



Cullen and Dykman LLP  
229 Nassau Street  
Princeton, NJ 08542  
T: 609.279.0900  
F: 609.497.2377

NEIL YOSKIN  
PARTNER  
NYoskin@cullenllp.com

July 14, 2020

*Via e-mail (kevin.terhune@law.njoag.gov) and regular mail*

Kevin A. Terhune, DAG  
N.J. Office of the Attorney General  
Division of Law Environmental Enforcement  
& Environmental Justice Section  
P.O. Box 093  
Trenton, NJ 08625

RE: City of North Wildwood Beach Maintenance Activities  
DEP File No. PEA 200001-0507-03-0009.3 and 0009.4

Dear Mr. Terhune:

This letter is in response to the Department of Environmental Protection's June 6, 2020 Notices of Violation and request for information in connection with the above-referenced matter. We are also responding to the Subpoena issued by your office on June 25, 2020, without conceding the legality or validity of that subpoena. The information and responses that follow consist of the following:

- Preliminary Statement
- Chronology of relevant events
- List of appended documents and exhibits [**To be submitted separately**]
- Responses to the allegations in the respective NOVs.

### Preliminary Statement

Everyone that lives, owns property, or vacations in the City of North Wildwood knows of the severe erosion that North Wildwood's beaches and dunes have experienced over the past six years, erosion which decimated much of the dune and wetlands complex along JFK Drive between 2<sup>nd</sup> and 15<sup>th</sup> Avenues. What was a 1,500' wide beach was, by the winter of 2019/2020, reduced to a beach that was entirely underwater much of the time, and a dune field that was under direct wave attack.

The City has spent upwards of \$10 million since 2016 on coastal resiliency initiatives including annual sand back-passing projects (in which surplus sand was trucked from Wildwood to North Wildwood) and the extension of a steel bulkhead from 4<sup>th</sup> – 13<sup>th</sup> Avenues. These emergency efforts are attributable for the most part to the failure of the USACE and NJDEP to begin, let alone complete, the Hereford Inlet to Cape May Inlet Shore Protection project. Not only did these agencies fail to begin this project, they repeatedly provided timeframes to North Wildwood for construction that North Wildwood relied on for budgetary and capital improvement planning purposes. Those timeframes were not met and continue to be unmet. As a result, North Wildwood appears to be the *only* oceanfront community in New Jersey that has not received federal aid for shore protection.

On June 20, 2020, NJDEP issued two Notices of Violation (NOVs) to the City. The first NOV (PEA 200001-0507-03-0009.3) indicated that during compliance evaluations conducted on

April 28 and May 26, 2020, DEP personnel observed the “unauthorized and unpermitted destruction of more than 8 acres of mature, densely vegetated natural dunes, the unpermitted construction of more than 2,234 linear feet of bulkhead, the unpermitted installation and construction of various structures and walkways and the continued failure to comply with conditions of a previously issued CAFRA Permit. Many of the activities cited in the NOV involved the installation or maintenance of previously approved improvements landward of the beach, such as the placement of crushed clam fill material for creation of a pathway, the placement of a small flag pole landing, the expansion of a pre-existing sidewalk, the installation of a 165 s.f. shed and other similar improvements. Other alleged violations included the disturbance of approximately 6.7 acres of beaches, dunes and freshwater wetlands between 7<sup>th</sup> and 13<sup>th</sup> Avenues.

As to the installation of the steel bulkhead, the City acknowledges that it was constructed without benefit of a CAFRA Permit. That construction, however, took place with the *full knowledge* of DEP officials (engineering plans for the bulkhead had been shared on several occasions with staff of the Division of Coastal Engineering) and was necessary to protect critical public infrastructure from the potential affects of the accelerating erosion of the City’s beaches and dunes.

The City was therefore disappointed to see DEP take such a public position by the way of the NOVs, given the fact that city officials have for years sought to underscore the urgency of damage to its beaches and dunes, as well as the ongoing delays of the USACE and NJDEP in

implementing the Hereford Inlet to Cape May Inlet Shore Protection Project. The City has pleaded for financial assistance on countless occasions, pleas which never received as much as a response.

