing] Project."

RESPONSE:

Subject to its general objections, BP will produce the documents identified below, in which New Jersey State officials made clear in 2005 that Delaware lacked jurisdiction over the portion of the Crown Landing Facility extending below the low-water line on the New Jersey side of the Delaware River:

- Letter of April 11, 2005, from Paul T. Fader to Joseph Schoell at 2-3 ("It is evident that Delaware does not have jurisdiction over the construction of the pier or any other part of this project . . . . Please review the New Jersey - Delaware Compact of 1905, and particularly Article VII, under which New Jersey clearly has the right to exercise riparian jurisdiction over the proposed Crown Landing Facility . . . . I would hope that in view of these rights . . . Delaware would acknowledge New Jersey's proper jurisdiction. If not, New Jersey will be forced to take all appropriate action to enforce its rights.");

- N.J. A. Res. 260 (adopted May 2, 2005) (urging "the Governor of the State of Delaware and the Delaware General Assembly to amend the Delaware Coastal Zone Act to conform it to the Compact of 1905 between New Jersey and Delaware . . . to make clear that the Delaware Coastal Zone Act does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact.");

- Letter of May 24, 2005 from Joseph J. Seebode to David Blaha at 2-3 ("As State officials have made clear, and as recognized in a May 13, 2005 letter from Gregory S. Roden, Esq., Senior Attorney for BP America, Inc., to David Risilia of ODST, although a portion of the pier is proposed to be in Delaware, construction of the entire pier, and any associated dredging, is subject to New Jersey's exclusive review and permitting authority, and not that of Delaware. This is the

case because the Compact of 1905 between New Jersey and Delaware, which was approved by the Legislatures of both States and by the United States Congress, gives New Jersey exclusive riparian jurisdiction of every kind and nature on its side of the Delaware River.");

- Letter of May 25, 2005 from Kenneth C. Koschek to Magalie R. Salas at 1 (confirming "that New Jersey, and not Delaware, has exclusive State regulatory authority over the plant, and the associated pier and dredging. This authority is reflected in the 1905 Compact between Delaware and New Jersey, which was approved by Congress in 1907.");

- Letter of June 13, 2005 from Suzanne U. Dietrick to Magalie R. Salas ("As explained in our letter to BP representatives of May 24, 2005, which was forwarded to you on May 25, 2005, the 1905 Compact between New Jersey and Delaware recognizes that New Jersey has exclusive riparian jurisdiction, of every kind and nature, on its side of the Delaware River.")

BP further states that communications took place between BP and New Jersey concerning New Jersey's objections to Delaware's asserted authority over the Project and New Jersey's plans to vindicate the rights of the State of New Jersey under the Compact of 1905. These communications are protected from disclosure by the attorney-client privilege, work-product doctrine, and common interest rule, and BP objects to producing them. BP shares a common legal interest with New Jersey in the outcome of this litigation. Should New Jersey prevail, the Crown Landing Facility will not require the Delaware permits that have been withheld by the State of Delaware. BP also anticipates being a party to future litigation with the State of Delaware (potentially prior to the resolution of this litigation) in which BP will assert that Delaware lacks jurisdiction over the Crown Landing Facility under the Compact of 1905, an issue to be decided in this litigation.

5. All Documents referring, reflecting, or relating to the following statement in paragraph 21 of the Segal Declaration, including but not limited to any communications and correspondence with New Jersey concerning or informing BP's "understanding" of the "action" that 'New Jersey would undertake": "Crown Landing further advised FERC that it was its understanding that New Jersey would undertake whatever appropriate action is necessary to confirm that Delaware lacks the authority to require any Delaware permits for the [Crown Landing] Project."

RESPONSE:

Subject to its general objections, BP is producing the documents identified below:

- Crown Landing, LLC, New Jersey Waterfront Development Permit Response to Deficiency Letter, FERC Docket CP04-411-000 (filed May 26, 2005) (Letter of May 11, 2005 from Greg Roden to David Risilia at 2 ("As has been recently reiterated by various New Jersey officials, activities taking place in connection with the Crown Landing Import Terminal, whether outshore or landward of the MLWL are under the regulatory jurisdiction of the State of New Jersey by virtue of the Compact of 1905.")); and

- Crown Landing Response to FERC May 16, 2005, Additional Information Request at 3, FERC Docket CP04-411-000 (filed May 26, 2005) ("Crown Landing understands that New Jersey will undertake whatever appropriate action is necessary to confirm that Delaware lacks the authority to require any Delaware permit for this project.").

