

**No. 134, Original**

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**In the  
SUPREME COURT OF THE UNITED STATES**

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**STATE OF NEW JERSEY,**

**Plaintiff**

**v.**

**STATE OF DELAWARE,**

**Defendant**

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**OFFICE OF THE SPECIAL MASTER**

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**ORDER ON NEW JERSEY'S MOTION TO STRIKE  
DELAWARE'S PROPOSED ISSUES OF FACT NOS. 1, 2, 6, 8 AND 9 AND  
TO PRECLUDE DISCOVERY ON THOSE ISSUES**

**June 13, 2006**

## ORDER

Upon consideration of New Jersey's Motion to Strike Delaware's Issues of Fact Nos. 1, 2, 6, 8 and 9 and to Preclude Discovery on These Issues, Delaware's Opposition thereto, and New Jersey's Reply, and after oral argument held on June 7, 2006, IT IS HEREBY ORDERED:

1. Delaware's Proposed Issue of Fact No. 1: New Jersey's motion to strike is granted.

Delaware asserts as a relevant factual issue, and seeks discovery concerning, any projects other than the Crown Landing LNG facility that "are under consideration or pending for approval in New Jersey within the twelve-mile circle and implicate Article VII or VIII" of the Compact of 1905.

To the extent the Compact is found to be ambiguous, it may be appropriate to look to extrinsic evidence of the States' intentions and course of conduct. But, as Delaware itself has recognized, information concerning other proposed projects that might be in the development pipeline – but that have not been approved or for which approval has not been sought in either state – cannot be useful in clarifying any ambiguity in the meaning of the grant of riparian jurisdiction to the states contained in the Compact. (*See* Def. Opp. to Motion to Strike Issues of Fact at 21.)

Delaware apparently seeks to have the Court render an opinion on whether any manner of speculative development that could conceivably be proposed in the future on New Jersey's shore within the twelve-mile circle would fall within the scope of the Compact's reservation of riparian jurisdiction. But whether private parties someday might propose "casinos, restaurants, heliports, amusement parks, or adult entertainment"

on the New Jersey side of the Delaware River, whether such projects might be permitted by New Jersey under its applicable laws and regulations, and whether Delaware itself might assert jurisdiction to regulate such proposed projects under state law are all abstract, hypothetical questions. What the Court is asked to do in this case is to determine the scope and meaning of the language of the Compact framed against the backdrop of a particular project, the Crown Landing LNG facility, over which Delaware has asserted jurisdiction and for which Delaware has declined to issue permits under Delaware law. As discussed below, the scope and particulars of that project, which brought the dispute between the states to a head, are potentially relevant in analyzing the meaning of the Compact. But, evidence of any possible but yet unrealized future proposals could not be relevant to the legal issue that the Court has to resolve.

2. Delaware's Proposed Issue of Fact No. 2: New Jersey's motion to strike is granted.

Delaware has asserted as a relevant factual issue, and seeks discovery concerning, 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." By granting New Jersey leave to file its Bill of Complaint, the Court has already – at least implicitly – determined that New Jersey is a real party in interest and that the Court does have jurisdiction over this dispute.

That implicit holding is reinforced by the fact that, in response to New Jersey's attempt to obtain permission to file a Petition to Reopen No. 11, Original, Delaware argued that the Court "lacks jurisdiction over this dispute, which in reality is between BP and Delaware, not two states." (Def. Opp. to Mot. to Reopen & for Supp. Decree at 21.)

Thus, the Court must have considered the matter in deciding to grant New Jersey leave to file its Bill of Complaint. In light of that determination and in the absence of any instruction from the Court to reconsider Delaware's jurisdictional arguments, it is inappropriate for the Special Master to reconsider the Court's implicit ruling that BP's role in urging or assisting New Jersey in the pursuit of this action is insufficient to defeat the Court's original jurisdiction.

Apart from the Court's implicit ruling, it is clear in any event that New Jersey is a real party in interest – even assuming the level of involvement by BP that Delaware suggests. New Jersey seeks to enforce its sovereign rights to whatever riparian jurisdiction is reserved to it under the Compact. The possibility that BP might benefit from a ruling in New Jersey's favor does not eliminate New Jersey's own independent interest in pursuing this original action against a sister state. Even the assumption – or the fact – that BP is funding New Jersey's litigation costs, providing tactical litigation support, operating under a “common interest” agreement and otherwise attempting to persuade or even goad New Jersey into filing and pursuing this action, could not negate New Jersey's own interest in enforcing its sovereign interests under the Compact.

Delaware recognizes in its brief that “the relief New Jersey seeks goes well beyond BP's project.” (Def. Opp. to Mot. to Strike Issues of Fact at 21.) That does indeed appear to be the case, in that New Jersey is seeking resolution of a long-disputed question of interpretation of the Compact that, although implicated most recently by the Crown Landing facility, extends beyond any single project. It is apparent that New Jersey does have a legitimate interest in this dispute and is a real party in interest. Accordingly, discovery into the relationship between BP's commercial interests in

obtaining regulatory approval of the Crown Landing project to New Jersey's decision to bring this action cannot lead to the production of admissible evidence bearing on the central issue in dispute in this case.<sup>1</sup>

3. Delaware's Proposed Issue of Fact No. 6: New Jersey's motion to strike is denied.

Delaware has identified as a factual issue, and seeks discovery related to, 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." As discussed above, to the extent the Compact is found to be ambiguous, interpretation of the meaning of the wording of the Compact might entail a review of the parties' course of conduct in the 101 years since the Compact's ratification.

New Jersey now concedes that it "does not object to this issue, to the extent it contemplates discovery concerning other projects previously approved by New Jersey within the Twelve-Mile Circle that have involved dredging." (Pl. Reply in Supp. of Mot.

