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By: Dianna E. Shinn ID 242372017
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NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Plaintiff,

v.

CITY OF NORTH WILDWOOD, XYZ
CORPORATIONS 1-10, and JOHN
AND/OR DOES 1-10,

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIV - CAPE MAY
COUNTY
DOCKET NO.: CPM-C-55-22

**NOTICE OF MOTION TO DISMISS
CITY OF NORTH WILDWOOD'S
COUNTERCLAIM**

TO: Anthony S. Bocchi, Esq.
CULLEN AND DYKMAN LLP
Continental Plaza
433 Hackensack Avenue
Hackensack, New Jersey 07601
Attorney for Defendant City of North Wildwood.

PLEASE TAKE NOTICE that on April 14, 2023, or as soon thereafter as counsel may be heard, the undersigned will apply to the Superior Court, Cape May County, General Equity Division, for an Order granting the New Jersey Department of Environmental Protection's ("DEP") Notice of Motion to Dismiss City of North

Wildwood's Counterclaim for failure to state a claim upon which relief may be granted in the above-captioned case.

PLEASE TAKE FURTHER NOTICE that a proposed form of Order is attached hereto.

PLEASE TAKE FURTHER NOTICE that the undersigned will rely upon the attached Brief of Deputy Attorney General Dianna E. Shinn, and supporting certifications, in support of DEP's Motion to Dismiss the City of North Wildwood's Counterclaim.

PLEASE TAKE FURTHER NOTICE that, pursuant to R. 1:6-2, that oral argument is requested if timely opposition is filed.

Respectfully Submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

/s/ Dianna E. Shinn
Dianna E. Shinn
Deputy Attorney General

Dated: March 15, 2023

MATTHEW J. PLATKIN
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R.J. Hughes Justice Complex
25 Market Street
P.O. Box 093
Trenton, New Jersey 08625
Attorney for Plaintiff,
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SUPERIOR COURT OF NEW JERSEY
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COUNTY
DOCKET NO.: CPM-C-55-22

CERTIFICATION OF DIANNA E. SHINN IN SUPPORT OF PLAINTIFF'S MOTION TO DISMISS CITY OF NORTH WILDWOOD'S COUNTERCLAIMS

I, Dianna E. Shinn, of full age, hereby certify as follows:

1. I am a Deputy Attorney General in the Division of Law's Environmental Enforcement and Environmental Justice Section. On behalf of the Attorney General, I represent the Plaintiff New Jersey Department of Environmental Protection ("Department") in the above-captioned matter.

2. I submit this certification in support of the Department's Motion to dismiss all the counts in the City of the North Wildwood's Counterclaim.

3. Annexed hereto as **Exhibit A** is a true and correct

copy of the Transcript of the argument by the Department on its Order to Show Cause and the City of North Wildwood's motion for leave to file a Counterclaim, along with the Court's February 1, 2023 decision.

4. Annexed hereto as **Exhibit B** is a true and correct copy of the Court's February 1, 2023 Order.

5. Annexed hereto as **Exhibit C** is a true and correct copy of the City of North Wildwood's February 10, 2023 emergency authorization application.

6. Annexed hereto as **Exhibit D** is a true and correct copy of the DEP's decision regarding the City of North Wildwood's February 10, 2023 emergency authorization application.

7. Annexed here as **Exhibit E** is a true and correct copy of the City of North Wildwood's Amended Answer, Affirmative Defenses, and Counterclaim.

8. On February 24, 2023, the Court held a case management conference, in part, to discuss the finality of the Court's February 1, 2023 Order that indicated the Order was a Final Judgment. On February 24, 2023, the Court clarified that its February 1, 2023 Order is not a Final Judgment.

9. Annexed hereto as **Exhibit F** is a true and correct copy of the State Aid Agreement entered between the Department

and the City of North Wildwood on March 1, 2022.

10. Annexed hereto as **Exhibit G** are true and correct copies of the hearing requests filed by the City of North Wildwood challenging the three recently issued AONOCAPAs.

I certify that the foregoing statements made by me are true, and that any exhibits attached hereto are true and correct copies. I further certify that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Dianna E. Shinn
Dianna E. Shinn
Deputy Attorney General

Dated: March 15, 2023

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
25 Market Street
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Attorney for Plaintiff,
New Jersey Department of Environmental Protection

By: Dianna E. Shinn ID 242372017
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NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Plaintiff,

v.

CITY OF NORTH WILDWOOD, XYZ
CORPORATIONS 1-10, and JOHN
AND/OR DOES 1-10,

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIV - CAPE MAY
COUNTY
DOCKET NO.: CPM-C-55-22

Order

THIS MATTER, having been opened to the Court on the return date of April ____, 2023, by Matthew J. Platkin, Attorney General of the State of New Jersey (Deputy Attorney General Dianna E. Shinn, appearing), upon a motion of the New Jersey Department of Environmental Protection (“DEP”), requesting dismissal of the City of North Wildwood’s Counterclaim;

IT IS on this ____ day of ____, 2023, ORDERED that DEP’s Motion to Dismiss is HEREBY GRANTED;

AND IT IS FURTHER ORDERED that all of the Counts in the Counterclaim of the City of North Wildwood are HEREBY DISMISSED with prejudice and without fees or costs; and

IT IS FURTHER ORDERED that this Order shall be electronically filed via e-courts thereby ensuring prompt service upon all counsel of record.

Hon. Michael J. Blee, A.J.S.C.

[] Opposed
[] Unopposed

CERTIFICATION OF SERVICE

I hereby certify that on March 15, 2023 a true copy of the Department of Environmental Protection's Notice of Motion and supporting brief; Certification of Dianna E. Shinn, DAG with exhibits; Certification of Peter Ramos; and proposed Order were served on the following recipient via JEDS and by e-mail:

Anthony S. Bocchi, Esq.
CULLEN AND DYKMAN LLP
Continental Plaza
433 Hackensack Avenue
Hackensack, New Jersey 07601
Attorney for Defendant City of North Wildwood.

I further certify that all of the following statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

/s/ Dianna E. Shinn
Dianna E. Shinn
Deputy Attorney General

Dated: March 15, 2023



State of New Jersey

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
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Governor

SHEILA Y. OLIVER
Lt. Governor

MATTHEW J. PLATKIN
Attorney General

MICHAEL T.G. LONG
Director

March 15, 2023

By electronic filing

Honorable Michael J. Blee, A.J.S.C.
Chancery Division
Cape May County Superior Court
9 North Main Street,
Cape May, New Jersey 08210

Re: Department of Environmental Protection v. City of North Wildwood; "XYZ Corporations" 1-10; and "John and/or Jane Does" 1-10

DEP's Motion to Dismiss City of North Wildwood's Counterclaims

Dear Judge Blee:

The Department of Environmental Protection ("DEP") has filed a motion to dismiss the City of North Wildwood's Counterclaims in lieu of an answer pursuant to R. 4:6-2. Enclosed for filing please find the following documents:

- DEP's Notice of Motion to Dismiss City of North Wildwood's Counterclaims;
- Brief;
- Certification of Dianna E. Shinn, DAG with exhibits;
- Certification of Peter Ramos;
- Proposed Order; and



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March 15, 2023

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- Certification of Service.

Courtesy copies have also been sent via overnight delivery to the Court.

Sincerely yours,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Dianna E. Shinn
Dianna E. Shinn
Deputy Attorney General

Encls.

cc: Anthony S. Bocchi, Esq. (by e-courts)

EXHIBIT A

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
CAPE MAY COUNTY
DOCKET NO. CMC-C-55-22

NEW JERSEY DEPARTMENT OF)
ENVIRONMENTAL PROTECTION,)

Plaintiff,)

v.)

CITY OF NORTH WILDWOOD, ET)
AL.,)

Defendant.)

TRANSCRIPT

OF

MOTION

Place: Cape May Courthouse
9 North Main Street
2nd Floor
Cape May, NJ 08210

Date: February 1, 2023

BEFORE:

HON. MICHAEL J. BLEE, J.S.C.

TRANSCRIPT ORDERED BY:

DIANNA SHINN
(NJ Division of Law)

APPEARANCES:

KEVIN TERHUNE
DIANNA SHINN
KEVIN FLEMING
(DAG)
Attorneys for the Plaintiff

ANTHONY BOCCHI
NEIL YOSKIN
RYAN DUFFY
Attorneys for the Defendant



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I N D E X

<u>EXHIBITS:</u>	<u>IDENT.</u>	<u>EVID.</u>
D - B Moriarty Certification	26	

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THE COURT

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Findings		62
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Requests for written discovery shall be within 30 days		65
Depositions shall be completed within 180 days		65
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Defendant's expert reports shall be provided by August 15th		65
No amendments to the pleading after August 31st		66

1 P R O C E E D I N G S

2 THE COURT: Once again, good morning. I'm
3 Michael Blee. I'm the assignment judge for Vicinage 1.

4 We'll start with appearances of counsel. If
5 counsel will be kind enough, if you have clients with
6 you or decision-makers to introduce them to the Court,
7 that would be appreciated.

8 This is the matter for the New Jersey
9 Department of Environmental Protection versus The City
10 of North Wildwood under docket number C 55-22.

11 Counsel, please enter your appearance
12 starting this plaintiffs.

13 MR. TERHUNE: Good morning, Your Honor.
14 Kevin Terhune, Deputy Attorney General for Department
15 of Environmental Protection.

16 THE COURT: Morning.

17 MS. SHINN: Dianna Shinn, DAG for DEP.

18 THE COURT: Morning.

19 MR. FLEMING: And Kevin Fleming, also Deputy
20 Attorney General for DEP.

21 THE COURT: Good morning.

22 MR. FLEMING: Good morning.

23 THE COURT: Are any representatives here from
24 the DEP?

25 MR. FLEMING: We do. We have Cop Collin



1 Keller (phonetic), Michelle Profilac (phonetic), and
2 Janice Berg (phonetic).

3 THE COURT: Morning, everyone, and welcome.
4 Thank you.

5 Defendant?

6 MR. BOCCHI: Good morning, Your Honor. May
7 it please the Court? Anthony Bocchi from the law firm
8 of Cullen and Dykman, LLP, on behalf of the City of
9 North Wildwood.

10 THE COURT: Good morning.

11 MR. YOSKIN: Good morning, Your Honor. Neal
12 Yoskin, also of the firm of Cullen and Dykman, LLP, for
13 the defendant of City of Wildwood, North.

14 THE COURT: Good morning.

15 MR. DUFFY: Good morning, Your Honor. Ryan
16 Duffy of Cullen and Dykman, LLP, on behalf of the City
17 of North Wildwood.

18 THE COURT: Good morning.

19 And are any principals here from the City of
20 North Wildwood? If you'd be kind enough to introduce
21 them.

22 MR. DUFFY: Yes, Your Honor. We have Mayor
23 Rosenello here.

24 THE COURT: Mayor, good morning.

25 Okay. Let me just summarize why we're here



1 and discuss the process.

2 Before the Court is in order to show cause
3 filed by the plaintiff, New Jersey Department of
4 Environmental Protection, seeking a restraining order,
5 injunctive relief. In anticipation of today's
6 proceeding, the Court has considered and will rely upon
7 the following December 6th complaint and brief in
8 support of temporary restraints, the order to show
9 cause filed December 8th. These are all the
10 submissions by the plaintiff.

11 The defendant, on January 4th, filed a brief
12 in opposition. There was also a request for a site
13 visit on January 9th. Plaintiff, by way of a letter,
14 opposed defendants' request for a site visit on January
15 11th. Plaintiff filed a reply brief.

16 Also before the Court is defendant's motion
17 seeking leave to file a counterclaim that was filed on
18 January 4th. On January 13th, plaintiff filed a brief
19 in opposition to defendants' motion. On January 18th,
20 the defendants filed a reply brief. And we are here
21 for oral argument.

22 I have reviewed everything. Everything was
23 well done on both sides. I know we have a bunch of
24 attorneys here. I would just ask one attorney -- just
25 people will be arguing to do so. If you want to divide

1 up certain portions of the argument, you can. But I
2 don't want all three of you participating. Okay?

3 Who will be arguing on behalf of the State?

4 MR. TERHUNE: Your Honor, I will be.

5 THE COURT: Very well.

6 We'll hear order to show cause -- order to
7 show cause first. Then we'll hear opposition. We'll
8 have a reply. Then I would ask defendants then to talk
9 about the application for a counterclaim; give you a
10 chance to oppose that counsel and also a chance to
11 reply. I should be in a position to render findings
12 today. Thank you.

13 MR. TERHUNE: Thank you, Your Honor. Good
14 morning. May it please the Court. Kevin Terhune,
15 Deputy attorney General for New Jersey Department of
16 Environmental Protection.

17 As Your Honor pointed out, we are here for an
18 order to show cause that we submitted in order to show
19 cause and verify complaint on December 6th, pursuant to
20 Rule 4:67-6, at which time we were seeking, among other
21 relief, to temporarily and preliminarily enjoin the
22 City of North Wildwood from installing a bulkhead at
23 15th and 16th Avenues on their oceanfront, engaging in
24 any further excavation or placement of sand between
25 14th and 16th Avenues without a permit, and engaging in

1 any further oceanfront construction, reshaping of
2 dunes, and/or any type of reconstruction. All these
3 without a permit and DEP approval.

4 In response to that, Your Honor, a letter was
5 submitted by the -- on behalf of the City of North
6 Wildwood. And in that letter, the City acknowledged
7 that the emergency did not appear that there was any
8 emergency at this point and that the City intended to
9 first seek an emergency authorization before it did
10 anything further on the beachfront.

11 Then the next day Your Honor had executed the
12 order to show -- the order in which it denied our
13 Department of Environmental protections, temporary
14 restraints, and set today's date for the hearing.

15 Since that day, just to summarize, DEP
16 representatives and counsel for DEP have reached out to
17 counsel for the City on numerous occasions to offer
18 assistance, including any type of pre-approval or pre-
19 review -- excuse me, not pre-approval -- by pre-review
20 of any anticipated or draft emergency authorizations.
21 As represented, they indicated that if an emergency --
22 it was deemed necessary to act further and submit an
23 emergency authorization, that it was intended to do so,
24 and in -- in an effort to assist with that, we offered
25 to pre-review any application to discuss any type of

1 issues that we thought might be needed to be addressed.

2 No emergency authorization has since been signed.

3 This original emergency authorization that
4 we're here for today was submitted back in October,
5 originally. Okay?

6 Rather than submitting an emergency
7 authorization, Your Honor, the -- the City has filed,
8 as Your Honor put out, a motion for leave to file a
9 counterclaim in this case. At which -- in which not
10 only are they alleging new information including a
11 breach of contract claim, but they're asking this Court
12 to go through the extraordinary requested relief of
13 asking this Court to authorize them to install a
14 bulkhead without a permit issued by the DEP. Okay.

15 Our position is very clear. We are here for
16 the limited purpose of our -- our orders. And we -- we
17 do not feel the Court has any jurisdiction to not only
18 dispute -- or examine the issues set forth in that
19 order as far as the merits of that order. But in fact,
20 this Court really -- the jurisdiction that we're here
21 for today is that you are to enforce the orders that
22 were answered by the DEP. Okay.

23 This case, Your Honor, has a very long
24 history of, unfortunately going back all the way back
25 to 2012, where there's a history of noncompliance with

1 the DEP and the statutes and regulations for this --
2 for this beachfront. Most relevant in 2022 or --
3 excuse me, 2020, Northwest Wildwood -- or North
4 Wildwood, excuse me, destroyed and disturbed more than
5 six acres of mature, densely vegetated dunes and
6 installed a vinyl and steel bulkhead from 3rd Avenue to
7 13th Avenue without applying for receiving any type of
8 required DEP approvals.

9 While not directly relevant to this case, it
10 does establish, Your Honor, a history of the City
11 moving forward without getting proper approvals. Okay?
12 DEP was alerted to those violations back in 2020 and
13 issued a notice of violation for that. These areas are
14 strictly regulated, Your Honor. They're regulated by
15 the Coastal Facilities -- Coastal Area Facility Review
16 Act, the Freshwater Wetlands Protection Act, and also
17 The Flood Hazard Area Control Act. Okay. As such, the
18 DEP is the one agency that's responsible for enforcing
19 regulations for those.

20 Subsequent to those -- that notice of
21 violation, North Wildwood did submit a permit in 2020
22 to try to legalize the unauthorized work, and that
23 permit is currently pending.

24 Administratively, that process has not gone
25 into to technical review at this point. There is a

1 remaining issue that has to be resolved by the City to
2 get that in front of the DEP for technical review. We
3 understand that they are working on a way to resolve
4 that issue and look forward to receiving that permit.
5 Okay.

6 Immediately, what we're here for today, Your
7 Honor, is a situation that arose post Hurricane Ian.
8 In the end of September, beginning of October,
9 Hurricane Ian did some damage to the coastline. And in
10 response to that, the City filed an emergency request
11 of authorization pursuant to NJAC 7:7-21.1.

12 In that authorization that North Wildwood
13 sought, the immediate installation of Jersey barriers
14 at the City's beach patrol building, future
15 installation of bulkhead in the same location, and
16 requested, among other things, the reshaping of the
17 ocean side of the dune that went across that
18 building -- in front of that building, Your Honor.
19 This is approximately between the 15th and 16th Avenue
20 areas that we've mentioned earlier.

21 They also requested repair of a right-of-way
22 access to the beach at 16th and 25th Avenues. Okay?

23 DEP reviewed those at that application. They
24 immediately granted partial relief pursuant to that,
25 Your Honor. Those -- what was initially, they approved

1 the installation of the temporary Jersey barriers and
2 also the removal and relocation of some composite
3 timber decking walkway that -- to allow for the
4 installation of those barriers.

5 DEP later, after further request or further
6 review of the application on October 12th, denied the
7 remainder of that, including specifically any type of
8 reshaping or construction work on the ocean waterfront
9 side of the dune, also any type of repair to the 16th
10 and 25th Avenue access points. The DEP determined that
11 the threat was no longer existing, the storm had past,
12 that there was a substantial amount of dune remaining
13 and that there was no emergent condition that would
14 affect that area.

15 As Your Honor is aware, the City disagreed
16 with that assessment, and instead of doing anything
17 further, decided they were going to act on their own
18 behalf and continued -- and did their own reshaping of
19 the dune without authorization, without permit. The
20 next day on the -- excuse me, Your Honor, if I could go
21 back also, as far as timing is concerned. After the
22 decision on the 12th, that decision was memorialized in
23 the DEP's bulletin record on October 19th, 2020, to
24 making that an official order.

25 On the 20 -- October 20th, the City had



1 reached out to DEP and indicated that they were going
2 to be proceeding with the unauthorized dune reshaping,
3 which was specifically denied in that EA request, Your
4 Honor. And in fact, that day, a contractor for the
5 City, in fact, did proceed with that work. Not only
6 did that -- they proceed from that work, they took sand
7 from another area of the beach in front of 11th Avenue
8 and took that sand and moved that to the area between
9 15th and 16th Avenues without a permit.

10 So there was violations not only for -- did
11 they violate the emergency authorization, but they also
12 did additional beachfront construction, which was not
13 requested in violation and without a permit. From
14 those violations, Your Honor, a notice of violation was
15 issued on October 20th, 2022. Okay.

16 Since -- since that point, the -- the City --
17 or excuse me, the Department had received letters on
18 November 9th and 16th, both indicating from the mayor,
19 indicating that they were going to be proceeding with
20 the installation of arrangements for installing a
21 bulkhead in that -- in that location. Your Honor, that
22 was the -- that's really what precipitated the -- the
23 State's involvement in this crisis, at least as far as
24 the division of laws and of representation of DEP to
25 work into stopping them from moving forward without

1 or -- or emergency authorization or permit.

2 As Your Honor knows, we were in -- this is --
3 they have a substantial history of acting without
4 permits. And we were trying to resolve this issue
5 early on and get it worked out. In question, there's a
6 particular sensitive area, Your Honor. Just
7 immediately north of the -- the lifeguard building is
8 an area that has freshwater wetlands and a freshwater
9 wetlands transition area that is also an important
10 habitat for certain endangered migratory raptors. It's
11 a very environmentally sensitive area, Your Honor, and
12 it's for these reasons alone that certain permits and
13 everything else, when you are looking to disturb these
14 areas, they're particularly required for the DEP to
15 carefully look.

16 Your Honor, we talked earlier about why we're
17 here, but I also just like to emphasize the Court's
18 jurisdiction in this case. What the Court has
19 jurisdiction to do is enforce the court order, and
20 that's why we are here in a summary matter. Okay?

21 The DEP partially denied the emergency
22 application and that left the City with certain
23 options. They could have gone and filed an
24 administrative appeal pursuant to NJAC 7:7-28.1V. They
25 did not file any type of appeal to administratively.

1 North Wild could also have attempted to seek
2 review of the partial denial to the Appellate Division
3 in the interest of justice. That's pursuant to Rule
4 2:2-3(a2). That had to be done within 45 days of the
5 publication of the order, pursuant to Rule 2:4-1(b).
6 That was not done. They did not file any type of
7 proceedings with the Appellate Division.

8 Rather, they came before, Your Honor, with
9 the extraordinary request that Your Honor not only
10 make -- make some type of factual determinations as to
11 the conditions as they existed and the conditions that
12 set forth in their applications as to whether or not
13 they warranted approval or not approval, but they are
14 now seeking the extraordinary relief of asking Your
15 Honor to approve the installation of a bulkhead and go
16 completely around the DEP.

17 Court doesn't have this type of jurisdiction,
18 Your Honor. The Court does have broad discretion as
19 far as court of equity to remedy fashion -- remedy --
20 to provide remedies to address specific facts and
21 situations. But this Court's jurisdiction can only go
22 so far. This -- what they're asking is completely
23 above and beyond what the Court's rules provide. Rule
24 4:67-6C1 specifically sets forth that the court's
25 jurisdiction in this case would be to enforce a final

1 agency action, which is what DEP is asking this Court
2 to do in this matter. 4:67-3c3 specifically holds that
3 the merits of final agency decisions are not reviewable
4 in the enforcement actions in the Superior Court. That
5 is exactly what they're asking you to do today, which
6 is completely contrary to the rules of court.

7 Any arguments or evidence submitted in
8 connection with the motion or in opposition should not
9 be considered by this Court, as the Court does not have
10 jurisdiction to hear those.

11 Regardless, I will say for as far as the
12 application for preliminary injunction, Your Honor, the
13 case law is clear that we are -- the State is entitled
14 to injunctive relief pursuant to not only we believe
15 that we would satisfy the Crowe factors, as we will go
16 into later as set forth in Crowe v. De Gioia 90NJ126 et
17 cetera, but also we would say, that just simply by the
18 violations of the state statutes in question, that we
19 are entitled to injunctive relief.

20 Specifically, injunctive relief is available
21 for violations of the Coastal Area Facilities Act,
22 which is also known as CAFRA; NJSA 13:19-18 et cetera;
23 the Coastal Zone Management rules NJSA C7:7-29.8a1; the
24 Flood Hazard Act, which was NJSA 58:60A-63(C); and the
25 Freshwater Protection Act. All of these statutes allow

1 for injunctive relief to be issued in this case. Where
2 a statute is violated, the courts are clear. There is
3 no -- we do not need to show any type of irreparable
4 harm made by the party that's seeking the injunction.
5 Nor should the Court -- must the Court consider whether
6 injunction is in the public interest. That can be
7 found not only in 42 and your second injunction,
8 Section 23, but also the Department of Environmental
9 Protection v. Interstate Recycling, 267 NJ Super 574,
10 and that's an Appellate Division case in 1993. That
11 case held that Department need not show actual
12 environmental damage for the court to enjoin repeated
13 violations of environmental statutes, which is exactly
14 what we have in this case, Your Honor.

15 Also, we have that -- that case cited Hoffman
16 v. Garden State Farm, 76 NJ Super 189; Matawan
17 Regulatory Association v. Matawan Aberdeen Board of
18 Education, 2012 NJ Super 328. In that case, need not
19 show irreparable harm to be entitled to injunctive
20 relief where injunctions are creatures of statute; all
21 that need to be proven is as a statutory violation.

22 Your Honor, we have statutory and violations
23 in this case. Notices of violation were issued by the
24 DEP and they were clearly set forth in these
25 proceedings.

1 Regardless, Your Honor, even if the Court
2 were to determine that we are not entitled to
3 injunctive relief by statutory violations alone, we
4 feel that we have satisfied the equitable factors set
5 forth in Crowe v. De Gioia. In that case, Your Honor,
6 for seeking injunctive relief, we must show that a
7 reasonable probability of success on the merits based
8 on well-settled law. This factor should be noted,
9 should be -- should be relaxed if we're seeking the
10 status quo, which is in fact what we're doing here. We
11 are simply seeking that they do not act further in this
12 case.

13 The balance of hardships favor the party
14 requesting relief. The party seeking relief would
15 suffer irreparable harm in the absence of an
16 injunction, and also that the public interests will not
17 be harmed by the granting of an injunction.

18 In this case, Your Honor, regardless of the
19 statutory entitlement that we're entitled to an
20 injunction in this case, we are likely to prevail on
21 the merits as set forth clearly. The City has moved
22 forward without a permit and in violation of CAFRA and
23 the EA that was issued by the State and proceeded to go
24 forward and do beachfront construction work after they
25 were advised not to do it and without a permit.

1 We also would argue that it is very important
2 at this point for -- for the Court to consider that,
3 jurisdiction aside, it's very important for the DEP
4 themselves to be looking at the applications and
5 permits, and that's one of the reasons why it is so
6 important and that the statutes are in place. That is,
7 DEP is the experts. They are the -- the fact deciders
8 and they will be -- they are responsible for reviewing
9 the applications to make sure that the statutes and
10 regulations are in full compliance.

11 We would argue that the balance of the -- the
12 any hardships, inequities favor of the State. The
13 State is responsible for the natural -- holds the
14 natural features in trust, for the protection of the
15 health, safety -- weight safety and welfare of -- and
16 the environment in perpetuity. Installation of the
17 bulkhead at this time is not an emergency. We have
18 made it very clear, not only did the -- the immediate
19 concern for Hurricane Ian pass back in October. Okay?
20 At that point in October, their claim was that the
21 breach of this dune system was imminent. It's now been
22 four months since the -- since that storm had passed
23 and there has been no breach of this dune system.
24 Okay?

25 In January -- in their latest application,

1 they said breach is imminent. It's going to happen.
2 In the next storm, it's going to happen. Nothing has
3 happened. Your Honor, there is no emergency. And
4 because of that --

5 THE COURT: As I fully indicated, there
6 was -- there's not another application that between the
7 time of the filing and the time the court denied the ex
8 parte temporary restraints that there had -- that there
9 have been discussions but no application.

10 MR. TERHUNE: There has been no additional
11 emergency application filed, Your Honor, despite
12 representations that were -- that it was -- it would be
13 filed if an emergency was -- made it necessary. And
14 instead of filing an emergency application when they
15 deemed that the breach was imminent again in January,
16 they filed the motions with the Court instead of filing
17 an emergency application.

18 THE COURT: I understand. Okay. Thank you.
19 I thought there was something that I wasn't aware of
20 that was filed.

21 MR. TERHUNE: No.

22 THE COURT: Okay.

23 MR. TERHUNE: Your Honor, without thorough
24 review of the proposed bulkhead, including its proposed
25 location within and adjacent to the sand dunes, the

1 freshwater transition areas, and endangered migratory
2 species habitat, Your Honor, it's essential that the
3 DEP has the opportunity to review any applications for
4 disturbing these sensitive areas and, in particular --
5 in particular, reviewing what kind of results might
6 happen with the installation of a bulkhead in this
7 area. These areas are classified under CAFRA as
8 critical wildlife habitat, and under the ACT, the
9 Freshwater Pollution Act rules as having exceptional
10 resource value.

11 And because of that in -- again, in of
12 itself, DEP are the experts in this case. They need to
13 examine what permits are going to be done for what
14 construction is going to be done in this case.

15 As -- as said before, the DEP has reached out
16 to counsel on multiple occasions and offered for them
17 to discuss options, what they would be willing to do.
18 They look at the -- to pre-review any type of emergency
19 application. Nothing was submitted, Your Honor, until
20 the motion that was submitted to Your Honor in January.

21 Since that time there's been additional
22 discussions between counsel as to whether or not they
23 were going to be submitting an emergency application.
24 Again, assistance for pre-review of that application
25 was offered to address any immediate concerns they had

1 as far as the imminent breach of the dune or any type
2 of onsite conditions. No emergency application was
3 found in a draft form or in any other -- in any form
4 which would give the DEP the opportunity to try to work
5 with them to see what they would permit and what they
6 would not permit. Rather, Your Honor, they're looking
7 for you to make that decision. Okay?

8 There is immediate and irreparable harm to
9 this area. As discussed, this is an environmentally
10 sensitive area. Any disturbance of this could result
11 in substantial harm that's irreparable. Not only is it
12 the injunctive relief specifically authorized by
13 statute, but the further risk of harm by putting a
14 bulkhead in this sensitive location and destroying
15 vegetated dunes is incredibly damaging to the
16 environment. Okay?

17 As far as the going -- finally going to
18 enjoining the defendants from unpermitted activities is
19 squarely in the public interest, Your Honor. We are --
20 we are a society of laws and regulations. There is
21 avenues if the laws and regulations need to be revised.
22 There could be -- that's -- that's for the legislature.
23 It is very important that the public has an interest in
24 making sure that the laws and regulations that are in
25 place are followed, not by -- not just by private

1 people, but also by municipal corporations as well. It
2 certainly is -- restrained North Wildwood serves the
3 public interest just by not only by ensuring compliance
4 with those environmental statutes and regulations, but
5 also in submitting a permit, Your Honor. It actually
6 comes with a period of public comment to give the
7 public themselves the opportunity to be heard and to
8 weigh in on what that application is.

9 What they're asking today, Your Honor, which
10 we will address later in the hearing, is for the
11 judge -- or for Your Honor to decide a case and make a
12 determination without the required jurisdiction and
13 completely take the public out of the process. Your
14 Honor, that's one of the reasons why permits are
15 required and gives the public the opportunity to be
16 heard on the case. And therefore, there is no greater
17 interest in our determination that the -- would be
18 weighing not in favor of the DEP in this case here.

19 THE COURT: Thank you very much, Mr. Terhune.
20 As indicated, after we hear from defense counsel, I
21 will give you a chance to reply on this issue. Okay?
22 Thank you.

23 Who will be arguing on behalf of the
24 defendant?

25 MR. BOCCHI: I will, Your Honor. Thank you.



1 THE COURT: Thank you.

2 MR. BOCCHI: Your Honor, appreciate your
3 time. Appreciate that you've read all the papers.
4 I'll try to be brief and respond to some of the
5 statements that were made by counsel just now, a lot of
6 which we obviously disagree with.

7 But first things first. What the Court
8 should understand is that what's before you today is
9 not North Wildwood's seeking to relitigate, as they
10 indicated in their reply brief, what took place back in
11 October. It's not to relitigate whether or not the
12 issuance of that EA back in October should have in fact
13 been granted. We believe it should have been, but
14 that's not why we're here before Your Honor. They
15 would like to limit this matter back to October and
16 limit it in a sense to say, as he indicated, well, you
17 know, you should have triggered the appellate court's
18 jurisdiction. You're in the wrong forum to make these
19 arguments. But that's not true because this is a
20 unique case. And we do not have the luxury,
21 unfortunately, of making hyper-technical arguments in
22 terms of limiting the Court's analysis with respect to
23 existing conditions that took place back in October.

24 We are seeking the Court to invoke its
25 equitable jurisdiction. And we cited to the Sears

1 Roebuck case -- a Supreme Court case from 1938, which
2 has been adopted by the Supreme Court over the last 80
3 years and by the Appellate Division in New Jersey.
4 Where Mr. Terhune indicates that there has to be a
5 limit to your jurisdiction, where, in fact, the Supreme
6 Court of New Jersey specifically held that there is no
7 limit with respect to a court's equitable jurisdiction
8 to fashion remedies to changing circumstances as the
9 Court sees fit.

10 And I cannot think of another instance where
11 circumstances are changing faster than which exist in
12 this matter. Anyone who has lived near the Atlantic
13 Ocean understands the velocity at which these things
14 can change. And that's precisely what the Sears
15 Roebuck court was talking about in terms of a court's
16 vast, equitable powers to step in and to invoke its
17 powers to protect the public interests.

18 So we have not triggered the appellate
19 court's jurisdiction. We are not looking for the
20 Court, as Mr. Terhune just said, to make certain
21 factual findings. There's a bit of a gap between where
22 we're coming from and the arguments that have been set
23 forth by the DEP. And I hope my oral argument can sort
24 of bridge that gap. And what I mean by that is we
25 agree that this is the province of the DEP. I agree

1 with Mr. Terhune's comments that the DEP has been
2 deemed by the legislature as the experts with respect
3 to this issue. I agree with you on that.

4 We're not asking for the Court to invoke its
5 jurisdiction and put on the DEP hat. That would be
6 improper. Your Honor is not situated to do that. But
7 the work has already been done for Your Honor by the
8 experts, by the experts themselves.

9 (Moriarty Certification was hereby marked for identification
10 as Defendant's Exhibit B, as of this date.)

11 To the Moriarty certification dated October
12 7th, 2021 -- 2022, an email that states, given the
13 threat to severe loss of property and the emergent
14 nature of the work at the beach patrol building, Your
15 Honor, the experts have already made the determination.

16 With respect to the fact that a severe threat
17 already exists at that location. And we have submitted
18 an abundance of quantitative data that is often
19 rebutted because it cannot be rebutted. That this is
20 the most erosional site in the state of New Jersey.
21 And we have submitted quantitative data, which
22 unequivocally shows that the conditions have only
23 worsened in the four months since that determination in
24 October that there was a severe threat.

25 Yes, the dune has not breached. By the grace

1 of God, it is not breached. We're just lucky that it
2 hasn't happened. We have submitted certifications that
3 have indicated -- and I think they will have to agree
4 to this. That if there's a moderate storm, it's over.
5 There is nothing left there -- zero feet of beach berm
6 as of the time of the certifications.

7 So when you look at it from the perspective
8 of we don't have the luxury of just looking at it when
9 did it exist, what happened in October, what existed
10 then? That's not what I'm talking about. I'm talking
11 about what exists now. What exists now is they're
12 citing the case law that says Your Honor doesn't need
13 to look at the public interest. Is that the position
14 that he's taking in this case?

15 Because we've submitted materials to Your
16 Honor that say, once this reaches, there is a drainage
17 system that runs right along that area that will cause
18 mayhem if it is backed up. We have submitted
19 certifications to the Court that have said there will
20 be private property damage and public property damage.
21 And obviously we set forth case law under the Crowe v.
22 De Gioia standard with respect to meeting the
23 irreparable harm standard.

24 Now with respect to their invocation and
25 their being the invocation of Crowe v. De Gioia, their

1 own papers don't even satisfy the standard. Page 4 of
2 their reply brief, footnote 3, nonetheless,
3 installation of a required shore protection measure
4 such as a bulkhead will likely cause irreparable harm.
5 Well, words matter. That's not the standard under
6 Crowe v. De Gioia. It's not we think there might be
7 irreparable harm; it may happen. The standard under
8 Crowe v. De Gioia is there is immediate irreparable
9 harm and the court needs to intervene.

10 So even under their own words, they fail to
11 set forth the irreparable harm analysis that would be
12 required for the Court to invoke an injunction against
13 Wildwood. So they can't even meet the standard under
14 Crowe v. De Gioia. And I can walk you through that,
15 but I know Your Honor has -- has read the papers.

16 But at the end of the day, don't take my
17 word; take their own words. Their own words were a
18 severe, imminent threat existed. And if you look at
19 NJAC 7:7-21, now they're trying to un-ring the bell
20 that was wrong and it cannot be un-rung. If you look
21 at the administrative code provision that is being
22 invoked, there's no analysis to say it's a severe
23 threat for certain measures but not a severe enough
24 threat for other. The code speaks nothing of that.
25 There's a legal analytical framework that is set forth

1 in the code. Have we checked off those boxes? They
2 said yes. Yet days later, somehow, they said no.

3 And now in today's submission before the
4 Court, they have a certification that presents an
5 exhibit that says there is a severe threat. Yet on
6 page 32 of their brief and in the oral argument today,
7 they say there is no threat. So which one is it?
8 Either you're pregnant or you're not. There's no in
9 between.

10 So with respect to whether or not an
11 injunction should be issued to enjoin North Wildwood
12 from taking any measures at the subject site, their
13 entire application was premised on previous
14 correspondence and threats of we're going to move
15 forward anyway. And they ran to court and we submitted
16 a letter to the Court that said, now that the Court is
17 involved, we're not going to do anything. Their entire
18 application was based on -- we think they're going to
19 build this bulkhead without any permitting process.

20 And our ability to have the Court invoke its
21 equitable jurisdiction, which is broad and limitless,
22 and having the DEP be involved with respect to the
23 permitting process for the building of this bulkhead,
24 those are two things that are not mutually exclusive.
25 That's the disconnect. We, in fact, had resubmitted

1 the permit that dates back to 2020. There were some
2 procedural issues. We submitted it last night. It's
3 been submitted. Okay? So that is -- we are not taking
4 the position before Your Honor, let me be clear, Judge,
5 enter an order that allows us to build this bulkhead
6 and put the DEP to the side. They have no -- in -- no
7 involvement with respect to this process.

8 THE COURT: Mr. Bocchi, just -- you're using
9 a lot of hand gestures.

10 MR. BOCCHI: Yeah, I'm sorry.

11 THE COURT: But your kind of pointing to your
12 adversaries. I don't think that's professional.

13 MR. BOCCHI: I don't mean that. I don't mean
14 to point to them.

15 THE COURT: Point to the Court, but don't
16 point to your adversary, okay? You really shouldn't
17 point to the Court either.

18 MR. BOCCHI: But my point --

19 I appreciate that. I'm sorry, Your Honor.

20 THE COURT: Thank you.

21 MR. BOCCHI: But I use my hands a lot. It's
22 something I have to stop doing.

23 THE COURT: Understood. Just don't point to
24 your adversary, okay?

25 MR. BOCCHI: I understand.



1 THE COURT: Thank you.

2 MR. BOCCHI: My point, though, Your Honor, is
3 that we think that, given the fact that the permit has,
4 in fact, been filed, there is a methodology that can be
5 employed by this Court to invoke its jurisdiction to
6 allow us to build that bulkhead. At the same time, for
7 this permit to be analyzed by the DEP, to the extent
8 that there are any issues with that, we will be back
9 before Your Honor because they've chosen to bring this
10 matter. And Rule 4674, in fact, does allow for the
11 Court, upon its discretion, to make a determination
12 whether or not a case is so unique as in this case that
13 there should be a counterclaim.

14 And that's the arguments that we've offered
15 to the Court, because, yes, there is a long history
16 between the parties here. And I think our rules in the
17 entire controversy doctrine and the like call for
18 joinder of issues wherever possible so that there's not
19 piecemeal litigation.

20 So we think, Your Honor, we've presented the
21 materials to you that allow you to invoke your
22 equitable jurisdiction, to allow us to do what is so
23 severely needed, and to allow us to do what a mayor and
24 council is obligated to do, which is to serve to
25 protect its residents. And that is all that the City

1 of North Wildwood is looking to do with respect to this
2 matter.

3 At the end of the day what's before Your
4 Honor is we're seeking to invoke the Court's
5 jurisdiction to allow us to protect the residents of
6 the City of North Wildwood. And it's not to keep the
7 DEP to the sidelines and have no involvement with them.
8 In fact, there is a permit that is now before them that
9 they have had since 2020. And I -- you know, I wasn't
10 involved in 2020, so I can only speak to my involvement
11 now. So --

12 THE COURT: Well, they've had it since last
13 night?

14 MR. BOCCHI: No, no, no, I understand that.

15 THE COURT: Revised permit. Okay.

16 MR. BOCCHI: They have it is -- is all that I
17 can say. I mean, if we could have gotten it to them
18 earlier, of course we would have gotten to them
19 earlier.

20 But the point of it is, Judge, with respect
21 to their application for today's purposes, it was
22 premised on the fact of they are going to build this
23 bulkhead. And we submitted to the Court and have been
24 consistent with that in terms of saying, now that the
25 Court has jurisdiction over this matter, we're going to

1 wait before we come before Your Honor before we do
2 anything. And we think we have, based on this record,
3 presented enough of a record for you to be able to
4 invoke your jurisdiction to step in and, quite frankly,
5 to stop the madness, hopefully to allow these
6 protective measures to be employed, while at the same
7 time to allow the experts to review the permit process.

8 But with respect to the notion of, Judge,
9 they're inappropriately asking you to make factual
10 findings, we're not because they've already done that
11 analysis. And these conditions have only gotten worse.
12 So that's -- that -- that pertains primarily with
13 respect to the allegations that have been raised.

14 Now, the case law they cite to with respect
15 to repeated violations that counsel made reference to,
16 you know, in their reply brief speaks of a brief point
17 about repeated violations, and it seems like although
18 they're not invoking you here -- there's a long history
19 here. Look at what happened in 2020, and they want to
20 sort of bootstrap the violations from 2020 and try to
21 make an all-encompassing argument to the Court here
22 today to say, look at the past sins, and now, you know,
23 there has to be some sort of order that prevents them
24 from doing that moving forward.

25 My response to that, Your Honor, is what are

1 the past sins with respect to the subject site at
2 issue? Right? They said there was some reshaping of
3 dunes. They took some sand from another location.
4 That's the analysis that I would think that the Court
5 is limited to for this day in terms of whether or not
6 an injunction should be issued to prevent North
7 Wildwood from taking action to provide coastal
8 protection to its residents.

9 I think it's improper for the Court to look
10 back to -- going back to 2012 and to utilize that as a
11 basis for an injunction against North Wildwood in this
12 case today. And I say that because, if you look at the
13 case law that they cite to, these are cases that
14 involved the dumping of toxic waste repeatedly. One of
15 the cases involved the Milk Control Act in 1950, where
16 there was obligations upon milk dealers that they
17 couldn't raise certain prices and there was a violation
18 of that statute repeatedly.

19 And one of the other cases that they cited to
20 was a recycling center who repeatedly operated as a
21 recycling center without any license. But that's not
22 what this case is about. This is not a private party
23 who is breaching or violating statutes for their own --
24 for their own private gain. This is a municipality
25 that is taking actions in order to try to protect its

1 residents. So the case law just doesn't jibe with
2 the -- you know, the facts of this matter.

3 So for those reasons, Your Honor, Your Honor
4 should -- Your Honor correctly denied the TRO request.
5 And on this record, the record has only been developed
6 to a point to show why there would be no basis to upend
7 that decision into a -- and to enjoin North Wildwood
8 from taking any action. So I know we've made other
9 arguments with respect to why we think we're entitled
10 to an injunction, but I'll save those for --

11 THE COURT: The counterclaim. Okay.

12 MR. BOCCHI: -- for the counterclaim.

13 THE COURT: Very good. Thank you.

14 Mr. Terhune?

15 MR. TERHUNE: Yes.

16 THE COURT: A reply on the injunctive relief?

17 MR. TERHUNE: I appreciate it. Just -- just
18 briefly, Your Honor.

19 Number one, I like to point out, again, it is
20 true that Ms. Moriarty, who I misidentified earlier as
21 Dougherty -- apologize for -- to correct the record for
22 that; that is Jennifer Moriarty and not Jennifer
23 Dougherty. She did, in fact, issue that statement in
24 the email. And again, the DEP has never not once
25 maintained that there is not concerns for the area in

1 question at this site. That -- however, they felt that
2 the emergency authorization request that was submitted
3 in October was not sufficient and not appropriate for
4 the conditions and, again, that the requested relief
5 was above and beyond what they felt was necessary to
6 work on addressing the issues.

7 There is a series of alternative options
8 other than short of installing a bulkhead that the DEP
9 believes should be considered and should be addressed
10 in the emergency application; and based on the
11 application that was submitted, that's the application
12 that was denied. The North Wildwood says that
13 they're -- they've submitted a ton of additional
14 information and that the situation changes drastically
15 on a day-to-day basis, and that continues to change.
16 Your Honor, that is exactly why, if they believe that
17 the situation has changed, they need to file an
18 emergency authorization request for the DEP to consider
19 what changed circumstances or what additional
20 information they may have.

21 It's not Your Honor's purview to make that
22 decision. It's they -- they have the obligation to
23 make the request and submit the information to the
24 proper agency that's responsible for reviewing that
25 information. We made it very clear that we would be

1 willing to work with them on pre-reviewing any
2 additional applications they made from back in October
3 through now. Okay?

4 Your Honor, we just found out in court that
5 they resubmitted a permit. They are themselves
6 specifically acknowledging that the DEP is the -- is
7 the agency that's responsible for reviewing requested
8 of relief that they are doing. They acknowledged it in
9 their original submission of their emergency
10 application. Their acknowledgment throughout the
11 period that if an emergency arose, that they would
12 resubmit another emergency application. They made that
13 representation to Your Honor that they were going to do
14 that.

15 Rather than do any of that, despite them
16 saying that the next storm could take out the dune,
17 they never submitted an emergency application. Your
18 Honor, the permit -- I'm happy that they've corrected
19 the 2020 permit.

20 I completely disagree that references to
21 prior violations is not relevant to this case. Your
22 Honor, that's why we're here today. The injunctive,
23 right, is based specifically on statutes. We are here
24 today because they violated the statutes in October.
25 When they did -- October 20th, when they did

1 unauthorized work, it was specifically denied in the
2 DEP's review of their emergency application. And then,
3 an additional violation by removing sand from a
4 different area and putting it somewhere where they
5 wanted it on the beach without a CAFRA permit, those
6 are violations of statute, Your Honor. And the State
7 is entitled to an injunction to make sure that no
8 additional beachfront work is done without permit or
9 emergency application authorization from the DEP.

10 THE COURT: Thank you, Counsel.

11 We'll now move to the defendant's motion for
12 leave to file a counterclaim.

13 Mr. Bocchi, we'll start with you.

14 MR. BOCCHI: Thank you, Your Honor. I
15 touched upon some of this, so I'll try to be brief.
16 Rule 4674 speaks to some reaction, specifically allows
17 for the Court to consider in its discretion whether or
18 not a counterclaim can be issued in a matter like this.
19 And I understand the DEP's position with respect to --
20 and I spoke to it in my beginning presentation -- with
21 respect to limiting this to the October, you know, time
22 period. But that's not what this case is about. And
23 that's the whole point of the counterclaim.

24 What this case is about, from North
25 Wildwood's perspective, is that there are certain

1 obligations through state-aid agreement that the DEP
2 has failed to abide by in terms of failing to procure
3 certain easements that would allow for the beach
4 renourishment project through the U.S. Army Corps of
5 Engineers with oversight by the New Jersey Department
6 of Environmental Protection would allow that to be
7 administered in North Wildwood. And because of the
8 fact that the DEP has breached its obligations under
9 that agreement, North Wildwood has in fact had to
10 undertake significant efforts on its own -- on its own
11 dime, the tune of more than \$20 million in terms of
12 significant beach replenishment efforts that they have
13 undertaken themselves, that no other municipality that
14 I'm aware of has been required to do. That issue is
15 inextricably linked with respect to the matters that
16 have been raised on the initial application of the
17 order to show cause by the DEP.

18 In fact, one of the cases that the DPI cites
19 to, the Mazza (phonetic) case, allows for the Court to
20 consider contested issues of fact. It allows the Court
21 to conduct an evidentiary hearing to resolve factual
22 disputes with respect -- with respect to a party's
23 compliance or noncompliance. The Mazza court actually
24 says that. I'll read it to you: "Moreover, if there
25 is a contested issue of fact regarding the defendant's

1 compliance with the order or ability to comply, the
2 trial court must conduct an evidentiary hearing to
3 resolve the factual dispute."

4 So I understand that in the traditional
5 context of a summary proceeding, yes, you're limited to
6 looking at, okay, have they, in fact, violated this
7 agency order? And yes, typically, the Appellate
8 Division reserves jurisdiction with respect to
9 challenging that agency order. But that's not what our
10 counterclaim is about. Our counterclaim is not about,
11 Judge, you need to look back and overstep the bounds of
12 the Appellate Division and say that we should have
13 gotten that EA back in October. That's not what it's
14 about.

15 But what the counterclaim is about is,
16 because of DEP's failed actions in this matter, we have
17 been forced -- North Wildwood has been forced to
18 undertake efforts at its own cost in order to try to
19 protect its residents.

20 So those two issues are inextricably linked
21 and the entire controversy doctrine screams for the
22 Court to step in and to allow for all of these weighty
23 issues to be addressed in one litigation, before one
24 judge, so that a record is developed. Now, obviously,
25 that's not for purposes for today -- the sufficiency of

1 those arguments and the like. But the point of our
2 submissions, Your Honor, is that Rule 4674 allows you
3 to make that decision if it's in your discretion. And
4 we think based on all of the equitable powers that we
5 cited to in our papers, that you have in fact the
6 authority to do that and you have the authority to do
7 that under the rules -- under the specific rule. So
8 4674 allows you to step in, Your Honor, and to retain
9 jurisdiction with respect to this matter so that these
10 disputes, which we will agree have been longstanding,
11 can be fleshed out by the Court, because that would be
12 appropriate.