Crown Landing submitted these filings in reliance upon New Jersey's official position with respect to the Compact of 1905 discussed in response to Request No. 4. Communications also took place between BP and New Jersey concerning New Jersey's objections to Delaware's asserted authority over the Project and New Jersey's plans to vindicate the rights of the State of New Jersey under the Compact of 1905. These communications are protected from disclosure by the attorney-client privilege, work-product doctrine, and common interest rule, and BP objects to producing them. BP shares a common legal interest with New Jersey in the outcome of this litigation. Should New Jersey prevail, the Crown Landing Facility will not require the Delaware permits that have been withheld by the State of Delaware. BP also anticipates being a party to future litigation with the State of Delaware (potentially prior to the resolution of this litigation) in which BP will assert that Delaware lacks jurisdiction over the Crown Landing Facility under the Compact of 1905, an issue to be decided in this litigation.

6. All Documents referring, reflecting, or relating to any discussions or communications to or from New Jersey or any Third Party relating to New Jersey's regulatory authority and/or jurisdiction over the proposed Crown Landing Facility.

RESPONSE:

In addition to its general objections:

(a) BP objects to this Request on the ground that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence;

(b) BP will produce non-privileged documents describing the portion of the Crown Landing Facility extending below the mean-low water line on the New Jersey side of the Delaware River pursuant to an appropriate protective order as described above;

(c) BP objects to producing documents relating to the portion of the Crown Landing Facility located entirely within New Jersey, above the mean-low water line on the New Jersey side of the River. Such documents are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. In addition, this request would impose an undue burden on BP;

(d) BP objects to producing documents reflecting communications between BP and New Jersey concerning New Jersey's objections to Delaware's asserted authority over the Project and New Jersey's plans to vindicate the rights of the State of New Jersey under the Compact of 1905. These communications are protected from disclosure by the attorney-client privilege, work-product doctrine, and common interest rule. BP shares a common legal interest with New Jersey in the outcome of this litigation. Should New Jersey prevail, the Crown Landing Facility will not require the Delaware permits that have been withheld by the State of Delaware. BP also anticipates being a party to future litigation with the State of Delaware (potentially prior to the resolution of this litigation) in which BP will assert that Delaware lacks jurisdiction over the Crown Landing Facility under the Compact of 1905, an issue to be decided in this litigation.

7. All Documents referring, reflecting, or relating to any discussions or communications, including but not limited to those to or from New Jersey or any Third Party, relating to the proposed Crown Landing Facility, any other proposed BP LNG Facility to be located in any way in Delaware Territory, Delaware's regulatory authority over such projects (including via Delaware's Coastal Zone Act), and/or New Jersey's regulatory authority over such projects.

RESPONSE:

Subject to its general objections:

(a) BP will produce non-privileged documents describing the portion of the Crown Landing Facility extending below the mean-low water line on the New Jersey side of the Delaware River pursuant to an appropriate protective order as described above;

(b) BP objects to producing documents relating to the portion of the Crown Landing Facility located entirely within New Jersey, above the mean-low water line on the New Jersey side of the River. Such documents are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. In addition, this request would impose an undue burden on BP;

(c) To the best of BP's knowledge, there is no "other proposed BP LNG Facility to be located in any way in Delaware Territory," so BP is unaware of any documents responsive to that part of the request.

8. All Documents referring, reflecting, or relating to any discussions or communications, including but not limited to those to or from New Jersey or any Third Party, relating to *New Jersey v. Delaware, Virginia v. Maryland*, or the 1905 Compact, including but not limited to Documents referring, reflecting, or relating to the following statement in paragraph 23 of the Segal Declaration, "Crown Landing is not, and has never been, a party to any proceeding in which it has attempted to obtain a ruling concerning New Jersey's rights under the Compact of 1905."

