No. 134, Original

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY,
Plaintiff,
v.

STATE OF DELAWARE,
Defendant.

DELAWARE'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

JOSEPH R. BIDEN III
Attorney General
KEVIN P. MALONEY
DELAWARE DEPARTMENT OF JUSTICE
Carvel State Office Building
Wilmington, DE 19801
(302) 577-8338

COLLINS J. SEITZ, JR.
MATTHEW F. BOYER
KEVIN F. BRADY
MAX B. WALTON
CONNOLLY BOVE LODGE & HUTZ LLP
The Nemours Building
1007 N. Orange Street
Suite 878
Wilmington, DE 19801
(302) 658-9141
Special Counsel to the State of Delaware

DAVID C. FREDERICK
Counsel of Record
SCOTT H. ANGSTREICH
SCOTT K. ATTAWAY
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
Special Counsel to the State of Delaware

February 15, 2007

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GLOSSARY

1834 Compact	Act of June 28, 1834, ch. 126, 4 Stat. 708 (1834 New Jersey-New York Compact) (DE App. 885-88)
1877 Complaint	Complaint, *New Jersey v. Delaware*, No. 1, Original (U.S. filed Mar. 13, 1877) (DE App. 6-40)
1905 Compact	Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1905 New Jersey-Delaware Compact) (DE App. 11-14)
CMO No. 15	Case Management Order No. 15, *New Jersey v. Delaware*, No. 134, Orig. (U.S. Dec. 11, 2006)
DE App.	Appendix of the State of Delaware on Cross-Motions for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006 and Feb. 1, 2007)
DE Br.	Delaware's Motion for Summary Judgment and Supporting Brief, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006)
DE Letter Brief	Delaware's Letter-Brief to Special Master, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 4, 2006)
DE Opp.	Delaware's Brief in Opposition to New Jersey's Motion for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Feb. 1, 2007)
Hoffecker Rep.	Expert Report of Carol E. Hoffecker, Ph.D. (dated Nov. 9, 2006) (DE App. 4213-77)
LNG	Liquefied Natural Gas
New Jersey v. Delaware II	*New Jersey v. Delaware*, No. 19, Orig., 291 U.S. 361 (1934)
NJ App.	Appendix of the State of New Jersey on Motion for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006 and Feb. 1, 2007)
NJ Br.	New Jersey's Brief in Support of Its Motion for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006)

NJ Opp.	New Jersey's Brief in Opposition to Delaware's Motion for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Feb. 1, 2007)
NOAA	National Oceanic & Atmospheric Administration
Sax Rep.	Expert Report of Professor Joseph L. Sax (dated Nov. 7, 2006) (DE App. 4279-4302)

New Jersey's claim of exclusive jurisdiction over wharves is contrary to the text, structure, history, and purposes of the 1905 Compact. It is also belied by New Jersey's own subsequent, numerous concessions – made following years of analysis and consultation with its Attorney General – that Delaware's coastal zone laws apply fully to boundary-straddling projects within the twelve-mile circle. The 1905 Compact was negotiated at a time when two judicial decisions had already upheld Delaware's claim of sovereignty to low-water on the New Jersey shore, yet New Jersey claims that in Article VII Delaware unilaterally surrendered most if not all of the incidents of that sovereignty in exchange for nothing in return. New Jersey's claim must be rejected.

I. THE 1905 COMPACT LIMITS RIPARIAN JURISDICTION BY THE BOUNDARY

The baseline rule is that a State has full and exclusive sovereignty within its territory absent a clear and express surrender of any rights, which New Jersey does not dispute. *See* DE Br. 25; DE Opp. 21-22. The text, structure, history, context, and purposes of the 1905 Compact make clear that Article VII conveyed no such sovereign rights to New Jersey beyond its boundary with Delaware. *See* DE Br. 26-40; DE Opp. 19-35. Rather, like the surrounding Articles V, VI, and VIII, Article VII is a status quo provision, permitting that the States "may . . . continue to exercise riparian jurisdiction" pending resolution of the boundary. *See* DE Br. 35-40; DE Opp. 21-22.