13 We are against piecemeal litigation. There
14 should be one proceeding for the Appellate Division.
15 Something else regarding a contract before the --
16 before the trial court. The record should be
17 developed. North Wildwood should be given the
18 opportunity to make its claims. The DEP should be
19 given the opportunity to answer that complaint and
20 defend itself with respect to whatever their position
21 is in the manner. And a record should be developed.
22 And 4674, while if you read the first half of the
23 rules, it seems limiting in nature. 4674, in fact,
24 calls for it and allows for it.

25 We also cite to, as you know -- I'll never

1 forget, I took New Jersey practice in law school. And
2 my professor said to me, if you remember one thing from
3 this class, Rule 112, the rules were meant to be
4 relaxed. Right? Okay. Well, we don't like to argue
5 that unless we have to. And so but I remember
6 Professor Caraballo saying that a long time ago. And
7 Judge, he's right. The rules are meant to be relaxed.
8 And we cite case law where, in fact, the rules have
9 been relaxed in this context, where there's an agency
10 action and the rules were relaxed to allow for the
11 development of a record before a court. And that's
12 what our application is about, and that's the
13 disconnect. I understand the DEP is trying to make
14 this about October. But as I -- the first words I said
15 is we don't have the luxury of just looking at this
16 just in October, because there's too much at issue.
17 There's too much to lose.

18 If in fact a storm comes in and there are
19 problems -- and that's why we think the Court should
20 retain jurisdiction, allow us to assert this
21 counterclaim, allow the parties to deal with these
22 issues. And you know, ultimately, there will be a
23 disposition, or if there may be a settlement of those
24 disputes, who knows? But the point of it is, is that
25 we do think there is authority to allow North Wildwood

1 the ability to make these claims because the time is
2 now to make those claims. It's ripe for adjudication
3 based on what's happening and based on, you know -- you
4 know, conditions are worsening, not just with respect
5 to the site that we're talking about today, but in
6 other sites. So when you take that all into account,
7 the Court ought to invoke its jurisdiction and step in
8 and be a vehicle to hopefully try to, you know, dispose
9 of these matters in a way that is fair and equitable to
10 everyone. That's why we think Your Honor should invoke
11 your jurisdiction and allow us to assert that
12 counterclaim.

13 THE COURT: Thank you, Counsel.

14 Mr. Terhune, opposition?

15 MR. TERHUNE: Thank you, Your Honor. Again,
16 I'm going to try to avoid going into the merits
17 themselves of the -- of the requested counterclaim and
18 just point out a couple of things in particular.

19 The appearance to be the driving factor of
20 the request for North Wildwood not only is the current
21 conditions, which I think -- Your Honor, I think there
22 is some conflation as to what was done back in October
23 and what the current conditions are now. As, Your
24 Honor, we discussed, there's mechanisms in place to
25 address current conditions and -- and conditions since

1 October.

2 The January filing, despite what they're
3 saying, that they're not asking you to do in Count I,
4 is specifically asking you to do what they're saying
5 they're not asking you to do. They're asking you to
6 look at the current facts, look at all this additional
7 information that they want in the guise of the entire
8 controversy doctrine, and ask the Court for the
9 extraordinary relief of acting in the seat of an
10 administrative agency. Your Honor, the plea, the
11 proposed counterclaim itself is so above and beyond
12 what is allowed as far as the jurisdiction of this
13 Court that it should not be considered. And it should
14 not be considered as part of an entire controversy
15 argument. It is not the same controversy. It's a
16 different controversy.

17 They're arguing conditions as they exist
18 after the current application was made to the Court.
19 This is not the same -- the same controversy. It's not
20 the same conditions. They're admitting that the
21 conditions are changing. It is not the same
22 controversy in question.

23 The statutes were violated in October.
24 That's why we're seeking a preliminary injunction to
25 prevent future violations and future actions without

1 the proper review by DEP.

2 That being said, also, the application for
3 the counterclaim is not ripe. They're making a
4 contractual claim which violates the Contract --
5 Contractual Liability Act, which filed against The
6 State of New Jersey. If someone is seeking damages for
7 a breach of contract, they have to give the DEP -- the
8 state notice. They have since given that notice. It's
9 90 days before they can file a counterclaim related to
10 a breach of contractual claim. It could not be more
11 plain in the current statutes as to what is required,
12 Your Honor.

13 Not to say that the issue cannot be
14 considered by Your Honor, in April, when it's timely.
15 But as of right now, it is not. They're making
16 arguments that -- not for money is that they've
17 incurred since October, Your Honor. They're making
18 arguments for moneys they've spent over the last decade
19 for beach restoration. And arguably, there's a lot of
20 facts that need to be -- need to be heard, not only
21 requiring what was done, but what they might have done,
22 which might have exacerbated their own conditions, Your
23 Honor.

24 But again, not going into the merits of the
25 case, we reserve our right to specifically file a

1 motion to dismiss the counterclaim later if the Court
2 does give them leave to get that grant to file the
3 counterclaim. But the counterclaim, as it currently
4 exists in front of the Court, is so far beyond that we
5 think the motion itself should be denied in its current
6 form. Thank you.

7 THE COURT: Thank you, Counsel.

8 Reply?

9 MR. BOCCHI: Your Honor, I'll be brief.

10 THE COURT: Thank you.

11 MR. BOCCHI: Because I'm going to repeat
12 myself and say seven things I've already said to you.
13 But with respect to the New Jersey Contractual
14 Liability Act, counselor's right. We did, in fact,
15 file that notice of claim on January 18th. And in our
16 reply brief at point 6, we indicate to the Court that
17 in light of this, you know, brief interval of time and
18 from a practical perspective, we -- the Court should
19 permit the filing of the counterclaim. At this time
20 and thereafter allow the passage of the 90-day period
21 through April 18. And the disposition of -- of -- of
22 that most -- of that motion, in that way, I agree with
23 counsel. There are a lot of issues to address.
24 There's a tortured history.

25 But again, these are issues that we -- where

1 I disagree is they are inextricably linked. The
2 failure to abide by that state -- or the allegation of
3 the failure to abide by that state aid agreement is in
4 fact directly related to the actions that North
5 Wildwood has taken in the past. The actions that North
6 Wildwood is seeking to do in the future through the
7 authority of the Corps, it's all linked together.

8 So the Court should address that and allow
9 the parties to take discovery and get into those issues
10 and allow the parties to flesh out those issues,
11 because this is a unique case and 4674 allows you to
12 step in and to make that decision based on your
13 discretion.

14 And for those reasons, Your Honor, we think
15 that there is a basis for you to grant that motion,
16 allow us to file that counterclaim, and we'll deal with
17 any motion. I think it's appropriate to file a motion
18 to dismiss; we'll deal with the motion to dismiss;
19 we'll deal with the case as it goes on in the normal
20 course, just like every other case that we have. Thank
21 you, Your Honor.

22 THE COURT: Thank you, Counsel.

23 Folks, we've been here about an hour. Why
24 don't we take a five-minute recess and I'll come back
25 and make my findings? Okay? Thank you. Thank you.

1 MR. BOCCHI: Thank you, Your Honor.

2 MR. TERHUNE: Thank you, Your Honor.

3 THE CLERK: All rise.

4 (Recess)

5 THE COURT: Hopefully everyone's back. Okay.

6 Court having considered all of the written submissions
7 that I identified in the beginning of the proceeding.

8 It did? Okay. Just let me know. Computer
9 issues. Even in person we have computer issues.

10 MR. TERHUNE: We can go out and appear by
11 Zoom.

12 THE COURT: We're good? Okay.

13 We're going to have to consider all the
14 written submissions that identified at the beginning of
15 this proceeding, as well as oral argument here today.
16 I hereby make the following findings of fact and
17 conclusions of law.

18 I will start with the order to show cause in
19 a motion for a temporary restraining order injunctive
20 relief, then deal with the counterclaim.

21 This matter comes before the Court by way of
22 plaintiff's order to show cause and verify complaint
23 filed on around December 6th, 2022, by the New Jersey
24 Department of Environmental Protection against the City
25 of North Wildwood and its unknown agents.

1 Plaintiff challenges the defendants' alleged
2 conduct of disregarding a final order from the NJ DEP
3 and engaging in unauthorized oceanfront construction.
4 Plaintiff seeks temporary restraint, injunctive relief
5 against defendants.

6 The arguments of the parties are as follows:
7 plaintiff argues that defendants failed to exhaust her
8 administrative remedies before bringing this action;
9 plaintiff contends that defendants had to first seek
10 administrative or appellate review of defendants'
11 emergency authorization application before seeking
12 relief in this court; plaintiff argues that defendants
13 instead chose to proceed with construction and ignore
14 the NJ DEP's denial.

15 Defendants assert the following timeline of
16 events: October 5, 2022, defendants submitted their
17 emergency authorization request; October 7, 2022, the
18 NJ DEP partially granted the request that sought
19 additional time to review the remaining three requests;
20 October 12, 2022, the NJ DEP denied the remaining three
21 requests; on October 19, 2022, NJ DEP finally published
22 its denial of the request; October 20, 2022, defendant
23 sent a letter to the NJ DEP saying they were
24 nonetheless moving forward with the project.

25 Plaintiff argues that, from the October 19

1 publication date, the defendants had 30 days to file an
2 administrative appeal, which it did not do.

3 Additionally, they could have pursued an appeal to the
4 Appellate Division within 45 days, and they failed to
5 do so. Therefore, they have failed to exhaust the
6 administrative remedies and the Court should grant the
7 relief.

8 Plaintiff argues it is entitled a temporary
9 restraints and injunctive relief to prevent further
10 unauthorized work. Plaintiff argues that they're
11 entitled to injunctive relief where a statute
12 specifically provides the Court with the right to
13 enjoin noncompliance with the statute provisions.
14 Plaintiff contends that CAFRA is one such statute.
15 They argue that, when a statute is violated, the party
16 seeking an injunctive -- injunction does not need to
17 show irreparable harm, nor does the Court need to
18 consider whether the injunction is in the public
19 interest.

20 Plaintiff argues that, to obtain temporary
21 restraint and injunctive relief pursuant to CAFRA, in
22 addition to that, the Freshwater Wetlands Protection
23 Act, the Flood Hazard Area Control Act, and the
24 Coastal -- Coastal Zone Management rules, they only
25 must show that defendants violated and continue to

1 violate the relevant statutes and regulations.

2 Plaintiff asserts that, on October 20, 2022,
3 the same day defendants replied to the NJ DEP via
4 letter, defendants began work without a CAFRA permit.
5 They contend defendants have violated statute and
6 intend to keep violating through performing
7 construction without a permit, specifically moving some
8 sand from another area to that area and also doing some
9 work on the sand in that specific area.

10 Plaintiff also argues that, to meet all four
11 prongs under the Crowe v. De Gioia standard, they
12 contend they have a reasonable probability of success
13 on the merits because the decision to deny the request
14 was correct. Defendants need a permit to legally
15 install a bulkhead. They argue the defendants failed a
16 timely appeal denial, which was fatal.

17 Moreover, the equity's balance more in favor
18 of the plaintiff as the State is there to protect the
19 natural features in an event of protection to pursue
20 health, safety, and welfare and the environment in the
21 surrounding area, pointing to some wildlife that would
22 be affected by this activity.

23 Moreover, plaintiff argues the public
24 interest will be will not be harmed by joining actions
25 and argue under waste management that the Court should

1 grant it as maintaining the status quo.

2 Defendant opposes. Defendant argues that the
3 Court should use its equitable powers to allow
4 defendants to install protective bulkhead. Defendants
5 argue that equity requires the installation of the
6 bulkhead because it is an essential emergency measure
7 to protect North Wildwood. Defenders contend that this
8 is a response to an imminent threat to life and
9 property. Because it is currently storm season,
10 there's little beach protection left. They argue that
11 even a moderate storm may cause catastrophic loss to
12 life and property. They argue that the Crowe factors
13 lean more in favor of the defendants, that there would
14 be irreparable harm, and further argue that conditions
15 have worsened since October and the threat remains
16 severe. And they argue their environmental consultant
17 believes that North Wildwood could not withstand a
18 single coastal storm event up into the future. That if
19 the dunes are breached, there's a storm drainage system
20 which will likely be destroyed, rendering it
21 nonfunctional, leading to catastrophic widespread
22 flooding.

23 They argue that the beach nourishment method
24 has been ineffective through the years and the only
25 successful method of coastal protection is the

1 installation of bulkheads. They believe the
2 defendants -- that equity's balance in their favor.

3 In reply, plaintiff indicates that it
4 satisfies the legal standard for a preliminary
5 injunction, that there has been ongoing environmental
6 violations which is a ground for injunctive relief.
7 They further argue that it would be improper for this
8 Court to review the NJ DEP's October 5, 2022, and
9 October 12 determinations, denying the application
10 because it is a final agency action and the defendants
11 have failed to exhaust their administrative remedies
12 and cannot relitigate issues without pursuing it.

13 The material facts and procedural history as
14 follows -- during the evening of October 3, 2022,
15 plaintiff received email correspondence from a
16 consultant working for defendants, indicating that
17 defendants would be submitting an emergency
18 authorization request to protect their beach patrol
19 building on 15th Avenue.

20 On October 4th, 2022, plaintiff replied,
21 indicating it would expedite review of its request. On
22 October 5, 2022, defendants submitted an emergency
23 authorization request stating a breached condition of
24 their dune was imminent -- dune system was imminent,
25 and that they lost more than 75 percent of their dune

1 system in front of the beach patrol building.

2 Defendants requested an immediate installation of
3 Jersey barriers at its beach patrol building, future
4 installation of a bulkhead at the same location,
5 reshaping of the dune in the area, and a repair of the
6 16th and 25th Avenue access ways to the beach.

7 On October 7, 2022, plaintiff partially
8 granted defendants' request for the installation only
9 of temporary Jersey barriers and a removal of a timber
10 walkway to allow for those barriers. Plaintiff denied
11 remaining request on October 12, 2022, finding that
12 there are unnecessary to prevent in an imminent threat.
13 Plaintiff, in its denial, reasoned that the defendants
14 did not demonstrate an imminent threat of loss of life
15 or property as well as the emergency authorizations are
16 not meant for immediate action and a proposed bulkhead
17 would not be immediate.

18 Plaintiff published the action on October
19 19th. Immediately thereafter, October 20, '22,
20 defendants indicated via letter that they were
21 nonetheless moving forward on the projects plaintiff
22 rejected. On that same day, plaintiff issued a notice
23 of violation to North Wildwood.

24 On October 28, 2022, plaintiff issued another
25 notice of violation to defendants' contractor, H4

1 Enterprises, LLC, for sand excavation and dune grading.
2 On October 9th and 16th, plaintiff received letters
3 from North Wildwood's mayor indicating that they are
4 moving forward with constructing a bulkhead in the
5 vicinity of 15th and 16th Avenues.

6 The standard of review for injunctive relief
7 is as follows: trial courts have the inherent
8 authority to grant interlocutory injunctive relief,
9 which is an extraordinary, equitable remedy utilized
10 primarily to forbid and prevent irreparable injury.
11 Zoning Board of Adjustment v. Service Electric Cable
12 Television, Inc., 198 NJ Super 378, 379, Appellate
13 Division 1985. Injunctive relief is intended to
14 maintain a status quo and must be administered with
15 sound discretion and consideration of the equities
16 involved.

17 Christiansen v. Milk Drivers and Dairy
18 Employers, 127 NJ Equity 215 219-20, 1940.

19 This application is made under two different
20 standards. One, the -- the general standard of Crowe
21 v. De Gioia, which has four factors. But they also
22 make the application under what is known as the express
23 statutory authority for this type of relief.

24 For the following reasons I grant the
25 preliminary injunction. There's been comment about the

1 fact that the Court did not grant this relief when the
2 initial application came in. It is really this
3 practice to give everyone to have a chance and an
4 opportunity to be heard, so all the issues could be
5 properly vetted. So nothing should be read into the
6 Court's original denial of the ex parte restraints
7 other than I wanted the defendants to have an
8 opportunity to be heard.

9 The Court finds, when a statute specifically
10 provides the right to enjoin noncompliance with the
11 statute provisions, a court may grant injunctive relief
12 pursuant to the statute rather than principles of
13 equity. Matawan Teachers Association v. Matawan
14 Aberdeen Regional Board of Education, 212 NJ Super 328
15 335.

16 And the Court finds that CAFRA NJSA 13:9-
17 18C1, and the CZM Rules NJAC Section 7:7-29.8A1, the
18 FHCA NJSA Section 58:16A 63C1, and the FWPA NJSA
19 Section 13:9B-21C1 are all such statutes providing the
20 right to enjoin noncompliance. When such statutes have
21 been violated, the moving party no longer has to show
22 irreparable harm nor must the Court consider the public
23 interest.

24 State Department of Environmental Protection
25 v. Interstate Recycling, Inc., 267 NJ Super 547 at 577-

1 78. All that needs to be proven for injunctive relief
2 to be granted is the statute was violated. Here, a
3 longstanding maximum of equity bears repeating that
4 equity follows the law. *Hedges v. Dixon City*, 150 U.S.
5 182 at 192, 1893.

6 Defendants really did not dispute that after
7 being placed on notice of the of the -- of the DEP's
8 decision that they would not grant the emergency
9 application, that they specifically wrote to them the
10 next day indicating that they were going to proceed.
11 That is a direct violation of the -- of the -- of the
12 authority of the DEP.

13 Moreover, the defendants had a plain avenue
14 of appeal and for some reason made the decision not to
15 exhaust their administrative remedies. Instead, they
16 made an intentional decision to forego the appeal
17 process and filed their response and their
18 counterclaim.

19 We'll now deal with the counterclaim. I
20 incorporate my findings on the record. And we'll
21 proceed.

22 Defendants seek leave of a court to file a
23 counterclaim. They argue that, pursuant to the court
24 rules, when an order to show cause is issued ex parte,
25 the responding party must first obtain leave of court

1 before filing a counterclaim. Defendants contend that
2 the entire controversy doctrine compels this Court to
3 permit defendants leave to file a counterclaim so that
4 the plaintiff's conduct can be adjudicated in a
5 proceeding. Defendants argue that a fundamental
6 principle of the doctrine is fairness and judicial
7 economy, and therefore, the Court should grant the
8 relief.

9 The Court -- the order that the Court has
10 jurisdiction to adjudicate its counterclaims rather
11 than the Appellate Division, because Rule 4:67-6C3 may
12 be relaxed or dispensed with by the Court if adherence
13 would result in an injustice. Defendants contend that
14 the Court, in its equitable discretion to relax the
15 rule requirements because there are questions of law,
16 in fact requiring a Court to develop a record.

17 In opposition, plaintiff argues defendants'
18 request for leave to file counterclaim must be denied
19 because it is procedurally insufficient and request
20 relief that cannot be resolved in a summary manner.
21 They contend defendants fail to provide sufficient
22 facts indicating that or authorized by rule or statute
23 to proceed in a summary manner, fail to plead
24 sufficient facts for the Court to determine whether
25 relief should be granted.

1 They further argue that, with respect to
2 Count II, there is a notice requirement that was not
3 met. And in fact, the defendants agree with that, but
4 the defendants asked the Court to simply keep the case
5 that the notice under the Contract Act was filed on
6 January 18th, 2023, and the 90-day would expire April
7 18th. And therefore, the Court could keep the -- keep
8 the action open.

9 Moreover, the plaintiffs argue that Count I
10 is rehashing the October decision, which in their
11 position is now a final decision because of their
12 failure to exhaust the administrative remedies.

13 When an order to show cause is issued ex
14 parte, no counterclaim shall be asserted without leave
15 of court: Rule 4:67-4, State v. Bradley, 174 NJ Super
16 154 at 158, Appellate Division 1980.

17 Defendants in summary actions are not
18 precluded from requesting leave of court to file a
19 counterclaim. Rather, the Court, in its discretion,
20 may grant or deny such a request based on equitable
21 considerations and unique facts of each case: Highland
22 Lakes Country Club v. Nicastro, 201 NJ 123-125 2009.

23 Chief of these equitable considerations that
24 are principles laid out in the entire controversy
25 doctrine, which requires litigants to consolidate

1 claims arising from a single controversy or else run
2 the risk of forfeiting such claim. Dimitri Karpeles v.
3 Boris Goldin et al., 237 NJ 91 at 98 2019.

4 The polestar for the application of this
5 doctrine is judicial fairness: K-Land Corp No. 28 v.
6 Landis Sewerage Authority, 173 NJ 59 at 74, 2002.

7 Here, the equities are in favor of allowing
8 the defendants leave of court to file a counterclaim.
9 The counterclaims conceivably arise out of the same
10 transactions and occurrence. There is --- there
11 appears to be, on its face, a common nucleus of
12 operative fact. The -- the counterclaim does not
13 petition the Court to grant relief outside its
14 equitable authority. So the Court grants that
15 application.

16 I say that with the following comments.
17 First, the Court is also going to order something,
18 whether that be in the -- in the counterclaim or in the
19 case-in-chief. I find the defendants are not without
20 remedy. Defendants have presented the Court with a
21 myriad of exhibits and certifications detailing the
22 significant degradation of their coastal protective
23 barriers. Although Defendants have forgone the appeal
24 process pertaining to their earlier emergent
25 applications, defendants are in no way barred from

1 refiling an emergent application. In fact, it was
2 discussed by counsel today in oral argument.
3 Defendants may have a cause to file a new emergency
4 action requested immediately in light of the -- the
5 assertions by North Wildwood of the continued
6 degradation of their coastal protection system.

7 Currently North Wildwood has zero feet of
8 beach berm between 11th and 16th Avenues and has
9 suffered a loss of 12,382 cubic yards of protective
10 dune from 15th -- 15th and 16th Avenues.

11 That is the James certification in paragraph
12 3. These are just assertions, but it is based on
13 expert opinion. I'm not making findings that is
14 accurate, but it is being asserted. It is alleged the
15 defendants have lost more than 75 percent of the
16 protective dune system in front of their beach patrol
17 building. Defendants' expert, who has worked with
18 North Wildwood for 20 years to stave off erosion,
19 believes conditions will only worsen, particularly in
20 the upcoming nor'easter system. And even a moderate
21 storm could, as he says, easily decimate the town's
22 infrastructure as things stand.

23 Defendants' expert asserts what appears to be
24 somewhat of a persuasive argument and is apparent to
25 the Court, that whatever metric of sufficient shore

1 protection one goes by, it appears to be lacking here.
2 It is significant that defendants have found success
3 with their use of bulkheads in stark contrast to the
4 extensive and continued loss of dredge sand. These are
5 just comments by the Court. I'm not making a finding.

6 But I'm going to order the North Wildwood to
7 file an emergent authorization based on the change in
8 conditions within ten days.

9 Now I make some comments. I order that --
10 recognizing that the defendants believe through their
11 counterclaim that they can continue to pursue the
12 relief that they're seeking, some -- basically, which
13 is granting them the permission to do exactly what they
14 want to do, build the bulkhead and some other relief.
15 I am not making that decision today. That is not the
16 appropriate time to make that decision.

17 However, through motion practice, now that
18 the counterclaim is in, the State could make an
19 application that the Court has no jurisdiction over any
20 of this because of the lack of failure to exhaust
21 administrative remedies.

22 If that were to happen, North Wildwood does
23 not file the emergent application. North Wildwood may
24 not be without relief. The State, essentially, came to
25 oral argument saying we know that there's evidence of

1 further deterioration. We've reached out to say, if
2 you file something, we'll even help you file it. That
3 doesn't mean they're going to grant it.

4 But North Wildwood can continue these -- this
5 dispute on two tracks. At some point, though, as a
6 matter of law, this Court may determine what track was
7 appropriate. And the State seems to suggest not making
8 any guarantees that they would grant a new emergent
9 authorization, but they certainly would have an
10 obligation to review it and hopefully work together to
11 reach a solution.

12 On the counterclaim, the State needs some
13 very persuasive arguments on the merits. I'm granting
14 the leave to file a counterclaim. But as I see this
15 case progressing, I see that there will be extensive
16 motion practice at some point.

17 One, the State could make a motion tomorrow
18 that they should strike that count under the contract
19 law because there's been no notice -- or the 90 days
20 haven't expired. They can make the motion or they
21 could wait. They can make the motion and wait to
22 determine if their 90 days still as a matter of law.

23 They made an argument in oral argument under
24 Count I, that relitigating what should have been
25 litigated during the appeal process in October. I did

1 not make a finding on that. That would have to -- it
2 would have to entertain the motion practice and I'm not
3 suggesting I'm going to deny it or grant it.

4 But that really is the posture of the case
5 now. I ask for representatives to be here. I would
6 like to have some discussions in chambers. I want to
7 start first with counsel and mayor.

8 And the DEP reps, if you'd be kind enough
9 just to stay in the courtroom. We have a conference
10 room and I may want to talk together, if that's okay.
11 All right? Thank you. My staff will prepare an
12 appropriate order.

13 MR. BOCCHI: Thank you, Your Honor.

14 MR. TERHUNE: Thank you, Your Honor.

15 THE COURT: Thank you.

16 THE CLERK: All rise.

17 (Recess)

18 THE COURT: All right. We're back on the
19 record in a matter of the New Jersey Department of
20 Environmental Protection v. City of North Wildwood
21 under docket number CPMC-55--12. The time is about
22 1:17. We broke around 11 or so. I encouraged the
23 attorneys to -- to engage in settlement discussions.
24 We specifically agreed that nothing said during those
25 discussions could be used at the time of trial; that it

1 would be inadmissible pursuant to the evidentiary rule.

2 We've also discussed case management. Is
3 there anything you want to place on the record
4 resulting from your discussions or you'd rather not say
5 anything, counsel?

6 UNIDENTIFIED SPEAKER: Nothing at this time,
7 Your Honor.

8 THE COURT: Okay. Very well.

9 UNIDENTIFIED SPEAKER: I agree, Judge.

10 THE COURT: Well, hopefully it was helpful.
11 Anytime you can talk, I encourage the talks to
12 continue. And as I indicated, I'd love to see you try
13 to reach an amicable resolution in lieu of litigation.
14 But if you can't, then we also discussed a management
15 order, which we will generate.

16 Requests for written discovery are to be
17 propounded within 30 days and answered within the time
18 provided by the rules of court. Depositions are to be
19 completed within 180 days. Plaintiff shall produce
20 expert narrative reports on or before July 15th.
21 Defendants shall produce expert reports on or before
22 August 15th. Reply briefs -- reply reports for both
23 parties would be August 31st, and expert depositions
24 will be conducted between August 31st and October 13th;
25 that is the discovery cutoff date. No amendment to the

1 pleadings shall be permitted after August 31st.

2 We will reconvene for a case management
3 conference on April 4th at 10 a.m. via Zoom. And your
4 trial dates are Monday through Friday, November 13th
5 through the 17th, and will continue the week of
6 November 27th on such other dates as may be required.
7 We will conduct the trial here in this courtroom and
8 hopefully it will be live. As I indicated off the
9 record, that there are other numerous paragraphs that
10 really just discuss trial process that I would ask you
11 to review carefully when we submit the order.

12 Counsel, that's the schedule. If you need me
13 at any time, you want to have another conference,
14 please feel free to send an email, particularly if
15 there's discovery issues. If I can put out the fire
16 without having unnecessary motion practice, I'll try to
17 do that.

18 Okay. We also talked about mediation.
19 Mediation could be with no cost to the parties through
20 our staff mediator. Her name is Debra Fashia
21 (phonetic). She does an outstanding job, or the
22 parties could retain a private mediator. I would ask
23 you to explore that.

24 And why don't we -- I'm going to have two --
25 two management conferences. We'll come back in 30 days

1 to see if a mediation might be helpful or not. So the
2 order's going to read March 1st at 10 a.m. Zoom
3 conference to discuss specifically mediation and any
4 other issues that we have. And then we'll keep April
5 4th for a follow up. Okay? All right.

6 MR. SMITH: Thank you.

7 THE COURT: Anything else?

8 Any questions or concerns, counsel?

9 Okay.

10 UNIDENTIFIED SPEAKER: No, Your Honor.

11 THE COURT: Thank you all very much for your
12 time. Have a good afternoon.

13 Mayor (phonetic), thank you for attending.
14 Have a good afternoon.

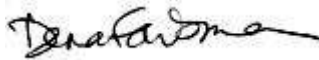
15 UNIDENTIFIED SPEAKER: Thank you, thank you.

16 THE COURT: Thank you.

17 (Proceedings concluded at 2:47 p.m.)
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CERTIFICATION

I, Dena Farbman Page, the assigned transcriber, do hereby certify the foregoing transcript of proceedings in the Cape May Superior Court, on February 1, 2023, from 1:17 p.m. to 2:47 p.m., is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.



DENA FARBMAN PAGE

AAERT CET-629

ESCRIBERS, LLC

Date: March 1, 2023



EXHIBIT B

Prepared by the Court

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Plaintiff,

v.

CITY OF NORTH WILDWOOD, "XYZ CORPORATIONS" 1-10; and "JOHN AND / OR JANE DOES" 1-10,

Defendants.

SUPERIOR COURT OF NEW JERSEY
CAPE MAY COUNTY
CHANCERY DIVISION

DOCKET NO: CPM-C-5522

Civil Action

ORDER

FILED

FEB - 1 2023

CIVIL DIVISION
SUPERIOR COURT - CAPE MAY CO.

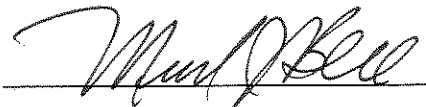
THIS MATTER, having been brought before the Court by way of an Order to Show Cause, Plaintiff's Motion for Temporary Restraining Order and Injunctive Relief, and Defendants' Motion for leave to file a Counterclaim; and Kevin A. Terhune, Esq., and Dianna E. Shinn, Esq., of the Deputy Attorney General Office, having appeared on behalf of Plaintiff; and Anthony S. Bocchi, Esq., of the firm Cullen and Dykman LLP, having appeared on behalf of Defendants; and the Court having reviewed the papers submitted and having heard oral argument; and for the reasons more fully set forth on the record; and for good cause shown;

IT IS on this 1st day of FEBRUARY 2023; ORDERED and ADJUDGED as follows:

1. Plaintiff's Motion for Temporary Restraining Order and Injunctive Relief is GRANTED and Defendants are hereby enjoined from:
 - a. Installing a bulkhead between 15th and 16th Avenues until it has received a permit authorizing the installation of same from the NJDEP;
 - b. Engaging in any further excavation, placement or regrading of sand between 14th and 16th Avenues until it has received a permit authorizing the installation of same from the NJDEP;
 - c. Engaging in any other oceanfront construction, reshaping of dunes and/or reconstruction of the access point at 16th and 25th Avenues until it has received a permit authorizing the installation of same from the NJDEP.
2. Defendants' Motion for leave to file a Counterclaim is hereby GRANTED.

Prepared by the Court

3. Defendants must file an Emergency Authorization application with the NJDEP WITHIN TEN (10) DAYS of this Order, seeking to:
 - a. Allow Defendants to install a bulkhead between 15th and 16th Avenues;
 - b. Allow Defendants to engage in further excavation, placement, or regrading of sand between 14th and 16th Avenues
 - c. Allow Defendants to engage in any other oceanfront construction, reshaping of dunes and/or reconstruction of the access point at 16th and 25th Avenues.
4. This Order and Final Judgment shall be electronically filed via e-courts thereby ensuring prompt service upon all counsel of record.



MICHAEL J. BLEE, A.J.S.C.

EXHIBIT C



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February 9, 2023
Via email

New Jersey Department of Environmental Protection
Division of Land Resource Protection
501 East State Street, Second Floor
Trenton, NJ 08625
ATTN: Ms. Colleen Keller and Ms. Janet Stewart

RE: Coastal Program Emergency Authorization Request
Shore Protection Measures for Installation of Oceanfront Bulkhead
Extending from Midblock Between 12th and 13th Avenues to 16th Avenue
Block 317.03, Lot 1 (portion thereof) and Block 317.02, Lot 2 (portion thereof)
City of North Wildwood, Cape May County, NJ
TLCG File No.: 22-1093.2

Dear Ms. Keller and Ms. Stewart,

On behalf of the City of North Wildwood (hereafter "City" or "Applicant"), please accept this Emergency Authorization request pursuant to the Coastal Zone Management Rules (CZMR) (*N.J.A.C. 7:7-21 et seq.*) under the authority of the NJ Department of Environmental Protection (NJDEP). Further, this submission follows an Order by the Superior Court of the State of New Jersey, Cape May County Chancery Division, Docket No.: CPM-C-5522, issued by Michael J. Blee, A.J.S.C. on February 1, 2023, which requires the City of North Wildwood to file an Emergency Authorization application with the NJDEP within 10 days of the Order date.

Summary

The nature and cause of the threat is recurrent storm damage, including during the October offshore passage of Hurricane Ian at which time the dune at 15th Avenue lost a majority of its mass, as well as subsequent unnamed coastal storm events prior to and following the October event which have continued to erode beach/dune sand reserves. This significant loss of sand from both the beach berm and remnant dune system leaves a multi-block section of the City at peril and without an effective barrier to mitigate storm surges and associated wave action. The depletion of sand from the City's overall beach/dune system has reduced the elevation of the beach such that sections of the remnant dune mass are now located at the edge of normal wave runup at a normal high tide. Therefore, any storm surge or spring tide with moderate to strong waves continues to erode into the dune toe. The rate of loss and area of impact has accelerated and expanded, respectively. Further, a nor'easter coastal storm is forecast by the National Weather Service for this coming Sunday, February 12, 2023, extending into Monday, February 13, 2023. The chance of precipitation is listed at 100%, and the predicted duration for this coastal storm event exceeds 24 hours. The predicted coastal conditions during this storm include northeast winds at 20-30 knots with gusts up to 40 knots and wave heights up to 10 feet.

The City hereby reaffirms the need for emergency shore protection, via installation of a bulkhead, on portions of Block 317.03, Lot 1 and Block 317.02, Lot 2 per the "Engineer's Report in Support of Application for Emergency Permit Authorization for Beach Bulkhead & Public Access Between 12th/13th & 16th Avenues, City of North Wildwood," prepared by Van Note-Harvey Associates, dated February 9, 2023 and as depicted on the "Plan of Proposed Beachfront Bulkhead & Public Access Between 16th Ave. & Midblock 12th & 13th Ave., City of North Wildwood," (Sheets 1 and 2), prepared by Van Note-Harvey, dated February 9, 2023.



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The project location and existing conditions are depicted on attached Site Location Figures and Photographs for reference. The proposed bulkhead installation will most expeditiously mitigate the imminent threat to severe loss of property and further environmental degradation that will result from a breach in the remnant dune system.

Applicant:

City of North Wildwood
901 Atlantic Avenue
North Wildwood, NJ 08260
Attn: Nicholas Long, City Administrator
609-522-6464
nlong@northwildwood.com

Project Area:

From the terminus of the existing bulkhead located midblock between 12th and 13th Avenues, extending southwest between the bike path and dune, then southeast along the dune toe around the Beach Patrol facility, then southwest along the dune toe, and terminating at the southern edge of the 16th Avenue beach access, and extending from the eastern edge of the JFK Boulevard (Beach Drive) right-of-way alignment to the mean high water line, as contained within portions of Block 317.03, Lot 1 and 317.02, Lot 2.

Attachments

The following documents are provided for reference in support of this Coastal Program Emergency Authorization Request.

- **Attachment 1**, Site location map, *“Figure 1 Site Location on Aerial Photographs Depicting the Project Area Limits,”* prepared by The Lomax Consulting Group, dated December 30, 2022
- **Attachment 2**, Site photographs depicting post-storm damage and impacted areas
- **Attachment 3**, *“Plan of Proposed Beachfront Bulkhead & Public Access Between 16th Ave. & Midblock 12th & 13th Ave., City of North Wildwood,”* (Sheets 1 and 2), prepared by Van Note-Harvey, dated February 9, 2023
- **Attachment 4, including Exhibits 1-10**, *“Engineer’s Report in Support of Application for Emergency Permit Authorization for Beach Bulkhead & Public Access Between 12th/13th & 16th Avenues, City of North Wildwood,”* prepared by Van Note-Harvey Associates, dated February 9, 2023

Background

This request follows a prior Emergency Authorization request submitted on October 5, 2022 on behalf of the City. Emergency Authorization was granted by NJDEP (via email) on October 7, 2022 for: a) the deployment of Jersey barriers (20’ segments) in a 400 linear foot alignment extending from the 15th Avenue northern right-of-way limit line along the landward edge of dune to the 16th Avenue southern right-of-way limit line; and b) remove/relocate existing composite/timber decking walkway from in front of the Beach Patrol building to facilitate Jersey barrier placement. Both of these activities have been completed. Emergency Authorization was denied by NJDEP (via email) on October 12, 2022 for: a) reshaping dune remnants, protecting existing dune vegetation to the maximum extent possible, to establish stabilized slopes secured landward by the Jersey barrier wall; b) installation of 404 linear feet cantilevered steel bulkhead (coated) with timber cap; c) immediately reconstruct the beach access via profile grading and



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deposition of stabilizing material within the residual upper beach berm and back beach limits, relatively minimal volumes of fill material are required to accomplish the necessary grading and restoration; and d) reconstruct the sloped ramps and landings within the access to restore the vehicular and pedestrian use, including pedestrian public access from the boardwalk and the adjoining 26th Avenue pier.

As summarized by the *“Historical Review of Oceanfront Shoreline Changes Since 1986 in North Wildwood”*, prepared by the Stockton University Coastal Research Center (**Attachment 4, Exhibit 1**), the North Wildwood shoreline has a long history of dynamic change, largely influenced by Hereford Inlet located to the north. The tide channels and associated shoaling of this inlet have altered littoral transport of sand and its associated deposition causing cyclical periods of erosion and accretion of the City’s beaches. In 1986, the beach at 15th Avenue extended approximately 1,500 feet to the east. This was the result of focused sand deposition immediately seaward of the oceanfront in North Wildwood which then migrated onto the beach shoreline expanding the beach widths. This period was then followed by a shoreline retreat from 1987 through 2005 during which a substantial portion of the beach was eroded and lost. In the early 1990’s, modifications to the City’s stormwater collection system were constructed, which presently exist today, directing stormwater discharge to two outfall locations, one at 3rd Avenue and the other at 21st Avenue. Shoreline retreat resulted in the need to modify these existing oceanfront stormwater outfalls due to the exposure of the supporting timber cribbing to unmitigated wave action and prevailing longshore currents. Due to the beach width and beach berm elevation losses, several hundred linear feet has been removed from these outfalls at both 3rd Avenue and 21st Avenue. Notwithstanding beach nourishment activity during 2009 and 2010, via hydraulic pumping of sand, and a series of sand harvesting operations from 2016 to present, multiple named storms, including Irene, Sandy, Jonas, and Ian, plus many other more moderate northeast coastal storm events, have significantly eroded the beach and dunes to a point whereby there is an imminent threat to a dune breach. Based upon the findings of Dr. Farrell of the Stockton University Coastal Research Center pursuant to the aforementioned beach losses since 1986, *the City of North Wildwood beaches, in particular 15th Avenue oceanfront location, is the most erosional site in New Jersey (Attachment 1)*.

Existing Conditions

In addition to the historic loss of beach width, the sand volume and beach elevation have diminished substantially. Most recently during Hurricane Ian’s October passage offshore, over 50,000 cubic yards of material was lost between 11th and 16th Avenues. The remaining volume of dune sand reserve at 15th Avenue is calculated at 18 cubic yards per foot, an amount significantly less than was lost in this most recent named coastal storm. *“Plan Showing Beach Erosion 12-27-2022 Beach Erosion 12/19/2022 Post-Ian Beach Loss (10/2022) Compared to Post-Beach Fill As-built (6/2022) between 16th and 11th Avenues North Wildwood Beach, City of North Wildwood,”* prepared by Van Note-Harvey, release date 1/10/2023 (**Attachment 4, Exhibit 7**), depicts a comparison of beach elevations between June 2022, at the conclusion of the backpassing beach fill project, and December 2022 for the section of beach and dunes between 11th and 16th Avenues. This comparative exhibit reveals that the location of the 7.0-foot (NAVD88) beach berm elevation established in June 2022 via beach fill sand backpassing has eroded to less than 1.0 foot (NAVD88) as of December 2022. The 7.0-foot beach berm elevation was defined by the required construction template per the USACE/NJDEP permit authorizations for the beach fill project. It should be noted that the mean high water line is located at 1.99 feet (NAVD88). Accordingly, the mean high water line exceeds the beach elevation in the former location of the design template beach berm for this section of the beach and dune system. The toe of dune is now located at the edge of normal wave runup at a normal



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high tide. The inundation at the seaward toe of the dune continues to cause erosion, which has resulted in cross-sectional area losses between the June 2022 beach fill conclusion and October 2022 of 760 square feet at 15th Avenue, 699 square feet at midblock between 15th and 16th Avenues, and 758 square feet at 16th Avenue. The referenced plan includes more recent surveyed profiles as well which clearly demonstrate successive erosional losses and a chronic retreat of the seaward dune limit through December 27, 2022. As stated in the above-referenced Stockton University Coastal Research Center report, *“Neither the current beach width at the lifeguard headquarters nor the dune width and elevation are sufficient to be regarded as “shore protection” worthy of the term.”* The crest of the former dune along with the entirety of its mass east of the crest are now gone and any storm surge or spring tide with moderate to strong wave action continues to erode into the dune unimpeded by a beach berm or any other protective measures. The above-referenced cross sections clearly demonstrate that less than 50% of the dune mass remained as of end of December 2022, and erosion has continued unabated since that time. Without the mass of the pre-existing dune, a moderate storm, akin to the October event, will rapidly erode through the balance of the dune and breach into the Beach Patrol facility (Block 317.03, Lot 1). Damage will be sustained not only to the building but to other City infrastructure as well (**Attachment 2. Photographs**).

The risk of an imminent breach is no longer isolated to the 15th Avenue location in front of the Beach Patrol facility. The rate of erosion between 13th and 14th Avenues has exceeded expectations largely due to shifts in the prevailing wind and wave direction during recent minor to moderate coastal storms. The cross-section area losses in this dune are now even more pronounced than at 15th Avenue. The *“Plan Showing Beach Erosion 12-27-2022 Beach Erosion 12/19/2022 Post-lan Beach Loss (10/2022) Compared to Post-Beach Fill As-built (6/2022) between 16th and 11th Avenues North Wildwood Beach, City of North Wildwood,”* prepared by Van Note-Harvey, release date 1/10/2023 (**Attachment 4, Exhibit 7**), depicts a comparison of beach elevations between June 2022, at the conclusion of the backpassing beach fill project, and December 2022 for the section of beach and dunes between 11th and 16th Avenues. Specifically, 13th Avenue has lost a cross-section area of the dune and beach berm of 1,239 square feet in less than four months. The corresponding cross-section area of the dune and beach berm loss midblock between 13th and 14th Avenues is 1,232 square feet for the same period. This cross-section analysis further reveals additional losses since October thereby confirming that this erosional state persists and is anticipated to continue. Pursuant the City Engineer’s analysis and subsequent determination on December 29, 2022, it now appears that a dune breach between 13th and 14th Avenues has an equal if not greater likelihood than a breach at 15th Avenue. The proximity of JFK Boulevard and existing City infrastructure within this right-of-way are at significant risk should a breach occur at 13th Avenue. The existing beach access configuration and its associated topography would essentially facilitate an overwash condition into the bike path and JFK Boulevard, exposing the storm drainage system to inundated capacity and a risk of filling with sand. Once sand enters the storm drainage system, flow and discharge will be inhibited, causing widespread, prolonged flooding within the City and the system would require substantial maintenance and even replacement of certain components.

Accordingly, and given that the City experiences the harshest storm conditions between October and May, generally consisting of nor’easters and/or extended period swells from storm systems stalled off the coast, the imminent threat continues to persist that a dune breach will occur before this year’s storm season concludes and before either the USACE’s “Hereford Inlet to Cape May Inlet New Jersey Hurricane and Storm Damage Reduction Project” (**Attachment 4, Exhibit 3**) moves to construction or the NJ Office of Coastal Engineering Office advances restoration of the beach to its original 2009 template. Moreover, these cumulative persisting conditions, coupled with insufficient time to pursue a traditional permit authorization, require that



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the proposed shore protection measures be approved by an Emergency Authorization. Please note that, consistent with previous collaborative discussions with the NJDEP and direction to keep all parties informed, this submission will be transmitted to the Bureau of Coastal and Land Use Compliance and Enforcement staff to ensure that they too are properly informed of the imminent threat and the Applicant's intent to implement emergency shore protections measures.

It should be noted that, despite the City's \$3.676 million investment in 2022 beach renourishment in advance of the summer season via the NJDEP and USACE-approved sand backpassing project, residual sand reserves were sufficiently depleted by the end of the season that little remained to withstand coastal storm events. Sand volume placed as part of the backpassing project was shaped into a dune ridge and dry beach area along the oceanfront consistent with the approved design template as is depicted by the June 2022 post beach fill line on the *"Plan Showing Beach Erosion 12-27-2022 Beach Erosion 12/19/2022 Post-Ian Beach Loss (10/2022) Compared to Post-Beach Fill As-built (6/2022) between 16th and 11th Avenues North Wildwood Beach, City of North Wildwood,"* prepared by Van Note-Harvey, release date 1/10/2023 (**Attachment 4, Exhibit 7**). *"The final tally of sand moved from Wildwood beaches to the beaches of North Wildwood was provided by the municipal engineer at 361,221 cubic yards making this season's transfer the largest thus far in this "in house" effort to restore a recreational and storm protection shoreline during this period of extensive oceanfront beach erosion manifesting itself in North Wildwood since the late 1990's."* (2022 Spring Report to the City of North Wildwood on the Condition of City Beaches, Stockton University Coastal Research Center, July 25, 2022). The prior season (2021), 356,856 cubic yards of sand was backpassed by the City for renourishment, also at exceptional expense borne by the City. In total, approximately 2,058,039 cubic yards of sand has been backpassed to renourish the City's eroding beaches since 2012. Despite these efforts, prevailing coastal processes have repeatedly depleted these reserves from the beach-dune complex on an annual basis, reserves of which have now settled into offshore deposits.

The history of erosion, as well as existing conditions, on the North Wildwood beaches should be taken into consideration when evaluating the imminent threat. Without the construction of a bulkhead for shore protection, the City is at risk of irreparable and unnecessary damage to infrastructure and property. The City has addressed the NJDEP information request for the still-pending 2020 CAFRA and Freshwater Wetlands permit application; however, this submission remains under review by the NJDEP and has not yet been advanced to public comment. A final decision is, at best, still months away and cannot be completed as expeditiously as is necessary to remedy the imminent threat. Emergency authorization for the installation of a bulkhead is necessary considering the unpredictable nature of coastal storm events and accelerated erosional conditions of the beaches and dune scarping. Due to this hazard, the City has insufficient time to pursue long lead-time alternatives, many of which would be less effective anyhow, nor does the City have unconstrained time to await a lengthy permitting process before action is taken. It is therefore necessary to pursue an Emergency Authorization since the threat of a dune breach is imminent.

Emergency Actions

As a result of recent coastal storm events and in light of the depleted sand reserves whereby a dune breach is imminent, the City, as owner of the subject properties and steward of the municipal transportation, utility and public safety infrastructure, has given its permission to pursue the prescribed emergency measures below and is hereby seeking an Emergency Authorization for the following activities:



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Project Area: midblock between 12th and 13th Avenues – 16th Avenue (Block 317.03, Lot 1 (P/O); Block 317.02, Lot 2 (P/O))

- 1) Installation of ±1,147 linear feet cantilevered steel bulkhead (coated) with timber cap
- 2) Excavation, placement, and regrading of residual sand within the project area
- 3) Reshaping of remnant dune in locations of scarps and or breach(s)
- 4) Reconstruction of beach access points over new bulkhead at 13th, 14th, 15th, and 16th Avenues
- 5) Removal and reinstallation of split rail fencing as necessary
- 6) Removal of the 15th Avenue ADA dune crossover beach access (if at risk of failure)

The above activities are depicted on the attached plans entitled “*Plan of Proposed Beachfront Bulkhead & Public Access Between 16th Ave. & Midblock 12th & 13th Ave., City of North Wildwood,*” (Sheets 1 and 2), prepared by Van Note-Harvey, dated February 9, 2023 (**Attachment 3**). Please note that the topographic contours on the site plans are vestigial indicative of conditions observed in October and December of 2022. Actual elevations and contours are rapidly changing due to chronic erosional conditions along the oceanfront.

Installation of the bulkhead and the associated public accessway ramps will result in an area of disturbance totaling 52,658 square feet (1.209 acres). The proposed bulkhead will be constructed of coated steel (cold rolled) 35-foot length pilings manufactured by Meever USA which has a 50-year life. The top 17.5 feet of the pilings will be coated. Once installed, the top of bulkhead will be at elevation 12.0 feet (NAVD88). The bulkhead cap will consist of laid boardwalk-style consisting decking of 2-inch by 6-inch copper azole treated timber fixed to two 3-inch by 6-inch (or 4-inch by 4-inch) greenheart walers (**Attachment 3, Sheet 1 Typical Bulkhead Detail**). The bulkhead will be installed at the landward toe of dune from midblock between 12th and 13th Avenue to 16th Avenue. In the location of the 16th Avenue beach access, the bulkhead will cross through the beach access ramp topography and its associated side slopes, otherwise the vertical structure will impede vehicular access at this location (**Attachment 3, Sheet 1 Proposed Vehicle Access Detail**). The proposed bulkhead will not promote or impact erosion since it will be at the landward limit of the existing dune toe. The bulkhead will, however, provide emergency coastal shore protection to the City of North Wildwood when, in the absence of beach nourishment, the existing severely eroded dune system is breached.