The City was also disappointed to learn that the compliance inspections that led to the issuance of the NOVs took place as early as April 28, yet the NOVs were issued without any prior notice to or discussion with the City. The State's public aggressive promotion of the matter is disheartening to City officials, especially given the stewardship and proactive measures the City has taken to protect existing properties and critical infrastructure.

The second NOV (PEA 200001-0507-03-0009.4) was jointly issued to the City and to BG Capital LLC, lessee and prospective developer of the City owned Seaport Pier located at East 22<sup>nd</sup> Avenue. The NOV alleges various violations of CAFRA Permit and Flood Hazard Permit that had been issued for expansion of the pier, and lists the City as somehow having been involved with these activities. Although the City is pleased to work with the DEP and BG Capital to address the violations, it believes that it has no legal responsibility for them.

#### **Timeline of Relevant Events and Correspondence**

**February 21, 2014** – USACOE/NJDEP joint public hearing on Federal Hereford Inlet to Cape May Inlet beach replenishment project Public Hearing convened in North Wildwood City Council Chambers



**February 24, 2014** – NJDEP/USACE Request for comments on the Federal Project

**April 2, 2014** – Letter from Mayor Patrick Rosenello to NJDEP Commissioner regarding Wildwood and Wildwood Crest’s failure to endorse the draft Feasibility Report for Hereford Inlet to Cape May Inlet

**March 16, 2015** – USACOE issues update on the Hereford Inlet to Cape May Inlet Shore Protection Project, acknowledging a project schedule/start date of potentially beginning late 2016/early 2017 (originally projected for December 2014 and February 2015).

**November 1, 2016** – the City of North Wildwood receives funding confirmation from NJDEP for \$9.3 million to complete a pump station project in the City’s entertainment district to support flood risk resiliency. [NOTE: *The City has since contacted both NJDEP and USACOE on multiple occasions in an effort to reallocate these funds to support a hydraulic beach fill and seawall extension based on the severity of damage to the beachfront.*]

**November 30, 2016** – NJDEP provided plans for Hereford Inlet to Cape May Inlet Shore Protection Project to North Wildwood with request for comment(s).

**January 22 – 24, 2016** – City beaches and dunes sustain severe damage between 2<sup>nd</sup> and 5<sup>th</sup> Avenues resulting from Winter Storm Jonas.

**January 29, 2016** – Letter from then NJDEP Commissioner Martin providing \$133,450 for emergency beach repair and stabilization in response to damage caused by Winter Storm Jonas.

**March 4, 2016** – Letter of Request to DEP Assistant Commissioner David Rosenblatt from Mayor Patrick Rosenello for approval of an assistance with hydraulic beachfill for sand back-pass.

**August 16, 2016** – The City of North Wildwood executes State Aid Agreement with NJDEP not to exceed \$133,450.00.

**July 21, 2017** – Request to David Rosenblatt for NJDEP to sign on as co-applicant of CAFRA Individual Permit for Sand Back-pass

**December 6 – 7, 2017** – E-mails from Mayor Rosenello and City Engineer Verna to NJDEP Division of Coastal Engineering regarding the severity of ongoing erosion and potential for catastrophic damage to JFK Drive and adjacent private properties.

**December 7, 2017** – Plans and support data for seawall and bulkhead submitted to NJDEP Coastal Engineering.



**December 19, 2017** – E-mail from City of North Wildwood Business Administrator Kevin Yecco to NJDEP’s Division of Coastal Engineering confirming cost sharing for proposed Seawall Extension project from 3<sup>rd</sup> Avenue to 6<sup>th</sup> Avenue.

**January 10, 2018** – City receives formal written confirmation of funding provided by NJDEP for the Seawall Extension Project, approved for 75% State cost, not to exceed \$6,767,212.50.

**February 21, 2018** – Kick-off coordination meeting held in North Wildwood to discuss the Seawall Extension project, at which several copies of the plans for the seawall extension and related bulkhead extension from 3<sup>rd</sup> Avenue to 6<sup>th</sup> Avenue were presented to NJDEP/DCE and USACE. NJDEP and USACE agreed to provide comments on the plans so that the City could proceed with a CAFRA permit application, with Division of Coastal Engineering signing on as co-applicant.