New Jersey claims (Opp. 14) Delaware's reading of "own side" is "at odds with its plain meaning" because it "conflicts with the stated intent of the Compact to effect a practical resolution of the boundary dispute without the need to resolve [its] actual location." New Jersey thus dismisses the plain import of "own side" in favor of what it repeatedly terms a "practical" solution making the boundary irrelevant. NJ Opp. 14-15, 17-18. New Jersey, however, mistakenly bases all of its textual arguments on the false premise that the Compact *must* be read to have resolved all issues by making the boundary irrelevant for all time. *See* DE Opp. 23-27; NJ Opp. 19 ("Articles V and VI . . . are not jurisdiction-conferring provisions"); *id.* at 22 (same for Article VIII).

New Jersey (Opp. 15-16) blurs the geographical scope of Article VII, claiming that "own side" means "from the side to the middle" because the right to wharf out extends to the point of navigability. New Jersey claims (Opp. 16) that, "[u]nlike Article VII, Articles I through IV identify areas of shared jurisdiction that do not depend on the rights regulated." But the drafters chose to set forth, in separate phrases, the questions of *where* the States could act and *what* they could do there. "Own side" speaks to geography, while "exercise riparian jurisdiction" and "make grants" speak to the conduct permitted. Articles I through IV similarly use different phrases to denote geography (*e.g.*, "eastern half") and conduct (fishing and service of process). *See* DE Opp. 28-30.[1]

New Jersey's claim is also contradicted by numerous examples in its pleadings, statutes, case law, and 1834 Compact with New York using the descriptor, "middle of the river." DE Br. 31-34. New Jersey attempts (Opp. 18) to distinguish that pervasive, contemporaneous usage by claiming that it pertained either to New Jersey's boundary with Delaware or other boundaries, "not to effect a reservation of 'riparian jurisdiction of every kind and nature' expressly designed to be implemented without the need to identify the boundary." But because the drafters were addressing matters in the *absence* of agreement on the boundary, they had every need to be geographically precise – which they were in the first four Articles. The choice of the phrase "own side of the river" contrasts sharply with the geographically precise language in the first four Articles, and indicates that the drafters could not agree in Article VII (just as in Articles V, VI, and VIII) to make the boundary irrelevant. The 1834 Compact conferred "exclusive jurisdiction" over wharves, but that language is found nowhere in Article VII. *See* NJ Opp. 18; Hoffecker Rep. 30.

Significantly, New Jersey does not dispute that, under its most-recent reading of Article VII, New Jersey gave up *nothing* in exchange for the exclusive jurisdiction Delaware supposedly

[1] New Jersey claims (Opp. 16) that its reading "reflects a more targeted approach" and "more clearly reserves to Delaware jurisdiction over other property rights," "such as mineral rights that are not related to access to the channel." But "rights to mine or drill are not themselves riparian." *Id*. at 46.

surrendered within the disputed territory. But that illogical reading is inconsistent with Delaware's steadfast protection of its territorial rights and with Articles I through IV, which *do* contain such clearly identifiable, reciprocal trades. *See* DE Br. 34-35.[2] Article VII's placement with Articles indisputably deferring the boundary dispute further reinforces Delaware's reading. *See* DE Br. 34-35. New Jersey claims (Opp. 19) that the "arrangement of the Articles follows a different logic," proceeding from fishing (III through V) to oysters (VI) to riparian jurisdiction (VII). The subject-matter of Articles I and II does not necessarily precede the other subjects, yet the drafters placed them at the beginning. If Article VII meant what New Jersey claims, it logically would have been placed before or after Articles I and II, as a significant grant of jurisdictional rights, and thus grouped with Articles in which the drafters were able to reach geographically precise agreements despite the unknown boundary. The placement of Article VII thus shows that it is not the one-way jurisdictional giveaway by Delaware now claimed by New Jersey.

New Jersey likewise misreads the drafting history in relying on its commissioners' self-serving report to the New Jersey legislature that its rights had been "'safeguarded'" and "'every question of practical difficulty between the two States settled for all time.'" NJ Opp. 23 (quoting NJ App. 103a). New Jersey does not dispute that riparian rights were not a part of the "practical" disputes at issue in *New Jersey v. Delaware II*, which concerned only fishing rights and arrests. *See* DE Br. 30-31; NJ App. 103a (distinguishing between riparian interests as "safeguarded," and issues of "practical difficulty" as "settled for all time"). New Jersey's 1877 Complaint had re-