RESPONSE:

Subject to its general objections:

(a) BP objects to producing documents regarding communications with New Jersey concerning "*New Jersey v. Delaware, Virginia v. Maryland,* or the 1905 Compact." These communications are protected from disclosure by the attorney-client privilege, work-product doctrine, and common interest rule. BP shares a common legal interest with New Jersey in the outcome of this litigation. Should New Jersey prevail, the Crown Landing Facility will not require the Delaware permits that have been withheld by the State of Delaware. BP also anticipates being a party to future litigation with the State of Delaware (potentially prior to the resolution of this litigation) in which BP will assert that Delaware lacks jurisdiction over the Crown Landing Facility under the Compact of 1905, an issue to be decided in this litigation;

(b) BP objects to producing documents concerning *Virginia v. Maryland.* The undersigned served as Special Counsel for the Commonwealth of Virginia in that litigation. As written, this request would cover most if not all of counsel's files concerning that case. The request is overbroad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and would require production of documents protected by the attorney-client and work-product privileges belonging to counsel's other clients. Based on discussions with counsel for Delaware, BP understands that Delaware is limiting this portion of the request to documents from *Virginia v. Maryland* that were provided to New Jersey and communications with New Jersey about that litigation. Even as so limited, the request seeks materials that are protected from disclosure by the work product doctrine and common interest rule. The selection of particular documents from that litigation to share with New Jersey reflects counsel's thought-processes and judgment as to which documents are significant or important, and therefore is protected by the attorney work product doctrine. Please see part (a) above;

(c) With respect to the last three lines of the request, BP has not been a party to date in any legal proceeding in which it has attempted to obtain a ruling concerning New Jersey's rights under the Compact of 1905. In its December 7, 2004, memorandum to Delaware Secretary John A. Hughes, Crown Landing stated:

> The following is a discussion of the applicability of Delaware's Coastal Zone Act ("CZA") to that portion of the Docking Facility within the State of Delaware, and thus inside the "coastal zone" as defined in the CZA. This memorandum does not address, and is not intended to address, the impact of the New Jersey – Delaware Interstate Compact of 1905, nor is this memorandum intended to address the effect of § 3 of the Natural Gas Act of 1938. Accordingly, this memorandum does not reach the issue of the legal capacity of the State of Delaware to regulate the Crown Landing facility under the CZA.[3]
>
> . . .
>
> n.3 Accordingly, Crown Landing and BP reserve any and all rights with respect to the relative ability of the State of Delaware to regulate within the riparian jurisdiction granted under the Compact to the state of New Jersey, or to assert jurisdiction over activities which are the exclusive regulatory province of the Federal Energy Regulatory Commission.

(Footnote omitted). However, BP anticipates being a party to future litigation with the State of Delaware (potentially prior to the resolution of this litigation) in which BP will assert that Delaware lacks jurisdiction over the Crown Landing Facility under the Compact of 1905, an issue to be decided in this litigation.

9. All Documents referring, reflecting, or relating to all historical or archival research, legal research, or expert research performed by BP, its attorneys, or agents pertaining to *New Jersey v. Delaware*, the 1905 Compact, and Delaware's or New Jersey's jurisdiction over the proposed Crown Landing Facility, including but not limited to any such discussions, memoranda, or communications between BP and New Jersey.

RESPONSE:

In addition to its general objections, BP objects to this request because the documents sought are protected from disclosure by the attorney-client privilege, work-product doctrine, and

common interest rule. In addition, although counsel for BP has collected certain primary and secondary source documents concerning *New Jersey v. Delaware*, 1905 Compact, and Delaware and New Jersey's respective sovereignty and jurisdiction in the Delaware River, such documents were obtained solely from public sources available equally to counsel for the State of Delaware. The selection of particular documents to be collected reflects counsel's thought-processes and judgment as to which documents are significant or important, and therefore is protected by the attorney work product doctrine.

10. All Documents referring, reflecting, or relating to any discussions or communications with New Jersey or any Third Party regarding the public trust doctrine, riparian rights, the riparian privilege, or riparian jurisdiction.