Due to the expanding erosional conditions to 13th and 14th Avenues, north of the Beach Patrol facility, the proposed bulkhead installation will require disturbance to 8,845 square feet (0.203 acres) of previously delineated interdunal freshwater wetlands and 25,039 square feet (0.575 acres) of freshwater wetlands transition area (**Attachment 3, Sheet 2**). It should be noted that these NJDEP-designated wetland areas formed as a result of impounded stormwater discharges from the developed lands immediately to the west. The prevailing topography along the landward toe of the dune slopes from the west, along JFK Boulevard, east towards the dune. The City’s previous stormwater system collected this flow and discharged onto the back beach areas, through multiple stormwater outfall lines, which created localized low areas with a source of artificial hydrology. As the City’s stormwater outfall and discharge locations were modified, the gravel road and bike path were installed, and the dunes were constructed, soil compaction of these disturbed areas exacerbated the stormwater sheet flow conditions towards the toe of the dune. As this stormwater was impounded and its easterly flow impeded, some hydrophytic vegetation began to colonize this area. These areas are not considered pristine, undisturbed wetlands of high resource value due to the surrounding activities from the gravel road, bike path, and residential and commercial development to the west and recreational



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beach activities to the east with beach access paths connecting west to east at each street end (**Attachment 2. Photographs**).

A Letter of Interpretation Line Verification (LOI) was issued by NJDEP on July 10, 2019, which verified the limits and resource value of the interdunal wetland area between 14th and 15th Avenues (NJDEP File No. 0507-03-0009.2 FWW180001). Pursuant to this LOI, NJDEP determined this wetland area to be of intermediate resource value with an associated 50-foot transition area. While not verified by an LOI, the immediately adjacent interdunal freshwater wetland between 13th to 14th Avenues exhibits similar characteristics as the verified wetland area between 14th to 15th Avenues. Given the consistency between these wetland areas, it would be anticipated that the wetland area between 13th to 14th Avenues should also be consistent with an intermediate resource value classification. However, it is important to note that, upon receipt of the City's 2020 CAFRA and Freshwater Wetlands permit application to authorize the construction of a bulkhead, the NJDEP opted to change its position on the resource value classification and assign a more restrictive resource value to this wetland area, changing the associated transition area from 50 to 150 feet. NJDEP reserves the right to reevaluate its wetland classification if additional or updated information is available; however, pursuant to *N.J.A.C. 7:7A-4.6 (a)*, the City was entitled to rely on the determination of NJDEP for a period of five years from its issuance of the LOI unless it is determined to have been based on inaccurate or incomplete information. The condition of the subject wetland area did not change during the 16-month interval between the issuance of the LOI and the subsequent CAFRA application. NJDEP staff had full access to the subject wetland for observational purposes and to properly assess the resource value of this feature during the 2019 LOI application review, which occurred during the period of biological activity for plant and wildlife species. Habitat factors (e.g., composition of vegetation species, availability of food, prevalence of water resources, stratum/structure, soils/gradient, surrounding disturbance, etc.) within this subject wetland did not change during this period. Habitat value within the subject wetland remains limited due to the current beach and dune condition, and these wetlands will remain at-risk to the existing erosional conditions which are exacerbated by the absence of an effective beach fill program with associated shore protection measures. It is also important to note that the NJDEP reclassification of these wetlands occurred after the City's application for the referenced bulkhead and subsequent to NJDEP Land Use Compliance and Enforcement actions commenced against the City.

A freshwater wetlands transition area, as defined in the Freshwater Wetlands Protection Act Rules (*N.J.A.C. 7:7A*), serves as *"an ecological transition zone providing temporary refuge for freshwater wetlands fauna during high water episodes, critical habitat for animals dependent upon but not resident in freshwater wetlands, and slight variations of freshwater wetland boundaries over time due to hydrologic or climatologic effects."* The freshwater wetlands transition areas between 13th and 15th Avenues do not function as such. No ecological benefit is achieved in changing the assigned transition area from 50 to 150 feet, especially given that established footprints of disturbance already exist within close proximity to these wetlands. Existing disturbances within a 50-foot transition area include a paved City street, concrete sidewalk, pre-existing timber bulkhead, concrete bike path, the Beach Patrol Headquarters building, and several beach access pathways, all of which limits the ecological function of the transition area. It is therefore anticipated that the addition of a proposed bulkhead would not negatively impact the function of the transition areas (**Attachment 3, Sheet 2**).

Recurrent site investigations performed by TLCG throughout this past growing season revealed no observations of listed or rare species within these features. The relatively limited habitat value does not substantiate the need for these features to be assigned exceptional resource



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value. Consequently, the proposed bulkhead, designed to avoid/minimize disturbance to the maximum extent practicable, is not anticipated to adversely impact listed species habitat to the extent that the continued survival of such species or the essential corridors necessary for the movement of such species results. The USACE/NJDEP-proposed "Hereford Inlet to Cape May Inlet New Jersey Hurricane and Storm Damage Reduction Project" also includes encroachment into the subject wetlands. Further, the wildlife species observed in these areas are not solely oriented to wetland features; they are more typical of those found in dune and developed barrier island areas. A robust beach nourishment project with a functional dune system would serve to provide far more beneficial ecological value to plant and wildlife species than these existing manmade impoundments. It should be noted that until a robust and large-scale beach fill project is implemented, these wetlands and functionally-limited transition areas remain at a high risk of erosion, breach and overwash.

The bulkhead installation and location were specifically designed and selected to avoid, where possible, and minimize, where practical, disturbance to these isolated NJDEP-designated wetland features. The bulkhead alignment was shifted as far west as possible; however, existing subsurface infrastructure and the existing bike path preclude it from being landward of the delineated wetland limits. Accordingly, portions of three small wetland areas, WE, WF and WG, are unavoidable. Sheet 2 of "*Plan of Proposed Beachfront Bulkhead & Public Access Between 16th Ave. & Midblock 12th & 13th Ave., City of North Wildwood,*" (Sheets 1 and 2), prepared by Van Note-Harvey, dated February 9, 2023 (**Attachment 3, Sheet 2**), depict these encroachments and associated disturbance calculations. Cantilevered steel bulkhead was selected, not only for its structural integrity and long life span, but also it is a non-polluting material and does not require extensive trenching on both sides of the sheet piles for the installation of anchoring. As such, the footprint of disturbance can be minimized consistent with that shown on the referenced plans as opposed to a more intrusive installation with greater distance and associated impacts. The bulkhead alignment was designed, as part of the 2020 CAFRA application, to be consistent with the rules and regulations associated with a Freshwater Wetlands General Permit (FWW GP) 6 and 6A to authorize disturbance in non-tributary wetlands and transition areas. However, upon receipt of this application, the NJDEP opted to change the resource value to exceptional, thereby removing General Permit availability and impeding the permitting pathway for the proposed activity. The City hereby requests reconsideration by the NJDEP of the resource value classification. The Freshwater Wetlands Protection Act (*NJSA 13:9B*) recognizes the need to disturb wetlands when there is no practicable, feasible alternative, and when doing so is in the public interest. This Emergency Authorization establishes the presence of an imminent threat based on the progressive erosion of the beach and dune and further demonstrates that the activity will greatly benefit the public interest. The proposed bulkhead is the only practicable and feasible alternative which will provide expedited shore protection for the preservation of public and private property and infrastructure as demonstrated herein.

To the extent that residual sand deposits can be accessed along portions of the City's oceanfront, excavation, relocation, placement and regrading of *in situ* sand within the project area may be necessary and advantageous to emergency shore protection response. However, these deposits are limited and will not suffice to resolve the eroded beach berm, nor will they restore the dune feature. Additionally, due the ongoing erosion of the dune, extensive scarping of this landform creates a public safety hazard to those both atop the dune remnant and walking along the base of the scarp. Despite the City's best efforts to cordon off the dune and pre-existing public accessways, the public continues to access the beach for recreation and often the dune edge out of curiosity and disbelief. Reshaping of the dune remnants in locations of scarps and or future breach(s) may be necessary to address on-going public safety



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considerations. Such activity would typically be completed per a 5-year NJDEP authorization for beach and dune maintenance; however, the City's permit application to renew an approval for this purpose is currently under review by NJDEP.

Additionally, coordination with Atlantic City Electric will be completed by the project engineer to address the overhead utility wires just north of the Beach Patrol facility in advance of the sheet pile installation so as to mitigate any construction-related conflicts with these utilities.

Reconstruction of pre-existing beach accessways at 13th through 16th Avenues is necessary for both public and emergency access, critical to oceanfront activity, public safety, 1st responders, and the DPW. The proposed activities include the reconstruction of the existing beach access paths at 13th, 14th, and 15th Avenues and the vehicle access path at 16th Avenue, which will ramp over the proposed bulkhead following its installation. In the location of these beach access paths, the bulkhead will cross through and under the beach access ramp topography and its associated side slopes. These existing feature reconstructions include 8-foot wide earthen ramps, which will not exceed a 1:12 slope, and will require the removal and reinstallation of split rail fencing as necessary, which establishes the lateral ramp limits and confines the emergency access traffic area to the ramp. The construction of these ramps will also necessitate the removal of some sections of existing composite decking and the relocation of benches at 13th and 14th Avenues. Reconstruction of the public accessway at 15th Avenue will require the installation of a new section of composite decking to link existing walkways at the Beach Patrol Headquarters to the earthen ramp (**Attachment 3**). The proposed access path at 16th Avenue is approximately 25 feet wide (varies) and composed of NJ Department of Transportation I-5 Gravel Mix 18 inches thick (compacted in 9-inch max. lifts) atop geotextile 350 ST fabric manufactured by Propex Geosolutions, and over the existing compacted subgrade. Both sides of the access path will contain a 12-inch shelf. The adjoining slope grade will be established at a 1V:2H ratio. The bulkhead will cross through the beach access ramp topography and its associated side slopes, otherwise the vertical structure would impede vehicular access at this location if shifted further to the west. Due to its proximity to the Beach Patrol Headquarters, beach vehicle access in this location is critical to oceanfront activity to accommodate access for first responders, lifeguards, and Department of Public Works staff to enhance and promote public safety and respond to oceanfront needs.

Since the offshore passage of Hurricane Ian in early October 2022 and from subsequent less intense coastal storm events, the ADA dune walkover at 15th Avenue has sustained significant damage due to ongoing erosion generated by the lack of beach berm. Incrementally, the beach path at this location has eroded to the extent that the timber dune walkover structure terminates just short of the dune scarp. Given the continuing erosion in this location and liability to public safety, this walkover has been temporarily closed (**Attachment 2. Photographs**). Due to the imminent threat of dune breach/collapse, it is anticipated that the remnants of this structure will need to be removed, particularly as the risk of failure increases.

The installation of oceanfront bulkhead in the City of North Wildwood is not new. There is a pre-existing timber bulkhead within the City (removed in some locations) extending from 2nd to 26th Avenues. Construction of a new bulkhead extension is consistent with these past practices and is an emergent measure required to protect the City from dune breach and its associated overwash impacts. The proposed bulkhead needs to be constructed easterly of the existing former bulkhead alignment to avoid a substantial concentration of legally existing infrastructure including utilities and privately-owned buildings and properties. It would therefore be impractical and financially unfeasible to construct a new bulkhead immediately adjacent to the existing bulkhead. The proposed bulkhead therefore must be constructed at the location in which it is proposed to provide sufficient shore protection.



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Alternatives Analysis

Before specifying the above emergency mitigative actions, an assessment of alternative measures was completed by the City Engineer as noted in "*Engineer's Report in Support of Application for Emergency Permit Authorization for Beach Bulkhead & Public Access Between 12th/13th & 16th Avenues, City of North Wildwood,*" prepared by Van Note-Harvey Associates, dated February 9, 2023 (**Attachment 4, including Exhibits 1-10**). Specifically, the standards applicable to emergency post-storm beach restoration under *N.J.A.C. 7:7-10.3* were evaluated, including NJDEP-preferred options under (b), for feasibility. Typically, the worst of the nor'easter storm season occurs from January through May. Considering the current eroded dune conditions and being in the midst of this storm season, the City is not in a position where alternative mitigative efforts which require long lead-times may be considered practical due to the urgent nature of this emergency. Pursuant to *N.J.A.C. 7:7-10.3 (b)*, NJDEP-preferred coastal shore protection activities for post-storm recovery include the placement of clean fill material with grain size compatible with (or larger than) the existing beach material; the bulldozing of sand from the lower beach profile to the upper beach profile; the alongshore transfer of sand on a beach; the placement of concrete, rubble or rock; and the placement of sand-filled geotextile bags or tubes. The following is a summary of the project engineer's alternatives analysis.

1) Placement of Clean Fill

Deposition of clean fill material consistent with grain size compatible with that of the existing beach material proved to be problematic in terms of sourcing, logistics, and secondary impacts. Transport of material from sand and gravel mines was assessed, and it was determined that there are several impediments to pursuing this option. The sand composition available from the proximate mines, as compared to that of the *in situ* beach material, was found to be inconsistent. Further, mainland sources will require the City's contractor to complete an intermediate sand transfer from street-legal tri-axle dump trucks to the heavy duty off-highway articulated dump trucks necessary to transit oceanfront conditions. Pursuing this option would require in excess of 13,000 tri-axle trucks loads, as well as duplicative handling of the fill material, if even suitable material could eventually be sourced within a reasonable proximity. The current oceanfront conditions and profile have, at least for now, severed the route for on-beach access to sand reserves further south of the project area limits, as well as trucking routes to deposit sand along the oceanfront from non-beach sources. The USACE's current beach berm and dune design template within the project area would require more than 209,000 cubic yards of sand to construct based on topographic conditions as of December 2022. However, due to an exceedingly high daily erosion rate, as experienced over the past several years without sand stockpiling, approximately 522,000 cubic yards of sand would actually be required to meet the USACE design template. Further, there is no practically accessible oceanfront borrow area/trucking route given the existing beach conditions and no location to stockpile sand. The volume of sand required and tedious logistics to implement the placement of clean fill would likely cost more than \$10 million, and the process would be very slow. Please note that present topography may not be representative of the conditions observed in December, and it is likely that further erosion has occurred since then. Beach berm erosion has extended a significant portion of the tide cycle to the toe of dune and waterward extent of both the 24th and 26th Avenue piers, as well as exposing stormwater outfalls, which impede the effective transport of sand to these erosional areas. Because these locations are inundated daily by the tidal cycle, the deposition of sand in these areas to re-establish trucking routes infeasible, at least until the beach profile re-forms through



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accretion. The construction of coffer dams to establish a trucking route, from either the inlet beaches to the north or Wildwood beaches to the south, to transport sand is logistically and financially not feasible. Past backpassing experience in the City, routinely since 2012, demonstrated that contractors struggle to supply and retain in service more than 8 trucks running simultaneously. A lack of available inventory, refusal of rental companies to expose their equipment to sea water, and frequency of repairs limits the trucking resources available for such a project. Given the emergent nature of this matter, there is insufficient time to pursue an option that is, at best, inefficient, slow and expensive, but also risks secondary damage to municipal infrastructure, including City streets that were not designed for the volume and frequency of heavy transport that would be required for this option. A comparative costs analysis is provided in the *“Engineer’s Report in Support of Application for Emergency Permit Authorization for Beach Bulkhead & Public Access Between 12th/13th & 16th Avenues, City of North Wildwood,”* prepared by Van Note-Harvey Associates, dated February 9, 2023 (**Attachment 4**). Therefore, this shore protection measure is not feasible.

2) Bulldozing of Sand from the Lower to Upper Beach Profiles

The lack of sand reserves in the lower beach profile also makes it impossible to bulldoze sand to the upper beach profile as an alternative means of re-establishing shore protection. While hydraulic beach fill/renourishment could access sand reserves in nearshore or offshore waters, where prior backpassed sand has settled and which are unattainable via typical trucking/backpassing, these dredging projects require scheduling years in advance, and the City does not have ready access to or control the availability a dredge for this purpose. The timeline for such a process does not reconcile with the current situation faced by the City, nor does the City have the funds to pursue such a project without significant State and/or Federal participation. Additionally, bulldozing sand from the lower beach to the upper beach profile would exacerbate the erosional conditions. Sand removed from the lower beach elevations could take years to naturally replenish and until then, water depth at the lower beach elevations would increase which would in turn increase wave and tidal energy; thereby accelerating erosion. Therefore, this shore protection measure does not exist until such time as beach nourishment occurs.

3) Alongshore Transfer of Sand

As mentioned above in alternate #1, the current beach conditions have diminished previously established truck routes thereby inhibiting the alongshore transfer of sand from neighboring municipalities to the south as was completed in years prior. Notwithstanding the challenges of tidal inundation of these routes, the waterward extent of both the 24th and 26th Avenue piers and exposed stormwater outfalls south of the project area and the 2nd Avenue rock groin north of the project area impede the effective backpassing transport of sand. Consequently, neither the Wildwood beach borrow areas nor the North Wildwood inlet beaches are accessible for this purpose without the construction of coffer dams, which were determined by the City Engineer to be logistically and financially unfeasible. Additionally, this backpassing process is expensive and time consuming. The urgent nature and need for shore protection efforts do not allow for the amount of time required to implement this alternate. As previously mentioned, the City has conducted NJDEP-approved and preferred methods of shore protection by means of the sand backpassing where sand was transferred alongshore from the neighboring municipalities to the south. Since 2012, 2,058,039 cubic yards of sand was backpassed to renourish the City’s eroding beaches. These shore protection measures have cost the



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City in excess of \$20 million since 2012. All of these efforts and expenses to transfer sand have since been diminished and lost. Prior experiences with this method have shown that contractors have struggled to keep more than 8 off-road trucks running at all times due to a lack of inventory and frequent vehicle maintenance. It has also proven difficult to find vendors who are willing to place their trucks on these projects due to the exposure to water. The USACE's current dune design template would require more than 209,000 cubic yards of sand to construct, based on topographic conditions as of December 2022. However, due to an exceedingly high daily erosion rate, as experienced over the past several years without sand stockpiling, approximately 522,000 cubic yards of sand would actually be required to meet the USACE design template, as there is currently no location to stockpile sand. Please note that present topography may not be representative of the conditions observed in December, and it is likely that further erosion has occurred since then. As mentioned above, due to extensive erosion there is currently no feasible route around the piers for trucks to safely transfer sand alongshore and no effective means of retaining the sand beyond a few months at which point the beach fill will have eroded again. An analysis of this alternate is provided in the *"Engineer's Report in Support of Application for Emergency Permit Authorization for Beach Bulkhead & Public Access Between 12th/13th & 16th Avenues, City of North Wildwood,"* prepared by Van Note-Harvey Associates, dated February 9, 2023 (**Attachment 4**). Therefore, this shore protection measure is not feasible.

4) Placement of Rock

The placement of rock, rubble or concrete is a very slow process, which again relies upon trucking from mainland facilities and sourcing material from out of the coastal region. This alternate creates secondary impacts to municipal infrastructure, including City streets, that were not designed for the volume and frequency of heavy transport that would be required for this option. Additional design concerns were expressed upon evaluating this option in that the placement of these materials restricts future engineering options, including facilitation of public access. The inability to drive piles for future timber walkover/ADA ramp structures would create challenges to efficient and effective public and Beach Patrol staff access to/from the beach. In addition to ready access of the Beach Patrol facility by its staff, this oceanfront safety destination also provides beachgoers with public restrooms, a first aid station, showers/footwash amenities, and shelter via the existing dune walkover/ramp structure at the 15th Avenue right-of-way alignment. A breach will destroy this access and the placement of rock, rubble or concrete will complicate or even preclude the replacement of such an access point. The placement of rock does not prevent erosion unless it is backstopped by bulkhead as noted in the *"Engineer's Report in Support of Application for Emergency Permit Authorization for Beach Bulkhead & Public Access Between 12th/13th & 16th Avenues, City of North Wildwood,"* prepared by Van Note-Harvey Associates, dated February 9, 2023 (**Attachment 4**). *"Properly constructed seawalls are constructed against a solid bulkhead to prevent erosion. So even if we considered rock for wave energy dissipation, we still need a bulkhead in order to stop the erosion."* Therefore, if this option were to be considered, a bulkhead would still need to be constructed as part of the shore protection measure. Comparatively, the costs associated with constructing a stone revetment with a bulkhead (seawall) equates to approximately \$14,000 per linear foot totaling ±\$16 million, while the construction of a stand-alone bulkhead equates to roughly \$1,850 per linear foot totaling ±\$2 million. A \$16 million seawall far exceeds the City's funding capacity. Additionally, the construction of a seawall will take approximately 2 years to



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complete which is not conducive to the emergent and time sensitive need for shore protection measures. Therefore, this shore protection measure is not feasible.

5) Geotextile tubes

The placement of sand-filled geotextile tubes requires a source for beach sand material, which is not available from the existing beach conditions and is challenging to acquire from mainland sources as was previously described in detail above. To fill these tubes *in situ* would further deplete the City's oceanfront of sand resources, especially given that the prevailing trend is one of erosion in this location. Losses of sand in this system have reduced the elevation of the beach such that the dune mass is now located at the edge of normal wave runup at a normal high tide. While geotextile tubes could serve as a protective measure and means to rebuild the dune features, these applications are only effective when combined with a robust, large-scale hydraulic beach fill project whereby the tube would remain covered for an extended period of time. At present, the State and Federal authorities have not advanced a beach nourishment program of this type in partnership with the City, and it remains unclear if/when the State/Federal Island-wide Dune Construction Project may be implemented from Hereford Inlet south to Cape May Inlet to serve as hurricane and storm damage reduction, including its associated planned cyclical renourishments. An analysis of this alternate is provided in the "Engineer's Report in Support of Application for Emergency Permit Authorization for Beach Bulkhead & Public Access Between 12th/13th & 16th Avenues, City of North Wildwood," prepared by Van Note-Harvey Associates, dated February 9, 2023 (**Attachment 4**). Therefore, this shore protection measure is not feasible.

6) Raising and/or Relocating the Beach Patrol Headquarters

Pursuant to the State's response to the previously filed Emergency Authorization in October 2022, NJDEP's contracted coastal engineering professional proposed an alternative mitigative effort consisting of raising and/or relocating the Beach Patrol headquarters. This method is impractical as it is an expensive endeavor and, more importantly, only serves as a temporary solution in protecting the building. This proposal does not account for the continued need for oceanfront public safety operations critical to be mobilized immediately adjacent to the beach areas. Additionally, construction activities associated with this alternate mitigative measure would take a substantial amount of time, which the City does not have being in the midst of the storm season and the continuing erosion that is confronting the City's beaches. Further, this consideration addresses only the Beach Patrol building does not offer protection of the City's infrastructure and oceanfront properties along JFK Boulevard. Therefore, this proposal is neither feasible nor practical.

7) Federal/State 5-Mile Island Project

After Superstorm Sandy in 2012, the City, in partnership with the USACE and NJDEP, committed to the "Hereford Inlet to Cape May Inlet New Jersey Hurricane and Storm Damage Reduction Project" (**Attachment 4, Exhibit 3**) to construct a coastal resiliency project which would establish a robust dune system and extensive beach area oceanward of the City as an effective barrier to flood storm surges and associated wave action. More than a decade has passed since that commitment was made, and it is unknown when this project is anticipated to commence. At present, two municipalities and multiple private property owners have yet to agree to the project and to provide the requisite easements needed to finalize design and advance the construction schedule.



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Therefore, this shore protection measure, as an immediate mitigative action, is neither feasible nor practical given the City's existing oceanfront conditions and exposure risk.

8) Bulkhead

A bulkhead, when deployed under certain oceanfront conditions where beach re-nourishment proves to be unreliable and challenging, has proven to be the more efficient and effective means of sustainable shore protection measures. These installations can be implemented rapidly and have longer useful life options where the cost-benefit ratio can be justified and effective shore protection realized. A bulkhead can be constructed more quickly than any other alternative, and due to the imminent threat, a bulkhead is the only alternative which can be constructed in a sufficient amount of time that will ensure the protection of the City, infrastructure, public and private property. Bulkheads are most easily incorporated into future beach nourishment/dune construction projects and buried within the future dune system with the least impact to future installations as compared to alternate structural shore protection measures. Additionally, the footprint of disturbance for these vertical installations can be minimized to reduce secondary impacts and avoid sensitive areas to the maximum extent practicable as compared to alternate measures requiring sloped angles of repose which would otherwise encroach extensively into sensitive areas. The bulkhead installation and location were specifically designed and selected to avoid, where possible, and minimize, where practical, disturbance to these isolated NJDEP-designated wetland features. The bulkhead alignment was shifted as far west as possible; however, existing subsurface infrastructure and the existing bike path preclude it from being landward of the delineated wetland limits. Accordingly, portions of three small wetland areas, WE, WF and WG, are unavoidable. It should be noted that these NJDEP-designated wetland areas formed as a result of impounded stormwater discharges from the developed lands immediately to the west. These areas are not considered pristine, undisturbed wetlands of high resource value due to the surrounding land uses, including commercial development to the west and recreational beach activities to the east with beach access paths connecting west to east at each street end. Existing disturbances within close proximity to these wetlands include a paved City street, concrete sidewalk, pre-existing timber bulkhead, concrete bike path, the Beach Patrol Headquarters building, and several beach access pathways, all of which limit the ecological function of the wetland transition area. The proposed bulkhead is not anticipated to adversely impact listed species habitat to the extent that the continued survival of such species or the essential corridors necessary for the movement of such species results. The bulkhead alternate minimizes the number of truck trips required to implement shore protection thereby reducing secondary impacts to the municipal infrastructure. Further, given the minimal footprint, future site improvements, including public accessways and dune construction, can be effectuated over top of and on either side of the bulkhead. The bulkhead will not impede or complicate the future USACE/NJDEP Beach Fill project, if it comes to fruition, as the bulkhead can be incorporated into and buried beneath the dune design profile template. The bulkhead will not promote or impact erosion since it will be at the landward limit of the existing dune toe and accordingly, the bulkhead has been designed to withstand wave runup forces and can be certified by the City Engineer as such. It is worth noting that the Engineers Report states that with respect to a bulkhead exacerbating the oceanfront erosional conditions, "...there is absolutely no indication that the bulkhead that has already been installed has created such problems..." and "...there has been no flanking and no scouring resulting from the construction of the bulkhead..." Accordingly, impacts to adjacent beach or dune areas and scour have not resulted following the installation of



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the existing bulkheads, and such impacts are not expected to occur following the installation of the proposed bulkhead. The bulkhead will, however, provide emergency coastal shore protection to the City of North Wildwood when, in the absence of beach nourishment, a breach occurs through a section of the dune in this most vulnerable City location. As mentioned above in alternate #4, the comparative costs for the bulkhead are significantly less than constructing a stone revetment/seawall. With an estimated construction cost of \$1,850 per linear foot totaling ±\$2 million, the bulkhead option is within the City's funding capacity. A comparative costs analysis is provided in the "Engineer's Report in Support of Application for Emergency Permit Authorization for Beach Bulkhead & Public Access Between 12th/13th & 16th Avenues, City of North Wildwood," prepared by Van Note-Harvey Associates, dated February 9, 2023 (**Attachment 4**). Therefore, this shore protection measure is the preferred alternate.

Furthermore, bulkhead materials were ordered on October 4, 2022 and there are currently 350± LF of steel sheet piles which have been delivered and remain ready to install. This length of bulkhead can be installed immediately, biased to the location of most dire need, while the balance of the steel sheet piles, ordered in January 2023, are in transit and expected to arrive within weeks. Upon the authorization of the proposed activities, the installation of the bulkhead may commence immediately.

Based on the information provided herein and attached for reference, the City hereby reaffirms its need for emergency shore protection, via installation of a bulkhead, to be initially approved as an Emergency Authorization pursuant to the Coastal Zone Management Rules (CZMR) (*N.J.A.C. 7:7-21 et seq.*). The City remains committed to the still-pending CAFRA and Freshwater Wetlands permit application for this project, which is under review by the NJDEP, but cannot wait for a final decision on that application which is, at best, still months away. Given the impending nor'easter coastal storm forecast for this coming Sunday and Monday, as well as an extended storm season still to come, it is therefore necessary to pursue an Emergency Authorization since the threat of a dune breach remains imminent.

This submission follows an Order by the Superior Court of the State of New Jersey, Cape May County Chancery Division, Docket No.: CPM-C-5522, issued by Michael J. Blee, A.J.S.C. on February 1, 2023, which requires the City of North Wildwood to file an Emergency Authorization application with the NJDEP within 10 days of the Order date.

If you have any questions or require additional information, please do not hesitate to contact me, especially given the emergent nature of this request, via office phone at 609-465-6700, mobile phone at 609-425-0240, or email at plomax@lomaxconsulting.com. Thank you for your prompt attention to this matter.

Sincerely,
 THE LOMAX CONSULTING GROUP, LLC

Peter L. Lomax
 Managing Principal

Enclosures



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ec: Jennifer Moriarty, Director NJDEP DLRP (w/enclosures)
Kimberly Cahall, Chief Enforcement Officer NJDEP CLUE (w/enclosures)
Michelle Kropilak, Manager NJDEP CLUE (w/enclosures)
Mayor Patrick Rosenello, City of North Wildwood (w/enclosures)
Nicholas Long, City Administrator, City of North Wildwood (w/enclosures)
Jim Verna III, PE, Van Note-Harvey Associates, Inc. (w/enclosures)
Neil Yoskin, Esq., Cullen & Dykman LLP (w/enclosures)
Anthony Bocchi, Esq. Cullen & Dykman LLP (w/enclosures)

ATTACHMENT 1

FIGURE 1: SITE LOCATION ON AERIAL PHOTOGRAPHS DEPICTING THE PROJECT AREA LIMITS

**PREPARED BY THE LOMAX CONSULTING GROUP
DATED DECEMBER 30, 2022**

BLOCK 317.03, LOT 1 (P/O); BLOCK 317.02, LOT 2 (P/O)
 CITY OF NORTH WILDWOOD, CAPE MAY COUNTY, NEW JERSEY

22-1093.2



FIGURE 1: SITE LOCATION ON AERIAL PHOTOGRAPHS DEPICTING THE PROJECT AREAS LIMITS

SOURCE: GIS DATA PROVIDED BY THE NJDEP, BING NEARMAP AND THE COUNTY PLANNING DEPARTMENT



DATE:
2022-12-30

DRAWN BY:
EJM

SCALE: AS NOTED



ATTACHMENT 2
SITE PHOTOGRAPHS

SITE PHOTOGRAPHS



PHOTOGRAPH 1. View north of the dune scarp (right) in October 2022, during the offshore passage of hurricane Ian, eroded to a point landward of the pre-existing dune crest between 15th and 16th Avenues in front of the City of North Wildwood Beach Patrol headquarters (left) and upper landing of dune walkover railing (background)

PHOTOGRAPH 2. View north of the dune scarp at the 14th Avenue beach access path. Note that the beach berm has been eroded which has caused normal high tides to impede on the toe of dune.





PHOTOGRAPH 3. View north of dune scarp conditions in January 2023. Note the damaged dune vegetation and negative ecological impacts of erosion.

PHOTOGRAPH 4. View south of interdunal wetland areas extending from 13th to 15th Avenues. Note the beach access path bisecting the wetland areas (in the background) and adjacent residential/commercial development to the west





PHOTOGRAPH 5. View northwest of the deployed jersey barriers in front of the City of North Wildwood Beach Patrol headquarters authorized through an Emergency Authorization submitted on October 5, 2022

PHOTOGRAPH 6. View of the dune walkover and ADA access ramp in front of the City of North Wildwood Beach Patrol headquarters. This access path has sustained significant damage since the passage of hurricane Ian in early October 2022. It is anticipated that the remnants of this structure will need to be removed, particularly as the risk of failure increases.



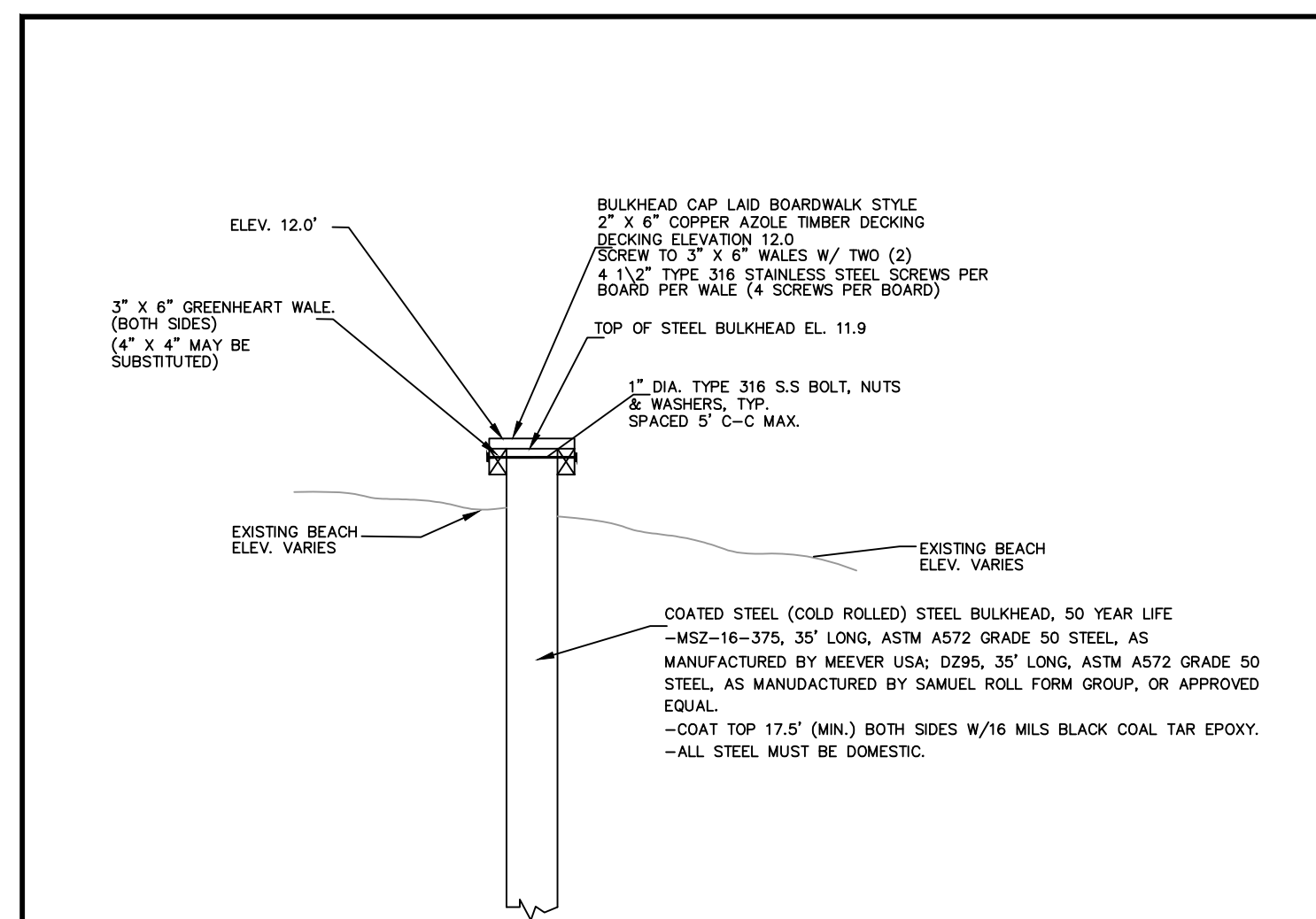


PHOTOGRAPH 7. View north of the 24th Avenue pier terminus and absence of beach berm waterward of the pier end, which precludes the sand backpassing truck route.

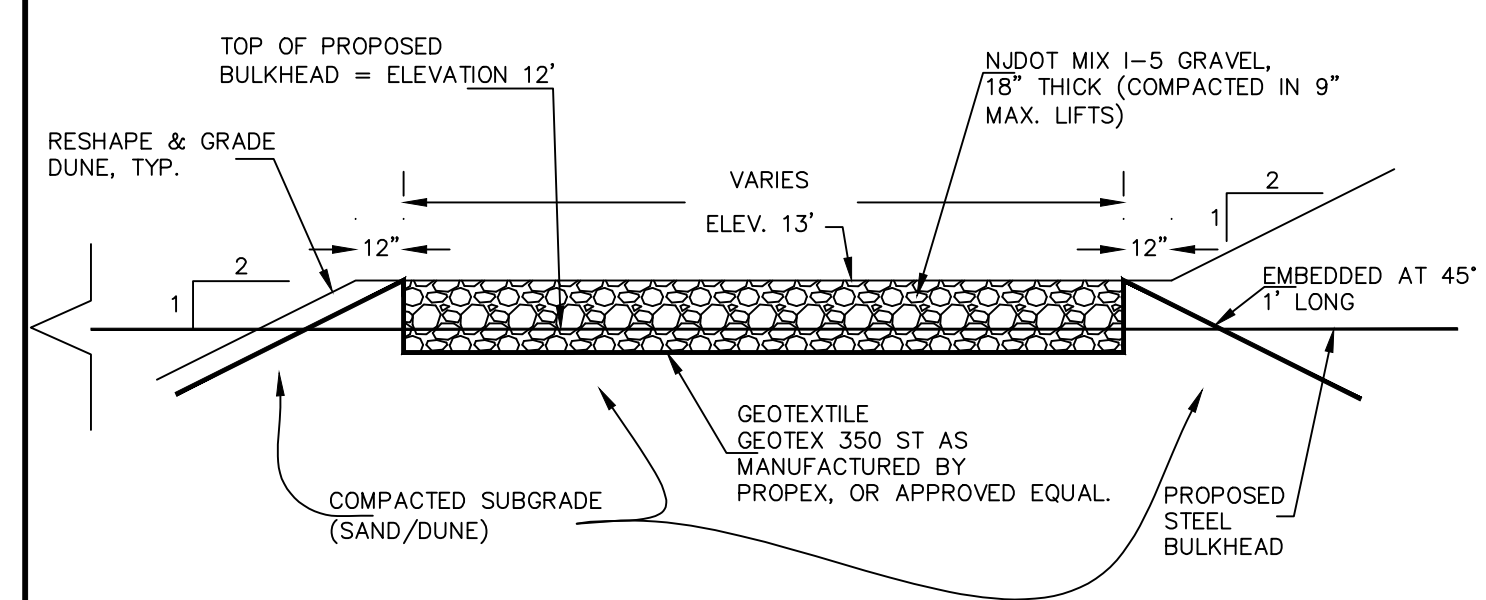
ATTACHMENT 3

PLAN OF PROPOSED AND EXISTING BEACHFRONT BULKHEAD BETWEEN 16TH AVENUE & MIDBLOCK 12TH & 13TH AVENUES CITY OF NORTH WILDWOOD

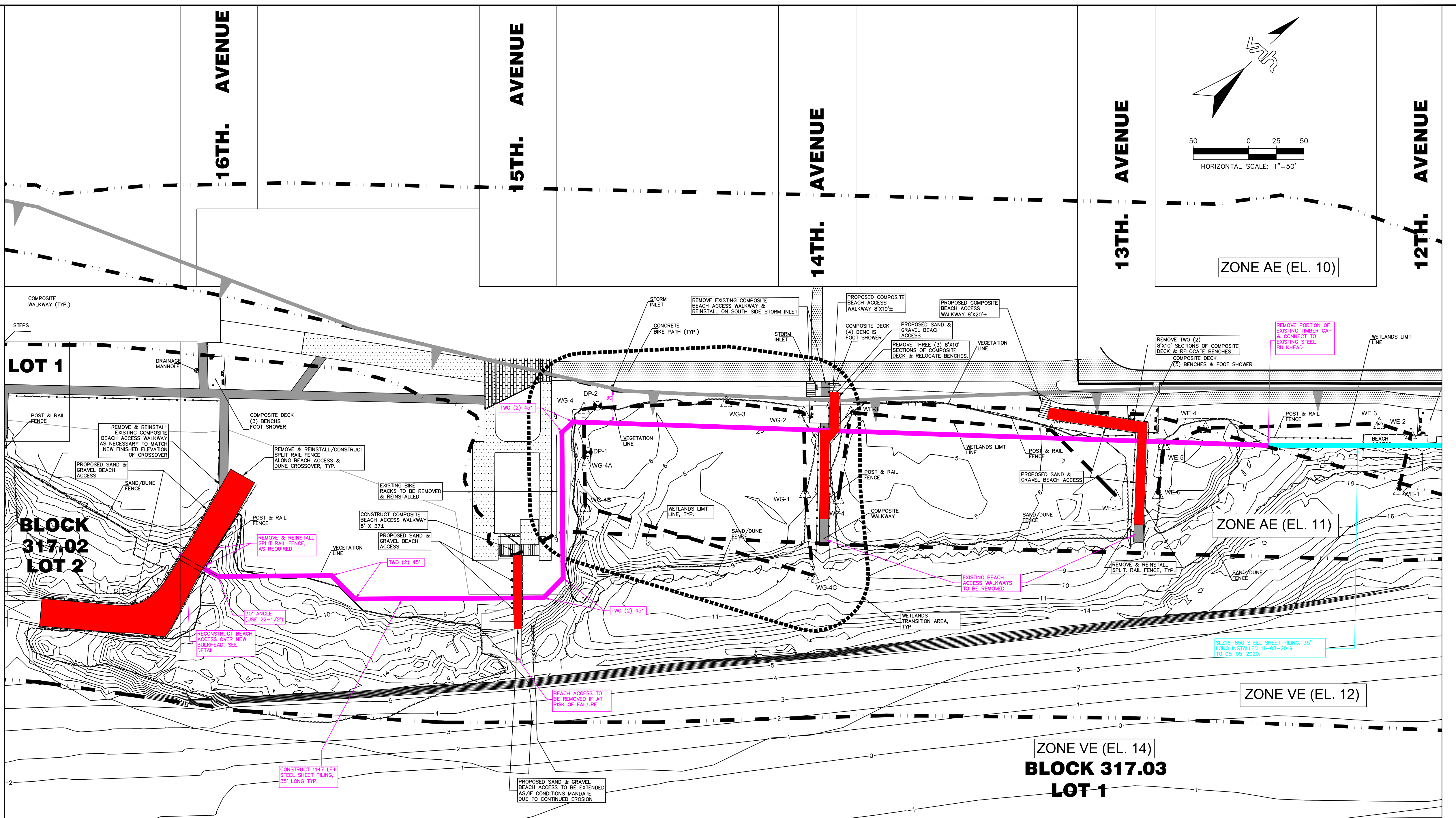
PREPARED BY VAN NOTE-HARVEY ASSOCIATES, INC.



TYPICAL BULKHEAD DETAIL
NOT TO SCALE



PROPOSED VEHICLE ACCESS DETAIL
NOT TO SCALE

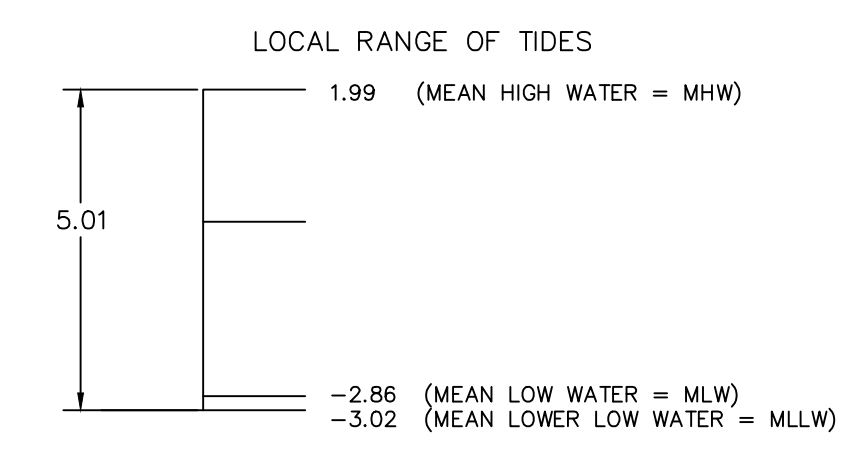


LEGEND

- WETLANDS LINE
- - - - - LIMIT OF WETLANDS TRANSITION
- WETLANDS POINT ID
- DATA POINTS
- ZONE VE (EL. 11) F.I.R.M. ZONE
- ▲ LIMWA LINE
- F.I.R.M. ZONE LIMIT LINE
- PROPOSED SAND & GRAVEL BEACH ACCESS
- ▨ PROPOSED COMPOSITE WALKWAY
- ▩ EXISTING COMPOSITE WALKWAY
- SPLIT RAIL FENCE

- NOTES:
- LOCATIONS AND ELEVATIONS SHOWN HEREON WERE TAKEN FROM GPS OBSERVATIONS PERFORMED 12/2022 REFERENCING NATIONAL GEODETIC SURVEY CONTINUOUSLY OPERATING REFERENCE STATION (NGSCORS) CORS ID NJCM PID D13828. VERTICAL DATUM IS NORTH AMERICAN VERTICAL DATUM OF 1988 (NAVD88) (GEOID12B)
 - WETLANDS POINTS:
 - WG-1 THRU WG-4, WF-1 THRU WF-4, WE-1 THRU WE-6 SHOWN HERE ON WERE FIELD DELINEATED AND LOCATED OCTOBER 2013 BY VANNOTE HARVEY ASSOCIATES.
 - WG-4A THRU WG-4-C SHOWN HEREON WERE FIELD DELINEATED AND LOCATED AUGUST 2018 BY VAN NOTE HARVEY ASSOCIATES
 - REFER TO FEMA FLOOD INSURANCE RATE MAP(S) (F.I.R.M.) NUMBER 34009C0306F EFFECTIVE DATE OCTOBER 5, 2017 AND MAP NUMBER 34009C0243F EFFECTIVE DATE OCTOBER 5, 2017 FOR F.I.R.M. LIMIT LINES, ZONES AND LIMIT OF MODERATED WAVE ACTION LINE (LIMWA).
 - TAX MAP INFORMATION
 - BLOCK 317.03 LOTS 1, 1.01
 - BLOCK 289.03 LOT 1
 - BLOCK 290.01 LOT 1

- BLOCK 291.01 LOT 1
BLOCK 315.02 LOT 1
BLOCK 316.02 LOT 1
BLOCK 317.02 LOT 1
SHEETS 17, 23, 62 AND 63



TIDAL INFORMATION U.S. DEPT. OF COMMERCE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (N.O.A.A.) NATIONAL OCEAN SERVICE TIDAL STATION ID#8536110 CAPE MAY NEW JERSEY. TIDAL EPOCH DATED JANUARY 1983 - DECEMBER 2001 SHWL EQUALS AVERAGE OF THE HIGHEST PREDICTED TIDE FOR EACH MONTH IN A 12 MONTH PERIOD EL = 2.67 HTL EQUALS THE HIGHEST PREDICTED TIDE IN A 12 MONTH PERIOD EL = 2.98 PREDICTED ON 7/04/2023, 8/03/2023 AND 8/31/2023

REV.	DESCRIPTION	DATE	DFT. BY	CKD. BY

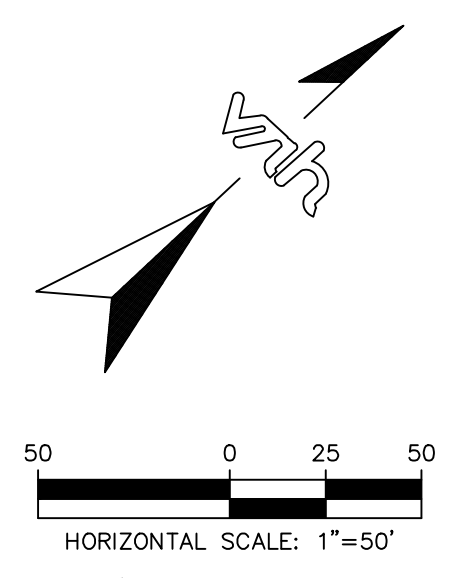
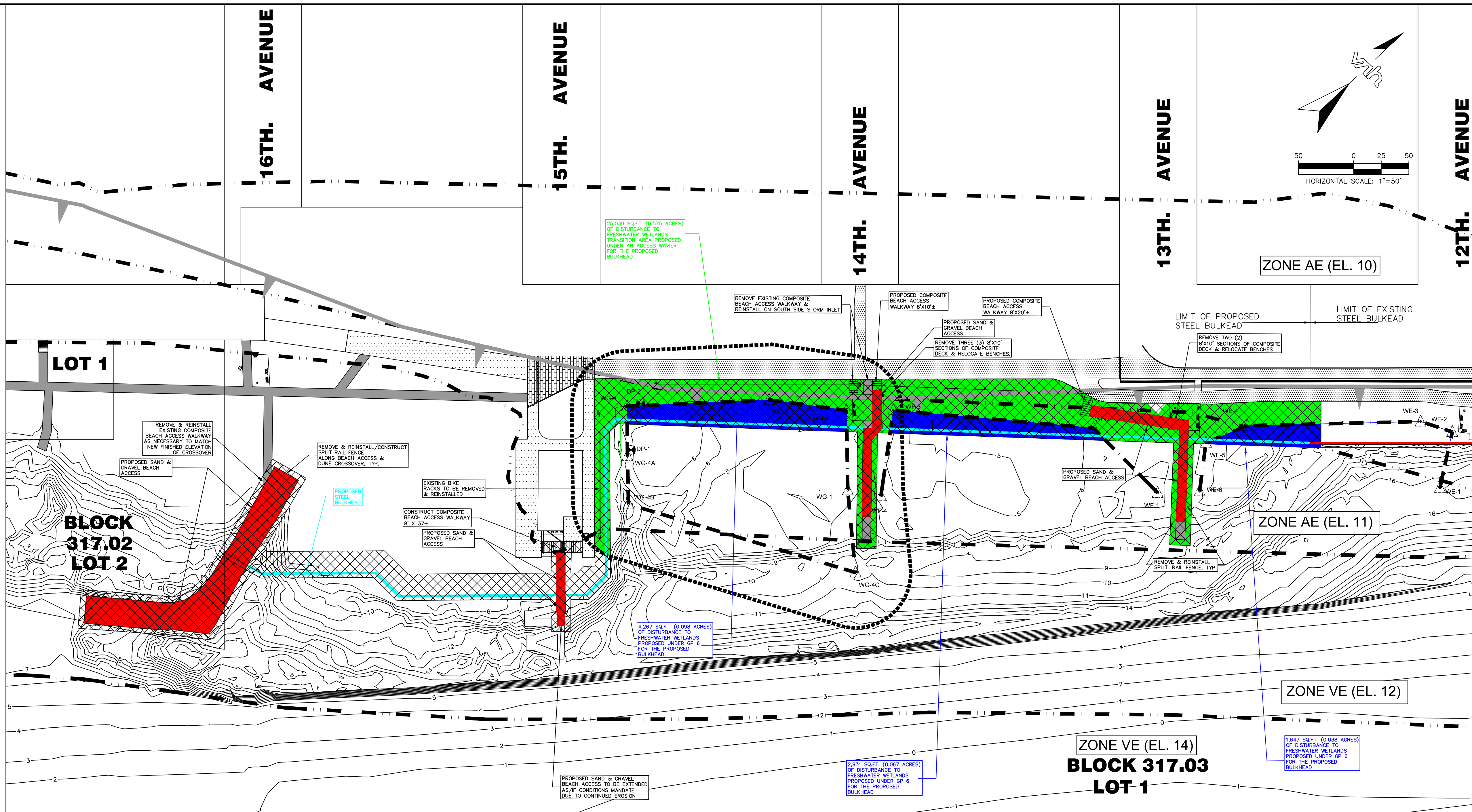
Ralph Petrella Jr.
02/9/2023
DATE OF SIGN.