[2] New Jersey notes (Opp. 16-17) that Articles I through IV gave New Jersey certain fishing and service-of-process rights within the undisputed territory on the western half of the river. In those Articles – but not under New Jersey's flawed reading of Article VII – *both* Delaware and New Jersey received rights to act in the *disputed* territory. Moreover, New Jersey's 1877 Complaint had claimed ownership of the bed of the river "to the middle of said river," as well as "an equal interest and concurrent jurisdiction with the State of Delaware" "in and on every part of the waters of said river." DE App. 20. Thus, in Articles I through IV, the States agreed to share jurisdiction throughout the river concerning service of process and enforcement of uniform fishing laws to be enacted later, but they made clear trades in the disputed territory.

ferred to wharves extending from New Jersey in asserting a prescription claim, *see* NJ Opp. 19-20, but no live dispute over those wharves needed to be resolved to dismiss the pending litigation, *see* DE Br. 30 & n.34; Hoffecker Rep. New Jersey asserts (Opp. 20) that it "never would have wanted to endanger jurisdiction related to those [riparian] concerns, which it had exercised to that point." Even if that were the case (and New Jersey cites no evidence of the drafters' intent), what controls here is the *agreement* that the commissioners of both States negotiated, which is to the contrary.[3]

Moreover, "may continue to exercise" in Article VII does not mean "shall have" jurisdiction. *See* DE Br. 35-40; DE Opp. 21-22. Having no response to this strikingly different language, New Jersey substitutes different words.[4] The drafters set forth express declarations of jurisdictional rights in Articles III and IV in the phrases "shall have and enjoy" and "shall have and exercise," but they avoided any express declaration of rights in Article VII. Moreover, New Jersey plainly could not "continue" exercising rights it never validly had to begin with – *i.e.*, rights to regulate beyond its border or convey lands that it did not own.[5]

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[3] New Jersey erroneously relies (Opp. 23) on the statement by Delaware's commissioners that passage was not possible in 1903 given opposition "to the surrender directly or indirectly of the title and jurisdiction which the State of Delaware claims to and over the soil and waters." NJ App. 105a-106a; DE App. 1117-18. That statement nowhere mentions riparian rights and plainly applies to the fishing and service-of-process issues. Moreover, Delaware's legislators had objected only on the basis that the Compact (1) would harm Delaware fishermen and (2) was submitted without proper notice, thus precluding adequate debate and requiring it to be "rushed through the house with undue haste." DE App. 4749-50; *see also* NJ Br. 8, NJ Opp. 24 (citing NJ App. 1081a-1108a (no discussion of Article VII in 1905 news reports)); DE App. 4753 (reporting that Compact was "in the nature of a modus vivendi"). Nor does the statement of Delaware's Secretary of State that the Compact was of sufficient importance to publish in a compilation of Delaware Laws – a self-evident proposition – shed any light on Article VII. *See* NJ Opp. 24.

[4] *See*, *e.g.*, NJ Opp. 13 ("Article VII provides that each State "*shall* 'on its own side of the river, continue . . . .'"), 51 ("providing that New Jersey would *have* 'riparian jurisdiction'") (emphases added).

[5] New Jersey all but ignores Article VIII, citing it only once (*see* Opp. 22) but never confronting the fact that it requires any surrender of rights to be "herein expressly set forth." An "express" concession must be "made known distinctly and explicitly, and not left to inference or implication," as "contrasted with 'implied.'" DE App. 4748 (Black's Law Dictionary 1891). New Jersey thus does not dispute that Article VIII by its own terms requires any perceived ambiguity to be resolved in Delaware's favor. *See* DE Br. 28, 41; DE Opp. 34, 42. Even if that were not the case, the applicable canons of construction would require the same result. *See* DE Br. 40-43; DE Opp 34-35. In any case, Delaware's reading is by far the more natural, among other things in comparing the presence and lack of geographically precise language in the various

II. RIPARIAN JURISDICTION IS LIMITED TO PROPERTY RIGHTS

Article VII refers to "riparian jurisdiction of every kind and nature," thus making "riparian" a modifier limiting the scope of "jurisdiction." Laws termed "riparian" have only referred to the private property rights of owners of land abutting water. There is no riparian right to load or unload any particular cargo, or to carry on any business activity simply because it occurs on a wharf. The public interest laws that might limit the exercise of riparian rights, including environmental laws, have never been called "riparian laws." *See* DE Br. 47-60; DE Opp. 35-46. The only riparian expert in this case has reached the same conclusion. *See* Sax Rep.