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<sup>1</sup> Because the Special Master has determined that discovery into the relationship between BP and New Jersey in causing the latter to bring this suit is inappropriate for the reasons stated above, it is unnecessary to resolve New Jersey's other bases for precluding discovery into the role BP might have played in New Jersey's decision to bring this action. (*See* Pl. Mot. to Strike Issues of Fact at 19-21; Pl. Reply in Supp. Mot. to Strike Issues of Fact at 11, 16-17.) Delaware also posits that it is "entitled to discovery on whether an alternative site for BP's LNG facility exists that would not necessitate encroachment on Delaware's soil." (Def. Opp. to Motion to Strike Issues of Fact at 10.) It is unclear how that relates to the Court's jurisdiction. This is an original jurisdiction action involving a dispute over the states' sovereignty and riparian rights on New Jersey's side of the Delaware River within the twelve-mile circle. The Court is not asked to evaluate the merits of the proposed LNG facility or its overall compatibility with state law. Thus, information regarding alternative locations within New Jersey for an LNG facility will not assist in determining the meaning of the Compact. The Court must resolve whether New Jersey or Delaware or conceivably both has/have jurisdiction under the Compact to regulate facilities such as the proposed LNG facility within the twelve-mile circle – not anywhere else within New Jersey's borders where such a facility might be constructed.

to Strike Issues of Fact at 18.) As New Jersey now agrees, “such projects are part of the States’ course of performance under the 1905 Compact.” (*Id.*)

New Jersey’s only apparent remaining objection is that the Crown Landing project “is the subject of voluminous public filings containing detailed information on the scope and status of the project,” so Delaware should look there for information. (*Id.* at 19.) However, the fact that many documents concerning the Crown Landing project might be available from public sources has no bearing on whether responsive documents concerning other projects – which is the subject of Delaware’s Issue of Fact No. 6 – are readily available from public sources. New Jersey has not identified any such public repository from which Delaware could easily obtain such files. Thus, as New Jersey essentially concedes, because Delaware’s Issue of Fact No. 6 is relevant, discovery should be permitted.

4. Delaware’s Proposed Issue of Fact No. 8: New Jersey’s motion to strike is denied.

Delaware seeks discovery regarding “the nature and scope of BP’s Crown Landing liquefied natural gas unloading facility.” Under Delaware’s apparent theory of the case,

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.

(Def. Opp. to Mot. to Strike Issues of Fact at 23.)

Although the main issue in this case is the existence and scope of riparian jurisdiction reserved to New Jersey under the Compact, this dispute is set against the

background of Delaware's denial of the Crown Landing project in particular. Such information arguably is 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." (Def. Opp. to Motion to Strike at 24.) Again, while BP is not a party to this original action and New Jersey is properly asserting sovereign interests distinct from the interests of BP alone, the Crown Landing project is the catalyst for this proceeding and information concerning that project arguably could be relevant in providing further context. To the extent extrinsic evidence is found necessary to construe the Compact, a comparison of the proposed LNG facility to past projects possibly could be of some relevance in evaluating the states' contentions regarding the meaning of the Compact.

The only remaining issue is whether there is some alternative public source from which Delaware could obtain the requested materials that would avoid unnecessary discovery costs, as New Jersey suggests. Mindful of the states' mutual interest in avoiding unnecessary discovery costs, and in light of the apparent public availability of at least a significant portion of the documents related to the Crown Landing project, the Order below sets forth the approach that the states are to follow. The Special Master assumes that the states will continue to work together cooperatively in this regard, as they have to date in this litigation, to avoid disputes in following the approach set forth in this Order.

6. Delaware's Proposed Issue of Fact No. 9: New Jersey's motion to strike is granted.

Delaware seeks discovery pertaining to whether BP has "obtained all necessary New Jersey government permits for the Crown Landing project," in order to determine "whether the case is ripe and, therefore, whether this Court has jurisdiction over the dispute." (Def. Opp. to Motion to Strike Issues of Fact at 25.)

New Jersey has alleged in response that, because Delaware has asserted jurisdiction over the BP project and has declined to permit BP to conduct sediment sampling from the Delaware River that is necessary for permitting under New Jersey's regulations, New Jersey is unable to complete any review of the BP proposal as a result of Delaware's actions. Under Delaware's theory, then, New Jersey's claim would never fully ripen as a result of Delaware's assertion of jurisdiction over the BP project. Under those circumstances, the matter is ripe for review in this original action.

In addition, for the reasons set forth in Section 2 above, New Jersey itself is a real party in interest by virtue of its claim that Delaware inappropriately is attempting to regulate matters on New Jersey's shores. Thus, discovery concerning whether BP has already obtained permits from New Jersey for the development of the Crown Landing facility cannot lead to the production of admissible evidence relevant to the issues involved in this original action.



CONCLUSION

For the foregoing reasons, after full consideration of the states' written submissions and following oral argument by counsel, it is hereby ORDERED that:

New Jersey's Motion to Strike Delaware's Proposed Issues of Fact Nos. 1, 2, 6, 8 and 9 and to Preclude Discovery on These Issues is GRANTED IN PART AND DENIED IN PART, as follows:

The Motion is GRANTED as to Delaware's Issues of Fact Nos. 1, 2 and 9;

The Motion is DENIED as to Delaware's Issues of Fact Nos. 6 and 8; and

With respect to Delaware's Issue of Fact No. 8: Delaware shall first attempt to obtain the documents it seeks from public sources. New Jersey shall help Delaware in identifying the locations of such public documents, to the extent Delaware is not already aware of such filings. Once Delaware has obtained the requested documents from public sources, it will then be entitled to obtain from New Jersey any remaining requested documents that are not publicly available and that reasonably bear on this issue.

Dated: June 13, 2006



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