RESPONSE:

In addition to its general objections, BP objects to this request as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. BP also objects because the documents sought are protected from disclosure by the attorney-client privilege, work-product doctrine, and common interest rule. BP shares a common legal interest with New Jersey in the outcome of this litigation. Should New Jersey prevail, the Crown Landing Facility will not require the Delaware permits that have been withheld by the State of Delaware. BP also anticipates being a party to future litigation with the State of Delaware (potentially prior to the resolution of this litigation) in which BP will assert that Delaware lacks jurisdiction over the Crown Landing Facility under the Compact of 1905, an issue to be decided in this litigation.

11. All Documents referring, reflecting, or relating to any agreements or contracts (formal or informal) with New Jersey relating to the proposed Crown Landing Facility or *New Jersey v. Delaware*, and any actual, promised, or proposed payments associated with either.

RESPONSE:

Subject to its general objections, BP states:

(a) As to the Crown Landing Facility, neither Crown Landing nor any BP affiliate has any agreement or contract with New Jersey. This Request does not cover proposed agreements or contracts. Nonetheless, Crown Landing discloses that it engaged in preliminary discussions with New Jersey about the possibility of New Jersey owning the pier and leasing it to Crown Landing. Those discussions did not culminate in any agreement or contract. To the extent Delaware intended this Request to cover documents relating to such discussions, BP objects to producing them on the ground that they are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

(b) As to *New Jersey v. Delaware*, BP has no formal agreement with New Jersey. BP does have a common legal interest with New Jersey concerning the issues in this litigation. Should New Jersey prevail, the Crown Landing Facility will not require the Delaware permits that have been withheld by the State of Delaware. BP also anticipates being a party to future litigation with the State of Delaware (potentially prior to the resolution of this litigation) in which BP will assert that Delaware lacks jurisdiction over the Crown Landing Facility under the Compact of 1905, an issue to be decided in this litigation. BP has been acting in accordance with the reasonable expectation that privileged communications relating to the common legal interest will remain confidential. No BP affiliate has proposed or promised any payment whatsoever to New Jersey in connection with this common interest. BP objects to producing documents in connection with its common interest with New Jersey. Such documents are protected from disclosure by the attorney-client privilege, work-product doctrine, and common interest rule.

Respectfully submitted,

BP AMERICA INC.
BP CORPORATION NORTH AMERICA INC.
BP COMPANY NORTH AMERICA INC.
BP AMERICA PRODUCTION COMPANY
BP ENERGY COMPANY
CROWN LANDING LLC

By: _____
Counsel

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Counsel for BP America Inc., BP Corporation North America Inc., BP Company North America Inc., BP America Production Company, BP Energy Company, and Crown Landing LLC

CERTIFICATE OF SERVICE

I certify that on March 21, 2006, the foregoing Response To Rule 45 Subpoenas Served on BP America Inc. and Affiliates was served by electronic mail, and two copies by U.S. Mail, to the offices of:

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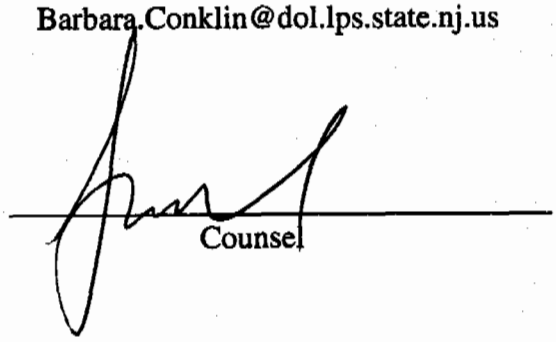