New Jersey does not (and cannot) dispute any of those points. It concedes that Delaware's coastal zone laws are not "riparian" but rather "environmental laws." NJ Opp. 48. New Jersey nevertheless attempts to rewrite Article VII to reverse the order of "riparian" and "jurisdiction" and remove Article VII's limit on "jurisdiction" as follows: "'jurisdiction of every kind and nature' over riparian private property." NJ Opp. 37.[6] New Jersey knew from the 1834 Compact how to write text providing it with "exclusive jurisdiction . . . over wharves," DE App. 887, but Article VII of the 1905 Compact is not written that way. *See* DE Br. 2, 58; DE Opp. 39-43. New Jersey's attempt to reverse the order of key terms in Article VII and add others must be rejected.

Articles – an approach that parallels the analysis relied on by this Court in *Virginia v. Maryland*, 540 U.S. 56 (2003). *See also* DE Opp. 34 n.34. New Jersey's claim (Opp. 31-32) that the canon requiring any relinquishment of sovereign rights to be made in clear terms applies only between "lesser sovereigns" is fully refuted by this Court's application of that canon when construing a grant between two States. *See Massachusetts v. New York*, 271 U.S. 65, 88-89 (1926) ("all grants *by or to* a sovereign government . . . must be construed so as to diminish the public rights of the sovereign only so far as is made necessary by an *unavoidable* construction," and only where "the technical language employed in the grants compels us to take an opposite view") (emphases added); DE Br. 40. The doctrine serves to protect sovereign rights, *see*, *e.g.*, *United States v. Winstar Corp.*, 518 U.S. 839, 877 (1996), and thus applies to both "lesser" and "equal" sovereigns. Finally, New Jersey's claim that a surrender of rights should be presumed unless clearly stated otherwise (*see* Opp. 55) squarely contravenes both Article VIII and the applicable canons.

[6] *See also*, *e.g.*, NJ Opp. 1 ("exclusive State jurisdiction to regulate the construction, maintenance and . . . improvements"), 12 ("complete jurisdiction over the construction, maintenance and use of improvements"), 13 ("comprehensive jurisdiction over improvements"), 34 ("entirety of the state's jurisdiction over riparian rights;" "regulatory jurisdiction"; "police powers over the riparian right"), 35 ("full jurisdiction over riparian rights"; "full range of state regulatory interests over those riparian rights and activities").

New Jersey next analogizes the environmental laws at issue here to earlier laws prohibiting public nuisances and otherwise protecting the public interest. *See* NJ Opp. 33-40. New Jersey cites no case holding or suggesting that public nuisance laws are riparian laws. That is understandable, because riparian rights are held by riparian landowners – not the general public. Although the police power may limit the riparian landowner's private property rights, such power is not in any fair sense of the word an application of "riparian" laws or jurisdiction.

The riparian right to wharf out is limited to *access* to navigable waters and does *not* include a riparian right to handle any particular cargo or conduct any particular business activity. *See* DE Br. 51-54; Sax Rep. ¶¶ 13-15, 23-25. New Jersey does not dispute that fundamental tenet of contemporaneous law and history.[7] Instead, it asserts that "'riparian jurisdiction of every kind and nature' necessarily must include the authority to more precisely define the right to wharf out, by defining the actual activities that may be undertaken to effectuate access to the river for commercial purposes." NJ Opp. 45. New Jersey thus seeks to divorce the term "riparian" from its historical and legal context and give it a far broader meaning to suit New Jersey's present purposes. New Jersey's impermissible approach goes against any fair construction of Article VII, as well as its own concession that "Article VII . . . must be read and understood *in light of the established scope of allowable riparian uses*." *Id.* at 13-14 (emphasis added).[8] Because "the estab-

[7] *See* NJ Opp. 43-44 (quoting without disputing Delaware's claim that "the riparian right to wharf out 'does not include any right to carry on any particular activities on the wharf, such as the unloading of LNG'") (quoting DE Br. 51).