RALPH PETRELLA JR.
N.J. PROFESSIONAL ENGINEER & LAND SURVEYOR LIC. NO. GB 23226

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211 Bayberry Drive • Cape May Court House, NJ 08210 • 609-465-2800
www.vannoteharvey.com Certificate of Authorization No. 2402A28271300

PLAN OF PROPOSED BEACH FRONT BULKHEAD & PUBLIC ACCESS
BETWEEN 16TH AVE & MID BLOCK 12TH & 13TH AVE
CITY OF NORTH WILDWOOD
CAPE MAY COUNTY, N.J.

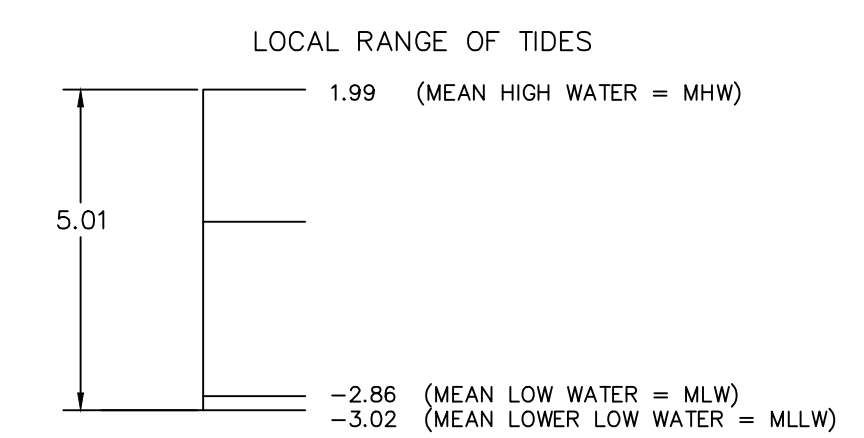
DRAWN BY BMP	FIELD BK	ORDER No.	FILE No.	SHEET No.
CHECKED BY RP/JWW	PAGE	46006-400-21		1/2



LEGEND

- WETLANDS LINE
- - - - - LIMIT OF WETLANDS TRANSITION
- △ A1 WETLANDS POINT ID
- DP-1 DATA POINTS
- ▨ LIMIT OF DISTURBANCE
- ▨ AREA OF IMPACTED WETLANDS TRANSITION
- ▨ AREA OF IMPACTED WETLANDS
- ZONE VE (EL. 11) F.I.R.M. ZONE
- LIMWA LINE
- - - - - F.I.R.M. ZONE LIMIT LINE
- ▨ PROPOSED SAND & GRAVEL BEACH ACCESS
- ▨ PROPOSED COMPOSITE WALKWAY
- ▨ EXISTING COMPOSITE WALKWAY
- ▨ SPLIT RAIL FENCE

TABLE OF PROPOSED NJDEP REGULATED DISTURBANCES	PROPOSED EMERGENCY BULKHEAD
DISTURBANCE TO FRESHWATER WETLANDS UNDER GP 6	8,845 SQ.FT. (0.203 ACRES)
DISTURBANCE TO FRESHWATER WETLANDS TRANSITION AREAS UNDER GP 6A	N/A
DISTURBANCE TO FRESHWATER WETLAND TRANSITION AREA PROPOSED UNDER AN ACCESS WAVIER	25,039 SQ.FT. (0.575 ACRES)
DISTURBANCE TO CAFRA AREA UNDER INDIVIDUAL PERMIT	52,658 SQ.FT. (1.209 ACRES)



TIDAL INFORMATION U.S. DEPT. OF COMMERCE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (N.O.A.A.) NATIONAL OCEAN SERVICE TIDAL STATION ID#8536110 CAPE MAY NEW JERSEY. TIDAL EPOCH DATED JANUARY 1983 - DECEMBER 2001 SHWL EQUALS AVERAGE OF THE HIGHEST PREDICTED TIDE FOR EACH MONTH IN A 12 MONTH PERIOD EL = 2.67 HTL EQUALS THE HIGHEST PREDICTED TIDE IN A 12 MONTH PERIOD EL = 2.98 PREDICTED ON 7/04/2023, 8/03/2023 AND 8/31/2023

van note-harvey associates, inc. consulting engineers, planners & land surveyors 103 College Road East • Princeton, NJ 08540 • 609-987-2323 211 Bayberry Drive • Cape May Court House, NJ 08210 • 609-465-2600 www.vannoteharvey.com Certificate of Authorization No. 2402A28271300 - Since 1894		
PLAN OF PROPOSED BEACH FRONT BULKHEAD & PUBLIC ACCESS BETWEEN 16TH AVE & MID BLOCK 12TH & 13TH AVE CITY OF NORTH WILDWOOD CAPE MAY COUNTY, N.J.		
REV. DESCRIPTION DATE DFT.BY CKD.BY _____ _____ _____ _____	DRAWN BY DMH CHECKED BY RP/JWW	FIELD BK PAGE ORDER No. 46006-400-21 FILE No. SHEET No. 2/2
_____ RALPH PETRELLA JR. N.J. PROFESSIONAL ENGINEER & LAND SURVEYOR LIC. NO. GB 23226		DATE OF SIGN. 02/9/2023

ATTACHMENT 4

**ENGINEER'S REPORT
IN SUPPORT OF
APPLICATION FOR EMERGENCY AUTHORIZATION
CITY OF NORTH WILDWOOD**

PREPARED BY VAN NOTE-HARVEY ASSOCIATES, INC.

(PROVIDED AS A DROPBOX LINK DUE TO FILE SIZE)

EXHIBIT D



State of New Jersey

PHILIP D. MURPHY
Governor

DEPARTMENT OF ENVIRONMENTAL PROTECTION

SHAWN M. LATOURETTE
Commissioner

SHEILA Y. OLIVER
Lt. Governor

Watershed & Land Management
Mail Code 501-02A
P.O. Box 420
Trenton, New Jersey 08625-0420
www.nj.gov/dep/landuse

February 24, 2023

VIA EMAIL

Nicholas Long, City Administrator
City of North Wildwood
901 Atlantic Avenue
North Wildwood, New Jersey 08260

**Re: City of North Wildwood Emergency Authorization Request
Division of Land Resource Protection Determination (Denial)
DLRP File No. 0507-03-0009.6 (CAF 230001)**

Dear Mr. Long:

The following is the Division of Land Resource Protection's (DLRP) determination on the City of North Wildwood's (NWW) request for an Emergency Authorization (EA). For the reasons that follow, DLRP hereby **denies** the current EA request, but notes that progress has been made toward analysis of alternative shore protection measures that could be approved if NWW submits another EA request. DLRP also looks forward to engaging with NWW as it reviews NWW's Individual Permit application (DLRP File No. 0507-03-0009.6), which was deemed administratively complete on 2/6/23, and which, in part, proposes shore protection measures in the locations at issue in the subject EA request.

North Wildwood's February 10, 2023 Emergency Authorization Request

NWW submitted to DLRP a request for an EA on February 10, 2023 with a proposal for bulkhead installation from the area between 12th and 13th Avenues, extending south to 16th Avenue. NWW stated that the proposed emergency work is necessary to address chronic erosional conditions along the oceanfront.

Within the EA request, NWW represented that, in the area between 15th and 16th Avenues, less than 50% of the dune mass remained at the end of December 2022, and erosion has continued. NWW states that "without the mass of the pre-existing dune, a moderate storm, akin to the October event, will rapidly erode through the balance of the dune and breach into the Beach Patrol facility

(Block 317.03, Lot 1).” NWW states that in the event of a dune breach, it is concerned that the Beach Patrol facility would be damaged, as well as other City infrastructure.

In addition to NWW's stated concerns for the area between 15th and 16th Avenues, NWW also requested authorization for work extending to the north, from 15th Avenue to the area between 12th and 13th Avenues. NWW represented that "it now appears that a dune breach between 13th and 14th Avenues has an equal if not greater likelihood than a breach at 15th Avenue. The proximity of JFK Boulevard and existing City infrastructure within this right-of-way are at significant risk should a breach occur at 13th Avenue. The imminent threat continues to persist that a dune breach will occur before this year's storm season concludes."

As stated above, the EA requests emergency work between the midblock of 12th and 13th Avenues to 16th Avenue (Block 317.03, Lot 1 (P/O); Block 317.02, Lot 2 (P/O)), specifically the following activities:

- 1) Installation of $\pm 1,147$ linear feet cantilevered steel bulkhead (coated) with timber cap
- 2) Excavation, placement, and regrading of residual sand within the project area
- 3) Reshaping of remnant dune in locations of scarps and or breach(s)
- 4) Reconstruction of beach access points over new bulkhead at 13th, 14th, 15th, and 16th Avenues
- 5) Removal and reinstallation of split rail fencing as necessary
- 6) Removal of the 15th Avenue ADA dune crossover beach access (if at risk of failure)

Standards applicable to Emergency Authorization Requests

For DLRP to issue an EA, the applicant must demonstrate that a threat to life, severe loss of property, or environmental degradation exists or is imminent, and can only be prevented or ameliorated through undertaking a regulated activity and is likely to occur, persist, or be exacerbated before the Department can issue authorization under a general permit or an individual permit for the preventative or ameliorative activity. N.J.A.C. 7:7-21.1.

Under N.J.A.C. 7:7-21.3 (e), if DLRP approves an emergency authorization request, the person to whom the emergency authorization is provided shall submit a complete application for an individual or general permit to authorize the activities, and under N.J.A.C. 7:7-21.3(h) and (i) the applicant must demonstrate compliance with the requirements of the CZM rules, or an explanation as to why full compliance could not be achieved, and the Department shall require design changes or restoration as necessary to ensure the requirements of the CZM rules are met to the maximum extent practicable. Thus, where, as here, the proposed emergency measure includes the installation of a permanent structure, it would not be appropriate for DLRP to authorize the activity where the applicant has failed to demonstrate the proposed activity would otherwise meet the requirements of the underlying rules.

Most relevant to this EA determination, installation of a bulkhead must comply with the Coastal Engineering Rule at N.J.A.C. 7:7-15.11. This rule requires DLRP to consider an alternatives analysis which allows structural shore protection measures, such as a bulkhead, to be authorized only upon a demonstration that non-structural and hybrid shore protection measures are not feasible or practicable. Non-structural and hybrid measures are required where feasible because

structural shore protection measures have greater environmental impact and can cause wave reflection, thus worsening erosion to the adjacent beach and dune system. This alternatives analysis is complex and technical.

DLRP's Review of the EA Request

Existence or Imminent Threat to Life, Severe Loss of Property, or Environmental Degradation

Upon receipt of the EA request, DLRP immediately reviewed the submitted information, existing condition information including aerials of the area in question, and consulted with the Department's Office of Coastal Engineering, which has experience in the design and location of shore protection measures.

With regard to the area extending from 15th Avenue north to the area between 12th and 13th Avenue, an established, vegetated dune and small beach berm are still in place within the majority of this area and would offer shore protection during a storm. Thus, DLRP determined there is no threat to life, severe loss of property, or environmental degradation. However, there is a bulkhead (that was installed without prior DLRP approval) in this location, terminating at the midpoint of 12th and 13th Avenues, and the immediate area of the terminus of this bulkhead is experiencing a higher level of erosion, exacerbated by end effect wave reflection from the currently existing, unauthorized bulkhead. Thus, DLRP finds that this isolated point at the terminus of the unauthorized bulkhead is at risk of imminent breach. However, as described in further detail below, the EA request proposing shore protection measures for the larger area is denied, and DLRP would consider a new EA request addressing alternatives for this specific location.

With regard to the area between 15th and 16th Avenues, DLRP has determined that severe erosion exists, and, due to the construction of the Beach Patrol building in a waterward location, the remaining dune may not provide protection in future storm events, making the building and nearby infrastructure vulnerable to damage. Thus, DLRP agrees with NWW that this area of the dune is at risk of imminent breach and would authorize shore protection under an EA in this location as necessary to abate the risk until DLRP can issue a decision on the pending Individual Permit application.

As indicated in N.J.A.C. 7:7-21.1 and 7:7-21.3(i), even if it determines an emergency exists, DLRP must also determine the emergency can only be ameliorated by the proposed regulated activity before it can issue an EA.

Based upon these standards, DLRP has endeavored to expediently obtain additional information for the alternatives analysis about non-structural measures that may be feasible at the subject location in NWW for the areas that require immediate shore protection, as set forth below.

Alternatives Analysis and Supplemental Information Exchange

DLRP February 14, 2023 Request

In its EA request, NWW analyzed the alternative of placement of sand to enhance the dune. Based on the initially submitted alternatives information, NWW represented that, for the area between 13th and 16th Avenues, "due to an exceedingly high daily erosion rate, as experienced over the past

several years without sand stockpiling, approximately 522,000 cubic yards (CY) of sand would be required to meet the ACOE design template”.

In an effort to fully explore the potential for alternatives that would have less impact on the adjacent beach and dune system than the installation of a bulkhead, DLRP requested additional information from NWW on February 14, 2023.

In its request, DLRP explained that meeting the ACOE design template is not necessary for purposes of the EA request. A dune with similar dimensions to what was constructed during the 2009 State/Local beachfill in this area previously by the NJDEP Office of Coastal Engineering (OCE) would afford immediate storm protection in this area in OCE’s opinion. Therefore, DLRP requested that NWW address the alternative using calculations that reflect the minimum amount of sand necessary to abate the City’s stated emergency until such time as a decision can be made on the City’s CAFRA Individual Permit application.

To offer assistance, DLRP requested that NWW provide sand volume calculations for the potential addition of sand to the existing dune to create a design profile of an approximately 20-foot wide dune at elevation +14.75 NAVD 88’ with 3:1 side slopes for the area from the northeastern portion of the beach safety patrol building extending to 300 linear feet to the vehicular accessway near 16th Avenue.

NWW February 16, 2023 Response

NWW responded on February 16, 2023 as follows:

"Given the present condition of the severely eroded beach berm and lack of a reliable trucking route for sand backpassing from either Wildwood or Wildwood Crest borrow areas, sand for the temporary beachfill would need to be imported from an extraction facility on the mainland. The estimated construction cost for this interim measure is \$339,690, which represents mobilization, required bonds and insurance, sand material and hauling, as well as grading and shaping of the temporary dune. Additional project fees and a modest construction contingency of 5%, result in a total project cost of \$471,597. As previously explained in the pending EA alternatives analysis, this type of beachfill project requires duplicate handling of the fill material, which increases the construction timeline and associated costs. The contractor must complete an intermediate sand transfer from street-legal tri-axle dump trucks importing the sand from the sand mine to the heavy duty off-highway articulated dump trucks necessary to transit oceanfront conditions to the fill site. Pursuing this temporary option would require in excess of 240 tri-axle truck loads and generate a cost of nearly a half million dollars. The City is concerned that this interim measure is not workable because of circumstances that the Department may not have taken into consideration, which is the significant change in the elevation of the beach."

DLRP February 22, 2023 Request

DLRP reviewed the information in NWW's February 16, 2023 response and provided clarification to the original request on February 22. Rather than proposing the placement of sand waterward of the dune on the existing beach berm, DLRP was requesting the assessment of possible placement of material landward of the beach berm to enhance the existing dune within the stated area of concern between 15th and 16th Avenues. The goal would be to augment the existing dune by

providing a minimum of 20 feet of additional dune crest at elevation +14.75 NAVD88 with some measure of seaward slope to tie into the existing dune along with a 3:1 backslope down to the existing parking area. Placing the material in a stable location would enhance the existing dune system from the landward side and eliminate the need for costly rehandling of material and mobilization of off-road dump trucks. Based on OCE's experience, it seems the necessary material to achieve this enhancement could be delivered from an upland quarry and would be cost effective.

NWW representatives asked for additional clarification regarding the placement location, and DLRP responded with additional guidance. DLRP stated that its design volume recommendations were based on a previously authorized project that was built in this area. However, DLRP clarified that NWW's proposal could propose additional material to increase the height and width of the dune if feasible.

NWW February 23, 2023 Response

NWW responded stating that based on the erosion rates experienced at this location over the past six months, the placement of ±1,194 CY of supplemental sand will not sustain the dune as an effective shore protection measure. Moreover, the existing beach conditions and NJDEP recommended fill project do not follow the federal template and therefore would be inconsistent with an engineered beach, as referenced in the Coastal Zone Management Rules.

In addition to the above, NWW has stated that the expansion of the dune footprint within the discussed area would impact access to the Beach Safety Patrol building and safety operations that occur in the adjacent area, specifically in the area of three storage buildings to the south. DLRP requested a description of the operations that occur in this area, but did not receive a response from NWW. However, the discussed dune enhancement would be approximately 37 feet away from the building, and NWW has not demonstrated that this would prevent access. We also note that to the extent NWW is concerned the storage buildings located south of the beach safety patrol buildings would interfere with the dune enhancement, these buildings were installed without DLRP authorization and it seems they could be relocated.

DLRP Determination

After reviewing the information submitted and the condition of the area between 15th and 16th Avenue, DLRP has determined NWW has not demonstrated dune enhancement is not feasible or practicable for the limited purpose of abating the immediate threat while DLRP reviews NWW's pending Individual Permit application, and thus, DLRP must deny the EA request. Dune enhancement is a non-structural alternative that would have less potential impact to the adjacent beach/dune system. Again, DLRP has an obligation to closely examine bulkhead proposals because a bulkhead in this location could increase erosion to the beach/dune system waterward of the structure (sand transport/volume), and to the north and south of the structure due to end-effect erosion, which could exacerbate, rather than alleviate, the problems faced by NWW in future storms.

Based on the foregoing, NWW's request for an EA to construct a bulkhead between 15th and 16th Avenues is **denied**. However, should NWW apply for a new EA proposing dune nourishment, DLRP could likely approve such an application. DLRP is more than willing to participate in a

pre-application meeting with NWW to discuss this alternative. DLRP continues to monitor conditions in this location.

With regard to the proposed bulkhead extending from 15th Avenue north to the area between 12th and 13th Avenue, the dune in this area offers sufficient shore protection pending determination on NWW's Individual Permit application. Thus, the EA request to install a bulkhead in this area is **denied**.

We again note that with regard to the immediate area of the terminus of the unauthorized bulkhead between 12th and 13th Avenues, there appears to be a specific area of erosion, likely exacerbated by end effect wave reflection from the currently existing, unauthorized bulkhead. However, this isolated area of concern does not justify installation of a bulkhead extending to 16th Avenue as requested in the current EA request. NWW could submit another EA request proposing shore protection in this area, with an alternatives analysis, for DLRP's review.

We understand materials have been delivered to the subject location in preparation for bulkhead installation. We reiterate our previous message that should the City proceed with any unauthorized work, it may be subject to enforcement action.

Should you have any questions, or if you would like to meet to further discuss options, please do not hesitate to contact me.

Sincerely,



Jennifer Moriarty
Director, Division of Land Resource Protection

C: Katrina Angarone, Assistant Commissioner, Watershed and Land Management, NJDEP
Kimberly Cahall, Chief Enforcement Officer, NJDEP
Dennis Reinknecht, Director, Resilience, Engineering, & Construction, NJDEP
Colleen Keller, Assistant Director, Division of Land Resource Protection, NJDEP
Janet Stewart, Bureau Chief, Bureau of Coastal Permitting, NJDEP
Michele Kropilak, Bureau Chief, Bureau of Coastal and Land Use Enforcement, NJDEP
Mayor Patrick Rosenello, City of North Wildwood
Jim Verna, III, PE, Van Note-Harvey Associates, Inc.
Neil Yoskin, Esq.
Anthony Bocci, Esq.
Kristina Miles, DAG
Jason Kane, DAG
Kevin Fleming, DAG
Dianna Shinn, DAG

EXHIBIT E

Anthony S. Bocchi, Esq. (Bar No. 005602006)
Neil Yoskin, Esq. (Bar No. 2091982)
Steven Siegel, Esq. (Bar No. 034141992)
Ryan P. Duffy, Esq. (Bar No. 379452022)

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Attorneys for Defendant/Counterclaimant City of North Wildwood

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Plaintiff,

vs.

**CITY OF NORTH WILDWOOD, “XYZ CONTRACTORS” 1-10,
“JOHN AND/OR JANE DOES” 1-10,**

Defendants.

**SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION:
CAPE MAY COUNTY**

DOCKET NO. C-55-22

CIVIL ACTION

AMENDED ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM OF THE CITY OF NORTH WILDWOOD

Defendant, the City of North Wildwood (“North Wildwood”), by way of answer to the Verified Complaint by Plaintiff, New Jersey Department of Environmental Protection (“NJDEP”), hereby states the following:

STATEMENT OF THE CASE

1. Denied.
2. Admitted.
3. North Wildwood admits only that in response to North Wildwood’s EA request,

NJDEP “determined there was neither an imminent nor ongoing threat to the loss of life or severe loss of property ...”

4. North Wildwood admits only that as a direct consequence of NJDEP's incredulous denial of its Emergency Authorization Application, North Wildwood was compelled, in the interest of the public safety of its residents, to excavate sand located at the 11th Avenue beach berm and graded the sand into the 14th and 16th Avenues. The "multiple written communications" referred to in Paragraph 4 of the Verified Complaint otherwise speak for themselves. North Wildwood denies all other allegations. The various legal conclusions set forth in Paragraph 4 of the Verified Complaint do not require a response.

5. Denied.

6. The allegations set forth in Paragraph 6 of the Verified Complaint state legal conclusions to which no response is required. To the extent that a response is required, said allegations are denied.

PARTIES

7. N.J.S.A. 13:1D-9 speaks for itself.

8. Admitted.

9. The allegations set forth in Paragraph 9 of the Verified Complaint are not directed at North Wildwood and, therefore, North Wildwood neither pleads nor responds thereto.

10. The allegations set forth in Paragraph 10 of the Verified Complaint are not directed at North Wildwood and, therefore, North Wildwood neither pleads nor responds thereto.

JURISDICTION AND VENUE

(The allegations moving forward in the Verified Complaint were improperly numbered by the NJDEP from this point on. For clarity purposes, North Wildwood will refer to the paragraph numbers using the misnumbered NJDEP version.)

7. North Wildwood admits that the Superior Court has jurisdiction over this matter. N.J.A.C. 7:7-21 and N.J.A.C. 7:7A-15 speak for themselves.

8. Rules 4:52-1, 4:67-6, and 4:67-1(b) speak for themselves. North Wildwood denies that this matter involves a “final agency order.”

9. North Wildwood admits only that venue is appropriate in Cape May County and denies all other allegations set forth in the improperly numbered paragraph 9 of the Verified Complaint.

FACTUAL ALLEGATIONS

North Wildwood’s 2020 Beach Front Bulkhead Project Application

10. North Wildwood admits only that it submitted a coastal permit application dated November 20, 2020, the provisions of which speak for itself.

11. The terms of the November 20, 2020 permit application speak for itself. All other characterizations by the NJDEP with regard to same are otherwise denied.

12. The terms of the November 20, 2020 permit application and the October 5, 2022 Emergency Authorization Application speak for themselves. All other characterizations by the NJDEP with regard to same are otherwise denied.

13. Denied.

14. The allegations set forth herein are legal conclusions to which no response is required.

Exceptional Resource Value Wetlands

15. North Wildwood is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in the improperly numbered paragraph 15 of the Verified Complaint and, therefore, North Wildwood neither pleads nor respond thereto.

16. N.J.A.C. 7:7A-3.2(b)(3) speaks for itself.

17. The allegations set forth in improperly numbered paragraph 17 of the Verified Complaint are not directed at North Wildwood and, therefore, North Wildwood neither pleads nor respond thereto.

18. The allegations set forth in improperly numbered paragraph 18 of the Verified Complaint are not directed at North Wildwood and, therefore, North Wildwood neither pleads nor respond thereto.

19. The allegations set forth in improperly numbered paragraph 19 of the Verified Complaint are not directed at North Wildwood and, therefore, North Wildwood neither pleads nor respond thereto. Further, North Wildwood is without knowledge and information sufficient to form a belief as to the truth of the allegations regarding any determination by the NJDEP alleged therein.

20. N.J.A.C. 7:7A-3.2(b)(c) speaks for itself. Further, North Wildwood is without knowledge and information sufficient to form a belief as to the truth of the allegations regarding any determination by the NJDEP alleged therein.

2022 Emergency Authorization Application

21. North Wildwood admits that on October 5, 2022 Peter Lomax, of the Lomax Consulting Group, submitted on behalf of North Wildwood an Emergency Authorization Application, the terms of both of which speak for themselves, including the fact that Mr. Lomax's e-mail references that the Emergency Authorization Application "specifically addresses the considerations [the NJDEP] highlighted in [its] email yesterday."

22. Admitted.

23. Admitted.

24. North Wildwood admits that the NJDEP emailed Mr. Lomax on October 4, 2022 regarding the Emergency Authorization Application. The terms of said email speak for itself. Further, the terms of N.J.A.C. 7:7-10.3(b) speaks for itself.

25. The allegations set forth in improperly numbered paragraph 25 of the Verified Complaint set forth legal conclusions to which no response is required. Further, N.J.A.C. 7:7-21.1 speaks for itself.

26. Admitted.

27. The terms of the October 5, 2022 Emergency Authorization Application speak for themselves.

28. The terms of both the Emergency Authorization Application and the 2020 permit application speak for itself.

29. North Wildwood admits only that the NJDEP incredulously and improperly determined that “North Wildwood did not meet any of the requirements for an emergency authorization for installing a bulkhead.” North Wildwood specifically denies the allegation that its EA request did not meet any of the requirements for installing a bulkhead.

30. North Wildwood admits only that the NJDEP incredulously and improperly denied North Wildwood’s Emergency Authorization Application. North Wildwood further avers that the NJDEP’s determinations set forth in improperly numbered paragraph 30 of the Verified Complaint will result in immediate and irreparable harm to North Wildwood and its citizens.

31. North Wildwood denies the false characterization set forth in improperly numbered paragraph 31 of the Verified Complaint that “no emergency situation exists.” Otherwise, the terms of N.J.A.C. 7:7-21.1, N.J.A.C. 7:7-1.1, and N.J.A.C. 7:7-15.11 speak for themselves.

32. North Wildwood admits only that the terms of Ms. Moriarty's October 12, 2022 e-mails sent to Peter Lomax at 3:47 p.m. speak for itself. However, North Wildwood vehemently denies, amongst other things, the improper conclusions set forth in said e-mail, particularly that "it has not been demonstrated that there is an imminent threat to the loss of life or property based on existing conditions."

33. The October 20, 2022, e-mail from the NJDEP to North Wildwood's counsel and the Mayor of North Wildwood referred to in improperly numbered paragraph 33 of the Verified Complaint speak for itself.

34. North Wildwood admits only that as a consequence of the NJDEP's incredulous and improper denial of its Emergency Authorization Application, and in order to secure the safety of its residents and property, which is of paramount concern to North Wildwood, North Wildwood could under no circumstances comply with the NJDEP's October 20, 2022 communication.

35. North Wildwood admits only that on October 20, 2022, the NJDEP issued a Notice of Violation ("NOV").

36. North Wildwood admits that Neil Yoskin, Esq. sent a response to the NJDEP regarding the NOV, as is set forth in improperly numbered paragraph 36 of the Verified Complaint. Mr. Yoskin's letter speaks for itself.

37. North Wildwood denies that the NJDEP has "continued its efforts to work with NWW to address its shoreline protection concerns."

**Stevens Institute of Technology Report Regarding Erosion
Analysis of the Dune System at 15th Avenue in NWW**

38. North Wildwood is without knowledge and information sufficient to form a belief as to the truth of the allegations set forth in improperly numbered paragraph 38 of the Verified Complaint.

39. North Wildwood is without knowledge and information sufficient to form a belief as to the truth of the allegations set forth in improperly numbered paragraph 39 of the Verified Complaint.

40. North Wildwood denies the adequacy of any and all “opinions” formed by Mr. Miller referenced in improperly numbered paragraph 40 of the Verified Complaint, specifically but not limited to the opinion that “the dune system in this area is adequate to protect upland infrastructure” and the incredulous and unsustainable “opinion” that “the need for a continuous bulkhead is not apparent.”

COUNT I

**Violation of the Coastal Zone Management Rules, Freshwater Wetland Rules
and the Coastal Area Facilities Review Act (All Defendants)**

41. North Wildwood repeats its responses to the foregoing paragraphs of the Verified Complaint as if set forth herein at length.

42. North Wildwood admits that on October 5, 2022, it submitted an Emergency Authorization Application, the terms of which speak for itself.

43. North Wildwood admits that on October 7, 2022, the NJDEP authorized, amongst other things, the use of certain temporary jersey barriers, the terms of which the October 7, 2022, authorization speak for itself.

44. North Wildwood admits that on October 12, 2022, the NJDEP denied North Wildwood's remaining portions of its Emergency Authorization Application to install a bulkhead, conduct scarp reshaping of the oceanside of the dune, and make repairs to the 25th Avenue vehicular access.

45. Denied.

46. Denied.

47. Denied.

48. Denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The NJDEP's Verified Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The Moriarty e-mail dated October 12, 2022, pertaining to the Emergency Authorization Application is not a final agency determination of the NJDEP and North Wildwood has not waived any right to appeal the denial of the Emergency Authorization Application to the Appellate Division.

THIRD AFFIRMATIVE DEFENSE

The NJDEP's denial of the Emergency Authorization Application was without any justifiable basis because North Wildwood demonstrated that there existed an imminent threat to the loss of life or severe loss of property following Hurricane Ian, or an ongoing threat to the loss of life or property, as required by the Coastal Zone Management Rules.

FOURTH AFFIRMATIVE DEFENSE

At the time of the submission of the Emergency Authorization Application there was not a substantial dune and beach berm which remained that could have provided sufficient shore protection, and since that time the condition of the dune and berm has only deteriorated even more significantly.

FIFTH AFFIRMATIVE DEFENSE

The NJDEP materially breached its obligations under certain State Aid Agreements with North Wildwood and said material breaches have proximately caused significant damage to North Wildwood.

SIXTH AFFIRMATIVE DEFENSE

North Wildwood historically sought to employ various methodologies short of installing a bulkhead all of which have proven to be ineffective while North Wildwood's installation of bulkheads historically has, in fact, proven to be highly effective in providing significant shore protection.

SEVENTH AFFIRMATIVE DEFENSE

The trial court is required to conduct an evidentiary hearing to resolve factual disputes where there are contested issues of fact, as is the case here, regarding North Wildwood's ability to comply or compliance with the NJDEP's order.

EIGHTH AFFIRMATIVE DEFENSE

The court is empowered to invoke its equitable relief to declare and adjudge that North Wildwood should be permitted to install the emergency bulkhead in question.

NINTH AFFIRMATIVE DEFENSE

There exists little, if any, risk of immediate irreparable harm to the environment if North Wildwood installs the subject bulkhead. Indeed, the installation of the subject bulkhead will only serve to best protect what little dune environment is left specifically because the proposed bulkhead will be installed well behind the subject dune system.

TENTH AFFIRMATIVE DEFENSE

The proposed bulkhead complies N.J.A.C. 7:7 with N.J.A.C. 7:7-15.11.

ELEVENTH AFFIRMATIVE DEFENSE

At all times relevant to this matter, the NJDEP failed to act reasonably in assisting North Wildwood to implement adequate shore protection and beach erosion measures to the point that North Wildwood was, by every objective measure, treated different than all other surrounding coastal municipalities.

TWELFTH AFFIRMATIVE DEFENSE

The NJDEP's claims are barred by the doctrine of laches, unclean hands, and/or waiver.

THIRTEENTH AFFIRMATIVE DEFENSE

At all times relevant to this matter, North Wildwood acted reasonably and in good faith in furtherance of its obligation to protect the safety and welfare of its residents and their property.

FOURTEENTH AFFIRMATIVE DEFENSE

The proposed area in question is an erosion hazard area as defined by N.J.A.C. 7:7-9.19, and the proposed bulkhead project satisfies N.J.A.C. 7:7-19.9(b)(2).

FIFTEENTH AFFIRMATIVE DEFENSE

The NJDEP was authorized pursuant to N.J.A.C. 7:7-21.3(f) to establish a timeframe greater than 30 days for the installation of the proposed bulkhead and as such there was no basis

to deny the Emergency Authorization Application simply because it could not be completed in 30 days.

SIXTEENTH AFFIRMATIVE DEFENSE

North Wildwood reserves its right to add, alter and/or amend their defenses and affirmative defenses as the course of discovery so requires.

WHEREFORE, Defendant City of North Wildwood demands judgment in its favor and against Plaintiff, New Jersey Department of Environmental Protection:

- (a) dismissing the NJDEP’s Verified Complaint with prejudice;
- (b) Awarding North Wildwood all taxable costs;
- (c) Awarding North Wildwood their attorneys’ fees and litigation costs; and
- (d) Granting North Wildwood any further or other relief as the Court finds just and proper, together with costs of suit, reasonable attorneys’ fees, and any further relief that this court may deem just and proper.

DEMAND FOR PRODUCTION OF DOCUMENTS

Pursuant to Rule 4:18-2, North Wildwood demands that NJDEP produce all documents referenced in its Verified Complaint within five (5) days of the date hereof.

DESIGNATION OF TRIAL COUNSEL

Pursuant to Rule 4:25-4, Anthony S. Bocchi, Esq. has been designated as trial counsel on behalf of North Wildwood.

COUNTERCLAIM

Defendant-Counterclaimant the City of North Wildwood (hereafter, “North Wildwood”), by way of Counterclaim against Plaintiff, the New Jersey Department of Environmental Protection (hereafter, the “NJDEP”), hereby states as follows:

SUMMARY OF ACTION

1. By this action, North Wildwood respectfully seeks that the Court declare and adjudge that it may take appropriate measures to, among other things, install approximately 1,147 linear feet of steel bulkhead beginning between 12th and 13th Avenues and extending to 16th Avenue. This measure is unquestionably needed to protect not only the health and safety of North Wildwood’s residents, but also its utility and public safety infrastructure. Without the Court’s immediate intervention, North Wildwood will suffer immediate and irreparable harm because a breach condition is imminent where there has been a loss of greater than 75% of the protective dune system in the subject area and the loss of a defined beach berm.

2. The record will reflect that the NJDEP has, for reasons which remain unjustifiable, stifled North Wildwood’s ability to adequately protect itself and ameliorate the devastating effects of beach erosion which has decimated North Wildwood, including most recently with Hurricane Ian.

3. North Wildwood, like the rest of the world, is faced with unprecedented weather systems caused, in part, by climate change. Our sea levels are rising at alarming rates never seen before, and at the same time our communities are compelled to prepare for and defend against destructive weather systems that can wreak irreparable havoc on communities within a matter of minutes.

4. North Wildwood has, without any justifiable basis, been thwarted by the NJDEP through its incredulous determinations, most recently its denial of North Wildwood's Emergency Authorization Application submitted in October 2022 (hereafter, the "2022 Emergency Authorization Application"), which sought, among other things, the installation of 404 linear feet of steel bulkhead between 15th and 16th Avenues.

5. Since the inception of this case, however, North Wildwood's beach conditions have only worsened. For a number of reasons, including the continued erosion of North Wildwood's beach, North Wildwood submitted a second Emergency Authorization Application on February 10, 2023 (hereafter, the "2023 Emergency Authorization Application").

6. The 2023 Emergency Authorization Application seeks, among other things, the installation of approximately 1,147 linear feet of steel bulkhead beginning between 12th and 13th Avenues and extending to 16th Avenue.

7. Indeed, in its submission to the court, the NJDEP characterizes North Wildwood as acting "in defiance to the DEP" while at the same time advocating "there is no emergency situation." Both of these contentions will be easily demonstrated as patently false.

8. The narrative of a "rogue" community acting in defiance of a state agency is belied by a record that makes clear that North Wildwood has continually sought the NJDEP's blessing on measures sought to protect the residents of North Wildwood.

9. For whatever reason, the NJDEP has used the underlying regulatory scheme as a sword against North Wildwood, literally preventing North Wildwood from taking necessary measures to protect its shores and its citizens in the face of a situation that literally gets worse as each day passes.

10. Indeed, as described further herein, the NJDEP's actions as applied to North Wildwood have quite literally been in breach of certain State Aid Contracts which have caused North Wildwood to expend more than \$21,000,000 in budgetary funds because of the NJDEP's refusal to assist North Wildwood through these perilous times.

11. Immediate court intervention in the form of injunctive relief is required granting North Wildwood the immediate right to build the subject bulkhead as proposed in the 2023 Emergency Authorization Application as a barrier to protect what little remains of the beach – a mere thirty (30) feet of sand dunes between buildings and pounding waves.

12. In addition, the NJDEP should be compelled to reimburse North Wildwood the \$21,000,000 in funds it has been forced to expend due to the NJDEP's failure to abide by the various State Aid Contracts it entered into with North Wildwood, the most recent of which was signed by North Wildwood in 2021, that should have provided North Wildwood with significant financial assistance in addressing the serious shore protection measures required of North Wildwood to stave off beach erosion and flooding.

13. In sum, the installation of a bulkhead is an absolutely necessary emergency shore protection measure and North Wildwood's application to the NJDEP for an Emergency Authorization Application for permission to install the proposed bulkhead should not have been denied. This Court – exercising its equitable jurisdiction – should allow North Wildwood to undertake this essential emergency measure. Additionally, the court should compel the NJDEP to reimburse North Wildwood for the in excess of \$21,000,000 North Wildwood has had to bear because of the NJDEP's material breaches of the State Aid Agreements and other wrongful actions as it pertains to North Wildwood's beach renourishment and shore protection efforts.

THE PARTIES

14. North Wildwood is a municipal corporation organized under the laws of the State of New Jersey, with a principal place of business at 901 Atlantic Avenue, North Wildwood, New Jersey 08260.

15. The NJDEP is a branch of the Executive Department of the State of New Jersey with its principal offices at 401 East State Street, Trenton, New Jersey.

JURISDICTION AND VENUE

16. The Superior Court has jurisdiction over suits arising under the Coastal Zone Management Rules (N.J.A.C. 7:7-21) and the Freshwater Wetlands Regulations (N.J.A.C. 7:7A-14).

17. This matter is appropriate for the Court's discretion under Rule 4:67-1(b).

FACTS COMMON TO ALL COUNTS

North Wildwood's 2022 Emergency Authorization Application

18. On October 5, 2022, North Wildwood submitted its 2022 Emergency Authorization Application, which sought to install a bulkhead in the area of 15th and 16th Avenues.

19. At the time, the 2022 Emergency Authorization Application was filed in part due to the effects of Hurricane Ian which had stalled off the mid-Atlantic coast causing a sustained multiday period of significant coastal flooding throughout the region and more specifically catastrophic beach and dune erosion to North Wildwood's oceanfront.

20. The 2022 Emergency Authorization Application sought permission for the following five critical activities as a means of addressing the residual impacts of Hurricane Ian:

- 1) Immediate deployment of Jersey barriers (20' segments) in a 400 LF alignment extending from the 15th Avenue northern right-of-way limit line along the landward edge of dune to the 16th Avenue southern right-of-way limit line

- 2) Remove/relocate existing composite/timber decking walkway from in front of the building to facilitate Jersey barrier deployment
- 3) Reshape dune remnants, protecting existing dune vegetation to the maximum extent possible, to establish stabilized slopes secured landward by the Jersey barrier wall
- 4) Installation of 404 LF cantilevered steel bulkhead (coated) with timber cap
- 5) Reconstruct/stabilize vehicular/pedestrian access from 16th Avenue right-of-way to the beach

21. As set forth in the 2022 Emergency Authorization Application, Hurricane Ian had caused a sustained three-day period of significant coastal flooding throughout the New Jersey Shore with the most severe impacts affecting North Wildwood.

22. As further set forth in the 2022 Emergency Authorization Application, the subject area between 15th and 16th Avenues was severely compromised because of the loss of more than 75% of the protective dune system and no beach berm which resulted in an imminent breach condition. That is, as of the time the 2022 Emergency Authorization Application was submitted, there was no reliable shore protection in front of North Wildwood's Beach Patrol Building, which serves as a critical oceanfront safety facility with public access amenities.

23. The 2022 Emergency Authorization Application specifically notes that North Wildwood's then \$3.7 million investment in the 2022 beach renourishment via the NJDEP and USACE-approved sand backpassing project were completely depleted and that a dune breach was imminent.

24. As noted in the 2022 Emergency Authorization Application:

The final tally of sand moved from Wildwood beaches to the beaches of North Wildwood was provided by the Municipal Engineer at 361,221 cubic yards making this season's transfer the largest thus far in this "in-house" effort to restore a recreational and storm protection shoreline during this period of extensive oceanfront beach erosion manifesting itself in North Wildwood since the late 1990's.

25. The 2022 Emergency Authorization Application makes specific reference to North Wildwood acting in its capacity as a “steward of the municipal transportation, utility and public safety infrastructure.”

26. By letter dated October 12, 2022, the NJDEP notified North Wildwood that it was not authorizing the then remaining relief sought by the 2022 Emergency Authorization Application. The final agency determination in this regard was confirmed in writing by the NJDEP Commissioner La Tourette on December 1, 2022.

27. North Wildwood’s 2022 Emergency Authorization Application should not have been denied.

28. The denial of the 2022 Emergency Authorization Application was without any justifiable basis.

29. The NJDEP’s conclusion that North Wildwood failed to demonstrate an imminent threat to the loss of life or severe loss of property because “a substantial dune and beach berm remains in place offering sufficient shore protection” is, by every objective measure, wrong.

30. Today, there is effectively no dune and beach berm protection left in place between 15th and 16th Avenues.

31. At the time the 2022 Emergency Authorization Application was submitted in October, 2022, North Wildwood made clear that there was an absence of a defined beach berm and a loss of more than 75% of the protective dune system in front of North Wildwood’s Beach Patrol Building/Oceanfront Safety Facility. In view of this, it was determined that a breach condition was imminent.

32. Since that time, the situation has only worsened.

33. North Wildwood is now at the point where one moderate storm or even a few

smaller storms will almost certainly result in a breach.

34. Notably, there is only a few feet left of dune protection between the ocean and North Wildwood's critical infrastructure. Simply put, what little beach and dune system that remains between 15th and 16th Avenues will be unable to withstand the upcoming Nor'easter and winter storm seasons.

35. Consequently, North Wildwood requires the court's intervention to protect the citizens of North Wildwood from storm systems which can easily decimate its infrastructure and cause irreparable damage to North Wildwood.

North Wildwood's 2023 Emergency Authorization Application

36. In response to worsening beach conditions, and pursuant to Judge Blee's Order entered on February 1, 2023, North Wildwood filed its 2023 Emergency Authorization Application on February 10, 2023.

37. Since the inception of this litigation in December 2022, the existing conditions of North Wildwood's beach have only worsened.

38. At this point, it now appears that a dune breach between 13th and 14th Avenues has an equal if not greater likelihood than a breach at 15th Avenue.

39. Therefore, the risk of an imminent breach is no longer isolated to the 15th Avenue location in front of the Beach Patrol facility.

40. This is because the rate of erosion between 13th and 14th Avenues has exceeded expectations.

41. The proximity of JFK Boulevard and existing infrastructure within this right-of-way are at significant risk should a breach occur at 13th Avenue.

42. As noted in the 2023 Emergency Authorization Application, the cross-section area

losses in the dune located between 13th and 14th Avenue are now even more pronounced than at 15th Avenue.

43. In view of the foregoing, the 2023 Emergency Authorization Application seeks permission for the following six critical activities to address North Wildwood's beachfront erosion:

Project Area: midblock between 12th and 13th Avenues – 16th Avenue

- 1) Installation of ±1,147 linear feet cantilevered steel bulkhead (coated) with timber cap;
- 2) Excavation, placement, and regrading of residual sand within the project area;
- 3) Reshaping of remnant dune in locations of scarps and or breach(s);
- 4) Reconstruction of beach access points over new bulkhead at 13th, 14th, 15th, and 16th Avenues;
- 5) Removal and reinstallation of split rail fencing as necessary; and
- 6) Removal of the 15th Avenue ADA dune crossover beach access (if at risk of failure).

44. The expansion of the proposed emergency bulkhead is absolutely necessary to address the worsening conditions of North Wildwood's beach.

45. The severe erosion impacting North Wildwood will persist and is anticipated to continue.

46. As addressed in the 2023 Emergency Authorization Application, the nature and the cause of the threat to North Wildwood is recurrent storm damage, including during the October offshore passage of Hurricane Ian at which time the dune at 15th Avenue lost a majority of its mass, as well as subsequent unnamed coastal storm events prior to and following the October event which have continued to erode beach/dune sand reserves.

47. There has been significant loss of sand from both the beach berm and remnant dune

system which leaves 13th to 16th Avenues at peril and without an effective barrier to mitigate storm surges and associated wave action.

48. As set forth in the 2023 Emergency Authorization Application, the depletion of sand from North Wildwood's overall beach/dune system has reduced the elevation of the beach such that sections of the remnant dune mass are now located at the edge of normal wave runup at a normal high tide.

49. Any storm surge or spring tide with moderate to strong waves continues to erode into the dune toe.

50. The rate of loss and area of impact has accelerated and expanded, respectively.

51. The 2023 Emergency Authorization Application references the NJDEP's previous (and improper) denial of the 2022 Emergency Authorization Application. If the NJDEP had granted the 2022 Emergency Authorization Application, North Wildwood would be in a much better position to withstand the effects of increasing rates of erosion.

52. The installation of a protective bulkhead beginning between 12th and 13th Avenues and extending to 16th Avenue is critical to the protection of North Wildwood.

53. The installation of the bulkhead beginning between 12th and 13th Avenues and extending to 16th Avenue is an absolutely necessary response to an imminent threat to life and property.

54. North Wildwood cannot afford to do nothing in the midst of storm season and thereby face unprotected the next major storm – and thereby suffer a catastrophic loss of life or property as a result of the lack of an absolutely necessary shore protection measure.

55. It is well known that North Wildwood's beaches have suffered from a long history of beach erosion and that its shoreline has retreated since at least 1987.

56. North Wildwood's beachfront commenced retreat in 1987, and continued through 2005 during which a substantial portion of the beach was eroded and lost.

57. In the early 1990's, modifications to the City's stormwater collection system were constructed, which presently exist today, directing stormwater discharge to two outfall locations, one at 3rd Avenue and the other at 21st Avenue.