- **2018 – 2019** multiple meetings held between USACE, NJDEP and the City, after which seawall and bulkhead plans were amended based on verbal comments provided during those meetings. Formal written comments, however, were not received from NJDEP until March 2020, some two years after the kick-off meeting.

**October 10, 2019** – City submits letter and photos to NJDEP confirming severe and ongoing beach and dune erosion South of 5<sup>th</sup> Avenue and requesting emergency monetary relief

for the bulkhead extension project, hydraulic beach fill, and/or sand back-pass project given the severity of damage and further damage expected.

**October 15, 2019** – The City of North Wildwood declares an emergency to extend the steel bulkhead from 7<sup>th</sup> to 10<sup>th</sup> Avenues, and issues contracts for work to commence immediately.

**October 17, 2019** – City provides drone footage to NJDEP’s Division of Coastal Engineering documenting the extent of damage to the beach and dunes during storm events on September 4, October 4 and October 11, 2019 explaining the loss and threat to critical public infrastructure, the majority of which was funded by the State of New Jersey through NJEIT funds. It was at this time, due to the severity of erosion, that the City of North Wildwood issued an emergency/executive decision to extend the bulkhead from 6<sup>th</sup> Avenue South to 11<sup>th</sup> Avenue.

**November 4, 2019** – Secretary of Interior authorizes the use of the Hereford Inlet Borrow Area for beach replenishment in accordance with the provisions of the Federal Coastal Barrier Resources Act. (NOTE: The use of the Hereford Inlet Borrow Area has repeatedly been approved by NJDEP.)

**November 8, 2019** – Letter from City to NJDEP Division of Coastal Engineering requesting amendment to the Federal Shore Protection Project to allow the use of the Hereford Inlet Borrow Area for hydraulic beach fill on North Wildwood’s beaches, specifically noting the

“near complete destruction of sensitive bird nesting and migratory feeding areas as well as designated wetlands” resulting from ongoing erosion.

**November 19, 2019** – Letter from North Wildwood Mayor Patrick Rosenello to Congressman Jeff Van Drew with copies to Lt Colonel David Park (USACE), Curtis Heckelman (USACE), Governor Murphy, Asst. Commissioner Rosenblatt (NJDEP), and Bill Dixon (NJDEP), setting forth the City’s unilateral expenses of over \$ 10 million thus far on sand back-passing, reiterating the City’s need for a hydraulic beach fill, explaining the City’s proposal for a bulkhead extension, and again requesting that the USACE amend the Federal Shore Protection Project to allow for hydraulic beach fill out of Hereford Inlet. Emergency Bulkhead Plans were also submitted yet again to NJDEP.

**December 6, 2019** – Letter from Congressman Van Drew to Lt. Col. Park regarding the severity of storm damage and erosion in North Wildwood, noting the City’s need for a hydraulic beach fill, requesting that the Shore Protection Project be amended to allow for a hydraulic beach fill out of Hereford Inlet, consistent with the CBRA.

**January 17, 2020** - Letter from Lt. Col. Park to Congressman Van Drew rejecting request for use of Hereford Inlet Borrow Area.

**December 19, 2019** – E-mail from Dr. Stewart Farrell, Stockton Coastal Research Center to City Administrator and Chris Constantino (NJDEP) with November 2019 beach survey results showing aggregate loss of 639,332 cy of sand over a 6-7 year period, and 155,000 cy of sand lost just in 2019 alone.

**January 9, 2020** – E-mail from the City to Chris Constantino (NJDEP) requesting financial assistance with City's sand back-pass project and expressing frustration as the City of North Wildwood continues to assume the financial burden of shore protection efforts alone.

**January 17, 2020** – City Administrator forwards correspondence and photos of erosion to DEP Assistant Commissioner Rosenblatt, documenting the ongoing significant damage to the City's beaches and dunes, and pointing out the inherent limitations with sand back-pass efforts.