[8] New Jersey's concession likewise compels rejection of its sole argument against admissibility of the Sax Report, which is that, because the phrase "riparian jurisdiction" is not a term of art, there is "no need for an 'expert.'" NJ Opp. 44 n.21. But New Jersey does not dispute that "riparian" *is* a term of art, and Professor Sax applies his 40 years of expertise to examine the contemporaneous meaning of that term selected by the attorney drafters of Article VII. New Jersey has abandoned any challenge to admissibility the Hoffecker Report. *See also* DE Letter Brief (filed Dec. 4, 2006); CMO No. 15 (denying NJ's motion to strike). New Jersey mistakenly asserts (Opp. 44 n.21) that Professor Sax "concedes" New Jersey has certain rights in Delaware; instead his opinion only "assume[s] it was determined that New Jersey's 'riparian jurisdiction' extended water-ward of the mean low-water mark." Sax Rep. ¶ 31.

lished scope of allowable riparian uses" does not speak to the question of whether a particular use or activity may be engaged in on a wharf, the term "riparian jurisdiction" cannot be read to include such police power jurisdiction to regulate particular uses in the public interest.

Indeed, New Jersey concedes (Opp. 45) that "the unloading of drugs, alcohol, cigarettes, or the use of a dock for gambling or prostitution" are "criminal or non-riparian uses." (Those activities obviously could also violate civil police power laws.) That concession thus recognizes that riparian rights are limited to a general right to use a wharf but not a specific right to handle particular goods, and New Jersey cites no authority for the proposition that unloading fuel such as LNG is a riparian right under the applicable legal precedents.[9]

New Jersey next relies (*see id.* at 38-46) on the fact that the full extent within which a riparian owner may act cannot be known in all respects until the State has also exercised any police powers that might limit those rights. But this Court's opinion and the New Jersey Attorney General's brief in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), show the important difference between regulating in the public interest and establishing the rights of private riparian property owners, and the tension between those principles. *See* DE Br. 55-59. As Justice Holmes's opinion for the Court held, a State may on a "principle of public interest and the police power" regulate in ways that limit the permissible activities of riparian proprietors to protect the environment "irrespective of the assent or dissent of the private owners of the land most immediately concerned." 209 U.S. at 355-56. New Jersey concedes (Opp. 41) that this distinction, as briefed by its Attorney General and commissioner Robert McCarter, between private property rights and the police power "was well established." New Jersey claims (*id.* at 42) that McCarter

[9] New Jersey's reliance on the limitation of the riparian right to protect navigation, (*see* Opp. 38-40) is likewise flawed because the right ceases to exist when navigable water is reached. *See* DE Opp. 35-39. New Jersey also wrongly suggests (Opp. 43) "that it had fully exercised" police power over wharves before 1905; the only acts identified by New Jersey within the twelve-mile circle concern only navigation. *See* DE Opp. 37-39 & n.35.

"recognized that the right to regulate riparian activities for the public good is an essential element of the State's 'jurisdiction' over the exercise of private riparian rights." But that argument ignores the very different exercises of jurisdiction by defining the general rights held by a riparian landowner – *e.g.*, to wharf out to navigable waters, to bathe, to cut ice, etc. – and protecting the rights of the public when private and public rights come into tension.

McCarter thus highlights the failure of New Jersey's commissioners to get "exclusive jurisdiction" over wharves. The issue is not, as New Jersey frames it, whether "New Jersey intended to effectuate a surrender of police power." *Id.* at 43. Police power is in the sovereign, which Delaware exercises over Delaware lands. "Riparian jurisdiction," fairly read, is only the authority to establish the riparian rights of private owners, and not the broader police power regulations that may limit those rights.[10]

Consistent with the historical and legal fact that the riparian right to wharf out did not include a property right to unload any particular cargo or engage in any particular business activity on a wharf, none of the riparian grants trumpeted by New Jersey authorizes a specific use. *See* DE Br. 53; DE App. 4147-61 (NJ Admission Responses). Likewise, Delaware's (and other States') common-law permission to wharf out did not authorize particular uses. Thus, if a riparian owner engaged in activities harmful to the public on a wharf, nuisance (or other) laws were available subsequently to address those harms on a case-by-case basis. As the sovereign, Delaware's police laws fully apply to protect public rights. New Jersey does not identify a single nuisance case concerning a wharf in the twelve-mile circle over which it has asserted jurisdiction, thus proving that it has long been the practice to establish the riparian property right first without having to anticipate whatever public nuisance claims might arise as a result of specific activities.