58. Shoreline retreat resulted in the need to modify these existing oceanfront stormwater outfalls due to the exposure of the supporting timber cribbing to unmitigated wave action and prevailing longshore currents.

59. Due to the beach width and beach berm elevation losses, several hundred linear feet has been removed from these outfalls at both 3rd Avenue and 21st Avenue.

60. Notwithstanding beach nourishment activity during 2009 and 2010, via hydraulic pumping of sand, and a series of sand harvesting operations from 2016 to present, multiple named storms, including Irene, Sandy, Jonas, and Ian, plus many other more moderate northeast coastal storm events, have significantly eroded the beach and dunes to a point whereby there is an imminent threat to a dune breach.

61. During the last decade, North Wildwood has tried to remediate the significant beach erosion issues North Wildwood has faced using various methods preferred by the NJDEP other than installation of bulkheads.

62. As demonstrated below, these efforts have cost North Wildwood excessive amounts of money all of which has effectively been squandered with no results that North Wildwood can point to. That is, all the methods we have employed short of installing a bulkhead have, unfortunately, been grossly ineffective.

63. By way of example, North Wildwood has repeatedly employed beach

renourishment efforts that have resulted in the placement of more than two million cubic yards of sand over the last decade at a cost in the amount \$18,380,815.

64. None of that sand remains on North Wildwood's beaches.

65. Additionally, North Wildwood has employed "backpassing" and hydraulic beach fill and, on occasion, have imported materials from quarries. These methods, while preferred by the NJDEP, have all proved futile in providing any coastal protection to North Wildwood.

66. By way of example, during the period of 2012 through 2019, North Wildwood completed a series of emergency beach fill projects harvesting sand from Wildwood Crest, Wildwood and Hereford Inlet. The sand volumes placed are as follows (CY = cubic yards):

- 2012 – 96,000 CY – Spring 2012
- 2013 – 150,530 CY – June 2012 Hydraulic Dredging
- 2014 – 2016 - 60,000 CY/Year
- 2016 – 15,000 CY – January 2016
- 2016 – 128,000 CY – Spring 2016
- 2016 – 30,000 CY – Fall 2016
- 2017 – 206,370 CY – Spring 2017
- 2018 – 155,000 CY – Spring 2018
- 2019 – 169,062 CY – Spring 2019

67. The above volumes total 1,129,962 CY of material, all of which have been lost due to persistent erosion. Notably, all of these methods were employed by North Wildwood with regulatory approvals from the United States Army Corp of Engineers, the NJDEP, and the U.S. Fish and Wildlife Service.

68. In further effort to combat the dire conditions, in the Spring of 2020 North Wildwood proceeded with another emergency sand back-pass project, followed by similar emergency sand back pass projects in Spring 2021 and Spring 2022. Sand volumes placed are as follows:

- 2020 – 210,000 CY – Spring 2020
- 2021 – 356,556 CY – Spring 2021
- 2022 – 361,221 CY – Spring 2022

69. The above volumes total 928,077 CY.

70. Combining the 2012 through 2019 renourishments, North Wildwood has harvested and placed 2,058,039 CY of same, none which on the beach as of this date.

71. The total amount of sand placed on the beach since 2010 is over 3.2 million cubic yards of material at a total cost of in excess of \$28.3 million.

72. This is effectively money lost to North Wildwood because these measures proved futile.

73. What has proven effective in North Wildwood's case, though, has been the installation of bulkheads from 3rd Avenue up to and including 13th Avenue.

74. Since 2012, North Wildwood has been compelled to install bulkheads which have been effective in protecting our residents from the devastating effects of coastal systems.

75. In 2012, North Wildwood installed steel bulkheads from 3rd Avenue to 4th Avenue. This installation of the bulkhead here immediately proved effective in providing significant coastal protection.

76. Thereafter, in 2018, after six years of employing the aforementioned methodologies, all of which were proven to be ineffective, North Wildwood expanded the

bulkhead from 5th Avenue to 7th Avenue. This immediately proved to be successful.

77. One year later, in 2019, because nothing else worked, North Wildwood once again was compelled to expand the bulkhead to from 7th Avenue to the midblock of 12th and 13th Avenues. Once again, this measure proved highly effective in providing coastal protection to the residents of North Wildwood.

78. It is important to recognize in almost every instance above, North Wildwood installed bulkheads behind the already existing manmade dune systems. That is, North Wildwood did not remove any dunes in any of the aforementioned bulkhead projects, but instead left whatever was left of them. This critical point is continuously ignored by the NJDEP.

79. It was against this backdrop that North Wildwood applied for the coastal permit application in 2020 referred to in the NJDEP's submission to the court. It was through this application that North Wildwood sought to legalize the bulkhead construction and to demonstrate to the NJDEP that North Wildwood's efforts were not only required, but effective.

80. For a variety of reasons, the 2020 permit application dragged on to the point where in October 2022, with the threat of the impending Nor'easter season upon us, North Wildwood felt compelled to seek the Emergency Authorization Application because there was little protection left between 15th and 16th Avenues.

81. As in the previous bulkhead projects, the proposed alignment of the steel bulkhead between beginning between 12th and 13th Avenues and extending to 16th Avenue has been strategically designed to facilitate construction/installation with the least amount of disturbance as possible to freshwater wetlands transition areas.

82. As noted in the 2023 Emergency Authorization Application, a freshwater wetlands transition area, as defined in the Freshwater Wetlands Protection Act Rules (N.J.A.C. 7:7A), serves

as “an ecological transition zone providing temporary refuge for freshwater wetlands fauna during high water episodes, critical habitat for animals dependent upon but not resident in freshwater wetlands, and slight variations of freshwater wetland boundaries over time due to hydrologic or climatologic effects.”

83. A Letter of Interpretation Line Verification (hereafter, the “LOI”) was issued by NJDEP on July 10, 2019, which verified the limits and resource value of the interdunal wetland area between 14th and 15th Avenues (NJDEP File No. 0507-03-0009.2 FWW180001).

84. Pursuant to the LOI, the NJDEP determined the aforementioned wetland area to be of intermediate resource value with an associated 50-foot transition area.

85. While not verified by an LOI, the immediately adjacent interdunal freshwater wetland between 13th to 14th Avenues exhibits similar characteristics as the verified wetland area between 14th to 15th Avenues.

86. As set forth in the 2023 Emergency Authorization Application, the freshwater wetlands transition areas between 13th and 15th Avenues do not function as such. No ecological benefit is achieved in changing the assigned transition area from 50 to 150 feet, especially given that established footprints of disturbance already exist within close proximity to these wetlands. Existing disturbances within a 50-foot transition area include a paved City street, concrete sidewalk, pre-existing timber bulkhead, concrete bike path, the Beach Patrol Headquarters building, and several beach access pathways, all of which limits the ecological function of the transition area.

87. Moreover, recurrent site investigations performed by The Lomax Consulting Group throughout this past growing season revealed no observations of listed or rare species within these features.

88. Thus, as set forth in the 2023 Emergency Authorization Application, the proposed bulkhead, designed to avoid/minimize disturbance to the maximum extent practicable, is not anticipated to adversely impact listed species habitat to the extent that the continued survival of such species or the essential corridors necessary for the movement of such species results.

89. It is noted in the 2023 Emergency Authorization Application that the bulkhead installation and location were specifically designed and selected to avoid, where possible, and minimize, where practical, disturbance to these isolated NJDEP-designated wetland features.

90. The 2023 Emergency Authorization establishes the presence of an imminent threat based on the progressive erosion of the beach and dune and further demonstrates that the activity will greatly benefit the public interest.

91. The protective bulkhead as proposed in the 2023 Emergency Authorization Application is the only practicable and feasible alternative which will provide expedited shore protection for the preservation of public and private property and infrastructure as demonstrated herein.

92. Installing the bulkhead further westward would create an impediment to reconstruct the beach access due to the required height of the bulkhead (elevation 12') versus the ground elevation of approximately 6'. It is noted the only other vehicular access to the beach is via 7th Avenue, but that access is frequently out of service due to persistent erosion and tidal conditions.

93. At the present time the dune protecting the lifeguard headquarters is susceptible to breach. Depending on the severity of the next storm event, the lifeguard headquarters could be undermined and damage well beyond the lifeguard facility would be probable.

94. For example, since the offshore passage of Hurricane Ian in early October 2022 and from subsequent less intense coastal storm events, the ADA dune walkover at 15th Avenue has

sustained significant damage due to ongoing erosion generated by the lack of beach berm.

95. Incrementally, the beach path at this location has eroded to the extent that the timber dune walkover structure terminates just short of the dune scarp.

96. Reconstruction of pre-existing beach accessways at 13th through 16th Avenues, as noted in the 2023 Emergency Authorization Application, is necessary for both public and emergency access, critical to oceanfront activity, public safety, 1st responders, and the DPW.

97. The primary drainage system for the east side of North Wildwood between Surf Avenue and the beach between 2nd and 16th Avenues is located along the beach front between 15th and 3rd Avenues with a major collection system on Ocean Avenue. Ocean Avenue is a localized low point.

98. A breach in the dune system could cause the drainage system to become inundated, resulting with capacity exceedance.

99. In addition, it would be likely for sand from the beach to wash into the drainage system, thereby rendering the system nonfunctional and resulting in widespread and potentially catastrophic flooding. This would result in significant damage to public and private infrastructure and extremely costly repairs.

100. If North Wildwood's drainage system became clogged with sand it would have to be replaced at a staggering cost exceeding approximately \$25 million. In addition, there could be the same or similar damage to North Wildwood's sanitary sewer system coming with similar or even higher replacement costs. Moreover, all properties would have to be vacated without a functioning sanitary sewer system.

101. As previously noted, North Wildwood's previous bulkhead projects since 2012 have proved to be the most prudent and effective measure employed in providing coastal

protection. Indeed, without the emergency bulkhead installation, North Wildwood's infrastructure and potentially extensive private infrastructure between 3rd Avenue and 13th Avenue would have been destroyed.

102. With the storm season upon us, North Wildwood cannot be restrained from constructing the emergency bulkhead beginning between 12th and 13th Avenues and extending to 16th Avenue. North Wildwood must be afforded the authority to be proactive in order to protect its infrastructure as was done in the past.

103. As made clear to the NJDEP in the 2022 and 2023 Emergency Authorization Applications, installing an emergency bulkhead would allow for the quickest and strongest level of protection to human life and property. Simply put, it is the most common-sense approach to the current situation that North Wildwood faces. That is, the installation of an emergency bulkhead under the beach's current conditions presents the fastest, least expensive, and longest serving solution to the problem of a potential dune breach.

104. An additional action is the failure complained of by North Wildwood are the failure of Defendant to carry out its statutory obligation to provide financial assistance for shore protection to North Wildwood and to carry out other acts in furtherance of a congressionally authorized joint state-federal shore protection project so that North Wildwood may fulfill its obligations to the citizens and residents of North Wildwood to maintain and replenish its beaches in the face of climate change, sea level rise, storms and related phenomena, and to provide public access in accordance with the statutes and common law of this state.

105. North Wildwood is an oceanfront community located on Five Mile Island, a barrier island in Cape May County. The entirety of North Wildwood's eastern shoreline is comprised of a beach which, being subject to the natural processes of a shoreline, is subject to erosion. The

erosional process has, for a multitude of reasons, accelerated over the past decade or more, as a consequence of which North Wildwood's beaches, in many locations, no longer exist or are dangerously narrow.

106. New Jersey's oceanfront beaches extend 127 miles from Cape May to Sandy Hook, spanning four counties and nearly 100 municipalities. North Wildwood's beach, as is the case with all oceanfront beaches, requires periodic restoration and nourishment.

107. As explained below, both the Federal Government and the State Government have long-standing programs for funding and conducting beach restoration and maintenance. The existence of these funding programs notwithstanding, North Wildwood has been forced to expend in excess of \$15 million over the past five years in an effort restore and renourish its beaches, without any federal or state financial aid, with the exception of a single \$133,000 emergency grant in 2016. To the best of North Wildwood's knowledge, it is the only oceanfront community in New Jersey to not receive state or federal aid for shore protection.

The New Jersey Shore Protection Program

108. N.J.S.A. 12:6A-1, entitled "Beach Protection; powers", authorizes and empowers the NJDEP to:

...[R]epair, reconstruct, or construct bulkheads , seawalls, breakwaters , groins, jetties, beach fills, dunes and any or all appurtenant structures and work, on any and every shorefront along the Atlantic Ocean , in the state of New Jersey or any shorefront along the Delaware Bay and Raritan River, Raritan Bay, Barnegat Bay, Sandy Hook Bay , Shrewsbury River, including Nevesink River, Shark River , and the coastal inland waterways extending southerly from Manasquan inlet to Cape May Harbor, or any inlet, estuary or tributary waterway or any inland waterways adjacent to any inlet, estuary or tributary waterway along the shores of the state of New Jersey, **to prevent or repair damage caused by erosion and storm, or to prevent erosion of the shores and to stabilize the inlets or estuaries and to undertake any and all actions and work essential to the execution of this authorization and the powers granted hereby.**

[emphasis added]

109. N.J.S.A. 13:19-16.1, entitled “Shore protection fund; funding; use”, creates in the Department of Treasury a special non-lapsing fund to be known as the “Shore Protection Fund.” The statute requires that the monies in the fund be dedicated to projects for the protection, stabilization, restoration or maintenance of the State’s beaches and shorelines, and may be applied to the non-federal share of any State-Federal project. N.J.S.A. 13:19-16.1(b) also provides, in relevant part, that:

The requirements of subsection c. of Section 1 of P.L. 1997, c. 384 N.J.S.A. (13:19-16.2) notwithstanding, the Commissioner of Environmental Protection may, pursuant to appropriations made by law, allocate monies deposited in the fund for shore protection projects of an emergency nature, in the event of storm, stress of weather or similar act of God.

The Federal Shore Protection Program for New Jersey

110. The Federal Water Resources Development Act of 1986, Public Law 99-662, as amended by the Water Resources Development Act of 1999, Public Law 106-53, authorizes the Federal Government, through the U.S. Army Corps of Engineers, to undertake, in cooperation with the State of New Jersey, “the Hereford Inlet to Cape May Inlet, New Jersey Hurricane and Storm Damage Reduction Project, Project Number 6040-NW-1” (hereinafter “the Project”), a 50 year program for the reconstruction and periodic renourishment of beaches extending from Townsends Inlet in Northern Cape May County South to Cape May Inlet. The Legislation provides that the Federal Government will contribute 65% of the Federal Project cost, with the non-federal i.e. state) sponsor responsible for 35%. The scope of the Federal Project includes the City of North Wildwood.

111. On February 1, 2016, The Assistant Secretary of the Army determined that the Project, including reconstruction and maintenance of approximately 4.5 miles of beaches and

dunes extended from Hereford Inlet in North Wildwood to Cape May Inlet in the south, was technically feasible, economically justified and environmentally acceptable.

112. Congress subsequently approved and authorized the estimated \$21,600,000 initial Project construction cost. Ordinarily, a municipality receiving aid for shore protection is required to pay 25% of the Department's 35% share of costs. However, in this case, the Project was authorized in part under the Federal Disaster Relief of Appropriations Act of 2013, as a consequence of which none of the municipalities were required to share the cost of the initial construction of the Project. The applicable federal statutes did, however, require that municipalities receiving aid to provide public access with regard to parking, restroom facilities, public access points and cross-overs to the beach.

113. On January 17, 2017, the Army Corps of Engineers and the Defendant, as the non-federal sponsor, entered into a Project Partnership Agreement for the purpose of undertaking the initial construction of the Project. The Agreement required, among other things, that the NJDEP obtain any easements required to implement the Project.

114. Typically, shore protection is accomplished using hydraulic pumping of sand from offshore borrow areas. It was decided however that, in the case of North Wildwood, a method called "backpassing" would be used instead. With backpassing, sand would be taken from locations in the City of Wildwood, where there was a surplus of sand, and placed in an area just offshore, where it would be hydraulically pumped to North Wildwood and distributed on the beaches there.

115. The hydraulic backpassing plan, for a variety of reasons, failed. It was decided that instead of pumping the sand, it would be trucked from Wildwood to North Wildwood. But because the NJDEP failed to obtain the easements necessary to implement the project (much of the beach

in Wildwood from which the sand was to be taken is privately owned), and because of other reasons having to do with the manner in which Corps projects get authorized, neither the State nor the Corps was willing to fund the work.

116. North Wildwood was instead left to its own devices. Between 2017 and 2021, the City's pleas for assistance from the NJDEP and the Corps went unheeded. Instead, it was forced to spend upwards of \$21 Million to truck sand from Wildwood in a largely unsuccessful effort to protect its beaches and dunes.

Hurricane Ian's Impacts on North Wildwood

117. North Wildwood's back passing operations became infeasible after Hurricane Ian caused catastrophic damage to the beach berm and dune system in October of 2022.

118. Hurricane Ian was a tropical storm event that had stalled off the mid-Atlantic coast causing a sustained multi-day period of significant coastal flooding throughout the region and, more specifically, potentially catastrophic beach and dune erosion to the North Wildwood oceanfront.

119. North Wildwood immediately sought to address the impacts of Hurricane Ian by filing an Emergency Authorization Application to the NJDEP for various forms of relief including, but not limited to, installing an emergency steel bulkhead between 15th and 16th Avenues. North Wildwood determined that installation of the emergency steel bulkhead was necessary to protect against the imminent threat of loss to human life and severe threat to the loss of property posed by having a severely compromised beach and dune system.

120. By way of this action, the NJDEP seeks to restrain North Wildwood from taking the foregoing actions. However, the NJDEP's proposed restraints will prevent North Wildwood from taking appropriate actions to protect its residents and its infrastructure.

The immediate installation of the protective bulkhead is a necessary interim measure until the USACE/NJDEP project provides a long-term remedy to the longstanding problem of the severe erosion of North Wildwood's beaches and dunes

121. It is expected that within the next few years the USACE and NJDEP will be expending in excess of \$20 million on a comprehensive remedy to the longstanding problem of the severe erosion of beaches and dunes of North Wildwood and adjoining municipalities.

122. The USACE/NJDEP project will use a combination of various coastal protection measures, including beach nourishment, bulkhead installation and dune creation. Moreover, the project will entail not just construction but long-term maintenance – backed by federal and state dollars. This is the long-term remedy to beach erosion that North Wildwood so desperately needs.

123. In the meantime, the immediate installation of the protective bulkhead is a necessary interim measure until the USACE/NJDEP project provides a long-term remedy to the longstanding problem of the severe erosion of North Wildwood's beaches and dunes.

124. As of the present date, North Wildwood has received 100% of the protective bulkhead materials in connection with the bulkhead as proposed in the 2022 Emergency Authorization Application. In this regard, North Wildwood is ready and able to commence installation of the bulkhead between 15th and 16th Avenues immediately.

125. In short, the installation of a protective bulkhead under the beach's current conditions presents the fastest, least expensive, and most effective interim solution to the immediate problem of severely eroded dunes and the irreparable harm to lives and property that would result in the event of a dune breach caused by even a moderate storm.

Since North Wildwood's Filing of its Motion for Leave to File a Counterclaim on January 4, 2023, the NJDEP has retaliated against North Wildwood by issuing North Wildwood three Administrative Orders and Notices of Civil Administrative Penalty Assessments (hereafter, "AONOCAPA") in the amount of \$12,818,182.00

126. On January 4, 2023, North Wildwood filed a Motion for Leave to File a Counterclaim Pursuant to R. 4:67-4 (hereafter, the "Motion").

127. The Counterclaim as proposed in the Motion sought, *inter alia*, \$21,000,000 in damages against the NJDEP.

128. Since North Wildwood filed its Motion, the NJDEP has issued three AONOCAPA's against North Wildwood.

129. On January 11, 2023 – seven (7) days after North Wildwood filed its Motion – the NJDEP issued an AONOCAPA in the amount of \$8,661,000.00 for alleged CAFRA violations, Flood Hazard Area Control Act violations, and Freshwater Wetland Protection Act violations dating back to 2020.

130. On January 24, 2023 – twenty (20) days after North Wildwood filed its Motion – the NJDEP issued a second AONOCAPA in the amount of \$2,941,000.00 for alleged CAFRA violations and Flood Hazard Area Control Act violations dating back to 2020.

131. On January 27, 2023 – twenty three (23) days after North Wildwood filed its Motion – the NJDEP issued a third AONOCAPA in the amount of \$1,216,182.00 for alleged construction and operation of a treatment works without a permit in 2020.

132. The AONOCAPA's total a sum of \$12,818,182.00 in fines assessed against North Wildwood.

133. The issuance of the AONOCAPA's against North Wildwood for alleged violations that occurred in 2020 is a retaliatory measure in response to North Wildwood's filing of its Motion.

134. Rather than allowing North Wildwood to install its emergency bulkhead to protect itself again severe erosion, the NJDEP has maliciously retaliated against North Wildwood by assessing millions of dollars in fines.

135. The NJDEP could have issued the AONOCAPA's in a timely manner when the alleged violations occurred in 2020. Yet, the NJDEP decided to wait more than two years to assess its fines, and did so only after North Wildwood filed its Motion.

136. The NJDEP's actions support the inference that it would not have issued the AONOCAPA's but for North Wildwood's filing of its Motion.

137. The NJDEP's actions further support the inference that its AONOCAPA's are meant to intimidate North Wildwood.

138. It is improper to issue AONOCAPA's to retaliate against or intimidate a New Jersey municipality.

139. If North Wildwood must turn square corners when dealing with the NJDEP, then it is also true, particularly when so much public interest is at stake, that the NJDEP must turn square corners when dealing with North Wildwood.

COUNT ONE
(Injunctive Relief)

140. North Wildwood incorporates by reference the allegations set forth above if as set forth here at length.

141. The NJDEP's refusal to allow North Wildwood's installation of a bulkhead between 15th and 16th Avenues constitutes an immediate and irreparable threat to North Wildwood's residents and infrastructure.

142. In the event that a storm breaches North Wildwood's decimated dune system, North Wildwood will experience catastrophic damage to its critical infrastructure. Moreover, private

properties located immediately adjacent to John F. Kennedy Beach Drive are at risk of facing deadly amounts of flooding.

143. If the foregoing occurs, which is imminent without the proposed steel bulkhead, North Wildwood could not be remedied by monetary damages alone.

144. North Wildwood must take action to secure its beaches and ensure its residents and infrastructure are well-protected throughout the incoming winter storm cycle.

WHEREFORE, North Wildwood demands that judgment be entered as follows:

- A. Allowing North Wildwood to install a bulkhead beginning between 12th and 13th Avenues and extending to 16th Avenue;
- B. Allowing North Wildwood to engage in further excavation, placement or regarding of sand between 14th and 16th Avenues;
- C. Allowing North Wildwood to engage in any other oceanfront construction, reshaping of dunes and/or reconstruction of the access point at 16th and 25th Avenue; and
- D. Such other relief that the Court deems just and equitable.

COUNT TWO
(Breach of Contract)

145. North Wildwood incorporates by reference the allegations set forth above if as set forth at length.

146. The State Aid Agreement between the DEP and North Wildwood, executed on November 16, 2021, provides that the NJDEP, in cooperation with North Wildwood, shall acquire perpetual easements for private properties necessary for construction, renourishment activities, and maintenance of the Hurricane and Storm Damage Reduction Project.

147. The NJDEP has breached their obligations under the State Aid agreement by failing to acquire required easements in connection with the Hurricane Storm Damage Reduction Project.

148. As a result of the NJDEP's failure to acquire the necessary easements under the State Aid Agreement, North Wildwood has been forced to spend over \$21,000,000.

149. As a result of the NJDEP's breach of the State Aid Agreement, the NJDEP has suffered and will continue to suffer damages.

WHEREFORE, North Wildwood demands that judgment be entered as follows:

- A. Reimbursement of all of the costs borne by North Wildwood in connection with funding the entirety of its beach restoration projects; and
- B. Such other relief that the Court deems just and equitable.

COUNT THREE
(Violation of the Public Trust Doctrine)

150. North Wildwood incorporates by reference the allegations set forth above if as set forth here at length.

151. P.L.2019, c. 81 provides in relevant part that "Pursuant to the Public Trust Doctrine, the State of New Jersey has a duty to promote, protect and safeguard the public's rights and ensure reasonable and meaningful public access to title waters and adjacent shorelines."

152. North Wildwood and the NJDEP have a mutual obligation to provide public beachfront access to the residents of North Wildwood and the citizens of New Jersey pursuant to the Public Trust Doctrine, both at common law and as codified at P.L. 2019, c. 81.

153. The NJDEP's failure to provide or to seek funding for the replenishment of North Wildwood's beaches, which has resulted in and will continue to result in all or a portion of North Wildwood's beaches being periodically closed to the public, constitutes a violation of the Public Trust Doctrine.

WHEREFORE, North Wildwood seeks declaratory judgment that:

- A. The failure of the NJDEP to satisfy its public access obligations are in violation of P.L. 2019, c. 81 and the Common Law of this State;
- B. That the NJDEP has an affirmative, ministerial, and nondiscretionary obligation to take any and all actions required to provide financial aid to North Wildwood; and
- C. Such other relief as the Court deems just and equitable.

COUNT FOUR
(Declaratory Judgment)

154. North Wildwood incorporates by reference the allegations set forth above if as set forth here at length.

155. The NJDEP's failure to provide financial assistance to North Wildwood by including such aid in the shore protection project priority ranking system pursuant to N.J.S.A. 13:19-6.2, its failure to provide emergency funding pursuant to N.J.S.A. 13:19-16.1(b) and its failure to obtain the easements required to implement the backpassing project were a breach of its affirmative, ministerial and non-discretionary statutory obligation to assist all New Jersey municipalities in circumstances presented here.

156. Additionally, the NJDEP's issuance of AONOCAPA's after North Wildwood filed its Motion constitutes retaliation and intimidation.

WHEREFORE, North Wildwood demands that judgment be entered as follows:

- A. The NJDEP has an affirmative duty under N.J.S.A. 12:6A-1 and N.J.S.A. 13:19-16.1(b) to take any and all steps necessary to provide financial assistance for shore protection North Wildwood;

- B. North Wildwood has no duty to pay any of the assessed fines referenced the AONOCAPA's that were issued after North Wildwood filed its Motion; and
- C. Such other relief that the Court deems just and equitable.

COUNT FIVE
(Nuisance)

157. North Wildwood incorporates by reference the allegations set forth above if as set forth here at length.

158. The State of New Jersey not only claims an interest in public trust lands, but exercises dominion over them through a statutory and regulatory scheme supported by jurisprudence.

159. The NJDEP's failure and refusal to invest the funds necessary to assist North Wildwood in maintaining its beaches in the manner contemplated by law in order to preserve public trust areas, and to instead allow them to erode and endanger both public and private property, constitutes a nuisance at common law.

160. North Wildwood, as a direct and proximate cause of the NJDEP's neglect of its lawful obligations and its maintenance of a continuing nuisance on public trust land, has suffered damages in the amount of approximately \$15 million, less any percentage of funds that it would have been required to pay as part of a cost sharing arrangement.

WHEREFORE, North Wildwood demands that judgment be entered as follows:

- A. That this Court determine that the NJDEP's actions constitute both a public and private nuisance for which it has liability as enumerated above;
- B. Preliminary and permanent injunction;
- C. Compensatory and consequential damages;
- D. Costs North Wildwood has expended in its attempts to abate the NJDEP's public

and private nuisances;

- E. Costs of suit;
- F. An award of reasonable attorneys' fees; and
- G. Such other relief as the Court may deem just and equitable.

COUNT SIX
(Violation of the Administrative Procedure Act)

161. North Wildwood incorporates by reference the allegations set forth above if as set forth here at length.

162. The Administrative Procedure Act ("APA", N.J.S.A. 52:14B-1 et seq.) sets forth the exclusive procedure by which state agencies may propose and adopt regulations; procedures which includes the publication of a Notice of Adoption in the New Jersey Register, accompanied by an explanatory comments and response document.

163. The failure of the NJDEP to propose and adopt as regulations the limitation on the use of state aid for shore protection projects as described on its website, except as the non-federal share of a federally undertaken project pursuant to the Administrative Procedure Act, is a violation of the APA.

164. The NJDEP's use of AONOCAPA's to retaliate against a New Jersey municipality is inconsistent with the purpose of the Administrative Procedure Act.

WHEREFORE North Wildwood seeks a declaratory judgment that:

- A. The NJDEP's adoption of the aforesaid limitation violates the Administrative Procedure Act, the provisions of N.J.S.A. 13:19-16.1 and 16.2 notwithstanding;
- B. North Wildwood has no duty to pay any of the assessed fines referenced in the AONOCAPA's that were issued after North Wildwood filed its Motion; and

C. Such other relief that the Court deems just and equitable.

CULLEN & DYKMAN LLP

*Attorneys for Defendant-Counterclaimant City of
North Wildwood*

/s/ Anthony S. Bocchi

By: _____

ANTHONY S. BOCCHI

Dated: February 17, 2023

CERTIFICATION

I hereby certify in accordance with New Jersey Civil Practice Rule 4:5-1 that to the best of my knowledge, information and belief the instant matter in controversy is not the subject of any other action pending in any court or of a pending arbitration, and that no other parties should be joined in this action.

CULLEN & DYKMAN LLP

Attorneys for Defendant-Counterclaimant City of North Wildwood

/s/Anthony S. Bocchi

By: _____
ANTHONY S. BOCCHI

Dated: February 17, 2023

EXHIBIT F

STATE AID AGREEMENT
BETWEEN
THE DEPARTMENT OF ENVIRONMENTAL PROTECTION
AND
THE CITY OF NORTH WILDWOOD
FOR CONSTRUCTION OF THE
HEREFORD INLET TO CAPE MAY INLET, NEW JERSEY
HURRICANE AND STORM DAMAGE REDUCTION PROJECT
PROJECT NUMBER 6040-NW-I

THIS AGREEMENT made and executed this _____ 1st _____ day of _____ March _____, Two Thousand and Twenty Two **BY AND BETWEEN THE CITY OF NORTH WILDWOOD**, a Municipal Corporation in the County of Cape May, New Jersey, hereinafter called the “Municipality”, and the **STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION**, hereinafter called the “Department”, **CLIMATE AND FLOOD RESILIENCE, DIVISION OF COASTAL ENGINEERING**, hereinafter called the “Division”.

WHEREAS, Construction of the Hereford Inlet to Cape May Inlet, New Jersey Hurricane and Storm Damage Reduction Project, hereinafter referred to as the “Project”, was authorized by Section 1401(3) of the Water Resources Development Act of 2016, Public Law 114-322; and

WHEREAS, under the Construction heading, Chapter 4, Title X, Division A of the Disaster Relief Appropriations Act of 2013, Public Law 113-2 (127 Stat. 24-25) enacted January 29, 2013, hereinafter “DRAA 13,” certain projects, or elements thereof, under study by the U.S. Army Corps of Engineers, hereinafter referred to as the “Corps”, for reducing flooding and storm damage risks in areas along the Atlantic Coast within the North Atlantic Division of the Corps that were affected by Hurricane Sandy are authorized for construction pursuant to DRAA13 to the extent DRAA13 funds are available; and

WHEREAS, the Assistant Secretary of the Army (Civil Works) on February 1, 2016 determined that the Project is technically feasible, economically justified, and environmentally acceptable; and

WHEREAS, Section 103 of the Water Resources Development Act of 1986, Public Law 99-662, as amended, (33 U.S.C. 2213) specifies the cost-sharing requirements applicable to the Project; and

WHEREAS, pursuant to DRAA 13, the Secretary of the Army is directed to finance the non-Federal cash contribution for certain projects using DRAA 13 funds in accordance with the provisions of Section 103(k) of the Water Resources Development Act of 1986, Public Law 99-662, to complete initial construction of the Project; and

WHEREAS, the provisions of Section 902 of the Water Resources Development Act of 1986, as amended, do not apply to DRAA 13 funds that will be used for design and construction of the Project; and

WHEREAS, the Department, as the non-Federal sponsor, and the Army Corps of Engineers entered into a Project Partnership Agreement, hereinafter referred to as the “PPA,” on January 17, 2017, attached hereto as Appendix A, for the initial construction of storm damage reduction measures in the City of North Wildwood, City of Wildwood, Borough of Wildwood Crest and Township of Lower, pursuant to the requirements of DRAA 13, and for periodic renourishment, operation, and maintenance of the Project; and

WHEREAS, the Department and the Municipality desire to enter into this State Aid Agreement for the initial construction of the Project; and

WHEREAS, the periodic renourishment portion of the Project is authorized for fifty years from the start of initial construction, at a four-year renourishment cycle, each renourishment being subject to subsequent State Aid Agreements; and

WHEREAS, the Department has the full authority to perform all of its responsibilities for the Project under New Jersey State Law PL 92, c. 148; PL 95, c. 164 and N.J.S.A. 12:6A-1, et seq.; and

WHEREAS, the Municipality has the full authority to perform all of its responsibilities for the Project under N.J.S.A. §§ 40:56-1, et seq., 40:69A-1, et seq., and 40A:12-1, et seq. and the applicable municipal code, and the Mayor of the Municipality is duly authorized to enter this Agreement; and

WHEREAS, the total cost of the entire Project, including initial beachfill construction and renourishment over 50 years, based on the March 2014 price level, is estimated at \$104,030,000.00, as defined in the PPA and January 23, 2015 Chief's Report issued by the Department of the Army, attached hereto as Appendix B; and

WHEREAS, the estimated cost of initial construction of the Project is projected to be \$21,600,000.00, with the Federal Government's 65% share of such costs projected to be \$14,040,000.00, and the Department's 35% share of such costs projected to be \$7,560,000.00. The Municipality is required to cost share \$1,000,000.00 for the initial construction of the Project as well as any Municipal-requested additional work and betterments, as set forth in attached Appendix C. This estimated cost includes the sand placement on the beach and dune, mobilization and demobilization, dune crossovers, dune planting and fencing, project related stormwater outfall improvements, and Engineering & Design/Supervision & Administration (E&D/S&A) costs within the City of North Wildwood, City of Wildwood, Borough of Wildwood Crest and Township of Lower; and

WHEREAS, future renourishment costs over the fifty-year life of the Project is 50% federal and 50% non-federal as set forth in the Chief's Report. During a periodic renourishment event, the Department anticipates that 75% of the non-federal share will be paid by the Department and the remaining 25% will be paid by the Municipality, and will be subject to a future State Aid Agreement; and

WHEREAS, with the exception of all alleyways and paper streets, the Municipality offers public parking within every public right of way in the City and further offers public parking-lots East of Atlantic Avenue at 1st & Surf Avenue and 15th Avenue & the Beach, as governed by existing municipal ordinance; and

WHEREAS, the Municipality currently provides public access points and crossovers to the to the beach and oceanfront at: 2nd Avenue and Ocean Avenue; 3rd Avenue and J. F. Kennedy

Boulevard/Beach Drive; 4th Avenue and J. F. Kennedy Boulevard/Beach Drive; 5th Avenue and J. F. Kennedy Boulevard/Beach Drive; 6th Avenue and J. F. Kennedy Boulevard/Beach Drive; 7th Avenue and J. F. Kennedy Boulevard/Beach Drive; 8th Avenue and J. F. Kennedy Boulevard/Beach Drive; 9th Avenue and J. F. Kennedy Boulevard/Beach Drive; 10th Avenue and J. F. Kennedy Boulevard/Beach Drive; 11th Avenue and J. F. Kennedy Boulevard/Beach Drive; 12th Avenue and J. F. Kennedy Boulevard/Beach Drive; 13th Avenue and J. F. Kennedy Boulevard/Beach Drive; 14th Avenue; 15th Avenue; 16th Avenue and Boardwalk; 17th Avenue and Boardwalk; 18th Avenue and Boardwalk, 19th Avenue and Boardwalk (Between 19th & 18th Avenues); 20th Avenue and Boardwalk; 21st Avenue and Boardwalk; 22nd Avenue and Boardwalk; 23rd Avenue and Boardwalk (between 23rd and 22nd Avenues); 24th Avenue and Boardwalk; 25th Avenue and Boardwalk (between 25th and 24th Avenues); 26th Avenue and Boardwalk (between Juniper and 26th Avenues); and

WHEREAS, the Municipality currently provides seasonal permanent restroom facilities at: 7th Avenue and J. F. Kennedy Boulevard, 15th Avenue (at the lifeguard headquarters), and 25th Avenue (on the boardwalk). The Municipality provides seasonal temporary restrooms at: approximately 20 locations along the beachfront. And the Municipality provides year-round temporary restrooms at Old New Jersey and Spruces Avenues, 15th Avenue (at the lifeguard headquarters), and 23rd Avenue (on the boardwalk); and

WHEREAS, the expenditure of public funds is conditioned upon compliance with the Department's Coastal Zone Management Rules and all other applicable laws, rules and regulations; and

WHEREAS, through the DRAA 2013, additional money was appropriated to the U.S. Department of Housing and Urban Development, hereinafter "HUD," to be allocated as Disaster Recovery Community Development Block Grants ("CDBG-DR") to Superstorm Sandy impacted states, including the State of New Jersey, in order to provide crucial funding for recovery efforts involving housing, economic development, infrastructure and prevention of further damage to affected areas; and

WHEREAS, pursuant to FR-5696-N-06, on November 18, 2013, the State of New Jersey received a second allocation of HUD funding through the New Jersey Department of Community

Affairs, hereinafter “DCA,” as the designated entity to administer the State’s CDBG-DR Program per 24 CFR 570.501; and

WHEREAS, \$50 million of the second allocation of CDBG-DR funds is reserved for the Department’s Office of Flood Hazard Risk Reduction Measures to support the Corps’ efforts by acquiring the necessary real estate for this and other Projects, and will supplement expenses not covered by the Corps’ reimbursement; and

WHEREAS, to be eligible for CDBG-DR funding for reimbursement of real estate acquisition costs, the Municipality must comply with all CDBG-DR requirements and procedures.

WHEREAS, once any portion of the Project is complete, the Municipality will be responsible for all routine operations, maintenance and associated costs of the Project in the Municipality between periodic renourishment of the Project.

NOW THEREFORE, all Parties hereto do mutually agree as follows:

(1) The Department, in cooperation with the Municipality, shall acquire the perpetual easements for the private properties listed in Appendix D necessary for construction, renourishment activities, and maintenance of the Project, and in some cases for the borrowing, excavating, and removing of sand and soil. The Municipality shall provide to the Department perpetual easements on or across any municipally owned properties also listed on Appendix D. The perpetual easement types required for all properties listed in Appendix D are located in Appendix E. In addition to the above, the easements shall provide access to the Department and the Corps, their representatives, agents, contractors and assigns, and shall provide for public access to and use of the entire beachfront and tidal lands in the Project construction area. The perpetual easements shall also provide the access necessary to ensure the protection of threatened and endangered wildlife and vegetation and for the implementation and enforcement of the beach wildlife and Seabeach Amaranth management plan developed under Clause (7) below, to the Department, and the Corps, their agents, employees, and contractors. The forms of easements shall be provided by the Department to the Municipality.

(2) In satisfying its obligations in this Agreement, the Municipality shall comply with all of the Department's Coastal Zone Management Rules (N.J.A.C. 7:7 et seq.), including but not limited to: Dunes (7:7-9.16); Overwash Areas (7:7-9.17); Coastal High Hazard Areas (7:7-9.18); Erosion Hazard Areas (7:7-9.19); Beaches (7:7-9.22); Endangered or Threatened Wildlife or Plant Species Habitat (7:7-9.36); and Coastal Engineering (7:7-15.11).

(3) Bulldozing, excavation or mechanical alteration of any beach and dune is strictly prohibited, except as permitted by the Department's Standards for Beach and Dune Activities in accordance with N.J.A.C. 7:7-10 or as permitted by any other valid permits from the Department pursuant to New Jersey's Coastal Zone Management Rules and with the concurrence of the Division and the Corps. The Municipality shall not conduct or allow obstructions or encroachments that reduce the level of protection of the Project or hinder operation and maintenance of the Project.

(4) The Municipality shall provide and maintain all existing public access and parking areas. All public access resulting from the operation of this Agreement shall be provided in a nondiscriminatory manner in accordance with law.

(5) The Municipality acknowledges all lands now or formerly flowed by the mean high tide are owned by the State of New Jersey, excluding any riparian interests previously granted by the State, and that title to any lands which cease to be flowed by the mean high tide as a result of the shore protection or dredging project remains in the State of New Jersey.

(6) The Municipality as a public entity recognizes its continuing obligation to ensure compliance with the Public Trust Doctrine in accordance with the laws of the State of New Jersey.

(7) The Municipality, pursuant to the Endangered Species Act (16 U.S.C. 1531, et. seq.), its implementing regulations (50 CFR Part 17), and the U.S. Fish and Wildlife Service document entitled, "Biological Opinion on the Effects of Federal Beach Nourishment Activities Along the Atlantic Coast of New Jersey Within the U.S. Army Corps of Engineers, Philadelphia District on the Piping Plover (*Charadrius melodus*) and Seabeach Amaranth (*Amaranthus pumilus*)", and to ensure consistency with endangered and threatened species provisions of New Jersey's Coastal Zone Management Rules (N.J.A.C. 7:7-9.36) and New Jersey's Endangered and Nongame Species Conservation Act (N.J.S.A. 23:2A); shall develop and implement one beach species management plan for the entire municipality. The federally approved management plan entitled, "The City of North Wildwood Beach Management

Plan for the Protection of Federally and State Listed Species”, dated December 2018, has been approved by the U.S. Fish & Wildlife Service and the Department’s Endangered & Nongame Species Program.

(8) All Project costs are estimates subject to adjustment by the Government, increases or decreases in equipment and material costs, and inflation, and are not to be construed as the total financial responsibilities of the Government, the State of New Jersey as the Non-Federal Sponsor and the Municipality. However, such adjustments will not impact the Municipality’s financial responsibilities for the initial construction of the Project. The cost of the Project may increase due to unanticipated additional work or betterments to the Project as requested by the Municipality. Municipally-requested additional work or betterments shall be paid 100% by the Municipality for non-shore protection work. Any unanticipated additional work or betterments requests that are considered shore protection work may be cost shared by the Department, if funds are available. The final cost will be based on actual cost as documented by records maintained by the Department and the Corps. The Department will invoice the Municipality for the Municipality’s financial obligations regarding any increase in Project cost, prior to bid solicitation for the construction contract for a particular phase of the Project. Payment shall be made by the Municipality within 30 days of its receipt of the invoice, unless a longer time period is agreed to by the Department. Should the Municipality be unable to pay any increased costs due to lack of funds, it must inform the Department prior to the construction of any future betterment. The Department will invoice the Municipality for any unanticipated Municipal requested additional work or betterments to the Project.

(9) If the Municipality fails to provide its share of the funding in the time and manner required or otherwise breaches any obligation under this Agreement, then the Department reserves all legal recourse including but not limited to seeking injunctive relief to force compliance or commencing an action in a court of appropriate jurisdiction to obtain an account and to recover the State’s share of any funds provided to the Municipality under this Agreement, plus interest, legal costs and other expenses. If the Municipality fails to provide its share of the funding in the time and manner required or otherwise breaches any obligation under this Agreement, the Department reserves the right to cease its performance under this Agreement. Further, if the Municipality fails to provide its share, or any portion thereof, of the funding in the time and manner required, the Department reserves the right to withhold from the Municipality payment of funds for present or future work on any phase of the

Project necessary for the Department to recover that share of the funding that the Municipality has failed to provide. Prior to instituting any action under this provision, the Department shall serve the Municipality with a written notice of the violation of the Agreement and the Municipality shall have 60 days to cure any breach or nonpayment. In addition, if the Municipality fails to perform in accordance with this Agreement, its eligibility for future shore protection funds may be impacted.

(10) Costs associated with the donation of the necessary municipally owned perpetual easements shall be initially borne by the Municipality and the costs can be submitted to the Department for reimbursement subsequent to execution of this Agreement. Costs not directly related to the Project shall be denied reimbursement. In order to receive reimbursement for all associated costs, the Municipality shall abide by all requirements and procedures set forth in the CDBG Grant Agreement attached in Appendix F.

(11) If the Department fails to receive annual appropriations or the federal share provided for under the PPA in amounts sufficient to meet the Department's project costs for the then current upcoming fiscal year, the Department shall so notify the Municipality in writing, and 60 days thereafter either party may elect without penalty to terminate this Agreement or to suspend future performance under this Agreement. Such suspension shall remain in effect until such time as the Department receives sufficient appropriations or until either party elects to terminate this Agreement. Any such termination shall not relieve the parties of liability for any obligation previously incurred.

(12) All notices under this Agreement shall be sent in writing to:

For the Department:

Director
Division of Coastal Engineering
1510 Hooper Avenue, Suite 140
Toms River, New Jersey 08753

For the Municipality:

Mayor
City of North Wildwood
901 Atlantic Avenue
North Wildwood, New Jersey 08260

(13) The Municipality herein represents that it has complied with all conditions and obligations imposed by any prior State Aid Agreement with the Department or the Division or has entered into a compliance schedule, which is made a part of this Agreement and is attached hereto.

(14) The waiver of a breach of any of the terms or conditions of this Agreement by the Department shall not constitute a waiver of any subsequent breach. Any consent by the Department to a delay in the Municipality's performance of any obligation shall apply only to the particular transaction to which the consent to delay relates, and it shall not be applicable to any other obligation or transaction under this Agreement.

(15) In the event that any one or more of the provisions of this Agreement shall be determined to be void or unenforceable by a court of competent jurisdiction, or by law, such determination will not render this Agreement invalid or unenforceable and the remaining provisions hereof shall remain in full force and effect.

(16) Nothing contained herein shall be construed so as to create rights in any third party.

(17) This Agreement will take effect upon execution by all parties and will remain in effect, except as otherwise provided in the Agreement, and can be amended by agreement of the parties.

(18) This Agreement may be executed in counterparts.

(19) If any provision of this Agreement or the application thereof to any person or circumstances is found to be invalid, the remainder of the provisions of this Agreement and the application of such provision to persons or circumstances other than those as to which it is found to be invalid, shall not be affected thereby.

(20) This Agreement shall be interpreted in accordance with the laws of the State of New Jersey.

(21) Once any portion of the Project is complete, the Municipality is responsible for all future routine operation, maintenance and associated costs of the Project between jointly performed beach renourishment. The Municipality is not required to independently perform Project renourishment. In

order to perform certain beach and dune maintenance activities, the Municipality must have a valid beach and dune maintenance permit issued from the Department's Division of Land Resource Protection. Future non-routine maintenance of the Project shall be addressed in further detail by a future State Aid Agreement signed by the parties.

(22) The Municipality agrees to comply with all CDBG-DR requirements and procedures as set forth in Appendix F. Failure to comply with said requirements and procedures will impact the Municipality's eligibility for real estate acquisition reimbursement.

(23) All parties understand and agree that the intent of this Project is to provide shoreline stabilization and storm damage reduction along the Atlantic Ocean in the City of North Wildwood. This Project has been designed by the U.S. Army Corps of Engineers and reviewed and approved by the Department and the Municipality. Due to natural forces and/or changing conditions, there is no guarantee that the beachfill will persist or maintain its engineering integrity and effectiveness post construction.

PROJECT# - 6040-NW-I

IN WITNESS WHEREOF, the Municipality and the Department have hereunto set their respective names on the day and year first above written.

CITY OF NORTH WILDWOOD

ATTESTED:

BY 

Patrick T. Rosenello
Mayor
City of North Wildwood




W. Scott Jett
Municipal Clerk
City of North Wildwood

PROJECT# - 6040-NW-I


STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
WATERSHED AND LAND MANAGEMENT
DIVISION OF RESILIENCE ENGINEERING & CONSTRUCTION
OFFICE OF COASTAL ENGINEERING

ATTESTED:

BY 

William T. Dixon
Assistant Director
Office of Coastal Engineering

APPROVED:

BY 

Dennis Reinknecht
Director
Division of Resilience Engineering & Construction

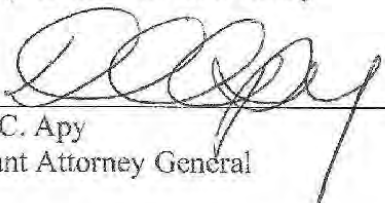
AUTHORIZED:

BY 

Vincent Mazzei
Assistant Commissioner
Watershed and Land Management

The aforementioned agreement has been reviewed and approved as to form.

Gurbir S. Grewal
Attorney General of New Jersey

BY 

David C. Apy
Assistant Attorney General

APPENDIX A
THE PPA

PROJECT PARTNERSHIP AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
FOR
THE HEREFORD INLET TO CAPE MAY INLET, NEW JERSEY
HURRICANE AND STORM DAMAGE REDUCTION PROJECT

THIS AGREEMENT is entered into this 17th day of Jan, 2017, by and between the Department of the Army (hereinafter the "Government"), represented by the U.S. Army Engineer, Philadelphia District (hereinafter the "District Engineer") and the New Jersey Department of Environmental Protection (hereinafter the "Non-Federal Sponsor"), represented by the Commissioner.