**March 5, 2020** – NJDEP finally provides comments letter to the City of North Wildwood for Seawall extension project.

**May 19, 2020** – Despite pleas for financial assistance for the City's beach reconstruction efforts to both NJDEP and USACE, the Corps instead commits to funding a sand back-pass project for the City of Cape May.



**Response to NOV PEA 200001-0507-03-0009.3  
(Waterfront Area, Surf Avenue and 2<sup>nd</sup> Avenue to 22<sup>nd</sup> Avenue)**

**“The construction of approximately 617 linear feet of steel bulkhead from 5<sup>th</sup> to 7<sup>th</sup> Avenue within a prior beach and dune area”**

Response: The City acknowledges the construction of approximately 617 linear feet of steel bulkhead from 5<sup>th</sup> to 7<sup>th</sup> Avenue without prior authorization, which was necessary to respond to the public emergency posed by the severe ongoing and acceleration erosion of the City’s beaches and dunes.

**“The removal of vegetation, filling and grading of the (now bulkheaded) beach and dune area (approximately 0.58 acres) from 5<sup>th</sup> to 7<sup>th</sup> Avenue to create a park with playground, walkways and other amenities”**

Response: The City acknowledges construction of the playground, disputes whether the area in question (which was previously disturbed for CAFRA permitted construction of a municipal stormwater system) was vegetated at the time of construction, and disputes that it was a beach and dune area as those terms are defined in the Coastal Zone Management Rules at the time of construction.

**“The construction of approximately 1,617 linear feet of steel bulkhead from 7<sup>th</sup> Avenue to 13<sup>th</sup> Avenue along the oceanfront, within prior dune and freshwater wetland areas”**

Response: The City acknowledges construction of the steel bulkhead, which was necessary to respond to severe, ongoing and accelerating erosion of the City’s beaches and dunes, and in the absence of assistance from the State or federal government. As shown in as-built construction plans for the bulkhead (Van Note Harvey Associates, two sheets, July 7, 2020, unrevised), the City believes that only 9,046 square feet of freshwater wetlands were disturbed.<sup>1</sup>

**“The placement of crushed clam fill material for the creation of a path through approximately 8,565 s.f. of beach/dune/CAFRA area from Surf Avenue to the Lou Booth Amphitheater”**

Response: The work in question constituted routine maintenance of a municipal improvement the construction of which was authorized by a CAFRA Permit.

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<sup>1</sup> Plans to be submitted under separate cover.



**“The placement of an approximately 96 s.f. concrete landing/flagpole adjacent to the Lou Booth Amphitheater”**

Response: The work in question constituted routine maintenance of a municipal improvement the construction of which was authorized by a CAFRA Permit. The City, in addition, questions whether the activity requires a CAFRA Permit.

**“The 1,084 s.f. expansion of concrete sidewalk at Surf Avenue leading to the path through the dune that leads to the Lou Booth Amphitheater”**

Response: The work in question constituted routine maintenance of a municipal improvement the construction of which was authorized by a CAFRA Permit. The City, in addition, questions whether the activity requires a CAFRA Permit.

**“The placement of an approximately 165 s.f. shed within a CAFRA area at the beginning of the path on Surf Avenue leading to the Lou Booth Amphitheater”**

Response: The work in question constituted routine maintenance of a municipal improvement the construction of which was authorized by a CAFRA Permit. The City, in addition, questions whether the activity requires a CAFRA Permit.

**“The placement of a 470 s.f. of concrete path in a CAFRA area near the intersection of 2<sup>nd</sup> and Ocean (adjacent to Amphitheater)”**

Response: The work in question constituted routine maintenance of a municipal improvement the construction of which was authorized by a CAFRA Permit.

**“The removal of vegetation, grading and filling of a beach/dune/CAFRA area at the intersection of 1<sup>st</sup> and Surf: specifically, the placement of concrete and gravel for pathways and a bike rack area within a 4,234 s.f. area”**

Response: The work in question constituted routine maintenance of a municipal improvement the construction of which was authorized by a CAFRA Permit. The City, in addition, questions whether the activity requires a CAFRA Permit.