[10] "Of every kind and nature" cannot expand "riparian jurisdiction." "Every" means "all members of a class." NJ Opp. 36 n.26. Just as "fruits of every kind and nature" excludes squash, "riparian jurisdiction of every kind and nature" excludes "non-riparian jurisdiction." *See* Sax Rep. ¶¶ 13-14 (listing riparian rights).

III. THE COURSE OF PERFORMANCE AND THE EQUITIES FAVOR DELAWARE

New Jersey has presented *no* evidence – and there is none – that, before this case, it ever sought to assert exclusive jurisdiction over wharves extending into Delaware. *See* NJ Opp. 24-30. Nor does New Jersey dispute that only 14 such structures have existed within the last 155 years, that only four remain, or that Delaware has regulated every such project constructed since it first enacted coastal zone statutes in the 1960s. DE Br. 19-21, 45-46; DE Opp. 54-57. None of New Jersey's actions (*see* Opp. 24-30) amounts to an assertion that Delaware lacks authority over boundary-straddling structures or activities.[11] Nor is there evidence that any of the 11 such structures constructed between 1854 and 1969 arguably constituted a public nuisance – the standard applied under Delaware common law – that would require Delaware to intervene.[12]

[11] New Jersey relies (*see* Opp. 25) on pierhead and bulkhead lines and two permits issued while the boundary was still unsettled. None of those acts purports to regulate the activities on a wharf, and one of the permits concerns a cross-river submerged electric cable (*see* NJ App. 633a-635a), which New Jersey argues is "completely irrelevant to the meaning of Article VII." NJ Opp. 29. New Jersey's 1917 cession (*see id*. at 26) did not concern a riparian structure but rather land sought by the United States to deposit dredging materials, and it concerned the same general area of lands ceded previously by both States for that purpose in 1907 at the request of the United States given the unresolved boundary. *See* DE App. 1263-90. Delaware's adoption of pierhead and bulkhead lines for only nine miles of its 86-mile coastal zone (*see* NJ Opp. 26-27) shows only that it limited such actions to urban areas, not that it disclaimed authority on the eastern half of the river (*see* DE Br. 16) – which New Jersey concedes has had exceedingly little development over the last 155 years. *See* NJ Opp. 8; DE Br. 19-21, 45-46. The Wilmington City Code's reservation of the taxing issue (*see* NJ Opp. 27-28) merely recognized that the matter was in dispute and conceded nothing to New Jersey. *See* DE Br. 15; DE Opp. 53-54; DE App. 2098; *see also* NJ App. 1491a, DE App. 4855-57 (New Castle County taxes Keystone but not Fort Mott due to governmental tax exemption). New Jersey relies on a 1957 letter by outside counsel concurring in DuPont's assertion that the Highway Department has no jurisdiction over an outfall pipe proposed to be constructed by DuPont. *See* NJ Opp. 28. But other correspondence in its appendix shows that "permission was granted [by the Highway Department] to place the new outfall," thus showing Delaware's assertion of regulatory authority. NJ App. 638a. In any case, Delaware's Attorney General had previously advised that "the Highway Department [lacks] authority to sell submerged lands in the Delaware River." DE App. 4777. *Cf.* DE App. 4855-56 (New Jersey statement to Congress on importance of applying Delaware laws to boundary-straddling projects operated by the DRBA); *id.* at 4787, 4828-31 (NOAA approved Delaware CMP over Sun Oil's claim that the Compact denies Delaware authority over boundary-straddling projects); NJ Br. 22-23, Opp. 52 (Sun Oil).

[12] *See Georgia v. South Carolina*, 497 U.S. 376, 389 (1990) ("Inaction, in and of itself, is of no great importance; what is legally significant is silence in the face of circumstances that warrant a response.") (citing *New Jersey v. Delaware II*); DE Opp. 54-57. New Jersey also does not dispute that it never gave notice to Delaware before issuing any of its riparian grants or leases, or that it would be unreasonable to require Delaware to monitor New Jersey's administrative processes. *See* DE Br. 46.