WITNESSETH, THAT:

WHEREAS, under the Construction heading, Chapter 4, Title X, Division A of the Disaster Relief Appropriations Act of 2013, Public Law 113-2 (127 Stat. 24 – 25) enacted January 29, 2013 (hereinafter "DRAA 13"), certain projects, or elements thereof, under study by the Corps of Engineers for reducing flooding and storm damage risks in areas along the Atlantic Coast within the North Atlantic Division of the Corps that were affected by Hurricane Sandy are authorized for construction pursuant to DRAA 13 to the extent DRAA 13 funds are available;

WHEREAS, the Assistant Secretary of the Army (Civil Works) on February 1, 2016 determined that the Project is technically feasible, economically justified, and environmentally acceptable;

WHEREAS, Section 103 of the Water Resources Development Act of 1986, Public Law 99-662, as amended, (33 U.S.C. 2213) specifies the cost-sharing requirements applicable to the Project;

WHEREAS, pursuant to DRAA 13, the Secretary of the Army is directed to finance the non-Federal cash contribution for certain projects using DRAA 13 funds in accordance with the provisions of Section 103(k) of the Water Resources Development Act of 1986, Public Law 99-662; and the interest rate for such payments shall be determined in accordance with Section 106 of the Water Resources Development Act of 1986;

WHEREAS, the provisions of Section 902 of the Water Resources Development Act of 1986, as amended, do not apply to DRAA 13 funds that will be used for design and construction of the Project;

WHEREAS, this Agreement covers design and initial construction of the Project only, and any periodic renourishment will be subject to additional authorization, applicable cost-sharing, and execution of a subsequent agreement between the Government and Non-Federal Sponsor for such work;

WHEREAS, 33 U.S.C. 701h authorizes the Government to undertake, at the Non-Federal Sponsor's full expense, additional work while the Government is carrying out the Project; and

WHEREAS, the Government and the Non-Federal Sponsor have the full authority and capability to perform in accordance with the terms of this Agreement.

NOW, THEREFORE, the parties agree as follows:

ARTICLE I - DEFINITIONS

A. The term "Project" means design and initial construction of the hurricane and storm damage reduction project for Hereford Inlet to Cape May Inlet, New Jersey which provides for a dune and berm extending approximately 4.5 miles from Herford Inlet to Cape May Inlet encompassing the towns of North Wildwood, Wildwood Crest and Lower Township with Project dimensions consisting of a +16-foot North American Vertical Datum 1988 (NAVD 1988) dune, with 25 foot dune crest on a 75 foot berm that is 6.5-foot NAVD 1988 in elevation within North Wildwood, Wildwood, Wildwood Crest and Lower Township, with dune side slopes of 1V:5H and berm side slopes of 1V:30H; and approximately 64 acres of dune grass, 28,000 linear feet of sand fence, 44 extended crossovers, 7 new pedestrian crossovers, 7 extended handicap crossovers, 6 new handicap crossovers, 8 existing vehicle crossover extensions, and 5 new vehicle crossovers, as generally described in the report of the Chief of Engineers for New Jersey Shore Protection, Hereford Inlet and Cape May Inlet, Cape May County, New Jersey dated January 23, 2015, and determined by the Assistant Secretary of the Army (Civil Works) on February 1, 2016 to be technically feasible, economically justified, and environmentally acceptable (hereinafter the "Decision Document").

B. The term "construction costs" means all costs incurred by the Government and Non-Federal Sponsor in accordance with the terms of this Agreement that are directly related to design and construction of the Project and are cost shared. The term includes, but is not necessarily limited to: the Government's preconstruction engineering and design costs; the Government's engineering and design costs during construction; the Non-Federal Sponsor's creditable costs and the Government's costs of investigations to identify the existence and extent of hazardous substances; the costs of historic preservation activities except for data recovery for archaeological remains; the Government's supervision and administration costs; the Government's costs of monitoring; the Government's costs of participation in the Project Coordination Team; the Non-Federal Sponsor's creditable costs for providing real property interests and performing relocations; and the Government's costs of audit. The term does not include

any costs for periodic renourishment; any costs for operation, maintenance, repair, rehabilitation, or replacement; any costs of dispute resolution; any costs for betterments; any costs for additional work; or the Non-Federal Sponsor's cost of negotiating this Agreement.

C. The term "real property interests" means lands, easements, and rights-of-way, including those required for relocations and borrow and dredged material disposal areas. Acquisition of real property interests may require the performance of relocations.

D. The term "relocation" means the provision of a functionally equivalent facility to the owner of a utility, cemetery, highway, railroad, or public facility when such action is required in accordance with applicable legal principles of just compensation. Providing a functionally equivalent facility may include the alteration, lowering, raising, or replacement and attendant demolition of the affected facility or part thereof.

E. The term "functional portion thereof" means a portion of the Project that has been completed and that can function independently, as determined in writing by the "District Engineer", although the remainder of the Project is not yet complete.

F. The term "betterment" means a difference in the construction of an element of the Project that results from the application of standards that the Government determines exceed those that the Government would otherwise apply to the construction of that element.

G. The term "additional work" means items of work related to, but not included in, the Project that the Government will undertake on the Non-Federal Sponsor's behalf while the Government is carrying out the Project, with the Non-Federal Sponsor responsible for all costs and any liabilities associated with such work.

H. The term "payment period" means a period of 30 years beginning upon the date specified in the written notice provided by the District Engineer pursuant to Article VII.B.1.

I. The term "principal amount" means that portion of the non-Federal cash contribution of the construction costs for which payment is deferred pursuant to Article VII.B., plus interest during design and construction determined in accordance with Article VII.B.3.b.

ARTICLE II - OBLIGATIONS OF THE PARTIES

A. In accordance with Federal laws, regulations, and policies, the Government shall undertake design and construction of the Project using DRAA 13 funds. In the event that there are insufficient DRAA 13 funds to complete design and construction of the Project, such completion shall be subject to Congress providing additional Project authorization and appropriations as well as the Non-Federal Sponsor providing funds required to cover its share of the remaining work.

1. The Non-Federal Sponsor shall contribute 35 percent of the construction costs allocated by the Government to hurricane and storm damage reduction and 100 percent of construction costs allocated by the Government to beach improvements with exclusively private benefits. In accordance with the provisions of Article III and IV, the Non-Federal Sponsor shall provide the real property interests, relocations, and investigations for hazardous substances required for construction, operation, and maintenance of the Project. After considering the estimated amount of credit the Government expects to afford to the Non-Federal Sponsor for such real property interests, relocations, and investigations for hazardous substances, the Government shall determine the estimated cash contributions required for the Non-Federal Sponsor to meet its share of construction costs allocated to hurricane and storm damage reduction. To the extent there are sufficient DRAA 13 funds, the Government, in accordance with the provisions of Article VII.B., shall defer payment of the cash contributions that the Non-Federal Sponsor would have otherwise been required to provide during design and construction of the Project in order to meet its cost share. In addition, in accordance with Article VII.C., the Non-Federal Sponsor shall provide the full amount of the funds required to cover the construction costs allocated to beach improvements with exclusively private benefits.

2. When the District Engineer determines that the construction of the Project, or a functional portion thereof, is complete, the District Engineer shall so notify the Non-Federal Sponsor in writing and the Non-Federal Sponsor shall operate, maintain, repair, rehabilitate, and replace the Project or such functional portion thereof. The Government shall furnish the Non-Federal Sponsor with an Operation, Maintenance, Repair, Rehabilitation, and Replacement Manual (hereinafter the "OMRR&R Manual") and copies of all as-built drawings for the completed work.

B. To the extent practicable and in accordance with Federal laws, regulations, and policies, the Government shall afford the Non-Federal Sponsor the opportunity to review and comment on solicitations for contracts, including relevant plans and specifications, prior to the Government's issuance of such solicitations; proposed contract modifications, including change orders; and contract claims prior to resolution thereof. Ultimately, the contents of solicitations, award of contracts, execution of contract modifications, and resolution of contract claims shall be exclusively within the control of the Government.

C. The Government may include in its solicitation an optional bid item that the contractor shall take out and maintain Comprehensive General Liability Insurance which policy shall name the Non-Federal Sponsor and the participating municipality as additional insured and the policy may not be cancelled, terminated, or modified without 15 calendar days written advance notice to the Government and the Non-Federal Sponsor. The Non-Federal Sponsor shall be responsible for all additional costs associated with this bid item. Moreover, the Government's Contracting Officer may decline to include such insurance requirements in any individual contract for construction of the Project where the requirements may result in a restriction in full and open

competition, as defined by the Federal Acquisition Regulation, or other applicable procurement regulations. Nothing contained in this paragraph shall be construed to affect or limit in any way any rights or obligations of either party under any other provision of this Agreement, including the obligation of the Non-Federal Sponsor to hold and save the Government free from damages as described in Article X.

D. The Government, as it determines necessary, shall undertake the identification, survey, or evaluation of historic properties and other actions associated with historic preservation. All costs incurred by the Government for such work shall be included in construction costs and shared in accordance with the provisions of this Agreement except that in the unlikely event that there are costs associated with data recovery of archaeological remains, such costs shall be borne entirely by the Government; however, for costs allocable to beach improvements with exclusively private benefits, such costs are 100 percent a Non-Federal Sponsor responsibility.

E. At least annually and after storm events, the Non-Federal Sponsor, at no cost to the Government, shall perform surveillance of the Project to determine losses of material and provide results of such surveillance to the Government.

F. Not less than once each year, the Non-Federal Sponsor shall inform affected interests of the extent of risk reduction afforded by the Project.

G. The Non-Federal Sponsor shall participate in and comply with applicable Federal floodplain management and flood insurance programs.

H. In accordance with Section 402 of the Water Resources Development Act of 1986, as amended (33 U.S.C. 701b-12), the Non-Federal Sponsor shall prepare a floodplain management plan for the Project within one year after the effective date of this Agreement and shall implement such plan not later than one year after completion of construction of the Project. The plan shall be designed to reduce the impacts of future flood and coastal events in the project area, including but not limited to, addressing those measures to be undertaken by non-Federal interests to preserve the level of flood and storm damage risk reduction provided by such work. The Non-Federal Sponsor shall provide an information copy of the plan to the Government.

I. The Non-Federal Sponsor shall publicize floodplain information in the area concerned and shall provide this information to zoning and other regulatory agencies for their use in adopting regulations, or taking other actions, to prevent unwise future development and to ensure compatibility with the Project.

J. The Non-Federal Sponsor shall prevent obstructions or encroachments on the Project (including prescribing and enforcing regulations to prevent such obstructions or encroachments) that might reduce the level of protection the Project affords, hinder operation and maintenance of the Project, or interfere with the Project's proper function.

K. For those shores, other than Federal shores, protected pursuant to this Agreement using Federal funds, the Non-Federal Sponsor shall ensure the continued public use of such shores compatible with the authorized purpose of the Project.

L. The Non-Federal Sponsor shall provide and maintain necessary access roads, parking areas, and other associated public use facilities, open and available to all on equal terms, as described in the Decision Document.

M. The Non-Federal Sponsor shall not use Federal Program funds to meet any of its obligations under this Agreement unless the Federal agency providing the funds verifies in writing that the funds are authorized to be used for the Project. Federal program funds are those funds provided by a Federal agency plus any non-Federal contribution required as a matching share therefor.

N. Except as provided in Article V, the Non-Federal Sponsor shall not be entitled to any credit or reimbursement for costs it incurs in performing its responsibilities under this Agreement.

O. In carrying out its obligations under this Agreement, the Non-Federal Sponsor shall comply with all the requirements of applicable Federal laws and implementing regulations, including, but not limited to: Title VI of the Civil Rights Act of 1964 (P.L. 88-352), as amended (42 U.S.C. 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto; the Age Discrimination Act of 1975 (42 U.S.C. 6102); and the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and Army Regulation 600-7 issued pursuant thereto.

P. The Non-Federal Sponsor may request in writing that the Government perform betterments or additional work on behalf of the Non-Federal Sponsor. Each request shall be subject to review and approval by the Division Engineer for the North Atlantic Division. If the Government agrees to such request, the Non-Federal Sponsor, in accordance with Article VII.C., must provide funds sufficient to cover the costs of such work in advance of the Government performing the work.

ARTICLE III - REAL PROPERTY INTERESTS, RELOCATIONS, AND COMPLIANCE WITH PUBLIC LAW 91-646, AS AMENDED

A. The Government, after consultation with the Non-Federal Sponsor, shall determine the real property interests needed for construction, operation, and maintenance of the Project and, if applicable, any additional real property interests needed for betterments or additional work. The Government shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of the real property interests that the Government determines the Non-Federal Sponsor must provide for construction, operation, and maintenance of the Project, and shall provide the Non-Federal Sponsor with a written notice to proceed with acquisition. The Non-Federal Sponsor shall acquire the real property interests and shall provide the Government with

authorization for entry thereto in accordance with the Government's schedule for construction of the Project. The Non-Federal Sponsor shall ensure that real property interests provided for the Project are retained in public ownership for uses compatible with the authorized purposes of the Project.

B. The Government, after consultation with the Non-Federal Sponsor, shall determine the relocations necessary for construction, operation, and maintenance of the Project, and shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of such relocations and shall provide the Non-Federal Sponsor with a written notice to proceed with such relocations. The Non-Federal Sponsor shall perform or ensure the performance of these relocations in accordance with the Government's construction schedule for the Project.

C. To the maximum extent practicable, not later than 30 calendar days after the Government provides to the Non-Federal Sponsor written descriptions and maps of the real property interests and relocations required for construction, operation, and maintenance of the Project, the Non-Federal Sponsor may request in writing that the Government acquire all or specified portions of such real property interests that are owned by private interests, or perform the necessary relocations. If the Government agrees to such a request, the Non-Federal Sponsor, in accordance with Article VII.C., must provide funds sufficient to cover the costs of the acquisitions or relocations in advance of the Government performing the work. The Government shall acquire the real property interests and perform the relocations, applying Federal laws, policies, and procedures. The Government shall acquire real property interests in the name of the Non-Federal Sponsor except, if acquired by eminent domain, the Government shall convey all of its right, title and interest to the Non-Federal Sponsor by quitclaim deed or deeds. The Non-Federal Sponsor shall accept delivery of such deed or deeds. The Government's providing real property interests or performing relocations on behalf of the Non-Federal Sponsor does not alter the Non-Federal Sponsor's responsibility under Article IV for the costs of any clean up and response related thereto.

D. The Non-Federal Sponsor shall comply with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended (42 U.S.C. 4601-4655), and the Uniform Regulations contained in 49 C.F.R. Part 24, in acquiring real property interests for construction, operation, and maintenance of the Project and shall inform all affected persons of applicable benefits, policies, and procedures in connection with said Act. No person shall be displaced from their residence or business due to an exercise of the authority provided by N.J.S.A. App. §§ A:9-51.5-51.7 or N.J.S.A. § 12:3-64 until all relocation benefits and services required to be provided prior to displacement under said Act and Uniform Regulations have been provided.

ARTICLE IV - HAZARDOUS SUBSTANCES

A. The Non-Federal Sponsor shall be responsible for undertaking any investigations to identify the existence and extent of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA") (42 U.S.C. 9601-9675), that may exist in, on, or under real property interests required for construction, operation, and maintenance of the Project. However, for real property interests that the Government determines to be subject to the navigation servitude, only the Government shall perform such investigations unless the District Engineer provides the Non-Federal Sponsor with prior specific written direction, in which case the Non-Federal Sponsor shall perform such investigations in accordance with such written direction.

B. In the event it is discovered that hazardous substances regulated under CERCLA exist in, on, or under any of the required real property interests, the Non-Federal Sponsor and the Government, in addition to providing any other notice required by applicable law, shall provide prompt written notice to each other, and the Non-Federal Sponsor shall not proceed with the acquisition of such real property interests until the parties agree that the Non-Federal Sponsor should proceed.

C. If hazardous substances regulated under CERCLA are found to exist in, on, or under any required real property interests, the parties shall consider any liability that might arise under CERCLA and determine whether to initiate construction, or if already initiated whether to continue construction, suspend construction, or terminate construction.

1. Should the parties initiate or continue construction, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for the costs of cleanup and response, including the costs of any studies and investigations necessary to determine an appropriate response to the contamination. Such costs shall be paid solely by the Non-Federal Sponsor without reimbursement or credit by the Government.

2. In the event the parties cannot reach agreement on how to proceed or the Non-Federal Sponsor fails to provide any funds necessary to pay for cleanup and response costs or to otherwise discharge the Non-Federal Sponsor's responsibilities under this Article upon direction by the Government, the Government may suspend or terminate construction but may undertake any actions it determines necessary to avoid a release of such hazardous substances.

D. The Non-Federal Sponsor and the Government shall consult with each other in an effort to ensure that responsible parties bear any necessary cleanup and response costs as defined in CERCLA. Any decision made pursuant to this Article shall not relieve any third party from any liability that may arise under CERCLA.

E. As between the Government and the Non-Federal Sponsor, the Non-Federal Sponsor shall be considered the operator of the Project for purposes of CERCLA liability. To the maximum extent practicable, the Non-Federal Sponsor shall operate, maintain, repair, rehabilitate, and replace the Project in a manner that will not cause liability to arise under CERCLA.

ARTICLE V - CREDIT FOR REAL PROPERTY INTERESTS, RELOCATIONS, AND INVESTIGATIONS FOR HAZARDOUS SUBSTANCES

A. The Government shall include in construction costs, and credit towards the Non-Federal Sponsor's share of such costs, costs incurred after January 29, 2013 to acquire real property interests from private owners determined by the Government to be required for construction, operation, and maintenance of the Project; to perform relocations for construction, operation, and maintenance of the Project; and to perform any investigation for hazardous substances for construction, operation, and maintenance of the Project.

B. To the maximum extent practicable, no later than 6 months after it provides the Government with authorization for entry a real property interest or pays compensation to the private owner, whichever occurs later, the Non-Federal Sponsor shall provide the Government with documents sufficient to determine the amount of credit to be provided for the real property interest in accordance with paragraphs C.1.a. through C.1.c. of this Article. For incidental costs associated with the acquisition of real property interests, for costs associated with relocations performed by the Non-Federal Sponsor, and for costs associated with investigations for hazardous substances, the Non-Federal Sponsor shall provide the Government with documentation sufficient for the Government to determine the amount of credit to be provided in accordance with paragraphs C.1.d., C.2., and C.3. of this Article no less frequently than on a biannual basis, to the maximum extent practicable. The Government shall provide the Non-Federal Sponsor with a list of the documents and any specific requirements necessary for credit.

C. The Government and the Non-Federal Sponsor agree that the amount of costs eligible for credit that are allocated by the Government to construction costs shall be determined and credited in accordance with the following procedures, requirements, and conditions, as well as additional guidelines to be developed and mutually agreed upon by the Government and the Non-Federal Sponsor. Such costs shall be subject to audit in accordance with Article XII.C. to determine reasonableness, allocability, and allowability of costs.

1. Real Property Interests.

a. General Procedure. The Non-Federal Sponsor shall obtain, for each real property interest acquired from a private owner after January 29, 2013, an appraisal of the fair market value of such interest on the date of acquisition that is prepared by a qualified appraiser who is acceptable to the parties. To the maximum

extent practicable, the appraisal shall meet the data documentation and reporting standards described in the Uniform Appraisal Standards for Federal Land Acquisitions (2000). The appraisal must be prepared in accordance with the applicable rules of just compensation, as specified by the Government. In the case of interests in lands subject to shore erosion, appraisals will determine fair market value considering non-speculative, reasonably calculable benefits that increase the property's value, regardless of whether those benefits are enjoyed to a lesser or greater degree by others in the community.

(1) Except for real property interests acquired through eminent domain proceedings instituted after the effective date of this Agreement, the Non-Federal Sponsor shall submit an appraisal for each real property interest to the Government for review and approval no later than, to the maximum extent practicable, 60 calendar days after the Non-Federal Sponsor provides the Government with an authorization for entry for such interest or concludes the acquisition of the interest through negotiation or eminent domain proceedings, whichever occurs later. If after coordination and consultation with the Government, the Non-Federal Sponsor is unable to provide an appraisal that is acceptable to the Government, the Government shall obtain an appraisal to determine the fair market value of the real property interest for crediting purposes.

(2) The Government shall credit the Non-Federal Sponsor the amount actually paid to the private owner of such real property interests but not to exceed the appraised amount approved by the Government. Except for interests in lands subject to shore erosion, where the amount paid by the Non-Federal Sponsor exceeds the approved appraised amount, the Government, at the request of the Non-Federal Sponsor, shall consider all factors relevant to determining fair market value and, in its sole discretion, after consultation with the Non-Federal Sponsor, may approve in writing an amount greater than the appraised amount for crediting purposes.

b. Eminent Domain Procedure. For real property interests acquired by eminent domain proceedings instituted after the effective date of this Agreement, the Non-Federal Sponsor shall notify the Government in writing of its intent to institute such proceedings and submit the appraisals of the specific real property interests to be acquired for review and approval by the Government.

(1) If the Government provides written approval of the appraisals, the Non-Federal Sponsor shall use the amount set forth in such appraisals as the estimate of just compensation for the purpose of instituting the eminent domain proceeding. Except as provided in paragraph C.1.b.(3) below, fair market value for crediting purposes shall be either the amount of the court award for the real property interests taken or the amount of any stipulated settlement or portion thereof that the Government approves in writing.

(2) If the Government provides written disapproval of the appraisals, the Government and the Non-Federal Sponsor shall consult to promptly resolve the issues that are identified in the Government's written disapproval. In the

event the issues cannot be resolved, the Non-Federal Sponsor may use the amount set forth in its appraisal as the estimate of just compensation for purpose of instituting the eminent domain proceeding. However, fair market value for crediting purposes shall be the amount of the court award for the real property interests taken (or the amount of any stipulated settlement, if applicable), or the amount determined by an appraisal prepared by the Government, whichever is less.

(3) For interests in lands subject to shore erosion acquired by eminent domain proceedings, fair market value for crediting purposes shall be the lesser of the amount of the court award for the real property interests taken (or the amount of any stipulated settlement, if applicable), or the approved appraisal amount, whichever is less.

c. Waiver of Appraisal. Except as required by paragraph C.1.b. of this Article, the Government may waive the requirement for an appraisal pursuant to this paragraph if, in accordance with 49 C.F.R. Section 24.102(2):

(1) the private owner is donating the property to the Non-Federal Sponsor and releases the Non-Federal Sponsor in writing from its obligation to appraise the property, and the Non-Federal Sponsor submits to the Government a copy of the private owner's written release; or

(2) the Non-Federal Sponsor determines that an appraisal is unnecessary because the valuation problem is uncomplicated and the anticipated value of the property proposed for acquisition is estimated at \$10,000 or less, based on a review of available data. When the Non-Federal Sponsor determines that an appraisal is unnecessary, the Non-Federal Sponsor shall prepare the written waiver valuation required by Section 24.102(2) and submit a copy thereof to the Government for approval.

d. Incidental Costs. The Government shall include in construction costs and credit towards the Non-Federal Sponsor's share of such costs, the incidental costs, documented to the satisfaction of the Government, that the Non-Federal Sponsor incurred after January 29, 2013 in acquiring from private owners any real property interests required pursuant to Article III for construction, operation, and maintenance of the Project. Such incidental costs shall include closing and title costs, appraisal costs, survey costs, attorney's fees, plat maps, mapping costs, actual amounts expended for payment of any relocation assistance benefits provided in accordance with Article III.C., and other payments by the Non-Federal Sponsor for items that are generally recognized as compensable, and required to be paid, by applicable state law due to the acquisition of a real property interest pursuant to Article III.

2. Relocations. The Government shall include in construction costs and credit towards the Non-Federal Sponsor's share of such costs, the costs, documented to the satisfaction of the Government, that the Non-Federal Sponsor incurred after January 29, 2013 in the performance of any relocations directly related to construction, operation, and maintenance of the Project.

a. For a relocation other than a highway, the costs shall be only that portion of relocation costs that the Government determines is necessary to provide a functionally equivalent facility, reduced by depreciation, as applicable, and by the salvage value of any removed items.

b. For a relocation of a highway, which is any highway, roadway, street, or way, including any bridge thereof, that is owned by a public entity, the costs shall be only that portion of relocation costs that would be necessary to accomplish the relocation in accordance with the design standard that the State of New Jersey would apply under similar conditions of geography and traffic load, reduced by the salvage value of any removed items.

c. Relocation costs include actual costs of performing the relocation; planning, engineering and design costs; supervision and administration costs; and documented incidental costs associated with performance of the relocation, as determined by the Government. Relocation costs do not include any costs due to betterments, as determined by the Government, nor any additional cost of using new material when suitable used material is available.

d. Any credit afforded under the terms of this Agreement for the costs of relocations for construction, operation, and maintenance of the Project is subject to satisfactory compliance with applicable Federal labor laws covering non-Federal construction, including, but not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (labor standards originally enacted as the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, and the Copeland Anti-Kickback Act). Notwithstanding any other provision of this Agreement, credit may be withheld, in whole or in part, as a result of the Non-Federal Sponsor's failure to comply with its obligations under these laws.

3. Investigations in accordance with Article IV. The Government shall include in construction costs and credit towards the Non-Federal Sponsor's share of such costs, the costs, documented to the satisfaction of the Government, that the Non-Federal Sponsor incurred after January 29, 2013 in the performance of any investigations for hazardous substances that may exist in, on, or under real property interests directly related to construction, operation, and maintenance of the Project:

D. Notwithstanding any other provision of this Agreement, the Non-Federal Sponsor shall not be entitled to credit for costs incurred by the Non-Federal Sponsor:

1. for real property interests that were previously provided as an item of local cooperation for another Federal project;

2. to provide real property interests (other than those acquired through relocations) that are owned or controlled by other public entities;

3. to provide any additional real property interests, relocations, or investigations in accordance with Article IV.A. that the Government determines are needed for betterments or additional work; or

4. to defend against claims or litigation relating to an exercise of the authority provided by N.J.S.A. App. §§ A:9-51.5-51.7 or N.J.S.A. § 12:3-64, except for costs solely related to the amount of compensation due to private owners for real property interests taken for the Project.

ARTICLE VI - PROJECT COORDINATION TEAM

To provide for consistent and effective communication, the parties shall establish a Project Coordination Team to discuss the progress of design and construction and significant issues or actions. The Project Coordination Team shall include the Government's Project Manager and the Non-Federal Sponsor's counterpart and one senior representative each from the Government and Non-Federal Sponsor. The Non-Federal Sponsor's costs for participation on the Project Coordination Team shall be paid solely by the Non-Federal Sponsor without reimbursement or credit by the Government.

ARTICLE VII - METHOD OF PAYMENT

A. As of the effective date of this Agreement, the construction costs are projected to be \$21,605,000, with the Government's share of such costs projected to be \$14,043,000, the Non-Federal Sponsor's share of such costs projected to be \$7,562,000, and the Non-Federal Sponsor's deferred payment of funds, excluding interest during design and construction, is projected to be \$6,288,000; the costs for betterments are projected to be \$0; and the costs for additional work are projected to be \$0. These amounts are estimates only that are subject to adjustment by the Government and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.

B. Deferred Payment of Cash Contributions for Design and Construction of the Project.

1. Upon determination by the District Engineer that (1) construction of the Project is complete; or (2) construction of the Project is terminated pursuant to Article VIII, the District Engineer shall immediately issue a written notification to the Non-Federal Sponsor specifying which of the above events occurred and the day, month, and year of such occurrence.

2. Immediately after the date of the District Engineer's written notice pursuant to paragraph B.1. of this Article, the Government shall conduct a final accounting of the construction costs. If outstanding relevant claims and appeals or eminent domain proceedings prevent a final accounting of the construction costs from

being conducted in a timely manner, the Government shall conduct an interim accounting and furnish the Non-Federal Sponsor with written notice of the results of such interim accounting. Once all outstanding relevant claims and appeals and eminent domain proceedings are resolved, the Government shall complete the final accounting and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. The interim or final accounting, as applicable, shall determine the construction costs. In addition, for each set of costs, the interim or final accounting, as applicable, shall determine each party's required share thereof, and each party's total contributions thereto as of the date of such accounting. Such final accounting does not limit the Non-Federal Sponsor's responsibility to pay its share of construction costs, including contract claims or any other liability that may become known after the final accounting.

3. The Government shall maintain records of Federal obligations each month during design and construction of the Project, and shall determine for each month a monthly amount equal to the non-Federal share of Federal obligations. Each monthly amount shall be assumed to have taken place at the mid-point of that month. Any non-Federal cash contributions required for preconstruction engineering and design conducted prior to the effective date of this Agreement to meet the non-Federal cost share of construction costs shall be included in the first monthly amount.

a. In the event the Non-Federal Sponsor elects to make a payment during design and construction of the Project or the Government determines at any time that it does not have sufficient funds to allow the Non-Federal Sponsor to defer its cash contributions pursuant to the provisions of paragraph B. of this Article, the Non-Federal Sponsor shall provide such cash payment during design and construction of the Project, as determined by the Government, by delivering a check payable to "FAO, USAED, Philadelphia (E5)" to the District Engineer, or by providing an Electronic Funds Transfer of such required cash contributions in accordance with procedures established by the Government. Interest shall be charged on the amount of each Federal obligation made in lieu of the non-Federal cash contribution for the period between the month of the applicable Federal obligation and the month of the payment by the Non-Federal Sponsor. In computing the interest charges applied to the amount of each Federal obligation, the Government shall use an interest rate determined by the Secretary of the Treasury, taking into consideration the average market yields on outstanding marketable obligations of the United States with remaining periods of maturity equal to the length of time in months between the month of that Federal obligation and the month of that payment by the Non-Federal Sponsor, plus a premium of one-eighth of one percentage point for transaction costs.

b. During the design and construction of the Project, the Government shall charge interest on each monthly amount that is not paid in accordance with paragraph B.3.a. of this Article. The interest rate shall be determined in accordance with paragraph B.5. of this Article. Interest shall be compounded annually on each anniversary of that monthly amount until the date of the District Engineer's written notice pursuant to paragraph B.1. of this Article. In the event that such notice is less than twelve months after the month of that monthly amount, or the month of the last such

anniversary, if any, additional interest shall be charged for that number of months, and the additional interest shall be equal to the sum of the monthly amount plus compound interest as of any such previous anniversary, multiplied by the interest rate, multiplied by that number of months, divided by twelve.

c. During design and construction of the Project, the Government shall provide in writing to the Non-Federal Sponsor on a quarterly basis an accounting of all such monthly amounts incurred to date and the estimated interest applied to each monthly amount through that quarter.

4. Not later than 30 calendar days after the date of the District Engineer's written notice pursuant to paragraph B.1. of this Article, the Government shall: (1) complete the final or interim accounting, as applicable, in accordance with paragraph B.2. of this Article; (2) calculate all monthly amounts, the compound interest applied during design and construction of the Project to all monthly amounts, the principal amount, and the annual installments for payment of the principal amount, which shall be substantially equal; and (3) provide the Non-Federal Sponsor with written notification of the results of such accounting and such calculations. To calculate the annual installments, the Government shall amortize the principal amount over the payment period, beginning on the date of date of the District Engineer's written notice pursuant to paragraph B.1. of this Article using the interest rate determined in accordance with paragraph B.5. of this Article. If the determination of the principal amount and annual installments was based on an interim accounting, not later than 30 calendar days after completion of the final accounting, the Government shall: (1) recalculate all monthly amounts, the compound interest applied during design and construction of the Project to all monthly amounts, the principal amount, and the annual installments for payment of the principal amount, which shall be substantially equal; and (2) provide the Non-Federal Sponsor with written notification of the results of such final accounting and such recalculations. Any difference between the principal amount and the recalculated principal amount shall be amortized over the remaining portion of the payment period as of the date of such notification, using the interest rate determined in accordance with paragraph B.5. of this Article.

5. In accordance with Section 106 of WRDA 1986, the interest rate to be used in computing the interest during design and construction of the Project under paragraph B.3.b. of this Article and in calculating or recalculating the annual installments in accordance with paragraph B.4. of this Article shall be determined by the Secretary of the Treasury, taking into consideration the average market yields on outstanding marketable obligations of the United States with remaining periods of maturity comparable to the payment period during the month preceding the Government fiscal year in which the first Federal construction contract for the Project is awarded, plus a premium of one-eighth of one percentage point for transaction costs.

6. Until the end of the payment period, the Government, not later than 30 calendar days prior to each five year anniversary of the date of the District Engineer's written notice pursuant to paragraph B.1. of this Article, shall complete a recalculation of

the annual installments by amortizing the remaining balance of the principal amount over the remaining portion of the payment period and shall provide the Non-Federal Sponsor with such recalculated annual installments. The interest rate to be used in such recalculations shall be determined by the Secretary of the Treasury, taking into consideration the average market yields on outstanding marketable obligations of the United States with remaining periods of maturity comparable to the payment period during the month that represents each five year anniversary of the month preceding the Government fiscal year in which the first Federal construction contract is awarded, plus a premium of one-eighth of one percentage point for transaction costs.

7. The Non-Federal Sponsor shall pay the first annual installment, as determined in accordance with paragraph B.4. of this Article, within 30 calendar days after the date the Government provides written notification to the Non-Federal Sponsor in accordance with paragraph B.4. of this Article, by delivering a check payable to "FAO, USAED, Philadelphia (E5)" to the District Engineer or providing an Electronic Funds Transfer in accordance with procedures established by the Government. Thereafter, until the end of the payment period, the Non-Federal Sponsor shall pay an annual installment, as determined in accordance with paragraph B.4. or paragraph B.6. of this Article, as applicable, on each anniversary of the date of date of the District Engineer's written notice pursuant to paragraph B.1. of this Article, by delivering a check payable to "FAO, USAED, Philadelphia (E5)" to the District Engineer or providing an Electronic Funds Transfer in accordance with procedures established by the Government.

8. Notwithstanding paragraph B.7. of this Article, the Non-Federal Sponsor, in its sole discretion, may prepay the principal amount, in whole or in part, at any time without penalty. In addition, there shall be no additional interest charges on any portion of the principal amount that is prepaid within 30 calendar days after the Government provides written notification to the Non-Federal Sponsor in accordance with paragraph B.4. of this Article. In the event of such prepayment, the Government, not later than 30 calendar days after receipt of the prepayment, shall recalculate the annual installments by amortizing the outstanding portion of the principal amount over the remaining portion of the payment period as of the date of such recalculation, using the interest rate used most recently under paragraph B.4. or paragraph B.6. of this Article, and shall provide written notification to the Non-Federal Sponsor of the recalculated annual installments. The Non-Federal Sponsor shall pay the recalculated annual installments, if any, in accordance with paragraph B.7. of this Article.

9. Not later than 30 calendar days after the payment period has elapsed, the Government shall: (1) conduct an accounting and determine the total payments that the Non-Federal Sponsor has made in accordance with this Agreement; and (2) provide the Non-Federal Sponsor with written notification of the results of such accounting. In the event the non-interest component of total payments is less than the principal amount, the Non-Federal Sponsor, not later than 30 calendar days after receipt of the written notification from the Government, shall provide to the Government the amount of the shortage, by delivering a check payable to "FAO, USAED, Philadelphia (E5)" to the District Engineer or providing an Electronic Funds Transfer in accordance with

procedures established by the Government. In the event the non-interest component of the total payments exceeds the principal amount, the Government shall seek such appropriations as are necessary to refund the amount of the excess to the Non-Federal Sponsor.

10. Any delinquent payment owed by the Non-Federal Sponsor shall be charged interest at a rate, to be determined by the Secretary of the Treasury, equal to 150 per centum of the average bond equivalent rate of the 13 week Treasury bills auctioned immediately prior to the date on which such payment became delinquent, or auctioned immediately prior to the beginning of each additional 3 month period if the period of delinquency exceeds 3 months.

11. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the Congress. Further, nothing in this Agreement shall commit the Government to obligate funds beyond the amount of available appropriations.

C. Payment of Costs for Beach Improvements with Exclusively Private Benefits; and Costs for Real Property Interests, Relocations, Betterments, and Additional Work Provided on Behalf of the Non-Federal Sponsor.

1. No later than 30 calendar days of receiving written notice of the amount of funds required to cover any such costs, as applicable, the Non-Federal Sponsor shall make the full amount of such required funds available to the Government by delivering a check payable to "FAO, USAED, Philadelphia (E5)" to the District Engineer, or by providing an Electronic Funds Transfer of such funds in accordance with procedures established by the Government. If at any time the Government determines that additional funds are required to cover any such costs, as applicable, the Non-Federal Sponsor shall provide those funds within 30 calendar days from receipt of written notice from the Government.

ARTICLE VIII - TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, the Government may suspend or terminate design and construction of the Project unless the Assistant Secretary of the Army (Civil Works) determines that continuation of such work is in the interest of the United States or is necessary in order to satisfy agreements with other non-Federal interests.

B. If the Government determines at any time that the DRAA 13 funds made available for design and construction of the Project are not sufficient to complete such work, the Government shall so notify the Non-Federal Sponsor in writing, and upon exhaustion of such funds, the Government shall suspend design and construction until there are sufficient funds appropriated by the Congress and cash contributions provided by the Non-Federal Sponsor to allow design and construction to resume.

C. If hazardous substances regulated under CERCLA are found to exist in, on, or under any required real property interests, the parties shall follow the procedures set forth in Article IV.

D. In the event of termination, the parties shall conclude their activities relating to design and construction of the Project, as applicable. To provide for this eventuality, the Government may reserve a percentage of available funds as a contingency to pay the costs of termination, including any costs of resolution of real property acquisition, resolution of contract claims, and resolution of contract modifications.

E. Any suspension or termination shall not relieve the parties of liability for any obligation previously incurred. Any delinquent payment owed by the Non-Federal Sponsor pursuant to this Agreement shall be charged interest at a rate, to be determined by the Secretary of the Treasury, equal to 150 per centum of the average bond equivalent rate of the 13 week Treasury bills auctioned immediately prior to the date on which such payment became delinquent, or auctioned immediately prior to the beginning of each additional 3 month period if the period of delinquency exceeds 3 months.

ARTICLE IX - OPERATION, MAINTENANCE, REPAIR, REHABILITATION, AND REPLACEMENT

A. The Non-Federal Sponsor, at no cost to the Government, shall operate, maintain, repair, rehabilitate, and replace the Project. The Non-Federal Sponsor shall conduct its operation, maintenance, repair, rehabilitation, and replacement responsibilities in a manner compatible with the authorized purpose of the Project and in accordance with applicable Federal and State laws and specific directions prescribed by the Government in the OMR&R Manual and any subsequent amendments thereto. Nothing in this paragraph is intended to affect eligibility under Public Law 84-99 (33 U.S.C. 701n).

B. The Government may enter, at reasonable times and in a reasonable manner, upon real property interests that the Non-Federal Sponsor now or hereafter owns or controls to inspect the Project, and, if necessary, to undertake any work necessary to the functioning of the Project for its authorized purpose. If the Government determines that the Non-Federal Sponsor is failing to perform its obligations under this Agreement and the Non-Federal Sponsor does not correct such failures within a reasonable time after notification by the Government, the Government may undertake any operation, maintenance, repair, rehabilitation, or replacement of the Project. No operation, maintenance, repair, rehabilitation, or replacement by the Government shall relieve the Non-Federal Sponsor of its obligations under this Agreement or preclude the Government from pursuing any other remedy at law or equity to ensure faithful performance of this Agreement.

ARTICLE X - HOLD AND SAVE

The Non-Federal Sponsor shall hold and save the Government free from all damages arising from design, construction, operation, maintenance, repair, rehabilitation, and replacement of the Project, except for damages due to the fault or negligence of the Government or its contractors.

ARTICLE XI - DISPUTE RESOLUTION

As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other parties in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to the parties. Each party shall pay an equal share of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

ARTICLE XII - MAINTENANCE OF RECORDS AND AUDIT

A. The parties shall develop procedures for maintaining books, records, documents, or other evidence pertaining to Project costs and expenses in accordance with 33 C.F.R. 33.20 for a minimum of three years after the final accounting. To the extent permitted under applicable Federal laws and regulations, the parties shall each allow the other to inspect such books, records, documents, or other evidence.

B. The Non-Federal Sponsor is responsible for complying with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507). To the extent permitted under applicable Federal laws and regulations, the Government shall provide to the Non-Federal Sponsor and independent auditors any information necessary to enable an audit of the Non-Federal Sponsor's activities under this Agreement. The costs of non-Federal audits shall be paid solely by the Non-Federal Sponsor without reimbursement or credit by the Government.

C. Pursuant to 31 U.S.C. 7503, the Government may conduct audits in addition to any audit that the Non-Federal Sponsor is required to conduct under the Single Audit Act Amendments of 1996. The Government's costs of audits for design and construction of the Project shall be included in construction costs.

ARTICLE XIII - RELATIONSHIP OF PARTIES

In the exercise of their respective rights and obligations under this Agreement, the Government and the Non-Federal Sponsor each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other. Neither party

shall provide, without the consent of the other party, any contractor with a release that waives or purports to waive any rights a party may have to seek relief or redress against that contractor.

ARTICLE XIV - NOTICES

A. Any notice, request, demand, or other communication required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and delivered personally or mailed by certified mail, with return receipt, as follows:

If to the Non-Federal Sponsor:

Commissioner
New Jersey Department of Environmental Protection
401 E. State St.
7th Floor, East Wing
P.O. Box 402
Trenton, New Jersey 08625-0402

If to the Government:

District Engineer
U.S. Army Engineer District, Philadelphia
Wanamaker Building
100 Penn Square East
Philadelphia, PA 19107-3390

B. A party may change the recipient or address for such communications by giving written notice to the other party in the manner provided in this Article.

ARTICLE XV - CONFIDENTIALITY

To the extent permitted by the laws governing each party, the parties agree to maintain the confidentiality of exchanged information when requested to do so by the providing party.

ARTICLE XVI - THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES

Nothing in this Agreement is intended, nor may be construed, to create any rights, confer any benefits, or relieve any liability, of any kind whatsoever in any third person not a party to this Agreement.


ARTICLE XVII - OBLIGATIONS OF FUTURE APPROPRIATIONS

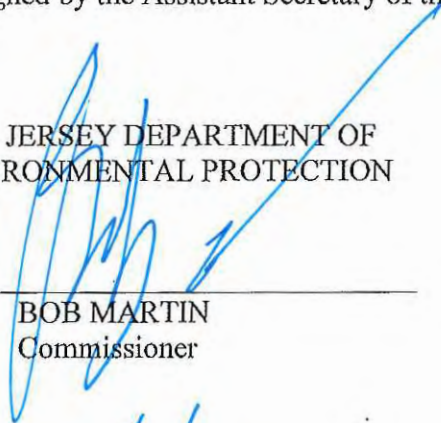
The Non-Federal Sponsor intends to fulfill fully its obligations under this Agreement. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the legislature of the State of New Jersey, where creating such an obligation would be inconsistent with New Jersey Constitution Article 8, Section 2, Paragraphs 2 and 3, N.J.S.A. 59:13-1 et seq., and N.J.S.A. 59:1-1 et seq. of the State of New Jersey.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the Assistant Secretary of the Army (Civil Works).

DEPARTMENT OF THE ARMY

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: 
MICHAEL A. BLISS
Lieutenant Colonel, U.S. Army
District Engineer

BY: 
BOB MARTIN
Commissioner

DATE: 17 JAN 17

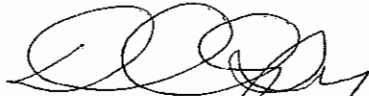
DATE: 1/11/2017

CERTIFICATE OF AUTHORITY

I, David C. Apy, do hereby certify that I am the principal legal officer of the New Jersey Department of Environmental Protection, that the New Jersey Department of Environmental Protection is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the New Jersey Department of Environmental Protection in connection with the Hereford Inlet to Cape May Inlet, New Jersey Hurricane and Storm Damage Reduction Project, and to pay damages, if necessary, in the event of the failure to perform in accordance with the terms of this Agreement, as required by Section 221 of Flood Control Act of 1970, Public Law 91-611, as amended (42 U.S.C. Section 1962d-5b), and that the persons who have executed this Agreement on behalf of the New Jersey Department of Environmental Protection have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this

10TH day of JANUARY 2017.



DAVID C. APY
Assistant Attorney General

CERTIFICATION REGARDING LOBBYING

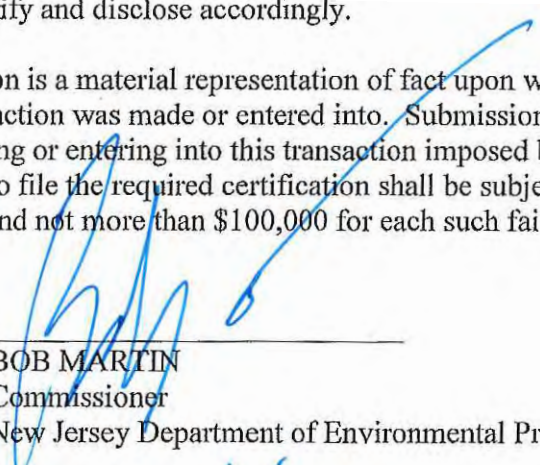
The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.



BOB MARTIN
Commissioner
New Jersey Department of Environmental Protection

DATE: 1/4/2017

AMENDMENT NO. 1 TO THE
PROJECT PARTNERSHIP AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
FOR
THE HEREFORD INLET TO CAPE MAY INLET, NEW JERSEY
HURRICANE AND STORM DAMAGE REDUCTION PROJECT

THIS AMENDMENT is entered into this 16 day of JAN, 2018, by and between the Department of the Army (hereinafter the "Government"), represented by the U.S. Army Engineer, Philadelphia District (hereinafter the "District Engineer"), and the New Jersey Department of Environmental Protection (hereinafter the "Non-Federal Sponsor"), represented by the Commissioner.

WITNESSETH, THAT:

WHEREAS, on January 17, 2017 the Government and the Non-Federal Sponsor entered into an agreement (hereinafter the "Agreement") for the construction of the Hereford Inlet to Cape May Inlet, New Jersey, Hurricane and Storm Damage Reduction Project (hereinafter the "Project");

WHEREAS, the Agreement contains certain requirements for the eligibility of specific reimbursable or creditable Lands, Easements, Rights-of-Way, Relocations and Disposal Area (LERRD) acquisition costs;

WHEREAS, the Government and the Non-Federal Sponsor desire to modify the Agreement to allow for the reimbursement or crediting of amounts over the approved fair market appraisal value for lands subject to shore erosion, if pre-approved in writing by the Government;

WHEREAS, the Government and the Non-Federal Sponsor desire to modify the Agreement to allow fair market value for crediting and reimbursement purposes to include the amount of a court award for the real property interests taken, where the Non-Federal Sponsor has initiated such eminent domain proceedings with an appraisal approved by the Government in writing.

NOW THEREFORE, the parties agree to amend the Agreement by:

1. Deleting ARTICLE V.C.1.a(2) in its entirety, and replacing it with the following:

“(2) The Government shall credit the Non-Federal Sponsor the amount actually paid to the private owner of such real property interests but not to exceed the appraised amount approved by the Government. Where the amount paid by the Non-Federal Sponsor exceeds the approved appraised amount, the Government, at the request of the Non-Federal Sponsor, shall consider all factors relevant to determining fair market value and, in its sole discretion, after consultation with the Non-Federal Sponsor, may approve in writing an amount greater than the appraised amount for crediting purposes.”

2. Deleting ARTICLE V.C.1.b(3) in its entirety, and replacing it with the following:


“(3) For interests in lands subject to shore erosion acquired by eminent domain proceedings, the Government will credit the amount of the court award or stipulated settlement only to the extent that the court award or stipulated settlement considered non-speculative, reasonably calculable benefits that increase the property’s value, regardless of whether those benefits are enjoyed to a lesser or greater degree by others in the community. If the court award or stipulated settlement did not consider such benefits, fair market value for crediting shall be limited to the amount determined by an approved appraisal considering such benefits.”

2. All other terms and conditions of the Agreement remain unchanged.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment as of the day and year first written above, which shall become effective upon the date it is signed by the District Engineer.

DEPARTMENT OF THE ARMY

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: 
KRISTEN N. DAHLE
Lieutenant Colonel, U.S. Army
District Engineer

BY: 
BOB MARTIN
Commissioner

DATE: 16 JAN 2018

DATE: 1/10/2018

CERTIFICATE OF AUTHORITY

I, David Apy, do hereby certify that I am the principal legal officer of the New Jersey Department of Environmental Protection, that the New Jersey Department of Environmental Protection is a legally constituted public body with full authority and legal capability to perform the terms of this Amendment to the Agreement between the Department of the Army and the New Jersey Department of Environmental Protection in connection with the Hereford Inlet to Cape May Inlet, New Jersey, Hurricane and Storm Damage Reduction Project, and to pay damages, if necessary, in the event of the failure to perform in accordance with the terms of this Agreement, as required by Section 221 of Flood Control Act of 1970, Public Law 91-611, as amended (42 U.S.C. Section 1962d-5b), and that the persons who have executed the Amendment to the Agreement on behalf of the New Jersey Department of Environmental Protection have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this
9TH day of JANUARY 2018.