**“The clearing of vegetation and grading of a beach/dune at the intersection of 1<sup>st</sup> and Surf: specifically, the placement of an approximate 230 s.f. platform with benches”**

Response: The work in question constituted routine maintenance of a municipal improvement the construction of which was authorized by a CAFRA Permit. The City, in addition, questions whether the activity requires a CAFRA Permit. The City, in addition, disputes that the

area in question was a beach and/or dune at those terms are defined in the Coastal Zone Management Rules at the time of construction.

**“The construction of a 598 s.f. gazebo at 1<sup>st</sup> and Surf”**

Response: See responses above.

**“The construction of 357 s.f. roof gazebo structure at the intersection of 2<sup>nd</sup> and JFK Boulevard”**

Response: See responses above.

**“The construction of approximately 4,216 s.f. of concrete walkway and composite walkway at the beach patrol building at 15<sup>th</sup> Avenue”**

Response: See responses above.

**“The placement/construction of approximately 4,691 s.f. of storage sheds at the beach patrol building at 15<sup>th</sup> Avenue”**

Response: See responses above.

**“The placement/construction of an approximate 1,638’ x 8’ composite bike path between 15<sup>th</sup> and 21<sup>st</sup> Street along the oceanfront”**

Response: The City acknowledges construction of the bike path.

**“The placement of approximately 44,981 s.f. of crushed clam fill material for the creation of a walkway between 15<sup>th</sup> and 21<sup>st</sup> along the oceanfront”**

Response: The City acknowledges construction of the walkway.



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**“The construction of 24,264 s.f. of composite walkway/shower platforms/bench platforms, etc. along the oceanfront at multiple street and entrances to the beach. The showers have been constructed outside of the sewer service area (also in violation of N.J.S.A. 58:10A-1 et seq. and N.J.A.C. 7:14 et seq.)”**

Response: The City acknowledges construction of the improvements. As to the claim that the showers required a Water Quality Management Plan Amendment, the City believes that showers, which produce only gray water, are not sewage generating structures as that term is defined in the Water Pollution Control Act and its implementing regulations.

**“The construction of approximately 495 linear feet of vinyl bulkhead along the oceanfront from 3<sup>rd</sup> to 5<sup>th</sup> Avenues along, waterward of the existing timber bulkhead”**

Response: The City acknowledges construction of the 495 feet of bulkhead. That construction was in response to severe and accelerating erosion of the City’s beaches and dunes, all of which represented an immediate public emergency. Plans for and knowledge of the construction was shared with the Department’s Division of Coastal Engineering on numerous occasions.

**“The performance of unauthorized regulated activities within a freshwater wetland area without authorization pursuant to N.J.A.C. 7:7A-2.2(a). Specifically, the vegetation removal, clearing, excavation, grading, removal of existing dunes and stockpiling of sand occurred within an approximately 6.7 acre area of prior beach/dune that also included areas of freshwater wetlands between 7<sup>th</sup> and 13<sup>th</sup> Avenue. The work in question was conducted in violation of Special Condition No. 4 of Coastal Permit No. 0507-03-0009.2 CAF 140001, FWW 140001 and FWW 140002”**

Response: The City believes that all but 9,046 s.f. of wetland/transition area disturbance resulted from natural forces, i.e. severe and accelerating erosion of the City’s beaches and dunes and overwash from the Ocean directly into the wetlands. It may be the case that sand that was trucked from Wildwood as part of the approved back-passing operation was placed within the dunes and wetlands, but those actions were made necessary by exigent circumstances, were not permanent and are correctable.

**“The performance of unauthorized regulated activities within a freshwater wetland transition area without approval in violation of N.J.A.C. 7:7A-2.3(a) and Special Condition No. 4 of the above-referenced Coastal Permit”**

Response: The City believes that all but 9,046 s.f. of wetland/transition area disturbance resulted from natural forces, i.e. severe and accelerating erosion of the City’s beaches and dunes and over wash from the ocean directly into the wetlands. It may be the case that sand that was trucked from Wildwood as part of the approved back-passing operation was placed within the dunes and wetlands, but those actions were made necessary by exigent circumstances, were not permanent and are correctable.