Counsel

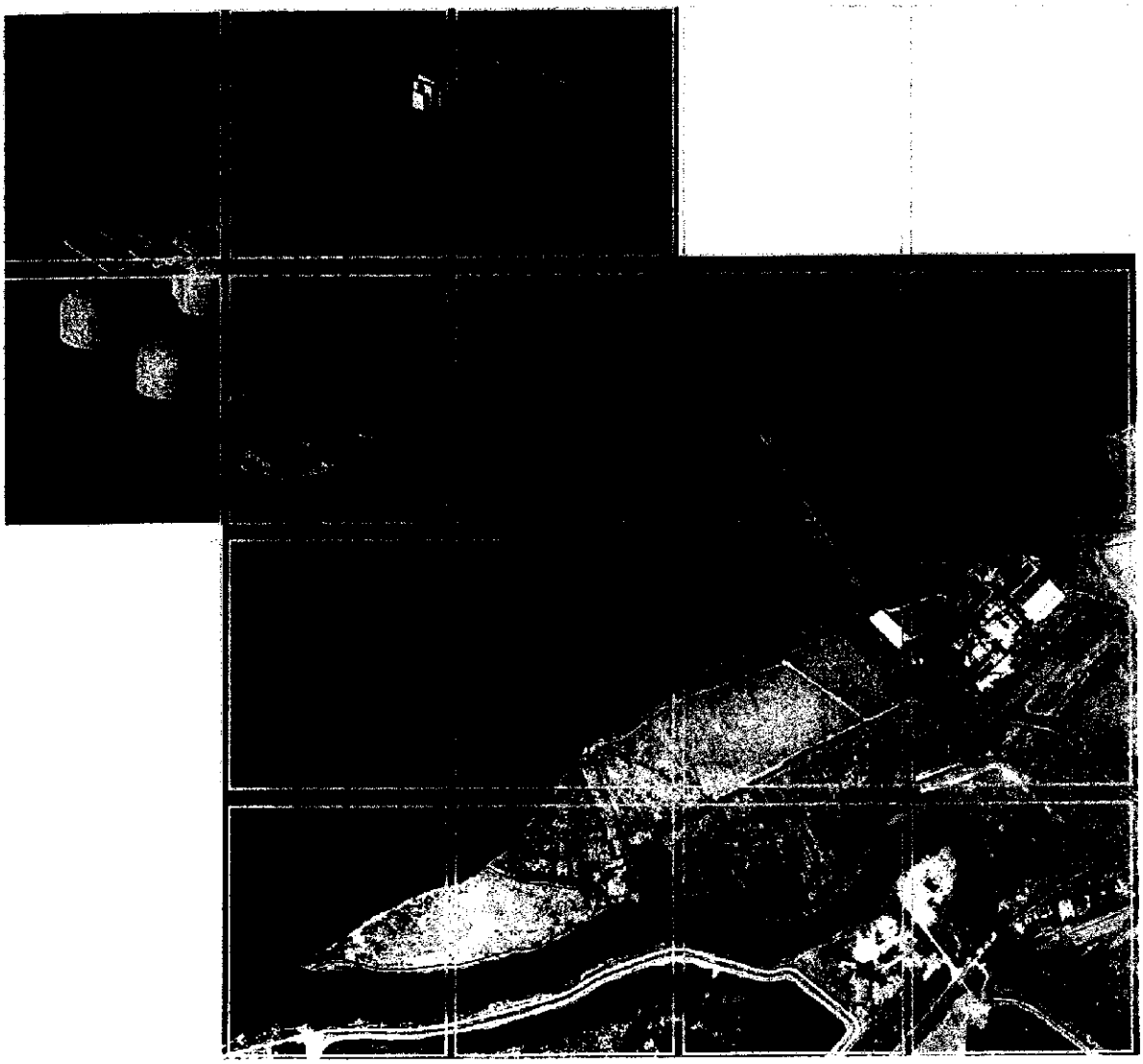
ATTACHMENT 5

Crown Landing LLC

Liquefied Natural Gas Import Terminal LOGAN TOWNSHIP, GLOUCESTER COUNTY, NEW JERSEY

Response to FERC January, 18 2005 Additional Information Request

January 21, 2005



Volume I: **PUBLIC**

Crown Landing LNG Project
Docket No. CP04-411-000
Response to FERC January 18, 2005
Additional Information Request

1. Please indicate which local jurisdiction would provide fire and other emergency services on the portion of Crown Landing's pier within the State of Delaware. Which emergency responders from the State of Delaware are being consulted in the development of Crown Landing's Emergency Action Plan (EAP)? When would Crown Landing have a draft EAP available for emergency personnel and Commission staff to review? Please describe the contacts you have made with these jurisdictions and their responses to date.