David C. Apy
Assistant Attorney General

APPENDIX B
CHIEF'S REPORT



DEPARTMENT OF THE ARMY
CHIEF OF ENGINEERS
2600 ARMY PENTAGON
WASHINGTON, DC 20310-2600

DAEN (1105-2-10a)

JAN 23 2015

SUBJECT: New Jersey Shore Protection, Hereford Inlet to Cape May Inlet, New Jersey

THE SECRETARY OF THE ARMY

1. I submit for transmission to Congress my report on the study of hurricane and storm damage reduction for coastal communities located between Hereford Inlet and Cape May Inlet, Cape May County, New Jersey. It is accompanied by the report of the district and division engineers. This report is an interim response to a resolution by the Committee on Transportation and Infrastructure of the United States House of Representatives, adopted December 1987 and by the Committee on Environment and Public Works of the United States Senate dated December 1987 and an interim response to PL 113-2, the Disaster Relief Appropriations Act. The resolutions requested the Secretary of the Army to review existing reports of the Chief of Engineers for the entire coast of New Jersey with a view to study, in cooperation with the State of New Jersey, its political subdivisions and agencies and instrumentalities thereof, the changing coastal processes along the coast of New Jersey. Preconstruction engineering and design activities for the Hereford Inlet to Cape May Inlet, New Jersey, project will continue under the study authority cited above. The Corps of Engineers intends to undertake initial construction of the project under the authority of, and using funds provided in, PL 113-2. I am recommending that the Congress authorize periodic nourishment and any initial construction of the project that will not be completed using PL 113-2 funds.

2. The reporting officers recommend authorization of the National Economic Development Plan that consists of a dune and berm construction using sand obtained from an onshore beach borrow source located at the southern end of Five Mile Island (the Wildwoods). The recommended plan extends approximately 4.5 miles from Hereford Inlet to Cape May Inlet and will encompass the towns of North Wildwood, Wildwood, Wildwood Crest and Lower Township. Dimensions of the project are a +16-foot North American Vertical Datum 1988 (NAVD88) dune, with a 25-foot wide dune crest on a 75-foot wide berm that is +6.5-foot NAVD88 in elevation within North Wildwood, Wildwood, Wildwood Crest and Lower Township. Side slopes for the dune will be 1V:5H and slopes for the berm will be 1V:30H. The plan includes approximately 64 acres of dune grass, 28,000 linear feet of sand fence, 44 extended crossovers, seven new pedestrian crossovers, seven extended handicap crossovers, six new handicap crossovers, eight existing vehicle crossover extensions and five new vehicular crossovers. The sand will be pumped from the southern borrow area using mobile back-passing technology to hydraulically pump sand from the Wildwood and Wildwood Crest borrow source to the placement area. Initial construction for the project will remove approximately 1,527,250 cubic yards (cy) of sand from the approved borrow zone, which includes a design quantity of 1,136,000 cy and advanced nourishment of 391,000 cy. Periodic nourishment is included in project design to maintain the integrity of the design beach template over the project period of analysis. Nourishment requirements were

DAEN

SUBJECT: New Jersey Shore Protection, Hereford Inlet to Cape May Inlet, New Jersey

determined by considering losses resulting from diffusion of the design beach fill planform and natural background erosion. Following the initial construction, approximately 391,000 cy of material will be back-passed every four years throughout the 50-year period of analysis for the periodic nourishment of the selected plan. Since the recommended plan would not have any significant adverse effects, no mitigation measures (beyond management practices and avoidance) or compensation measures would be required.

3. The New Jersey Department of Environmental Protection (NJDEP) is the non-federal cost sharing sponsor for all features. Based on a March 2014 price level, the estimated total nourishment cost is \$104,030,000, which includes the project first cost of initial construction of \$21,600,000 and a total of 12 periodic nourishments at a total cost of \$82,430,000. Cost sharing is applied in accordance with the provisions of Section 103 of the Water Resources Development Act (WRDA) of 1986, as amended by Section 215 of WRDA 1999, as follows:

a. Shore protection features are cost-shared at a rate of 65 percent federal and 35 percent non-federal for the initial construction. Thus the federal share of the project first cost is \$14,040,000 and the non-federal share is estimated at \$7,560,000 which includes the costs of land, easements, rights-of-way, relocations, and dredged or excavated material disposal areas (LERRD). LERRD costs are estimated at about \$1,270,000. The non-federal sponsor will receive credit for the costs of LERRD toward the non-federal share.

b. Periodic nourishment will be cost shared 50 percent federal and 50 percent non-federal. It is expected to have costs of \$5,950,000 for year 4 and 8, and \$6,190,000 every four years thereafter, except in year 24, which assumes major nourishment is required at a cost of \$7,920,000. In addition, nourishment activities include monitoring costs estimated to average about \$138,000 over the 50-year period for a total of \$6,900,000.

c. The NJDEP would be responsible for the operation, maintenance, repair, replacement, and rehabilitation (OMRR&R) of the project after construction, an average annual cost currently estimated at \$150,000 over the 50-year period of analysis.

4. Based on a 3.375-percent discount rate and a 50-year period of analysis, the total equivalent average annual costs of the project are estimated to be \$2,669,000, including monitoring and OMRR&R. All project costs are allocated to the authorized purpose of shoreline protection. The recommended plan has average annual benefits of \$6,252,000. The net national economic development (NED) benefits of the project are \$3,583,000 and the benefit to cost ratio (BCR) is 2.3. In addition to providing protection from coastal storms, the dunes and berm create habitat for bird nesting and coastal plant species. The 64 acres of Cape American Beach Grass has the potential to develop into a more diverse plant community in a stable dune system. This project should benefit the piping plover habitat in the North Wildwood by stabilizing the beaches through regular periodic nourishment and improve the overall quality of the beach habitat.

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SUBJECT: New Jersey Shore Protection, Hereford Inlet to Cape May Inlet, New Jersey

5. Risk and uncertainty has been explicitly factored into the economic analysis of this project. Chapter 6 of ER 1105-2-100, entitled "Risk Based Analysis for Evaluation of Hydrology/Hydraulics and Economics in Shore Protection Studies" specifies the analysis requirements for shore protection projects, the fundamental requirement being that all shore protection analyses adopt a life cycle approach. A risk and uncertainty analysis that incorporated key economic, hydraulic and sea level change parameters was performed for the feasibility study. This risk and uncertainty plan was peer reviewed by the Jacksonville District of the Army Corps of Engineers and approved by North Atlantic Division. The project is not intended to, nor will it, reduce risk to loss of life during major storm events. Loss of life can only be prevented by residents and visitors following the local evacuation plans that are already in place. These residual risks have been communicated to the NJDEP.

6. In accordance with the Corps of Engineering Circular (EC 1165-2-212) on sea level change, the study performed a sensitivity analysis to look at the effects that different rates of accelerated sea level rise could have on the recommended plan. The plan was formulated using a historical or low rate of sea level rise of 0.013 feet/year. The sensitivity analysis used additional accelerated rates, which includes what the EC defines as intermediate and high rates of 0.023 feet/year and 0.056 feet/year, respectively. The analysis found that the influence of current sea level rise on the project is relatively low as compared to other factors causing erosion (waves, currents, winds and storms). The magnitude of the short-term storm induced erosion during hurricane events have a much greater effect along the New Jersey coastline than those indicated by the natural long term shoreline trends. Adaptive management will be used including monitoring and adding additional volume of sand during periodic nourishments to compensate for significant accelerated sea level rise beyond the current observed rate should it become necessary.

7. In accordance with the Corps of Engineers Circular (EC 1165-2-214) on the review of decision documents, all technical, engineering and scientific work underwent an open, dynamic and rigorous review process to ensure technical quality. This includes a District Quality Control review, an Agency Technical Review (ATR), an Independent External Peer Review (IEPR) (Type 1), and a Corps Headquarters policy and legal review. The IEPR was completed by Battelle Memorial Institute. All comments from the above referenced reviews have been addressed and incorporated into the final documents. Overall, the reviews resulted in improvements to the technical quality of the report.

8. Washington level review indicates that the project recommended by the reporting officers is technically sound, environmentally and socially acceptable, and economically justified. The plan complies with all essential elements of the U.S. Water Resources Council's Economic and Environmental Principles and Guidelines for Water and Land related resources implementation studies and complies with other administrative and legislative policies and guidelines. Also, the views of interested parties, including federal, state and local agencies have been considered. During the State and Agency (S&A) review, comments were received from the U.S. Environmental Protection Agency (EPA) and the Department of the Interior (DOI). Other

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SUBJECT: New Jersey Shore Protection, Hereford Inlet to Cape May Inlet, New Jersey

agencies indicated they either had no comments or provided none. The EPA reiterated a comment on the draft report concerning the potential for erosion at dune cross over locations due to their alignment. The Corps responded that the final report had addressed the concern, and the seaward side of all of the vehicular and pedestrian crossovers would be constructed at an angle to the dune, not perpendicular, in order to enhance dune resiliency. The DOI commented on the consideration given to borrow from the inlet area and the potential listing of the Red Knot as a threatened species under the Endangered Species Act. The Corps responded that the recommended plan has no borrow from the Hereford Inlet. The Corps has been engaged in Endangered Species Act consultation with the U.S. Fish and Wildlife Service (FWS) regarding the red knot, which was listed as a threatened species following receipt of the DOI S&A comments. The district will coordinate any potential impacts related to this coastal project with the FWS and incorporate protection measures into the project plan as the design phase continues.

9. I generally concur in the findings, conclusions, and recommendations of the reporting officers. Accordingly, I recommend that the periodic nourishment associated with the project to reduce hurricane and storm damages for Hereford Inlet to Cape May Inlet, New Jersey and any initial construction of the project that will not be completed with PL 113-2 funds be authorized in accordance with the reporting officers' recommended plan, with such modifications as in the discretion of the Chief of Engineers may be advisable. The estimated cost of the project is \$104,030,000, which includes an estimated total cost for periodic nourishment of \$82,430,000 for 12 cycles of periodic nourishment and an estimated total cost of \$21,600,000 for initial construction that would be reduced by any initial construction undertaken using PL 113-2 funds. My recommendation is subject to cost sharing, financing, and other applicable requirements of federal laws and policies, including Section 103 of the Water Resources Development Act (WRDA) of 1986, as amended by Section 215 of WRDA 1999. This recommendation is subject to the non-federal sponsor agreeing to comply with all applicable federal laws and policies, including that it will:

a. Provide a minimum of 35 percent of initial project costs assigned to coastal storm damage reduction, plus 100 percent of initial project costs assigned to protecting undeveloped private lands and other private shores which do not provide public benefits, and 50 percent of periodic nourishment costs assigned to coastal storm damage reduction, plus 100 percent of periodic nourishment costs assigned to protecting undeveloped private lands and other private shores which do provide public benefits, and as further defined below:

1) Provide all lands, easements, and rights-of-way, including suitable borrow areas, and perform or ensure performance of all relocations determined by the federal government to be necessary for the initial construction, periodic nourishment, operation, and maintenance of the project;

2) Provide during construction any additional amounts necessary to make its total contribution equal to 35 percent of initial project costs assigned to hurricane and storm

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damage reduction plus 100 percent of initial project costs assigned to protecting undeveloped private lands and other private shores which do not provide public benefits;

b. Operate, maintain, repair, replace, and rehabilitate the completed project, or functional portion of the project, at no cost to the federal government, in a manner compatible with the project's authorized purposes and in accordance with applicable federal and state laws and regulations and any specific directions prescribed by the federal government;

c. Give the federal government a right to enter, at reasonable times and in a reasonable manner, upon property that the non-federal sponsor, now or hereafter, owns or controls for access to the project for the purpose of inspection, and, if necessary, after failure, to perform by the non-federal sponsor, for the purpose of completing, operating, maintaining, repairing, replacing, or rehabilitating the project. No completion, operation, maintenance, repair, replacement, or rehabilitation by the federal government shall relieve the non-federal sponsor of responsibility to meet the non-federal sponsor's obligations, or to preclude the federal government from pursuing any other remedy at law or equity to ensure faithful performance;

d. Hold and save the United States free from all damages arising from the initial construction, periodic nourishment, operation, maintenance, repair, replacement, and rehabilitation of the project, except for damages due to the fault or negligence of the United States or its contractors;

e. Perform, or cause to be performed, any investigations for hazardous substances that are determined necessary to identify the existence and extent of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Public Law 96-510, as amended, 42 U.S.C. 9601-9675, that may exist in, on, or under lands, easements, or rights-of-way that the federal government determines to be required for the initial construction, periodic nourishment, operation, and maintenance of the project. However, for lands that the federal government determines to be subject to the navigation servitude, only the federal government shall perform such investigations unless the federal government provides the non-federal sponsor with prior specific written direction, in which case the non-federal sponsor shall perform such investigations in accordance with such written direction;

f. Assume complete financial responsibility, as between the federal government and the non-federal sponsor for all necessary cleanup and response costs of any CERCLA regulated materials located in, on, or under lands, easements, or rights-of-way that the federal government determines to be necessary for the initial construction, periodic nourishment, operation, or maintenance of the project;

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SUBJECT: New Jersey Shore Protection, Hereford Inlet to Cape May Inlet, New Jersey

g. Agree that the non-federal sponsor shall be considered the operator of the project for the purpose of CERCLA liability, and to the maximum extent practicable, operate, maintain, repair, replace, and rehabilitate the project in a manner that will not cause liability to arise under CERCLA

h. Participate in and comply with applicable federal floodplain management and flood insurance programs.

i. Not use federal funds to meet the non-federal sponsor's share of total project costs unless the federal granting agency verifies in writing that the use of such funds for the project is authorized;

j. Prevent obstructions of or encroachment on the project (including prescribing and enforcing regulations to prevent such obstructions or encroachments) which might reduce the level of protection it affords, hinder operation and maintenance or future periodic nourishment, or interfere with its proper function, such as any new developments on project lands or the addition of facilities which would degrade the benefits of the project;

k. Not less than once each year, inform affected interests of the extent of protection afforded by the project;

l. Publicize floodplain information in the area concerned and provide this information to zoning and other regulatory agencies for their use in preventing unwise future development in the floodplain, and in adopting such regulations as may be necessary to prevent unwise future development and to ensure compatibility with protection levels provided by the project;

m. For so long as the project remains authorized, ensure continued conditions of public ownership and use of the shore upon which the amount of federal participation is based;

n. Provide and maintain necessary access roads, parking areas, and other public use facilities, open and available to all on equal terms; and

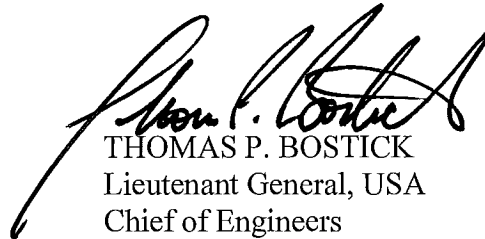
o. At least twice annually and after storm events, perform surveillance of the beach to determine losses of nourishment material from the project design section and provide the results of such surveillance to the federal government.

10. The recommendation contained herein reflects the information available at this time and current departmental policies governing the formulation of individual projects. It does not reflect program and budgeting priorities inherent in the formulation of a national civil works construction program or the perspective of higher review levels within the executive branch. Consequently, the recommendation may be modified before it is transmitted to Congress as a

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SUBJECT: New Jersey Shore Protection, Hereford Inlet to Cape May Inlet, New Jersey

proposal for authorization and implementation funding. However, prior to transmittal to Congress, the sponsor, the state, interested federal agencies, and other parties will be advised of any significant modifications and will be afforded an opportunity to comment further.



THOMAS P. BOSTICK
Lieutenant General, USA
Chief of Engineers

APPENDIX C
PROJECT 6040-NW-I
HEREFORD INLET TO CAPE MAY INLET, NEW JERSEY
HURRICANE AND STORM DAMAGE REDUCTION PROJECT
CITY OF NORTH WILDWOOD COST SHARING ANALYSIS

Hereford Inlet to Cape May Inlet
City of North Wildwood
Beachfill Cost Estimate
Cost Estimate based upon executed PPA

ESTIMATED TOTAL INITIAL CONSTRUCTION COST \$21,600,000.00

FEDERAL AND NON-FEDERAL ESTIMATED COST SHARE

65% Federal Share	\$14,040,000.00
35% Non-Federal Share	\$ 7,560,000.00
Total	<u>\$21,600,000.00</u>

NON-FEDERAL ESTIMATED COST SHARE

State of New Jersey Share	\$ 6,560,000.00
City of North Wildwood Share	\$ 1,000,000.00
Total	<u>\$ 7,560,000.00</u>

APPENDIX D**PERPETUAL STORM DAMAGE REDUCTION EASEMENTS WILL BE ACQUIRED FOR:**

BLOCK	LOT	DESCRIPTIONS/REMARKS
289.03	1	PUBLIC-OBTAINED
315.02	1	PUBLIC-OBTAINED
316.02	1	PUBLIC-OBTAINED
317.02	1	PUBLIC-OBTAINED
317.02	2	PUBLIC-OBTAINED
317.03	1	PUBLIC-OBTAINED
317.03	1.01	PUBLIC-OBTAINED

PERPETUAL STORM DAMAGE REDUCTION FOR PIER/STRUCTURE EASEMENTS WILL BE ACQUIRED FOR:

BLOCK	LOT	DESCRIPTIONS/REMARKS
288.02	1	PRIVATE-NOT OBTAINED
290.01	1	PRIVATE-NOT OBTAINED
291.01	1	PUBLIC-NOT OBTAINED
317.03	1	PUBLIC-NOT OBTAINED

APPENDIX E

**DRAFT PERPETUAL STORM DAMAGE REDUCTION EASEMENT
(SUBJECT TO FURTHER REVISION)**

Prepared by:

**DEED OF DEDICATION AND PERPETUAL STORM
DAMAGE REDUCTION EASEMENT**

THIS DEED OF DEDICATION AND PERPETUAL STORM DAMAGE REDUCTION EASEMENT is made this ____ day of _____ 2020 BY AND

BETWEEN

whose address is

referred to herein as Grantor,

AND

THE CITY OF NORTH WILDWOOD, a Municipal Corporation of the State of New Jersey whose post office address is Municipal Clerk, 901 Atlantic Avenue, North Wildwood, New Jersey 08260, **AND THE STATE OF NEW JERSEY** referred to herein collectively as the Grantees,

WITNESSETH

WHEREAS, Grantor is the owner of that certain tract of land, located in the City of North Wildwood, County of Cape May, State of New Jersey, and identified as **Block _____, Lot _____**, on the official tax map of the City of North Wildwood, hereinafter the "Property," and Grantor holds the requisite interest to grant this Deed of Easement; and

WHEREAS, the Grantees recognize that the beach at the City of North Wildwood, New Jersey is subject to constant erosion and degradation, thereby destroying a valuable natural resource and threatening the safety and property of the Grantor and of all of the citizens of the State; and,

WHEREAS, the Grantees desire to participate with each other and the United States Army Corps of Engineers to construct the Hereford Inlet to Cape May Inlet, New Jersey Hurricane and Storm Damage Reduction Project, as defined in the January 17, 2017 Project Partnership Agreement between the Department of the Army and the State of New Jersey, hereinafter "Project"; and,

WHEREAS, construction of the Project includes periodic renourishment, which may be performed solely by the Grantees or in conjunction with the United States Army Corps of Engineers; and,

WHEREAS, in order to accomplish part of the Project, Grantees need a Perpetual Storm Damage Reduction Easement on portions of said Property herein described; and,

WHEREAS, the United States Army Corps of Engineers and/or State of New Jersey will not participate in the Project unless the Grantees acquire the real property interest herein described in all real property needed for the Project; and,

WHEREAS, the City of North Wildwood shall consider this Deed of Easement in establishing the full assessed value of any lands subject to such restrictions; and,

WHEREAS, the Grantor desires to cooperate in allowing the Project to take place on a portion of said Property; and,

WHEREAS, the Grantor acknowledges that it will benefit from the successful implementation of the Project; and,

WHEREAS, the Grantor acknowledges that after successful implementation of the Project the beach and dune are still subject to the forces of nature which can result in both erosion and accretion of the beach and dune; and,

NOW, THEREFORE, in consideration for the benefits to be received by the Grantor from the successful implementation of the Project, the Grantor grants and conveys to Grantees an irrevocable, assignable, perpetual and permanent easement as set forth herein:

GRANT OF EASEMENT: A perpetual and assignable easement and right-of-way for the Hereford Inlet to Cape May Inlet, New Jersey Hurricane and Storm Damage Reduction Project in, on, over and across that land of the Property described as **Block** ____, **Lot** ____ as shown on the City of North Wildwood official tax maps for the Blocks and Lots listed above for use by the State of New Jersey and the City of North Wildwood, their representatives, agents, contractors and assigns to:

- a. Construct, preserve, patrol, operate, maintain, repair, rehabilitate, and replace a public beach, dune system, and other erosion control and storm damage reduction measures together with appurtenances thereto, including the right to deposit sand, to accomplish any alterations of the contours on said land, to construct berms and dunes, and to nourish and re-nourish periodically;
- b. Move, temporarily store and remove equipment and supplies;
- c. Erect and remove temporary structures;
- d. Perform any other work necessary and incident to the construction, periodic renourishment, and maintenance of the Hereford Inlet to Cape May Inlet, New Jersey Hurricane and Storm Damage Reduction Project together with the right of public use and access;
- e. Post signs, plant vegetation on said dunes and berms;

- f. Erect, maintain, and remove silt screens and snow fences;
- g. Facilitate preservation of dune and vegetation through the limitation of public access to dune areas;
- h. Trim, cut, fell, and remove from said land all trees, underbrush, debris, obstructions, and any other vegetation, structures, and obstacles within the limits of the easement;

The easement reserves to the Grantor, the Grantor's heirs, successors and assigns the right to construct a private dune overwalk structure in accordance with any applicable Federal, State, or local laws or regulations, provided that such structure shall not violate the integrity of the dune in shape, dimension, or function. Prior approval of the plans and specifications for such structures must be obtained from the City of North Wildwood and the State of New Jersey. Such structures are to be considered subordinate to the construction, operation, maintenance, repair, rehabilitation, and replacement of the project. The easement reserves to the Grantor, the Grantor's heirs, successors, and assigns all such rights and privileges as may be used and enjoyed without interfering with or abridging the rights and easements hereby conveyed to the Grantees, subject however to existing easements for utilities and pipelines, existing public highways, existing paved public roads and existing public streets. Grantor hereby expressly agrees not to grade or excavate within the easement area or to place therein any structure or material other than a dune walkover as referenced above without prior approval of the plans and specifications for said activities from the City of North Wildwood, the State of New Jersey and/or any applicable Federal agency, as required.

Duration of Easement: The easement granted hereby shall be in perpetuity, and in the event that the City of North Wildwood or the State of New Jersey shall become merged with any other geo-political entity or entities, the easement granted hereby shall run in favor of surviving entities. The covenants, terms, conditions and restrictions of this Deed of Easement shall be binding upon, and inure to the benefit of the parties hereto and their respective personal representatives, heirs, successors and assigns and shall continue as a servitude running in perpetuity with the land.

Municipality to Maintain Beach: The City of North Wildwood agrees, consistent with all Federal, State and local statutes and regulations, that at all times it shall use its best, good-faith efforts to cause the beach area abutting Grantor's lands to be maintained, consistent with any applicable Federal, State or local laws or regulations, notwithstanding any action or inaction of the State of New Jersey, Department of Environmental Protection or the United States Army Corps of Engineers to maintain the beach area.

Character of Property: Notwithstanding the foregoing, nothing herein is intended or shall be deemed to change the overall character of the Property as private property; nothing herein shall be deemed to grant to the Grantees or otherwise permit the Grantees or any other person to cross over or use any part of the Property which is not within the Easement Area; nothing herein is intended or shall be deemed to alter the boundary lines or setback lines of the Property.

By the acceptance of this Deed of Easement, the City of North Wildwood agrees, to the extent allowed by applicable law, that the Lands burdened by the easement herein described shall not be excluded from the calculation of minimum square footage requirements when construing applications under the Zoning Ordinance of the City of North Wildwood.

Miscellaneous:

1. The enforcement of the terms of this Easement shall be at the discretion of the Grantees and any forbearance by Grantees to exercise their rights under this Easement in the event of any violation by Grantor shall not be deemed or construed to be a waiver by Grantees of such term or of any subsequent violation or of any of Grantees' rights under this Easement. No delay or omission by Grantees in the exercise of any right or remedy upon any violation by Grantor shall impair such rights or remedies or be construed as a waiver of such rights or remedies.
2. The interpretation and performance of this Deed of Easement shall be governed by the laws of the State of New Jersey.
3. If any provision of this Deed of Easement or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of this Easement or the application of such provision to persons or circumstances other than those to which it is found to be invalid, as the case may be, shall not be affected thereby.
4. Any notice, demand, request, consent, approval or communication under this Deed of Easement shall be sent by regular first-class mail, postage prepaid and by Certified Mail, Return Receipt Requested, addressed to the mailing addresses set forth above or any other address of which the relocating party shall notify the other, in writing.
5. The captions in this Deed of Easement have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon its construction or interpretation.
6. Structures not part of the project are not authorized.
7. Grantor represents and warrants he/she/it holds the requisite ownership interest and authority to execute this Deed of Easement; and has made this Deed of Easement for the full and actual consideration as set forth herein.
8. This Deed may be executed in counterparts by the respective Parties, which together will constitute the original Deed.

IN WITNESS WHEREOF, with the parties understanding and agreeing to the above, they do hereby place their signatures on the date at the top of the first page.

Accepted by the
PROPERTY OWNER, GRANTOR

Witnessed by:

GRANTOR

NOTARY PUBLIC OF THE
STATE OF NEW JERSEY

Date _____

STATE OF NEW JERSEY
COUNTY OF _____ SS.:

I CERTIFY that on _____ 2020,

personally came before me and this person acknowledged under oath, to my satisfaction that this person (or if more than one, each person);

- 1) is named in and personally signed this Deed of Easement; and
- 2) signed, sealed and delivered this Deed of Easement as his or her act and deed.

NOTARY PUBLIC OF THE
STATE OF NEW JERSEY

Accepted by the
CITY OF NORTH WILDWOOD, GRANTEE

Witnessed by:

BY: _____
Patrick T. Rosenello
Mayor

NOTARY PUBLIC OF THE
STATE OF NEW JERSEY

Date _____

Accepted by the
STATE OF NEW JERSEY, GRANTEE

Witnessed by:

BY: _____
Dave Rosenblatt
Assistant Commissioner
Climate and Flood Resilience

NOTARY PUBLIC OF THE
STATE OF NEW JERSEY

Date _____

Non-Executable Instrument

APPENDIX E (Cont.)

**DRAFT PERPETUAL STORM DAMAGE REDUCTION FOR PIER/STRUCTURE
EASEMENT
(SUBJECT TO FURTHER REVISION)**

Prepared by:

**DEED OF DEDICATION AND PERPETUAL STORM DAMAGE REDUCTION
FOR PIER/STRUCTURE EASEMENT**

THIS DEED OF DEDICATION AND PERPETUAL STORM DAMAGE REDUCTION FOR
PIER/STRUCTURE EASEMENT is made this ____ day of _____, 2020 BY AND

BETWEEN

whose address is

referred to herein as Grantor,

AND

THE CITY OF NORTH WILDWOOD, a Municipal Corporation of the State of New Jersey whose
post office address is Municipal Clerk, 901 Atlantic Avenue, North Wildwood, New Jersey 08260,
AND THE STATE OF NEW JERSEY referred to herein collectively as the Grantees,

WITNESSETH

WHEREAS, Grantor is the owner of that certain tract of land, located in the City of North
Wildwood, County of Cape May, State of New Jersey, and identified as **Block** _____, **Lot** _____, on
the official tax map of the City of North Wildwood, hereinafter the "Property,"

WHEREAS, Grantor's Property currently includes a pier structure, commonly known as
_____, hereinafter the "Pier"; and

WHEREAS, the Grantees recognize that the beach at the City of North Wildwood, New Jersey
is subject to constant erosion and degradation, thereby destroying a valuable natural resource and
threatening the safety and property of the Grantor and of all of the citizens of the State; and,

WHEREAS, the Grantees desire to participate with each other and the United States Army
Corps of Engineers to construct the Hereford Inlet to Cape May Inlet, New Jersey Hurricane and Storm

Damage Reduction Project, as defined in the January 17, 2017 Project Partnership Agreement between the Department of the Army and the State of New Jersey, hereinafter “Project”; and,

WHEREAS, construction of the Project includes periodic renourishment, which may be performed solely by the Grantees or in conjunction with the United States Army Corps of Engineers; and,

WHEREAS, in order to accomplish part of the Project, Grantees need a Perpetual Storm Damage Reduction For Pier/Structure Easement on portions of said Property herein described; and,

WHEREAS, the United States Army Corps of Engineers and/or State of New Jersey will not participate in the Project unless the Grantees acquire the real property interest herein described in all real property needed for the Project; and,

WHEREAS, the City of North Wildwood shall consider this Deed of Easement in establishing the full assessed value of any lands subject to such restrictions; and,

WHEREAS, the Grantor desires to cooperate in allowing the Project to take place on a portion of said Property; and,

WHEREAS, with respect to the Pier, it is the intent of the Grantor to grant an easement for the beach area below the Pier and only to an area above the surface of the beach necessary for Grantees to undertake the actions authorized by this Deed of Easement and it is not the intent of Grantor to grant any easement or other rights on, over or above the Pier (the “Pier Easement Area”); and

WHEREAS, the Grantor acknowledges that it will benefit from the successful implementation of the Project; and,

WHEREAS, the Grantor acknowledges that after successful implementation of the Project the beach and dune are still subject to the forces of nature which can result in both erosion and accretion of the beach and dune; and,

NOW, THEREFORE, in consideration for the benefits to be received by the Grantor from the successful implementation of the Project, the Grantor grants and conveys to Grantees an irrevocable, assignable, perpetual and permanent easement as set forth herein:

GRANT OF EASEMENT: A perpetual and assignable easement and right-of-way for the Atlantic Coast of New Jersey, Hereford Inlet to Cape May Inlet, New Jersey Hurricane and Storm Damage Reduction Project in, on, over and across that portion of land of the Property known as **Block __, Lot __**, as shown on the City of North Wildwood official tax maps, described on the attached metes and bounds description with plot plan attached hereto as Exhibit A for use by the State of New Jersey, the City of North Wildwood, and the United States Army Corps of Engineers and its contractors, and each of their representatives, agents, contractors and assigns to:

a. Construct, preserve, patrol, operate, maintain, repair, rehabilitate, and replace a public beach, dune system, and other erosion control and storm damage reduction measures together with appurtenances thereto, including the right to deposit sand, to accomplish any alterations of the contours on said land, to construct berms and dunes, and to nourish and re-nourish periodically;

- b. Move, temporarily store and remove equipment and supplies;
- c. Erect and remove temporary structures;
- d. Perform any other work necessary and incident to the construction, periodic renourishment, and maintenance of the Atlantic Coast of New Jersey, Hereford Inlet to Cape May Inlet, New Jersey Hurricane and Storm Damage Reduction Project together with the right of public use and access;
- e. Post signs, plant vegetation on said dunes and berms;
- f. Erect, maintain, and remove silt screens and snow fences;
- g. Facilitate preservation of dune and vegetation through the limitation of access to dune areas;
- h. Trim, cut, fell, and remove from said land all trees, underbrush, debris, obstructions, and any other vegetation, structures, and obstacles within the limits of the easement (except the Pier as more particularly described in the blueprints and documents attached as Exhibit B hereto);

subject however to existing easements for utilities and pipelines, existing public highways, existing paved public roads and existing public streets

The Grantor reserves the right to reconstruct, operate, maintain, repair, and replace the Pier for all land uses including, but not limited to recreation, entertainment and/or commercial uses in accordance with any applicable Federal, State, or local laws or regulations, provided that the Pier shall not violate the integrity of the dune, beach, or other storm damage reduction measures in shape, dimension or function, and that prior written approval of the plans and specifications for any construction, repair or replacement of the Pier that requires grading, excavation or any other activity affecting the dune or beach is obtained from the City of North Wildwood, the State of New Jersey, and the District Engineer, U.S. Army Corps of Engineers, District Philadelphia, which may be conditioned upon such terms, conditions, and requirements as the City of North Wildwood, the State of New Jersey, and the District Engineer, U.S. Army Corps of Engineers, District Philadelphia may determine to be necessary to protect the Atlantic Coast of New Jersey, Hereford Inlet to Cape May Inlet, Hurricane and Storm Damage Reduction Project, including, but not limited to, a requirement to implement impact avoidance, minimization, and mitigation measures to restore the dune, beach, or other storm damage reduction measures to their previous condition.

The Grantor further reserves to the Grantor, the Grantor's heirs, successors and assigns the right to construct a dune overwalk structure in accordance with any applicable Federal, State, or local laws or regulations, provided that such structure shall not violate the integrity of the dune in shape, dimension, or function and that prior approval of the plans and specifications for such structures must be obtained from the City of North Wildwood and the State of New Jersey, and provided further that such structures are to be considered subordinate to the construction, operation, maintenance, repair, rehabilitation, and replacement of the Project. The Grantor further reserves to the Grantor, the Grantor's heirs, successors, and assigns all such rights and privileges as may be used and enjoyed without interfering with or abridging the rights and easements hereby conveyed to the Grantees.

Duration of Easement: The easement granted hereby shall be in perpetuity, and in the event that the City of North Wildwood or the State of New Jersey shall become merged with any other geo-political entity or entities, the easement granted hereby shall run in favor of surviving entities. The covenants, terms, conditions and restrictions of this Deed of Easement shall be binding upon, and inure to the benefit of the parties hereto and their respective personal representatives, heirs, successors and assigns and shall continue as a servitude running in perpetuity with the land.

Municipality to Maintain Beach: The City of North Wildwood agrees, consistent with all Federal, State and local statutes and regulations, that at all times it shall use its best, good-faith efforts to cause the beach area abutting Grantor's lands to be maintained, consistent with any applicable Federal, State or local laws or regulations, notwithstanding any action or inaction of the State of New Jersey, Department of Environmental Protection or the United States Army Corps of Engineers to maintain the beach area.

Character of Property: Notwithstanding the foregoing, nothing herein is intended or shall be deemed to change the overall character of the Property as private property; nothing herein shall be deemed to grant to the Grantees or otherwise permit the Grantees or any other person to cross over or use any part of the Property which is not within the Easement Area; nothing herein is intended or shall be deemed to alter the boundary lines or setback lines of the Property.

By the acceptance of this Deed of Easement, the City of North Wildwood agrees, to the extent allowed by applicable law, that the Lands burdened by the easement herein described shall not be excluded from the calculation of minimum square footage requirements when construing applications under the Zoning Ordinance of the City of North Wildwood.

Miscellaneous:

1. The enforcement of the terms of this Easement shall be at the discretion of the Grantees and any forbearance by Grantees to exercise their rights under this Easement in the event of any violation by Grantor shall not be deemed or construed to be a waiver by Grantees of such term or of any subsequent violation or of any of Grantees' rights under this Easement. No delay or omission by Grantees in the exercise of any right or remedy upon any violation by Grantor shall impair such rights or remedies or be construed as a waiver of such rights or remedies.
2. The interpretation and performance of this Deed of Easement shall be governed by the laws of the State of New Jersey.
3. If any provision of this Deed of Easement or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of this Easement or the application of such provision to persons or circumstances other than those to which it is found to be invalid, as the case may be, shall not be affected thereby.
4. Any notice, demand, request, consent, approval or communication under this Deed of Easement shall be sent by regular first-class mail, postage prepaid and by Certified Mail, Return Receipt Requested, addressed to the mailing addresses set forth above or any other address of which the relocating party shall notify the other, in writing.

5. The captions in this Deed of Easement have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon its construction or interpretation.
6. Structures not part of the Project or permitted under this Deed are not authorized.
7. Grantor represents and warrants he/she/it holds the requisite ownership interest and authority to execute this Deed of Easement; and has made this Deed of Easement for the full and actual consideration as set forth herein.
8. This Deed may be executed in counterparts by the respective Parties, which together will constitute the original Deed.

Non-Executable Easement

IN WITNESS WHEREOF, with the parties understanding and agreeing to the above, they do hereby place their signatures on the date at the top of the first page.

Accepted by the
PROPERTY OWNER, GRANTOR

Witnessed by:

GRANTOR

NOTARY PUBLIC OF THE
STATE OF NEW JERSEY

Date _____

STATE OF NEW JERSEY
COUNTY OF _____ SS.:

I CERTIFY that on _____ 2020,

personally came before me and this person acknowledged under oath, to my satisfaction that this person (or if more than one, each person);

- 1) is named in and personally signed this Deed of Easement; and
- 2) signed, sealed and delivered this Deed of Easement as his or her act and deed.

NOTARY PUBLIC OF THE
STATE OF NEW JERSEY

Accepted by the
CITY OF NORTH WILDWOOD, GRANTEE

Witnessed by:

BY: _____
Patrick T. Rosenello
Mayor

NOTARY PUBLIC OF THE
STATE OF NEW JERSEY

Date _____

Accepted by the
STATE OF NEW JERSEY, GRANTEE

Witnessed by:

BY: _____
Dave Rosenblatt
Assistant Commissioner
Climate and Flood Resilience

NOTARY PUBLIC OF THE
STATE OF NEW JERSEY

Date _____

Non-Executable Instrument

APPENDIX F

ADDITIONAL FEDERAL FUNDED AGREEMENT PROVISIONS COMMUNITY DEVELOPMENT BLOCK GRANT FUNDED PROJECTS

GRANT AGREEMENT BETWEEN CITY OF NORTH WILDWOOD AND THE STATE OF NEW JERSEY BY AND FOR THE DEPARTMENT OF ENVIRONMENTAL PROTECTION

ADDITIONAL FEDERAL FUNDED AGREEMENT PROVISIONS COMMUNITY DEVELOPMENT BLOCK GRANT FUNDED PROJECTS

I. BACKGROUND

In the aftermath of Superstorm Sandy, the United States Congress, through the Disaster Relief Appropriations Act of 2013, Public Law 113-2, appropriated approximately sixteen billion dollars (\$16,000,000,000) to HUD to be allocated as disaster recovery community development block grants among states, including the State of New Jersey (“State”), to provide crucial funding for recovery efforts (“Program” or “Activity”) involving housing, economic development, infrastructure and the prevention of further damage to affected areas. Through the State’s approved “Community Development Block Grant Disaster Recovery Action Plan” (“Action Plan”) and Action Plan Amendments, it has received a U.S. Department of Housing and Urban Development (“HUD”) Community Development Block Grant (“CDBG” or “CDBG-DR”) for funding Superstorm Sandy (“Sandy”) disaster recovery and other eligible events in calendar years 2011, 2012, and 2013.

The purpose of this Addendum is to set forth requirements and procedures in addition to those stated in the State Aid Agreement between the City of North Wildwood (“Subrecipient”) and the New Jersey Department of Environmental Protection (“Department”) for the Hereford Inlet to Cape May Inlet, New Jersey Hurricane and Storm Damage Reduction Project, hereinafter referred to as the “Project”, supported in part by CDBG-DR funds.

II. ASSURANCES

Subrecipient and any agents, employees, assigns, contractors, subcontractors or other third parties receiving funds for CDBG-DR Programs under this agreement shall be responsible for complying with all applicable CDBG-DR Program and CDBG regulations, guidelines and standards, including all administration and compliance requirements set forth by this addendum.

Subrecipients shall be responsible for requiring that all of its contractors and subcontractors adhere to all applicable State and Federal laws and regulations, and to conduct all necessary monitoring for such compliance.

Subrecipient agrees to comply with all applicable Federal CDBG-DR, and cross-cutting statutes and regulations, subject to waivers cited in the Federal Register / Vol. 78, No. 43 / Tuesday, March 5, 2013, Department of Housing and Urban Development, [Docket No. FR-5696-N-01] Allocations, Common

Application, Waivers, and Alternative Requirements for Grantees Receiving Community Development Block Grant Disaster Recovery Funds in Response to Hurricane Sandy.

In the occasion that two or more applicable rules, regulations, or procedures related to this agreement, incorporated into or otherwise referenced herein are in conflict with one another, the most proscriptive rule, regulation, or procedure shall apply.

THE SUBRECIPIENT HEREBY AGREES TO THE FOLLOWING PROVISIONS (AS APPLICABLE):

III. GENERAL PROVISIONS

- A. It shall implement the CDBG-DR Program using the CDBG-DR funds so as to give maximum feasible priority to activities to benefit low and moderate income families in accordance with the HUD-approved Action Plan Action Plan Amendments.
- B. It shall adhere to Section 312 of the Stafford Act and 76 FR 71060 (published November 16, 2011), regarding duplication of benefit requirements applicable to the CDBG-DR Program. Subrecipient shall ensure that no Program component supported by CDBG funds are also receiving financial assistance from any other program or from insurance or any other source for the same purpose. Subrecipient agrees as a condition for funding to repay the funding if it later receives other disaster assistance funding for the same purposes herein.
- C. It shall enforce safeguards to prohibit employees from using positions for a purpose that is or gives the appearance of being motivated by a desire for private gain for themselves or others, particularly those with whom they have family, business, or other ties, in accordance with CDBG regulations.
- D. It shall abide by and enforce the conflict of interest requirement set forth in 24 CFR 570.611, 24 CFR 85.36 and 24 CFR 84.42 and 24 CFR 570.489. Except for approved eligible administrative and personnel costs, none of Subrecipient's designees, agents, subcontractors, members, Departments, employees, consultants, and no other public official who exercises or who has exercised any functions or responsibilities with respect to the CDBG-funded Program during his or her tenure, or who is in a position to participate in a decision-making process or gain inside information with regard to the Program, has or shall have any interest, direct or indirect, in any contract or subcontract or the proceeds thereof for work performed in connection with the Program or in any Activity, or benefit there from, which is part of this Agreement at any time during or after such person's tenure unless all procedures for an exception have been documented and submitted in writing to the DCA and DCA has approved such exception.
- E. It shall comply with the provisions of the Hatch Act that limit the political activity of employees and HUD regulations governing political activity at 24 CFR 570.207. CDBG funds shall not be used to finance the use of facilities or equipment for political purposes or to engage in other partisan political activities, such as candidate forums, voter transportation, or voter registration. However, a facility originally assisted with CDBG funds may be used on an incidental basis to hold political meetings, candidate forums, or voter registration campaigns, provided that all parties and organizations have access to the facility on an equal basis, and are assessed equal rent or use charges, if any.
- F. It shall comply with HUD rules prohibiting the use of CDBG funds for inherently religious activities, as set forth in 24 CFR 570.200(j), except for circumstances specified in the Department of Housing and Urban Development Allocations, Common Application, Waivers, and Alternative Requirements for Subrecipients Receiving CDBG Disaster Recovery Funds in Response (March 5, 2013). Subrecipient shall provide the State and HUD, and any of their representatives or agents, access to and the right to examine all records, books, papers, or documents related to the Grant funds.

- G. It shall comply with the provisions in 24 CFR 570.200(c) regarding special assessments to recover capital costs if imposed.
- H. In addition to the lobbying restrictions set forth in the Agreement, Subrecipient certifies that no federally appointed funds shall be used for lobbying purposes regardless of level of government.
- I. It certifies that it shall provide a drug-free workplace in compliance with the Drug-Free Workplace Act of 1988, as amended and with 2 CFR Part 182 and Part 2429. Further, it will endeavor to ensure that contractors, subcontractors, and any third parties providing CDBG-funded services are in compliance with the Drug-Free Workplace Act of 1988, as amended, and with 4 CFR Part 182 and Part 2429.
- J. It shall comply with the following requirements, subject to waivers cited in the Federal Register/Vol. 78, No. 43/Tuesday, March 5, 2013, Department of Housing and Urban Development, [Docket No. FR-5696-N-01] Allocations, Common Application, Waivers, and Alternative Requirements for Grantees Receiving CDBG Disaster Recovery Funds in Response to Hurricane Sandy. It shall comply with the requirements of Title 24 of the CFR, 570 (the U.S. Housing and Urban Development regulations concerning CDBG).
- K. It shall establish procedures for responding to citizens' complaints regarding activities carried out utilizing these CDBG-DR funds. Citizens will be provided with an appropriate address, phone number, and times during which they may submit such complaints. The State or the Subrecipient, as the case may be, will provide a written response to every citizen complaint within fifteen (15) working days of the complaint.

SUBRECIPIENT FURTHER CERTIFIES THAT IT WILL COMPLY WITH THE FOLLOWING MANDATORY CONTRACT PROVISIONS:

IV. PERSONAL IDENTIFIABLE INFORMATION

- A. Subrecipient agrees to comply with the Privacy Act of 1974 and HUD rules and regulations related to the protection of personal identifiable information. The Department shall provide and require Subrecipient and all staff, consultants, contractors, and sub-contractors to sign a Non-Disclosure Agreement to protect any personal identifiable information necessary to complete its scope of work. If Subrecipient is procured for the design, development, or operation of a system of records on individuals, it shall do so in compliance with 48 CFR 24.102, et seq.

V. ENVIRONMENTAL REGULATORY COMPLIANCE

- A. Subrecipient must comply with the following HUD CDBG-DR environmental regulations at 24 CFR 58, and other federal environmental requirements, included but not limited to:
 - 1. Executive Order 11990, Protection of Wetlands;
 - 2. The Coastal Zone Management Act Sections 307(c)(d);
 - 3. In relation to water quality:
 - a. Executive Order 12088, as amended by Executive Order 12580, relating to the prevention, control and abatement of water pollution;
 - b. The Safe Drinking Water Act of 1974 (42 U.S.C. §§ 201, 300(f) et seq. and U.S.C. §349), as amended, particularly Section 1424(e) (42 U.S.C. §§ 300h-303(e)), which is intended to protect underground sources of water. No commitment for federal financial assistance can be entered into for any project which the U.S. Environmental Protection Agency ("EPA") determines may contaminate an aquifer which is the sole or principal drinking water source for an area (40 CFR 149); and

- c. It shall comply with Executive Order 12088, as amended by Executive Order 12580, relating to the prevention, control and abatement of water pollution; The Federal Water Pollution Control Act of 1972, as amended, including the Clean Water Act of 1977, Public Law 92-212 (33 U.S.C. §1251, et seq.) which provides for the restoration and maintenance of the chemical, physical and biological integrity of the nation's water.
4. Endangered Species Act of 1973 (50 CFR 402), as amended;
5. The Fish and Wildlife Coordination Act of 1958, as amended;
6. Wild and Scenic Rivers Act of 1968 (Sections 7(b) and (c)), as amended;
7. Executive Order 11738, providing for administration of the Clean Air Act and the Federal Water Pollution Control Act With Respect to Federal Contracts, Grants, or Loans, and EPA regulations (40 CFR 15);
8. The Clean Air Act of 1970 (42 U.S.C. 7401 et seq. as amended, particularly sections 176(c) and (d), and 40 CFR 6, 51, 93), which prohibits engaging in, supporting in any way, or providing financial assistance for, licensing or permitting, or approving any activity which does not conform to the State implementation plan for national primary and secondary ambient air quality standards.
9. The Farmland Protection Policy Act, 7 U.S.C.A. §4201 et seq., which requires recipients of federal assistance to minimize the extent to which their projects contribute to the unnecessary and irreversible commitment of farmland to nonagricultural uses;
10. Noise abatement and control requirements at 24 CFR 51B;
11. Explosive and flammable operations requirements at 24 CFR 51C, explosive and flammable operations;
12. Requirements at 24 CFR 58.5(i) relating to toxic chemicals and radioactive materials;
13. Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. §6901, et seq.), and
14. Environmental Justice, Executive Order 12898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, February 11, 1994 (59 FR 7629), 3 CFR, 1994 Comp. p. 859.

VI. FINANCIAL MANAGEMENT AND PROCUREMENT

- A. It shall adhere to the principles and standards governing federal grant distribution set forth in OMB Circular A-87 (Cost Principles for State, Local and Indian Tribal Governments) as amended; A-102 (Grants and Cooperative Agreements with State and Local Governments) as amended and made part of State regulations; OMB Circular A-133 (Audits of States, Local Governments, and Non-Profit Organizations) revised; OMB Circular A-21 (Cost Principals for Educational Institutions); and OMB Circular A-122 (Costs Principles for Non-Profit Organizations).
- B. It shall comply with the uniform administrative procedures set forth in 24 CFR 85 (Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally Recognized Indian Tribal Governments). Where the New Jersey Local Public Contract Law is more stringent, it shall comply with N.J.S.A. 40A:11 et seq.
- C. It shall comply with the administrative requirements at 24 CFR 85.35 prohibiting the making of any award or permitting any award (sub grant or contract) at any tier to any party that is debarred or suspended or is otherwise excluded from or ineligible for participation in federal assistance programs subject to 2 CFR Part 2424. Additional policies concerning debarment and suspension are contained at 2 CFR Part 180 and 2 CFR Part 2424. It shall certify that it, and all contractors and subcontractors are

not on the List of Parties Excluded from Federal Procurement or Non-procurement Programs promulgated in accordance with Executive Orders 12549 and 12689, “Debarment and Suspension,” as set forth at 24 CFR 24 (CDBG funds may not be provided to excluded or disqualified persons) <https://www.sam.gov/portal/public/SAM/>;

- D. It shall comply with all requirements imposed by the State concerning special requirements of law, program requirements, and other administrative requirements; and
- E. It shall comply with 24 CFR Part 570, Part 84 and Part 85 regarding the management and disposition of cash, real and personal property acquired with CDBG-DR funds.
- F. It shall comply with 24 CFR 570.489(j) regarding change of use of real property. These standards apply to real property within its control (including activities undertaken by contactors, subcontractors and third parties). These standards apply from the date CDBG-DR funds are first spent until five years after the closeout of the Program.
 1. It cannot change the use or planned use of any such property (including the beneficiaries of such use) from that for which the acquisition or improvement was made, without first providing citizen review and comment and either:
 - a. The new use meets one of the national objectives (see 24_CFR 570.482) and is not a building for the general conduct of government;
 - b. The requirements of 24 CFR 570.489(j) are met.
 2. If the change of use does not qualify, Subrecipient may retain or dispose of the property if the CDBG-DR Program is reimbursed for the fair market value of the property, less any portion of the value that is attributable to non-CDBG-DR funds.
 3. Following the reimbursement the property shall no longer be subject to any CDBG-DR requirements.