New Jersey admits (Opp. 50-54) both that Delaware vigorously enforced its coastal laws and that until 2005 New Jersey conceded its right to do so. New Jersey dismisses its numerous concessions as "[l]ater actions" (Opp. 13), but that 35-year history is the best course-of-performance evidence here. For most of the 1970s, New Jersey thoroughly investigated its power within the twelve-mile circle in developing its CMP and specifically sought advice from its Attorney General regarding the boundary.[13] Over the next two decades, New Jersey acted fully in accord with its Attorney General's firm conclusion that it lacked exclusive jurisdiction. *See* DE Opp. 5-19, 57-60; *Illinois v. Kentucky*, 500 U.S. 380, 386-87 (1991) (concessions "in the recent past" sufficient to undermine prescription claim).[14] Nor is there merit to New Jersey's equitable claim (Opp. 50) that permitting Delaware to regulate boundary-straddling projects would unfairly allow it "to control access to the Delaware River" in certain respects. Delaware applies its coastal zone laws even-handedly throughout the river,[15] and the States have long cooperated effectively in regulating boundary-straddling projects – as New Jersey has long admitted. *See* DE Opp. 5-19, 43-46, 57-60; DE App. 3135 (New Jersey rejection of identical claim by Salem County in 1980).

CONCLUSION

Textual and historical analysis of the Compact, New Jersey's numerous concessions of Delaware's authority, and the equities all refute New Jersey's newly minted claim of exclusive jurisdiction. The Special Master should recommend that the Court hold that Article VII denies New Jersey any authority in Delaware and dismiss New Jersey's complaint with prejudice.

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[13] New Jersey's suggestion (Br. 22) that its CMP was developed in ignorance of the Compact is untenable. The 1979 Options Report bases its detailed boundary analysis on *New Jersey v. Delaware II*, *see* DE App. 2509, which in turn discussed the Compact and thus certainly was consulted, *see* 291 U.S. at 376-78.

[14] "[P]ractical interpretation of an agreement by a party to it is always a consideration of great weight. . . . Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties . . . often claim more, but rarely less, than they are entitled to." *Brooklyn Life v. Dutcher*, 95 U.S. 269, 273 (1877).

[15] *See Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 406-07 (3d Cir. 1987).

Respectfully submitted,

DAVID C. FREDERICK
Counsel of Record
SCOTT H. ANGSTREICH
SCOTT K. ATTAWAY
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
Special Counsel to the State of Delaware

JOSEPH R. BIDEN III
Attorney General
KEVIN P. MALONEY
DELAWARE DEPARTMENT OF JUSTICE
Carvel State Office Building
Wilmington, DE 19801
(302) 577-8338

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MAX B. WALTON
CONNOLLY BOVE LODGE & HUTZ LLP
The Nemours Building
1007 N. Orange Street
Suite 878
Wilmington, DE 19801
(302) 658-9141
Special Counsel to the State of Delaware

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STATE OF NEW JERSEY, *Plaintiff,* v. **STATE OF DELAWARE,** *Defendant.*	**No. 134, Original** **Before the Special Master The Hon. Ralph J. Lancaster**

CERTIFICATE OF SERVICE

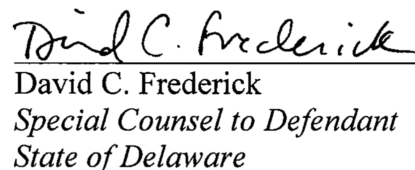
The undersigned hereby certifies that on this 15th day of February 2007, counsel for the State of Delaware caused true and correct copies of (1) Delaware's Reply Brief in Support of its Motion for Summary Judgment; (2) Volume 9 of Delaware's Appendix on Cross-Motions for Summary Judgment; (3) the original and four copies of the updated Comprehensive Table of Contents for Delaware's Appendix (Volumes 1 through 9); and (4) two courtesy copies of a CD containing Volume 9 of Delaware's appendix and the Comprehensive Table of Contents in electronic form to be served upon counsel for the State of New Jersey in the manner indicated below:

BY ELECTRONIC MAIL AND THREE COPIES BY FIRST CLASS MAIL

Rachel J. Horowitz
(Rachel.Horowitz@law.col.lps.state.nj.us)
Deputy Attorney General
Richard J. Hughes Justice Complex
25 West Market Street
P.O. Box 112
Trenton, New Jersey 08625
(609) 984-6811

BY ELECTRONIC MAIL AND TWO COPIES BY FIRST CLASS MAIL

Barbara Conklin
(Barbara.conklin@law.col.lps.state.nj.us)
Deputy Attorney General
Richard J. Hughes Justice Complex
25 West Market Street
P.O. Box 112
Trenton, New Jersey 08625
(609) 633-8109



David C. Frederick
Special Counsel to Defendant
State of Delaware