The providers of emergency services in jurisdictions near the Crown Landing Project formed the Crown Landing First Responder Task Force in November, 2004 to work with Crown Landing. The current members of the Crown Landing First Responder Task Force are Bill Rieger, Gloucester County Emergency Response Coordinator; Pat Spring, Logan Township Fire Chief; Eric J. Haley, Claymont DE Fire Chief; Michael Hall, NJ Division of Fire Safety; Joe Kempista, Wilmington Fire Department (Marine Unit); Doug Dillon, Tri-state Maritime Safety Association (TMSA) and Michael Gallagher, NJ Division of Fire Safety. Additional members will be added and these participants will be Chief Mike Smith, Logan Township Police Department; Lt. Rick Minnich, USCG; Andy Lovell, Logan Township Emergency Medical Services (EMS) Coordinator and Mike Solecki, USEPA On-Scene Coordinator and TMSA member.

Based on Crown Landing's review of Delaware law and conversations with members of the Crown Landing First Responder Task Force, Crown Landing understands that the Claymont Fire District will be the first responder organization, and therefore, would provide fire and other emergency services on the portion of Crown Landing's pier within the State of Delaware. A first draft of the Crown Landing Emergency Response Plan (ERP) that is currently being prepared provides that Crown Landing plans to follow the Incident Command System (ICS) response structure as described in the National Incident Management System (NIMS), Homeland Security Presidential Directive (HSPD-5), which is used in this area and throughout the United States. The Crown Landing ERP covers the shore facility and the pier activities.

An incident on the pier would initially involve a response from the Crown Landing Emergency Response Team (ERT), which is composed of Crown Landing employees or contractors. If there were a need for additional assistance, the Claymont Fire District would be called to respond. Additional response organizations would be called based on emergency pre-plans and taking into account the nature of the incident. Crown Landing will work with the Crown Landing First Responder Task Force and any other relevant organizations to develop formal mutual aide agreements that will describe the resources that are available for deployment in response to an emergency on the pier. A first draft of the Emergency Response Plan (ERP) is being finalized for further discussion with the Crown Landing First Responder Task Force, and this draft is expected to be submitted to the Commission staff by March 31, 2005.

Public

Crown Landing has been consulting and working with Ben Anderson and Chris Berlin, DNREC; Joseph Kalinowski, Deputy Chief, Wilmington Fire Department; Joseph Kempista, Marine Unit, Wilmington Fire Department, Chief Eric Haley, Claymont Fire Department and Doug Dillon and Al Huelsenbeck, Tri-state Maritime Safety Association (TMSA), which is located in Newport, Delaware.

Crown Landing began its stakeholder outreach, including outreach to emergency responders, at the time the company made the public announcement of the proposed Crown Landing import terminal during the fall of 2003. This early outreach effort is consistent with FERC's stakeholder guidance (Ideas for Better Stakeholder Involvement In the Interstate Natural Gas Pipeline Planning Pre-Filing Process, December 2001) which states that "*companies are encouraged to seek out greater involvement from the various groups early in the planning so those who are interested can participate in the decision-making process... The goal is to achieve consensus and settlements among the groups and the company about an acceptable project design. Earlier and more productive involvement will lead to better project designs....*"

The Crown Landing team initiated this outreach effort through two meetings with the emergency responders that were held in November, 2003. The first meeting on November 19, 2003 was held with agencies and other responders in the New Jersey-Delaware-Pennsylvania tri-state area who could respond to an incident involving a ship en route to, or docked at, the Crown Landing facility on the Delaware River, or involving the waterfront facility portion of the site. Meeting participants included eleven responders from state, federal and county response agencies, including wildlife responders. Representatives from Delaware Bay and River Pilots Association, the Tri-state Maritime Safety Association (TMSA) and Tri-state Bird Rescue attended. Delaware representatives at this meeting included Ben Anderson of DNREC; Doug Dillon of TMSA (Newport, DE); and Dr. Susie Michaelson of Tri-state Bird Rescue (Newark, DE). Mr. Bud Foster of DE Emergency Management Agency was invited but did not attend.

The second meeting was held on November 20, 2003 with Logan Township, Gloucester County, NJ first responders who would respond to an incident at the Crown Landing facility. Meeting participants included twenty responders from two fire departments, the Logan Township Police Department, the Gloucester County Office of Emergency Management, and the Logan Township EMS. A representative from the Tri-state Maritime Safety Association (TMSA) also attended.

