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Muddy Waters: Jurisdiction Over the Delaware River and Bay



Legal Ease

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Throughout history mankind has used waterways to create natural borders. With these natural divisions comes a history of boundary and jurisdictional disputes including between Virginia and Maryland, Ohio and Kentucky, and New York and New Jersey, among others.

The history between the States of Delaware and New Jersey is no different. Numerous disputes have led to an interstate compact agreement, three Supreme Court decisions, the threatened use of the National Guard, and the re-commissioning of the USS NEW JERSEY to ward off an invasion. With these disputes aside, no one can argue with the proposition that the states of Delaware, New Jersey, and Pennsylvania must work together to successfully promote the growth of the ports as well to balance environmental regulations affecting the ports.

The Delaware-New Jersey Border

Delaware and New Jersey have disputed their border rights over the Delaware River since the birth of our nation. These have led to three Supreme Court decisions establishing the boundaries between Delaware and New Jersey on the Delaware River and Bay.

The first major dispute between the two states started in the mid-1800s after Delaware passed a law requiring New Jersey fishermen to obtain Delaware fishing licenses. New Jersey brought suit against Delaware to declare the long-disputed boundaries. The case went on for many years and was ultimately dismissed in 1907 after Delaware and New Jersey created the Compact of 1905, later approved by Congress.

The Compact of 1905 established Delaware and New Jersey's riparian rights to the Delaware River, concurrent jurisdiction with respect to civil and criminal process as well as the concurrent rights of regulating the fishery. However it did not specifically address or affect either state's territorial limits, rights or jurisdiction over the Delaware River, nor its subaqueous soil. These omissions would lead to future disputes and litigation.

A second action was brought in 1934 by New Jersey to determine the rights to the subaqueous soil after a dispute arose over the rights to an oyster bed within the twelve-mile circle of New Castle, Delaware. In *New Jersey v. Delaware II*, the Supreme Court established the boundary line between Delaware and New Jersey in the River below the twelve-mile circle and the Delaware Bay.

The Court traced Delaware's title through a series of deeds originating from a 1682 deed to William Penn granting him all the lands lying within the twelve-mile circle of New Castle, including the River, its islands and submerged lands. On reviewing the Compact of 1905 the Court determined that it did not affect either state's territorial limits, rights or jurisdiction over the River's subaqueous soil. The Supreme Court held that Delaware had title to the subaqueous soil within the twelve-mile circle.

The Supreme Court also held that the boundary between the two states below the

twelve-mile circle and into the Delaware Bay is the centerline of the main shipping channel. The Court found that after the Revolutionary War there was no treaty or convention establishing a boundary between Delaware and New Jersey.

When independence was achieved, international law was applied to establish water boundaries between the states. Under the doctrine of "Thalweg," international law divides boundaries by the middle of the main shipping channel, where one exists, and not by the geographical center of the river banks. The Court looked at Fisher's Chart of Delaware Bay and found that there was a well-defined navigation channel on the Delaware Bay and River as early as 1756. Applying the Thalweg doctrine, the Supreme Court held that below the twelve-mile circle, the boundary between Delaware and New Jersey is the middle of the Delaware Bay and River's main shipping channel.

Development of Environmental Regulations and Interstate Cooperation

The environmental movement began in the late 1950s, and Delaware enacted several statutes regulating the submerged lands of the Delaware River. In 1971, it implemented the Delaware Coastal Zone Act (DCZA) which was established to protect Delaware's coastal zone and prevent a danger of pollution to the coastal zone. The DCZA prohibits "heavy industry uses of any kind" and "offshore gas, liquid or solid bulk product transfer facilities."

In 1972, Congress passed the Coastal Zone Management Act (CZMA) which encourages states to develop coastal zone protection programs in exchange for federal funding; each state's coastal management plan (CMP) must be approved by the National Oceanographic and Atmospheric Administration (NOAA). Once a CMP has been approved, proposed projects contained within a state's coastal zone must conform to the plan.

In 1979, Delaware's CMP was approved by NOAA, and in 1980, New Jersey's CMP was approved. Each state's CMP is different, as some states are less restrictive to industrial activities in the coastal zone while others are more so. Because of these differences, states must cooperate to encourage development of their coastal zones.

