

# Staying Ahead

with Saul Ewing

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## Supreme Court Rules for Delaware, Against New Jersey in Boundary Dispute

*By Steven J. Picco and Cristina Stummer*

In Round Three of the Delaware River boundary dispute between Delaware and New Jersey, the United States Supreme Court ruled yesterday that the states of New Jersey and Delaware have overlapping authority to regulate extraordinary riparian and waterfront improvements that extend beyond the low water mark on the eastern shore of the Delaware River within a circle of twelve miles centered on the town of New Castle, Delaware. See, *New Jersey v. Delaware*, 552 U.S. \_\_\_ (March 31, 2008). In a 6-2 decision, the Court rejected New Jersey's position that its authority was exclusive.

This current boundary dispute over the twelve-mile circle arises from the state of Delaware's denial of certain permits to a company that proposed to construct a Liquefied Natural Gas (LNG) facility on the eastern banks of the Delaware River in New Jersey. Although the LNG facility would be located on-shore of New Jersey, the wharf that would service the LNG facility would extend into the Delaware River, beyond the low water mark in the twelve-mile circle and into territory belonging to Delaware. See *New Jersey v. Delaware*, 291 U.S. 361, 385 (1934). When the company sought permission from Delaware's Department of Natural Resources and Environmental Control (DNREC) to construct the facility, the agency refused permission asserting that Delaware's Coastal Zone Act prohibited the construction of such an off-shore terminal and heavy industrial use along the Delaware River.

Prior to the 1934 boundary determination, the two states had entered into a Compact in 1905, which was ratified by Congress in 1907. Although this compact did not decide the state boundary within the twelve mile circle at that time, the 1905 Compact contained two jurisdictional provisions, which took center stage during round three of the jurisdictional battle:

“Art. VII. Each State may, on its own side of the river, 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.

Art. VIII. Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.”

After DNREC denied the company the authority to construct the LNG facility, New Jersey commenced an action in the Supreme Court seeking a declaration that Article VII of the 1905

Compact gave it exclusive jurisdiction over all waterfront development projects appurtenant to its shores, including wharves extending past the low water mark on New Jersey's side into Delaware territory. Disagreeing with New Jersey, the Supreme Court ruled that under the 1905 Compact, the state of Delaware retained police power to regulate certain riparian uses that extend offshore from New Jersey beyond the low water mark within the twelve-mile circle.

According to the Supreme Court, the 1905 Compact only afforded New Jersey exclusive governing control over "ordinary and usual" riparian rights for improvements appurtenant to the eastern shore of the River within the twelve-mile circle, extending offshore beyond the low water mark. Examples afforded by the Court of what are "ordinary and usual" riparian rights include "how far a riparian owner can wharf out, the quantities of water that a riparian owner can draw from the River, and the like."

On the other hand, if improvements "exceed ordinary and usual riparian uses" or are of "extraordinary character," the Supreme Court ruled that the 1905 Compact granted Delaware the ability to exercise governing authority over the improvements, subject to the rights reserved to New Jersey, once those improvements extend offshore of the low water mark. Although the Court failed to articulate the meaning of its "extraordinary character" test, it held that the LNG facility went "well beyond the ordinary or usual" and that Delaware had retained police power to regulate the proposed riparian use. The Court rationalized, "New Jersey cannot authorize activities that go beyond the exercise of ordinary and usual riparian rights in the face of contrary regulation by Delaware."

The Supreme Court retained jurisdiction over the matter to entertain all those future disputes as to what is in fact an ordinary versus an extraordinary riparian use. The decision, while important to Delaware and New Jersey, is limited to the interpretation of the Compact between them, and thus will have limited or no impact in other jurisdictions.

However, under on this decision, anyone pursuing a development on the NJ shoreline within the 12 mile circle may need Delaware as well as NJ approvals under the states' respective Coastal Zone Management programs. Saul Ewing, with offices in NJ and Wilmington, is uniquely positioned to assist in these circumstances.

*This Bulletin was written by Steven J. Picco, a Partner in Saul Ewing's Environmental Department and Cristina Stummer, an Associate in Saul Ewing's Environmental Department. If you have questions or wish to discuss the contents of this Bulletin, please feel free to contact Mr. Picco at 609.452.3153 or [spicco@saul.com](mailto:spicco@saul.com) or Ms. Stummer at 609.452.5023 or [cstummer@saul.com](mailto:cstummer@saul.com). This publication has been prepared by the Environmental Department for information purposes only.*

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