**“The performance of unauthorized regulated activities, specifically the construction of 617 linear feet of steel bulkhead between 5<sup>th</sup> and 7<sup>th</sup> Avenue, the construction of 1,617 linear feet of bulkhead between 7<sup>th</sup> and 13<sup>th</sup> Avenue and the placement of approximately 4,691 s.f. of storage sheds at the beach patrol building at 15<sup>th</sup> Avenue, without a Flood Hazard Area Permit, as required by N.J.A.C. 7:13-2.1(a)”**

Response: The City acknowledges construction of the listed improvements. That being said, jurisdictional provisions of N.J.A.C. 7:13-2.1 were designed to avoid unnecessary overlap between the requirement for a CAFRA Permit and requirement for a Flood Hazard Area Control Act Permit. The work in question must ultimately comply with the Flood Hazard Area Special Areas Rule, N.J.A.C. 7:7-9.25. The alleged violation is, therefore, a technical violation at most.

**“Failure to comply with Special Conditions 4, 10 and 13 of CAFRA Permit 0507-03-0009.3 CZM 170001 (beach and dune maintenance) in violation of N.J.A.C. 7:7-27.2(c)(8). Specifically, the removal of vegetation, grading and filling of 0.58 acres of prior beach/dune area between 5<sup>th</sup> and 7<sup>th</sup> Avenue for installation of a bulkhead and park, the disturbance of 6.7 acres of prior beach/dune that include areas of freshwater wetlands and wetland transition areas between 7<sup>th</sup> and 13<sup>th</sup> Avenue and the removal of vegetation, filling and grading of approximately 0.57 acres of beach/dune area adjacent to the Seaport Pier”**

Response: See all responses above.

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**“Failure to comply with the approved sand harvesting/sand transfer/beach fill permit and standard condition no. 12 of permit 0500-07-0006.3 CAF 180001 and WFD 180001 which authorized the harvesting of sand from the City of Wildwood and the transfer of that sand to North Wildwood to be deposited along beaches and dunes between 26<sup>th</sup> Avenue and 2<sup>nd</sup> Avenue, in violation of N.J.A.C. 7:7-27.2(c)(8)”**

Response: See all responses above. In all cases, the severe and accelerating erosion of the City’s beaches and dunes was such that when the sand that was transferred from Wildwood to North Wildwood, it was placed in the only locations at which such placement was feasible.

**“Failure to record a Freshwater Wetland and Transition Area Conservation Restriction as required by pre-construction condition 2 of CAFRA/FWW Permit 0507-03-0009.2 CAF 140001, FWW 140001 and FWW 140002.**

Response: The City acknowledges the oversight and the failure to record a conservation restriction.

**Response to NOV PEA 200001-0507-03-0009.4  
(Seaport Pier)**

**Construction of a 23,136 s.f. restaurant and bar building with bathrooms, concert stage, additional storage building and tiki bar on the main Seaport Pier**

Response: The City did not engage in and was not responsible for the construction.

**Failure to comply with the Seaport Expansion permit, permit modification and special conditions 1 and 11 of Permit No. 0507-03-0009.4 CZM 170001**

Response: The City did not engage in and was not responsible for the construction activities listed in the NOV.

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**Proposal for Corrective Actions/Restoration Plan**

As to all of the foregoing issues pertaining to the City's alleged violations in the waterfront area, Surf avenue and 2<sup>nd</sup> Avenue to 22<sup>nd</sup> Avenue, the City is fully prepared to engage in discussions with the Department that will lead to a mutually acceptable resolution of the matters set forth in the NOV.

Sincerely,

CULLEN AND DYKMAN LLP



Neil Yoskin

NY/cl

cc: Hon. Patrick Rosenello, Mayor  
Ronald Simone, City Administrator  
James Verna, P.E.  
Michele Kropilak  
Christopher Constantino, NJDEP  
Stewart Farrell, Ph.D.