Both meetings enabled Crown Landing to learn about the responders' issues, concerns, and questions related to the project and to give first responders open time to talk one-on-one with the Crown Landing representatives. Crown Landing provided basic information about the proposed project and displayed informational posters. Good discussions were held in each meeting and the emergency responders acknowledged the service levels needed.

On March 9, 2004, Crown Landing representatives met with Logan Township and Gloucester County first responders to discuss emergency access issues and site design options for the Crown Landing facility. Crown Landing met with representatives from the Logan Township Emergency Medical Services, Gloucester County Fire Marshall's office, Logan Township Fire Department, and Gloucester County Office of Emergency Management. As a result of this

Public

meeting, Crown Landing made changes to the site design to allow better emergency response access, while minimizing wetlands impacts associated with other access road options.

A combined meeting of first responders and river responders was held on April 6, 2004. Crown Landing personnel provided a status report on emergency response issues during the first part of the meeting. During the meeting, the participants discussed LNG physical properties and fire characteristics related to a large quantity released from a ship. Since ship emergencies could potentially involve three states, the responders discussed jurisdictional issues, responsibilities, and the hierarchy of response. Crown Landing committed to continuing to provide additional information about the terminal, vessel, pier and tugs for evaluation by the first response community.

Crown Landing met again with the emergency responders on September 21, 2004, and provided additional information regarding LNG physical properties, fire characteristics and emergency preparedness issues. To continue the discussion on emergency preparedness and response, a meeting was held on November 3, 2004 with law enforcement agencies (11 agency representatives) including the FBI-Joint Terrorism Task Force, NJ State Police, NJ Office of Counter Terrorism, and the US Coast Guard. On November 4, 2004 a meeting was held with local fire departments and fire protection agencies (14 agency representatives from New Jersey and Delaware). On November 4, 2004, another meeting was held with fire fighting representatives where representatives announced the formation of the Crown Landing First Responders Task Force, which is chaired by William E. Rieger, Jr., the Fire Marshal for Gloucester County, New Jersey. These meetings have resulted in terminal and pier design improvements as well as supporting the development of the Crown Landing Emergency Response Plan.

Response prepared under the supervision of:
James G. Busch
Regulatory
Crown Landing LLC
281-366-3531

2. *Which local jurisdiction would be responsible for on-site fire and safety inspections on the portion of Crown Landing's pier within the State of Delaware?*

Crown Landing is reviewing state, county and local regulations to determine if fire and safety inspections are required and which jurisdiction will be responsible to conduct the inspections. Crown Landing will report any additional findings at such time that we become aware of any new regulatory requirements.

Response prepared under the supervision of:
James G. Busch
Regulatory
Crown Landing LLC
281-366-3531

Public

3. Provide any future plans that Crown Landing is considering for the construction of any hydrogen fuel production or other chemical manufacturing facilities at its proposed LNG import terminal site in Logan Township, New Jersey, other than those related to importing, storing, and regasifying LNG as proposed.

Crown Landing does not have any plans, current or future, for hydrogen fuel production or chemical manufacturing at this site.

Response prepared under the supervision of:
James G. Busch
Regulatory
Crown Landing LLC
281-366-3531

4. Are any county or other local building permits required for the portion of the pier to be constructed within the State of Delaware? When would Crown Landing apply for them?

Crown Landing's understanding has been that it would not require any county or other local building permits for the portion of the pier to be constructed within the State of Delaware. Crown Landing is in the process of conducting additional research regarding this matter and will supplement this response if it obtains any additional information.

Response prepared under the supervision of:
James G. Busch
Regulatory
Crown Landing LLC
281-366-3531

AFFIDAVIT

State of Texas §
Harris, County §

I, Gregory S. Roden, being duly sworn this 20th day of January 2005, do hereby state that, on behalf of Crown Landing LLC, the foregoing responses to the data request issued by the Federal Energy Regulatory Commission ("Commission") Staff on January 18, 2005 in Commission Docket No. CP04-411-000 were prepared by me or under my supervision and are true and accurate to the best of my knowledge, information and belief.

Gregory S. Roden
Senior Attorney
Crown Landing LLC
(281) 366-3666

Subscribed and sworn to me this 20 day of January 2005.

Notary

Commission Expires: 7-2-05

TERESA G. SHERRILL
Notary Public, State of Texas
My Commission Expires 07-02-05