Following the decision of *New Jersey v. Delaware II*, the states cooperated to develop structures extending from New Jersey into the Delaware River. From 1969 to 2006, any New Jersey project that extended out into the Delaware River beyond the low water mark had to obtain coastal permits from both states. During that time, three structures were built, and Delaware issued permits for each. In 1972, Delaware rejected the construction of an LNG unloading facility extending from New Jersey into the Delaware River, because the facility violated the "heavy industry uses" and "bulk product transfer facilities" provisions of the DCZA. New Jersey did not object to Delaware's rejection at that time. However, this would be the harbinger of things to come.

New Jersey v. Delaware III

In the mid-2000s, British Petroleum planned the construction of an LNG offloading facility in New Jersey. The project, termed "Crown Landing," included the construction of a pier which would extend approximately 2,000 feet from New Jersey into the Delaware River. In addition, the project required the dredging of approximately 1.24 million cubic yards of subaqueous soil and affecting approximately 29 acres of riverbed within Delaware's jurisdiction.

In 2004, BP sought Delaware's permission to construct the project. Delaware denied the request and in support of its denial cited the DCZA which prohibits "bulk product transfer facilities" and "heavy industry uses." These same prohibitions were relied upon in Delaware's 1972 decision prohibiting the construction of an LNG facility.

Rather than accepting Delaware's decision, a dispute quickly escalated. New Jersey threatened to withdraw funds from Delaware's banks; Delaware considered mobilizing the National Guard to project its border; New Jersey's legislature looked into re-commissioning the battleship NEW JERSEY to repel a possible invasion by Delaware. In the end, cooler heads prevailed, and rather than firing the 16" guns of the NEW JERSEY into Delaware, New Jersey took to the pen and fired a complaint, hauling Delaware back to the Supreme Court for a third time.

In *New Jersey v. Delaware III*, New Jersey brought suit against Delaware seeking a declaratory judgment that under Article VII of the Compact of 1905 New Jersey had the authority to construct the Crown Landing project.

The Supreme Court looked to the Compact to determine what riparian rights New Jersey had over the subaqueous soil within the twelve-mile circle. While Article VII allows each state to exercise riparian jurisdiction of every kind and nature under the laws of that respective state, Article VIII specifically states that the Compact does not affect "the territorial limits, rights, or jurisdiction of either state...or the ownership of the subaqueous soil." Based on Article VII of the Compact, the Court determined that New Jersey has riparian rights within the twelve-mile circle.

A riparian landowner has a bundle of rights to use the waters his property abuts, including the right to wharf out and to access navigable waters of a stream. However, these rights are subject to law and regulation of the state in which the stream is situated. The Supreme Court thus concluded that New Jersey's riparian rights within the twelve-mile circle are subject to Delaware's regulation. While New Jersey had the right to construct a wharf, it could only do so if it did not violate Delaware law.

Rather than hold that New Jersey's riparian rights within the twelve-mile circle are subject to Delaware's law and regulation, the Supreme Court held that New Jersey may grant and exercise authority over "ordinary and usual riparian rights" for the construction, maintenance, and use of wharves within the twelve-mile circle extending beyond the low-water mark. Delaware may exercise governing authority over those wharves to the "extent that they exceed ordinary and usual riparian uses." Though the Court failed to define what is considered or-



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inary and usual riparian uses, it determined that the Crown Landing project went beyond the ordinary or usual and therefore, Delaware had the authority to prohibit the construction of the facility.

The Supreme Court's decision was not unanimous. The dissent argued that the majority's opinion failed to explain the "extraordinary character" test it set forth and also that the particular riparian right at issue in the case was the right of wharfing out.

The activity at issue is nothing more or unusual than what would have occurred in 1905 when the Compact was created. In 1905 wharves were used primarily for the transfer of bulk cargo and heavy industrial use. While the liquefied natural gas industry was not developed in 1905, similar loading and unloading activities were occurring on wharves.

Future Development on the Delaware River and Bay

For future port development on the Delaware River and Bay to be successful, New Jersey, Delaware, and Pennsylvania must work together.

For centuries, Delaware and New Jersey have fought over jurisdiction on the Delaware River. Consistency, port growth, and the resulting economic development on the Delaware River and Bay could be properly balanced through cooperation with the need for responsible environmental regulation.

Today, some policymakers are suggesting that Delaware revise its CZMA in light of changes in both the environmental and economic climates since the Act was first written. As clearly illustrated here, decisions made by one state can dramatically affect the activities of another.

It is worth noting in a later suit brought by Delaware against the Federal Energy Regulatory Commission, FERC determined that the Crown Landing project was subject to coastal zone consistency reviews and approval by New Jersey, Delaware, and Pennsylvania before FERC approved construction of the project.

Interstate cooperation is the key to the future success of the development of the tri-state regional port.

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