VII. RECORDS AND RECORDS RETENTION

- A. The [State Agency] shall maintain, and require each Subrecipient maintain, all Program records required by 24 CFR 570.506 for five years following termination or expiration of the Agreement. These records shall include the following as applicable:
 - The executed Agreement;
 - Description, geographic location and budget of each funded Activity;
 - Eligibility and national objective determinations for each Activity;
 - Personnel files;
 - Property management files;
 - HUD monitoring correspondence;
 - Citizen participation compliance documentation;
 - Fair Housing and Equal Opportunity records;
 - Environmental review and regulatory compliance documents;
 - Documentation of compliance with other federal requirements (e.g., Davis-Bacon, Uniform Relocation Act, and Lead-Based Paint); and

- Documentation with other State requirements (e.g. the provisions at N.J.S.A. 52:14-34.4 et seq., notice of availability of grant funds).

B. FINANCIAL RECORDS to be maintained include:

- Chart of accounts;
- Manual on accounting procedures;
- Accounting journals and ledgers;
- Source documentation (such as purchase orders, invoices, canceled checks);
- Procurement files (such as bids, contracts);
- Status of Subrecipient reimbursements;
- Real property inventory, if applicable;
- Bank account records (including revolving loan fund records, if applicable);
- Draw down requests;
- Payroll records and reports including timesheets or timecards as applicable;
- Financial reports;
- Audit files; and
- Relevant financial correspondence.

C. ACTIVITY records should include the following documentation:

- Eligibility of the Activity for Grant Funding;
- Evidence of having met a national objective (See 24 CFR 570.482);
- Grant Funding Agreement entered into between the [State Agency] and the Subrecipient;
- Any bids or contracts;
- Characteristics and locations of the Programs and each Program Activity;
- Compliance with special program requirements, such as coordination and cooperation with the N.J. Department of Health;
- Budget and expenditure information (including draw requests); and
- The status of the Program and each Activity thereunder.

D. LITIGATION/CLAIMS: If any litigation, claim, negotiation, audit, monitoring, inspection or other action has been started before the expiration of the required five year record retention period, required by 24 CFR 570.506 records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the required period, whichever is later.

VIII. FEDERAL LABOR STANDARDS

A. It shall administer and enforce the labor standards requirement set forth in 24 CFR 570.603 and any other regulations issued to implement such requirements;

- B. It shall comply with Section 110 of the Housing and Community Development Act of 1974, as amended and as set forth in 24 CFR 570.603 to ensure that all laborers and mechanics employed by c contractors and subcontractors for CDBG-related services are paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Davis-Bacon Act, as amended.;
- C. It shall comply with the Davis-Bacon Act, as amended (40 U.S.C. 3141 et seq.), and described in the Agreement above. The Act does not apply to construction contracts at or below \$2,000 (arbitrarily separating a project into contracts below \$2,000 is not permitted), and it does not apply to rehabilitation of residential structures containing less than eight units;
- D. It shall comply with the Contract Work Hours and Safety Standards Act (40 U.S.C. 327 et seq.), requiring that mechanics and laborers (including watchmen and guards) employed on federally assisted contracts be paid wages of not less than one and one-half times their basic wage rates for all hours worked in excess of forty in a work-week;
- E. It shall comply with the Federal Fair Labor Standards Act (29 U.S.C. 201 et seq.), requiring that covered employees be paid at least the minimum prescribed wage, and also that they be paid one and one-half times their basic wage rate for all hours worked in excess of the prescribed work-week;
- F. It shall comply with the Copeland “Anti-Kickback” Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR 3);
- G. It shall comply with the following HUD regulations and/or guidance:
 - 1. 24 CFR 570.489(1): Debarment and suspension
 - 2. 24 CFR 570.603: Labor standards
 - 3. 24 CFR 570.609: Use of debarred, suspended, or ineligible contractors or counties
 - 4. HUD Handbook 1344.1 Federal Labor Standards Compliance in Housing and Community Development Programs;
- H. It shall comply with the following Department of Labor regulations in parallel with HUD requirements above:
 - 1. 29 CFR 1: Procedures for Predetermination of Wage Rates
 - 2. 29 CFR 5: Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also, Labor Standards Provisions Applicable to Non-construction Contracts Subject to the Contract Work Hours and Safety Standards Act)
 - 3. 29 CFR 5: Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also, Labor Standards Provisions Applicable to Non-construction Contracts Subject to the Contract Work Hours and Safety Standards Act)
 - 4. 29 CFR 6: Rules of Practice for Administrative Proceedings Enforcing Labor Standards In Federal and Federally Assisted Construction Contracts and Federal Service Contracts
 - 5. 29 CFR 7: Practice Before the Administrative Review Board With Regard to Federal and Federally Assisted Construction Contracts.

IX. FAIR HOUSING AND NON-DISCRIMINATION

- A. Any act of unlawful discrimination committed by Subrecipient or failure to comply with the following obligations when applicable shall be grounds for termination of this Agreement or other enforcement action. Subrecipient shall agree to comply with:

1. Title VI of the Civil Rights Act of 1964 and as amended in 1988, 42 U.S.C. §200d et seq., as amended, and the regulations issued pursuant thereto (24 CFR 1), which provide that no person in the United States shall on the grounds or race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which it receives federal financial assistance and shall immediately take any measures necessary to effectuate this assurance. If any real property or structure thereon is provided or improved with the aid of federal financial assistance extended to it this assurance shall obligate it , or in the case of any transfer of such property, and transferee, for the period during which the property or structure is used for another purpose involving the provision of similar services or benefits.
2. Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. 3601–3619), which requires administering all programs and activities relating to housing and community development in a manner to affirmatively further fair housing. Title VIII further prohibits discrimination against any person in the sale or rental of housing, or the provision of brokerage services, including in any way making unavailable or denying a dwelling to any person, because of race, color, religion, sex, national origin, handicap or familial status.
3. Title II of the Civil Rights Act of 1968 (25 U.S.C. 1301-1303, Indian Civil Rights Act).
4. Architectural Barriers Act of 1968.
5. Title IX of the Education Amendments Act of 1972.
6. Section 504 of the Rehabilitation Act of 1973, as amended, which provides that no otherwise qualified individual shall, solely by reason of his or her handicap be excluded from participation, denied program benefits or subjected to discrimination on the basis of age under any program receiving federal funding assistance.
7. Section 508 of the Rehabilitation Act of 1973.
8. Section 109 of Title I of the Housing and Community Development Act of 1974, and the regulations issued pursuant thereto (24 CFR 570.602), which provides that no person in the United States shall, on the grounds of race, color, national origin, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity funded in whole or in part with funds provided under that Part. Section 109 further prohibits discrimination to an otherwise qualified individual with a handicap, as provided under Section 504 of the Rehabilitation Act of 1973, as amended, and prohibits discrimination based on age as provided under the Age Discrimination Act of 1975. The policies and procedures necessary to ensure enforcement of section 109 are codified in 24 CFR 6.
9. Section 104(b)(2) of the Housing Community Development Act of 1974.
10. Age Discrimination Act of 1975.
11. Title II of the Americans with Disabilities Act of 1990.
12. Housing for Older Persons Act of 1995 (“HOPA”).
13. It shall require every building or facility (other than a privately owned residential structure) designed, constructed, or altered with funds provided to it to comply with any accessibility requirements, as required by Title III of the Americans with Disabilities Act of 1990 (42 U.S.C.A. § 12101 et seq.), and shall be responsible for conducting inspections to ensure compliance with these specifications any contractor or subcontractor.
14. It shall take affirmative steps and use its best efforts to afford small and disadvantaged businesses, minority business enterprises, and veteran and women’s business enterprises the maximum practicable opportunity to participate in the performance of this contract. As used in this contract, the terms “small business” means a business that meets the criteria set forth in section 3(a) of the

Small Business Act, as amended (15 U.S.C. 632), and “minority and women’s business enterprise” means a business at least fifty-one (51) percent owned and controlled by minority group members or women. For the purpose of this definition, “minority group members” are Afro-Americans, Spanish-speaking, Spanish surnamed or Spanish-heritage Americans, Asian-Americans, and American Indians. It may rely on written representations by businesses regarding their status as minority and female business enterprises in lieu of an independent investigation.

X. SECTION 3 REQUIREMENTS

- A. Subrecipient shall ensure that requirements under Section 3 of the Housing and Urban Development Act of 1968 (HUD Act of 1968) shall apply to all individual properties assisted with these funds, regardless of the actual amount spent on each individual unit/property. Compliance with the provisions of Section 3 of the HUD Act of 1968, as amended, and as implemented by the regulations set forth in 24 CFR 135, and all applicable rules and orders issued hereunder prior to the execution of this contract, shall be a condition of the Federal financial assistance provided under this contract and binding upon the [State Agency], Subrecipient and third-party entities. Subrecipient certifies and agrees that no contractual or other disability exists that would prevent compliance with these requirements. Subrecipient certifies and agree that no contractual or other disability exists that would prevent its compliance with these requirements.
- B. Subrecipient shall ensure compliance with the statutory and regulatory requirements of Section 3 in its own operations, and those of covered contractors or third parties. These responsibilities include:
1. Making efforts to meet the minimum numerical goals found at 24 CFR 135.30;
 2. Complying with the specific responsibilities at 24 CFR 135.32; and
 3. Submitting Annual Summary reports in accordance with 24 CFR 135.90.
- C. If covered contractors and subcontractors receive awards that exceed \$100,000 for the construction and rehabilitation activities listed above, responsibility for Section 3 compliance is shared between the [State Agency] and that firm (or if it is the Subrecipient’s covered contractor, then the Subrecipient and that firm), (with the exception of the submission of the Section 3 Annual report (Form HUD 60002), which must be submitted by the, or the Subrecipient, to DCA).
- D. The following language shall be included in all contracts and subcontracts:**
1. *The work to be performed under this contract is subject to the requirements of section 3 of the Housing and Urban Development Act of 1968, as amended, 12 U.S.C. 1701u (section 3). The purpose of section 3 is to ensure that employment and other economic opportunities generated by HUD assistance or HUD-assisted projects covered by section 3, shall, to the greatest extent feasible, be directed to low- and very low-income persons, particularly persons who are recipients of HUD assistance for housing.*
 2. *The parties to this contract agree to comply with HUD's regulations in 24 CFR 135, which implement section 3. As evidenced by their execution of this contract, the parties to this contract certify that they are under no contractual or other impediment that would prevent them from complying with 24 CFR 135.*
 3. *The contractor agrees to send to each labor organization or representative of workers with which the contractor has a collective bargaining agreement or other understanding, if any, a notice advising the labor organization or workers' representative of the contractor's commitments under this section 3 clause, and shall post copies of the notice in conspicuous places at the work site where both employees and applicants for training and employment positions can see the notice. The notice shall describe the section 3 preference, shall set forth minimum number and job titles subject*

to hire, availability of apprenticeship and training positions, the qualifications for each; and the name and location of the person(s) taking applications for each of the positions; and the anticipated date the work shall begin.

4. *The contractor agrees to include this section 3 clause in every subcontract subject to compliance with regulations in 24 CFR 135, and agrees to take appropriate action, as provided in an applicable provision of the subcontract or in this section 3 clause, upon a finding that the subcontractor is in violation of the regulations in 24 CFR 135. The contractor shall not subcontract with any subcontractor where the contractor has notice or knowledge that the subcontractor has been found in violation of the regulations in 24 CFR 135.*
5. *The contractor shall certify that any vacant employment positions, including training positions, that are filled (1) after the contractor is selected but before the contract is executed, and (2) with persons other than those to whom the regulations of 24 CFR 135 require employment opportunities to be directed, were not filled to circumvent the contractor's obligations under 24 CFR 135.*
6. *Noncompliance with HUD's regulations in 24 CFR 135 may result in sanctions, termination of this contract for default, and debarment or suspension from future HUD assisted contracts.*
7. *With respect to work performed in connection with section 3 covered Indian housing assistance, section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e) also applies to the work to be performed under this contract. Section 7(b) requires that to the greatest extent feasible (i) preference and opportunities for training and employment shall be given to Indians, and (ii) preference in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned Economic Enterprises. Parties to this contract that are subject to the provisions of section 3 and section 7(b) agree to comply with section 3 to the maximum extent feasible, but not in derogation of compliance with section 7(b).*

XI. NONDISCRIMINATION AND FAIR HOUSING

- A. In delivering programmatic activity supported by CDBG funds, or in contracting with third parties for services supported by CDBG funds, Subrecipient shall comply with the following:
 1. Executive Order 11063: Equal Opportunity in Housing, November 20, 1962, as amended by Executive Order 12259, and the regulations issued pursuant thereto, which pertains to equal opportunity in housing and non-discrimination in the sale or rental of housing built with federal assistance.
 2. Executive Order 11246: EEO and Affirmative Action Guidelines for Federal Contractors Regarding Race, Color, Gender, Religion, and National Origin, September 25, 1965 and Executive Order 11375: Amending Executive Order No. 11246, October 13, 1967, which provide that no person shall be discriminated against on the basis of race, color, religion, sex, or national origin in all phases of employment during the performance of federal or federally assisted construction contracts. Further contractors and subcontractors on federal and federally assisted construction contracts shall take affirmative action to insure fair treatment in employment, upgrading, demotion, or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training and apprenticeship.
 3. Executive Order 12086: Consolidation of contract compliance functions for equal employment opportunity, October 5, 1978.
 4. Executive Order 12892: Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing, January 17, 1994.

5. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, February 11, 1994.
6. Executive Order 13166: Improving Access To Services For Persons With Limited English Proficiency, August 11, 2000.
7. Executive Order 13217: Community-Based Alternatives for Individuals with Disabilities, June 19, 2001.
8. Executive Order 13330: Human Service Transportation Coordination, February 24, 2004.
9. And affirms it shall comply with implementing regulations for the above:
 - a. 24 CFR 1: Nondiscrimination in Federally Assisted Programs of HUD.
 - b. 24 CFR 3: Nondiscrimination on the Basis of Sex in Education Programs or Activities receiving Federal Financial Assistance.
 - c. 24 CFR 5.105: Other Federal Requirements.
 - d. 24 CFR 6: Nondiscrimination in Programs, Activities Receiving Assistance under Title I of the Housing and Development Act of 1974.
 - e. 24 CFR 8: Nondiscrimination Based on Handicap in Federally Assisted Programs and Activities of the Department of Housing and Urban Development.
 - f. 24 CFR 50.4(l) and 58.5 (j): Environmental Justice.
 - g. 24 CFR 91.225(a)(1): Affirmatively Furthering Fair Housing.
 - h. 24 CFR 91.325(a)(1): Affirmatively Furthering Fair Housing.
 - i. 24 CFR 91.325(b)(5): Compliance with Anti-discrimination laws.
 - j. 24 CFR 91.520: Performance Reports.
 - k. 24 CFR 100-125: Fair Housing.
 - l. 24 CFR 107: Non-discrimination and Equal Opportunity in Housing Under Executive Order 11063 (State Community Development Block Grant Grantees).
 - m. 24 CFR 121: Collection of Data.
 - n. 24 CFR 135: Economic Opportunities for Low- and Very Low-Income Persons.
 - o. 24 CFR 146: Non-discrimination on the Basis of Age in HUD Programs or Activities Receiving Federal Financial Assistance.
 - p. 24 CFR 570.206(c): Fair Housing Activities.
 - q. 24 CFR 570.487(b): Affirmatively Furthering Fair Housing.
 - r. 24 CFR 570.487(e): Architectural Barriers Act and Americans with Disabilities Act (State Community Development Block Grant Grantees).
 - s. 24 CFR 570.490(a)(b): Recordkeeping requirements.
 - t. 24 CFR 570.491: Performance Reviews and Audits.

- u. 24 CFR 570.495(b): HCDA Section 109 nondiscrimination.
- v. 24 CFR 570.506(g): Fair Housing and equal opportunity records.
- w. 24 CFR 570.601: Affirmatively Further Fair Housing.
- x. 24 CFR 570.608 and Part 35: Lead-Based Paint.
- y. 24 CFR 570.614: Architectural Barriers Act and Americans with Disabilities Act.
- z. 24 CFR 570.904: Equal Opportunity and Fair Housing Review
- aa. 24 CFR 570.912: Nondiscrimination compliance

APPENDIX G

**GUIDELINES FOR MANAGING RECREATION ACTIVITIES IN PIPING PLOVER
BREEDING HABITAT ON THE U.S. ATLANTIC COAST TO AVOID TAKE UNDER
SECTION 9 OF THE ENDANGERED SPECIES ACT**

Northeast Region, U.S. Fish & Wildlife Service, April 15, 1994

<http://www.fws.gov/northeast/pipingplover/recguide.html>

GUIDELINES FOR MANAGING RECREATIONAL ACTIVITIES
IN PIPING PLOVER BREEDING HABITAT ON THE U.S. ATLANTIC COAST
TO AVOID TAKE UNDER SECTION 9 OF THE ENDANGERED SPECIES ACT

Northeast Region, U.S. Fish and Wildlife Service
April 15, 1994

The following information is provided as guidance to beach managers and property owners seeking to avoid potential violations of Section 9 of the Endangered Species Act (16 U.S.C. 1538) and its implementing regulations (50 CFR Part 17) that could occur as the result of recreational activities on beaches used by breeding piping plovers along the Atlantic Coast. These guidelines were developed by the Northeast Region, U.S. Fish and Wildlife Service (Service), with assistance from the U.S. Atlantic Coast Piping Plover Recovery Team. The guidelines are advisory, and failure to implement them does not, of itself, constitute a violation of the law. Rather, they represent the Service's best professional advice to beach managers and landowners regarding the management options that will prevent direct mortality, harm, or harassment of piping plovers and their eggs due to recreational activities.

Some land managers have endangered species protection obligations under Section 7 of the Endangered Species Act (see section I below) or under Executive Orders 11644 and 11989¹ that go beyond adherence to these guidelines. Nothing in this document should be construed as lack of endorsement of additional piping plover protection measures implemented by these land managers or those who are voluntarily undertaking stronger plover protection measures.

This document contains four sections: (I) a brief synopsis of the legal requirements that afford protection to nesting piping plovers; (II) a brief summary of the life history of piping plovers and potential threats due to recreational activities during the breeding cycle; (III) guidelines for protecting piping plovers from recreational activities on Atlantic Coast beaches; and (IV) literature cited.

¹ Executive Order 11644, Use of Off-Road Vehicles on the Public Lands and Executive Order 11989, Off-Road Vehicles on Public Lands pertain to lands under custody of the Secretaries of Agriculture, Defense, and Interior (except for Indian lands) and certain lands under the custody of the Tennessee Valley Authority.

I. LEGAL CONSIDERATIONS

Section 9 of the Endangered Species Act (ESA) prohibits any person subject to the jurisdiction of the United States from harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting listed wildlife species. It is also unlawful to attempt such acts, solicit another to commit such acts, or cause such acts to be committed. A "person" is defined in Section 3 to mean "an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States." Regulations implementing the ESA (50 CFR 17.3) further define "harm" to include significant habitat modification or degradation that results in the killing or injury of wildlife by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering. "Harass" means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. Penalties for violations of Section 9 are provided in Section 11 of the ESA; for threatened species, these penalties include fines of up to \$25,000, imprisonment for not more than six months, or both.

Section 10 of the ESA and related regulations provide for permits that may be granted to authorize acts prohibited under Section 9, for scientific purposes or to enhance the propagation or survival of a listed species. States that have Cooperative Agreements under Section 6 of the ESA, may provide written authorization for take that occurs in the course of implementing conservation programs. For example, State agencies have authorized certain biologists to construct predator exclosures for piping plovers. It is also legal for employees or designated agents of certain Federal or State agencies to take listed species without a permit, if the action is necessary to aid sick, injured, or orphaned animals or to salvage or dispose of a dead specimen.

Section 10 also allows permits to be issued for take that is "incidental to, and not the purpose of, carrying out an otherwise lawful activity" if the Service determines that certain conditions have been met. An applicant for an incidental take permit must prepare a conservation plan that specifies the impacts of the take, steps the applicant will take to minimize and mitigate the impacts, funding that will be available to implement these steps, alternative actions to the take that the applicant considered, and the reasons why such alternatives are not being utilized.

Section 7 of the ESA may be pertinent to beach managers and landowners in situations that have a Federal nexus. Section 7 requires Federal agencies to consult with the Service (or National Marine Fisheries Service for marine species) prior to authorizing, funding, or carrying out activities that may affect listed species. Section 7 also requires that these agencies use their authorities to further the conservation of listed species. Section 7 obligations have caused Federal land management agencies to implement piping plover protection measures that go beyond those required to avoid take, for example by conducting research on threats to piping plovers. Other examples of Federal activities that may affect piping plovers along the Atlantic Coast, thereby triggering Section 7 consultation, include permits for beach nourishment or disposal of dredged material (U.S. Army Corps of Engineers) and funding of beach restoration projects (Federal Emergency Management Authority).

Piping plovers, as well as other migratory birds such as least terns, common terns, American oystercatchers, laughing gulls, herring gulls, and great black-backed gulls, their nests, and eggs are also protected under the Migratory Bird Treaty Act of 1918 (16 U.S.C. 703-712). Prohibited acts include pursuing, hunting, shooting, wounding, killing, trapping, capturing, collecting, or attempting such conduct. Violators may be fined up to \$5000 and/or imprisoned for up to six months.

Almost all States within the breeding range of the Atlantic Coast piping plover population list the species as State threatened or endangered (Northeast Nongame Technical Committee 1993). Various laws and regulations may protect State-listed species from take, but the Service has not ascertained the adequacy of the guidelines presented in this document to meet the requirements of any State law.

II. LIFE HISTORY AND THREATS FROM HUMAN DISTURBANCE

Piping plovers are small, sand-colored shorebirds that nest on sandy, coastal beaches from South Carolina to Newfoundland. Since 1986, the Atlantic Coast population has been protected as a threatened species under provisions of the U.S. Endangered Species Act of 1973 (U.S. Fish and Wildlife Service 1985). The U.S. portion of the population was estimated at 875 pairs in 1993 (U.S. Fish and Wildlife Service 1993). Many characteristics of piping plovers contribute to their susceptibility to take due to human beach activities.

LIFE HISTORY

Piping plovers begin returning to their Atlantic Coast nesting beaches in mid-March (Coutu et al. 1990, Cross 1990, Goldin 1990, MacIvor 1990, Hake 1993). Males establish and defend territories and court females (Cairns 1982). Eggs may be present on the beach from mid-April through late July. Clutch size is generally four eggs, and the incubation period² usually lasts for 27-28 days. Piping plovers fledge only a single brood per season, but may renest several times if previous nests are lost. Chicks are precocial³ (Wilcox 1959, Cairns 1982). They may move hundreds of yards from the nest site during their first week of life (see Table 1, Summary of Chick Mobility Data). Chicks remain together with one or both parents until they fledge (are able to fly) at 25 to 35 days of age. Depending on date of hatching, flightless chicks may be present from mid-May until late August, although most fledge by the end of July (Patterson 1988, Goldin 1990, MacIvor 1990, Howard et al. 1993).

Piping plover nests are situated above the high tide line on coastal beaches, sand flats at the ends of sandspits and barrier islands, gently sloping foredunes, blowout areas behind primary dunes, and washover areas cut into or between dunes. They may also nest on areas where suitable dredge material has been deposited. Nest sites are shallow scraped depressions in substrates ranging from fine grained sand to mixtures of sand and pebbles, shells or cobble (Bent 1929, Burger 1987a, Cairns 1982, Patterson 1988, Flemming et al. 1990, MacIvor 1990, Strauss 1990).

² "Incubation" refers to adult birds sitting on eggs, to maintain them at a favorable temperature for embryo development.

³ "Precocial" birds are mobile and capable of foraging for themselves within several hours of hatching.

Nests are usually found in areas with little or no vegetation although, on occasion, piping plovers will nest under stands of American beachgrass (*Ammophila breviligulata*) or other vegetation (Patterson 1988, Flemming et al. 1990, MacIvor 1990). Plover nests may be very difficult to detect, especially during the 6-7 day egg-laying phase when the birds generally do not incubate (Goldin 1994).

Plover foods consist of invertebrates such as marine worms, fly larvae, beetles, crustaceans or mollusks (Bent 1929, Cairns 1977, Nicholls 1989). Feeding areas include intertidal portions of ocean beaches, washover areas, mudflats, sandflats, wrack lines⁴, and shorelines of coastal ponds, lagoons or salt marshes (Gibbs 1986, Coutu et al. 1990, Hoopes et al. 1992, Loegering 1992, Goldin 1993). Studies have shown that the relative importance of various feeding habitat types may vary by site (Gibbs 1986, Coutu et al. 1990, McConnaughey et al. 1990, Loegering 1992, Goldin 1993, Hoopes 1993) and by stage in the breeding cycle (Cross 1990). Adults and chicks on a given site may use different feeding habitats in varying proportion (Goldin et al. 1990). Feeding activities of chicks may be particularly important to their survival. Cairns (1977) found that piping plover chicks typically tripled their weight during the first two weeks post-hatching; chicks that failed to achieve at least 60% of this weight gain by day 12 were unlikely to survive. During courtship, nesting, and brood rearing, feeding territories are generally contiguous to nesting territories (Cairns 1977), although instances where brood-rearing areas are widely separated from nesting territories are not uncommon (see Table 1). Feeding activities of both adults and chicks may occur during all hours of the day and night (Burger 1993) and at all stages in the tidal cycle (Goldin 1993, Hoopes 1993).

THREATS FROM NONMOTORIZED BEACH ACTIVITIES

Sandy beaches that provide nesting habitat for piping plovers are also attractive recreational habitats for people and their pets. Nonmotorized recreational activities can be a source of both direct mortality and harassment of piping plovers. Pedestrians on beaches may crush eggs (Burger 1987b, Hill 1988, Shaffer and Laporte 1992, Cape Cod National Seashore 1993, Collazo et al. 1994). Unleashed dogs may chase plovers (McConnaughey et al. 1990), destroy nests

⁴ Wrack is organic material including seaweed, seashells, driftwood and other materials deposited on beaches by tidal action.

(Hoopes et al. 1992), and kill chicks (Cairns and McLaren 1980).

Pedestrians may flush incubating plovers from nests (see Table 2, Summary of Data on Distances at Which Plovers React to Disturbance), exposing eggs to avian predators or causing excessive cooling or heating of eggs. Repeated exposure of shorebird eggs on hot days may cause overheating, killing the embryos (Bergstrom 1991). Excessive cooling may kill embryos or retard their development, delaying hatching dates (Welty 1982). Pedestrians can also displace unfledged chicks (Strauss 1990, Burger 1991, Hoopes et al. 1992, Loegering 1992, Goldin 1993). Fireworks are highly disturbing to piping plovers (Howard et al. 1993). Plovers are particularly intolerant of kites, compared with pedestrians, dogs, and vehicles; biologists believe this may be because plovers perceive kites as potential avian predators (Hoopes et al. 1992).

THREATS FROM MOTOR VEHICLES

Unrestricted use of motorized vehicles on beaches is a serious threat to piping plovers and their habitats. Vehicles can crush eggs (Wilcox 1959; Tull 1984; Burger 1987b; Patterson et al. 1991; *United States of America v. Breezy Point Cooperative, Inc.*, U.S. District Court, Eastern District of New York, Civil Action No. CV-90-2542, 1991; Shaffer and Laporte 1992), adults, and chicks. In Massachusetts and New York, biologists documented 14 incidents in which 18 chicks and 2 adults were killed by vehicles between 1989 and 1993 (Melvin et al. 1994). Goldin (1993) compiled records of 34 chick mortalities (30 on the Atlantic Coast and 4 on the Northern Great Plains) due to vehicles. Many biologists that monitor and manage piping plovers believe that many more chicks are killed by vehicles than are found and reported (Melvin et al. 1994). Beaches used by vehicles during nesting and brood-rearing periods generally have fewer breeding plovers than available nesting and feeding habitat can support. In contrast, plover abundance and productivity has increased on beaches where vehicle restrictions during chick-rearing periods have been combined with protection of nests from predators (Goldin 1993; S. Melvin, pers. comm., 1993).

Typical behaviors of piping plover chicks increase their vulnerability to vehicles. Chicks frequently move between the upper berm or foredune and feeding habitats in the wrack line and intertidal zone. These movements place chicks in the paths of vehicles driving along the berm or through the intertidal zone. Chicks stand in, walk, and run along tire ruts, and sometimes have

difficulty crossing deep ruts or climbing out of them (Eddings et al. 1990, Strauss 1990, Howard et al. 1993). Chicks sometimes stand motionless or crouch as vehicles pass by, or do not move quickly enough to get out of the way (Tull 1984, Hoopes et al. 1992, Goldin 1993). Wire fencing placed around nests to deter predators (Rimmer and Deblinger 1990, Melvin et al. 1992) is ineffective in protecting chicks from vehicles because chicks typically leave the nest within a day after hatching and move extensively along the beach to feed (see Table 1).

Vehicles may also significantly degrade piping plover habitat or disrupt normal behavior patterns. They may harm or harass plovers by crushing wrack into the sand and making it unavailable as cover or a foraging substrate, by creating ruts that may trap or impede movements of chicks, and by preventing plovers from using habitat that is otherwise suitable (MacIvor 1990, Strauss 1990, Hoopes et al. 1992, Goldin 1993).

III. GUIDELINES FOR PROTECTING PIPING PLOVERS FROM RECREATIONAL DISTURBANCE

The Service recommends the following protection measures to prevent direct mortality or harassment of piping plovers, their eggs, and chicks.

MANAGEMENT OF NONMOTORIZED RECREATIONAL USES

On beaches where pedestrians, joggers, sun-bathers, picnickers, fishermen, boaters, horseback riders, or other recreational users are present in numbers that could harm or disturb incubating plovers, their eggs, or chicks, areas of at least 50 meter-radius around nests above the high tide line should be delineated with warning signs and symbolic fencing⁵. Only persons engaged in rare species monitoring, management, or research activities should enter posted areas. These areas should remain fenced as long as viable eggs or unfledged chicks are present. Fencing is intended to prevent accidental crushing of nests and repeated flushing of incubating adults, and to provide an area where chicks can rest and seek shelter when large numbers of people are on

⁵ "Symbolic fencing" refers to one or two strands of light-weight string, tied between posts to delineate areas where pedestrians and vehicles should not enter.

the beach.

Available data indicate that a 50 meter buffer distance around nests will be adequate to prevent harassment of the majority of incubating piping plovers. However, fencing around nests should be expanded in cases where the standard 50 meter-radius is inadequate to protect incubating adults or unfledged chicks from harm or disturbance. Data from various sites distributed across the plover's Atlantic Coast range indicates that larger buffers may be needed in some locations (see Table 2). This may include situations where plovers are especially intolerant of human presence, or where a 50 meter-radius area provides insufficient escape cover or alternative foraging opportunities for plover chicks.⁶

In cases where the nest is located less than 50 meters above the high tide line, fencing should be situated at the high tide line, and a qualified biologist should monitor responses of the birds to passersby, documenting his/her observations in clearly recorded field notes. Providing that birds are not exhibiting signs of disturbance, this smaller buffer may be maintained in such cases.

On portions of beaches that receive heavy human use, areas where territorial plovers are observed should be symbolically fenced to prevent disruption of territorial displays and courtship. Since nests can be difficult to locate, especially during egg-laying, this will also prevent accidental crushing of undetected nests. If nests are discovered outside fenced areas, fencing should be extended to create a sufficient buffer to prevent disturbance to incubating adults, eggs, or unfledged chicks.

Pets should be leashed and under control of their owners at all times from April 1 to August 31 on beaches where piping plovers are present or have traditionally nested. Pets should be prohibited on these beaches from April 1 through August 31 if, based on observations and experience, pet owners fail to keep pets leashed and under control.

⁶ For example, on the basis of data from an intensive three year study that showed that plovers on Assateague Island in Maryland flush from nests at greater distances than those elsewhere (Loegering 1992), the Assateague Island National Seashore established 200 meter buffers zones around most nest sites and primary foraging areas (Assateague Island National Seashore 1993). Following a precipitous drop in numbers of nesting plover pairs in Delaware in the late 1980's, that State adopted a Piping Plover Management Plan that provided 100 yard buffers around nests on State park lands and included intertidal areas (Delaware Department of Natural Resources and Environmental Control 1990).

Kite flying should be prohibited within 200 meters of nesting or territorial adult or unfledged juvenile piping plovers between April 1 and August 31. Fireworks should be prohibited on beaches where plovers nest from April 1 until all chicks are fledged. (See the Service's February 4, 1997 [Guidelines for Managing Fireworks in the Vicinity of Piping Plovers and Seabeach Amaranth on the U.S. Atlantic Coast.](#))

MOTOR VEHICLE MANAGEMENT

The Service recommends the following minimum protection measures to prevent direct mortality or harassment of piping plovers, their eggs, and chicks on beaches where vehicles are permitted. Since restrictions to protect unfledged chicks often impede vehicle access along a barrier spit, a number of management options affecting the timing and size of vehicle closures are presented here. Some of these options are contingent on implementation of intensive plover monitoring and management plans by qualified biologists. It is recommended that landowners seek concurrence with such monitoring plans from either the Service or the State wildlife agency.

Protection of Nests

All suitable piping plover nesting habitat should be identified by a qualified biologist and delineated with posts and warning signs or symbolic fencing on or before April 1 each year. All vehicular access into or through posted nesting habitat should be prohibited. However, prior to hatching, vehicles may pass by such areas along designated vehicle corridors established along the outside edge of plover nesting habitat. Vehicles may also park outside delineated nesting habitat, if beach width and configuration and tidal conditions allow. Vehicle corridors or parking areas should be moved, constricted, or temporarily closed if territorial, courting, or nesting plovers are disturbed by passing or parked vehicles, or if disturbance is anticipated because of unusual tides or expected increases in vehicle use during weekends, holidays, or special events.

If data from several years of plover monitoring suggests that significantly more habitat is available than the local plover population can occupy, some suitable habitat may be left unposted if the following conditions are met:

1. The Service OR a State wildlife agency that is party to an agreement under Section 6 of the ESA provides written concurrence with a plan that:

A. Estimates the number of pairs likely to nest on the site based on the past monitoring and regional population trends.

AND

B. Delineates the habitat that will be posted or fenced prior to April 1 to assure a high probability that territorial plovers will select protected areas in which to court and nest. Sites where nesting or courting plovers were observed during the last three seasons as well as other habitat deemed most likely to be pioneered by plovers should be included in the posted and/or fenced area.

AND

C. Provides for monitoring of piping plovers on the beach by a qualified biologist(s). Generally, the frequency of monitoring should be not less than twice per week prior to May 1 and not less than three times per week thereafter. Monitoring should occur daily whenever moderate to large numbers of vehicles are on the beach. Monitors should document locations of territorial or courting plovers, nest locations, and observations of any reactions of incubating birds to pedestrian or vehicular disturbance.

AND

2. All unposted sites are posted immediately upon detection of territorial plovers.

Protection of Chicks

Sections of beaches where unfledged piping plover chicks are present should be temporarily closed to all vehicles not deemed essential. (See the provisions for essential vehicles below.) Areas where vehicles are prohibited should include all dune, beach, and intertidal habitat within the chicks' foraging range, to be determined by either of the following methods:

1. The vehicle free area should extend 1000 meters on each side of a line drawn through the nest site and perpendicular to the long axis of the beach. The resulting 2000 meter-wide area of protected habitat for plover chicks should extend from the ocean-side low water line to the bay-side low water line or to the farthest extent of dune habitat if no bay-side intertidal habitat exists. However, vehicles may be allowed to pass through portions of the protected area that are considered inaccessible to plover chicks because of steep topography, dense vegetation, or other naturally-occurring obstacles.

OR

2. The Service OR a State wildlife agency that is party to an agreement under Section 6 of the ESA provides written concurrence with a plan that:

A. Provides for monitoring of all broods during the chick-rearing phase of the breeding season and specifies the frequency of monitoring.

AND

B. Specifies the minimum size of vehicle-free areas to be established in the vicinity of unfledged broods based on the mobility of broods observed on the site in past years and on the frequency of monitoring. Unless substantial data from past years show that broods on a site stay very close to their nest locations, vehicle-free areas should extend at least 200 meters on each side of the nest site during the first week following hatching. The size and location of the protected area should be adjusted in response to the observed mobility of the brood, but in no case should it be reduced to less than 100 meters on each side of the brood. In some cases, highly mobile broods may require protected areas up to 1000 meters, even where they are intensively monitored. Protected areas should extend from the ocean-side low water line to the bay-side low water line or to the farthest

extent of dune habitat if no bay-side intertidal habitat exists. However, vehicles may be allowed to pass through portions of the protected area that are considered inaccessible to plover chicks because of steep topography, dense vegetation, or other naturally-occurring obstacles. In a few cases, where several years of data documents that piping plovers on a particular site feed in only certain habitat types, the Service or the State wildlife management agency may provide written concurrence that vehicles pose no danger to plovers in other specified habitats on that site.

Timing of Vehicle Restrictions in Chick Habitat

Restrictions on use of vehicles in areas where unfledged plover chicks are present should begin on or before the date that hatching begins and continue until chicks have fledged. For purposes of vehicle management, plover chicks are considered fledged at 35 days of age or when observed in sustained flight for at least 15 meters, whichever occurs first.

When piping plover nests are found before the last egg is laid, restrictions on vehicles should begin on the 26th day after the last egg is laid. This assumes an average incubation period of 27 days, and provides a 1 day margin of error.

When plover nests are found after the last egg has been laid, making it impossible to predict hatch date, restrictions on vehicles should begin on a date determined by one of the following scenarios:

1) With intensive monitoring: If the nest is monitored at least twice per day, at dawn and dusk (before 0600 hrs and after 1900 hrs) by a qualified biologist, vehicle use may continue until hatching begins. Nests should be monitored at dawn and dusk to minimize the time that hatching may go undetected if it occurs after dark. Whenever possible, nests should be monitored from a distance with spotting scope or binoculars to minimize disturbance to incubating plovers.

OR

2) Without intensive monitoring: Restrictions should begin on May 15 (the earliest probable hatch date). If the nest is discovered after May 15, then restrictions should start immediately.

If hatching occurs earlier than expected, or chicks are discovered from an unreported nest, restrictions on vehicles should begin immediately.

If ruts are present that are deep enough to restrict movements of plover chicks, then restrictions on vehicles should begin at least 5 days prior to the anticipated hatching date of plover nests. If a plover nest is found with a complete clutch, precluding estimation of hatching date, and deep ruts have been created that could reasonably be expected to impede chick movements, then restrictions on vehicles should begin immediately.

Essential Vehicles

Because it is impossible to completely eliminate the possibility that a vehicle will accidentally crush an unfledged plover chicks, use of vehicles in the vicinity of broods should be avoided whenever possible. However, the Service recognizes that life-threatening situations on the beach may require emergency vehicle response. Furthermore, some "essential vehicles" may be required to provide for safety of pedestrian recreationists, law enforcement, maintenance of public property, or access to private dwellings not otherwise accessible. On large beaches, maintaining the frequency of plover monitoring required to minimize the size and duration of vehicle closures may necessitate the use of vehicles by plover monitors.

Essential vehicles should only travel on sections of beaches where unfledged plover chicks are present if such travel is absolutely necessary and no other reasonable travel routes are available. All steps should be taken to minimize number of trips by essential vehicles through chick habitat areas. Homeowners should consider other means of access, eg. by foot, water, or shuttle services, during periods when chicks are present.

The following procedures should be followed to minimize the probability that chicks will be crushed by essential (non-emergency) vehicles:

1. Essential vehicles should travel through chick habitat areas only during daylight hours, and should be guided by a qualified monitor who has first determined the location of all unfledged plover chicks.
2. Speed of vehicles should not exceed five miles per hour.
3. Use of open 4-wheel motorized all-terrain vehicles (ATVs) or non-motorized all-terrain bicycles is recommended whenever possible for monitoring and law enforcement because of the improved visibility afforded operators.
4. A log should be maintained by the beach manager of the date, time, vehicle number and operator, and purpose of each trip through areas where unfledged chicks are present. Personnel monitoring plovers should maintain and regularly update a log of the numbers and locations of unfledged plover chicks on each beach. Drivers of essential vehicles should review the log each day to determine the most recent number and location of unfledged chicks.

Essential vehicles should avoid driving on the wrack line, and travel should be infrequent enough to avoid creating deep ruts that could impede chick movements. If essential vehicles are creating ruts that could impede chick movements, use of essential vehicles should be further reduced and, if necessary, restricted to emergency vehicles only.

SITE-SPECIFIC MANAGEMENT GUIDANCE

The guidelines provided in this document are based on an extensive review of the scientific literature and are intended to cover the vast majority of situations likely to be encountered on piping plover nesting sites along the U.S. Atlantic Coast. However, the Service recognizes that site-specific conditions may lead to anomalous situations in which departures from this guidance may be safely implemented. The Service recommends that landowners who believe such situations exist on their lands contact either the Service or the State wildlife agency and, if appropriate, arrange for an on-site review. Written documentation of agreements regarding departures from this guidance is recommended.

In some unusual circumstances, Service or State biologists may recognize situations where this guidance provides insufficient protection for piping plovers or their nests. In such a case, the Service or the State wildlife agency may provide written notice to the landowner describing additional measures recommended to prevent take of piping plovers on that site.

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Table 1. Summary of Chick Mobility Data

<u>Source</u>	<u>Location</u>	<u>Data</u>
Patterson 1988 (p.40)	Maryland and Virginia	18 of 38 broods moved to feeding areas more than 100 meters from their nests; 5 broods moved more than 600 meters (distance measured parallel to wrackline).
Cross 1989 (p.23)	Virginia	At three sites, observers relocated broods at mean distances from their nests of 153 m +/-97m (44 observations, 14 broods), 32 m +/-7 m (8 observations, 3 broods), and 492 m +/-281 m (12 observations, 4 broods).
Coutu et al. 1990 (p.12)	North Carolina	Observations of 11 broods averaged 212 m from their nests; 3 broods moved 400-725 m from nest sites.
Strauss 1990 (p.33)	Massachusetts	10 chicks moved more than 200 m during first 5 days post-hatch while 19 chicks moved less than 200 meters during same interval.
Loevinger 1992 (p.72)	Maryland	Distances broods moved from nests during first 5 days post-hatch averaged 195 m in Bay habitat (n=10), 141 m in Interior habitat (n=36), and 131 m in Ocean habitat (n=41). By 21 days, average movement in each habitat had, respectively, increased to 850 m (n=1), 464 m (n=10), and 187 m (n=69). One brood moved more than 1000 m from its nest.
Melvin et al. 1994	Massachusetts and New York	In 14 incidents in which 18 chicks were killed by vehicles, chicks were run over ≤ 10 m to ≤ 900 m from their nests. In 7 of these instances, mortality occurred ≥ 200 m from the nest.

Table 2. Summary of Data on Distances at which Piping Plovers React to Disturbance

<u>Source</u>	<u>Location</u>	<u>Data</u>
<u>Flushing of Incubating Birds by Pedestrians</u>		
Flemming et al. 1988 (p.326)	Nova Scotia	Adults usually flushed from the nests at distances <40 m; however, great variation existed and reaction distances as great as 210 m were observed.
Cross 1990 (p.47)	Virginia	Mean flushing distances in each of two years were 47 m (n=181, range = 5 m to 300 m) and 25 m (n=214, range = 2 m to 100 m).
Loegering 1992 (p.61)	Maryland	Flushing distances averaged 78 m (n=43); range was 20 m to 174 m. Recommended use of 225 m disturbance buffers on his site.
Cross and Terwilliger 1993	Virginia	Mean flushing distance for all years on all sites (Virginia plover sites, 1986-91) was 63 m (n=201, SD=31, range = 7 m to 200 m). Differences among years were not significant, but differences among sites were.
Hoopes 1993 (p.72)	Massachusetts	Mean flushing distance for incubating plovers was 24 m (n=31).
<u>Disturbance to Non-incubating Birds</u>		
Hoopes 1993 (p.89)	Massachusetts	Mean response distance (all ages, all behaviors) was 23 m for pedestrian disturbances (range = 10 m to 60 m), 40 m for vehicles (range = 30 m to 70 m), 46 m for dogs/pets (range = 20 m to 100 m), and 85 m for kites (range = 60 m to 120 m).
Goldin 1993b (p.74)	New York	Average flushing distance for adult and juvenile plovers was 18.7 m for pedestrian disturbances (n=585), 19.5 m for joggers (n=185), and 20.4 m for vehicles (n=111). Pedestrians caused chicks to flush at an average distance of 20.7 m (n=175), joggers at 32.3 m (n=37), and vehicles at 19.3 m (n=7). Tolerance of individual birds varied; one chick moved 260 m in direct response to 20 disturbances in 1 hour.

EXHIBIT G



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

NEIL YOSKIN
PARTNER
NYoskin@cullenllp.com

February 2, 2023

Via e-mail (Gary.Brower@dep.nj.gov) and Overnight Delivery

Office of Legal Affairs
New Jersey DEP
401 E State St; Mail Code 401-04L
PO Box 402
Trenton, NJ 08625-0402

Attn: Adjudicatory Hearing Requests

RE: City of North Wildwood
EA ID No. PEA 230001-0507-03-0009.3
ADJUDICATORY HEARING REQUEST

Dear Sir/Madam:

This office represents the City of North Wildwood (“City” or “North Wildwood”). On or about January 11, 2023, the City was served with an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) seeking the payment of \$8,661,000 in penalties in connection with the installation, in 2020, of a protective steel bulkhead and related improvements, construction of which was made necessary by the failure of the State of New Jersey to conduct a legislatively mandated beach restoration project. The AONOCAPA also addresses alleged violations of a Coastal Area Facility Review Act (CAFRA) permit in connection with improvements to a public park.

The City vigorously questions the basis for and findings in the AONOCAPA, and hereby requests an administrative hearing. The following information is provided pursuant to the Adjudicatory Hearing Request Checklist and Tracking Form attached to the AONOCAPA. This request is filed within 35 days of the date on which the AONOCAPA was served and is, therefore, timely.



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I. Permit decision being appealed: Administrative Order and Notice of Civil Administrative Penalty Assessment dated January 11, 2023, EA ID No. PEA 230001-0507-03-0009.3 (copy attached).

II. Persons requesting hearing:

City of North Wildwood
10th & Atlantic Avenue
North Wildwood, NJ 08260
Attn: Nicolas Long, City Administrator

Name of Attorney:
Neil Yoskin, Esq.
Cullen and Dykman LLP
229 Nassau Street
Princeton, NJ 08542
609-279-0900

A. Date the alleged violator received the enforcement document: On or about January 11, 2023

B. and C. List of issues being appealed and admission or denial of each of the findings of fact:

FINDINGS

1. It is admitted that the City of North Wildwood owns the oceanfront beach and dune properties listed at Paragraph 1 of the AONOCAPA.
2. It is acknowledged that the wetland conservation restriction required by CAFRA and Freshwater Wetland Permit file Nos. 0507-03-0009.2 CAF 14001, FWW 14001 and FWW 14002 was not recorded.
3. It is admitted that on June 9, 2017, the Department issued a CAFRA and Waterfront Development Permit authorizing routine beach and dune maintenance and on June 29, 2018 issued a CAFRA and Waterfront Development Permit authorizing sand backpassing which included the harvesting of sand from the City of Wildwood and the deposition of that sand in designated areas on North Wildwood's beach between 2nd and 26th Avenue.
4. It is admitted that on December 19, 2017, the City submitted a jurisdictional determination to determine if proposed decking surrounding the beach patrol building at 15th Avenue required an NJDEP Coastal Permit. It is further admitted that on August 14, 2019, the Department issued a determination that a CAFRA permit would be required for the decking. It is acknowledged that aerial imagery from March 6, 2017 indicates that the City had already constructed approximately 4,216 s.f. of such decking.



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5. It is admitted that on July 10, 2019, the Department issued a Freshwater Wetland Letter of Interpretation identifying freshwater wetlands and transition areas in the vicinity of the Lou Booth amphitheater and within and surrounding the dunes to the north of the beach patrol building.
6. It is admitted that on April 3, 2020, the City submitted a coastal permit application seeking authority to construct ADA and other improvements at three locations: the 22nd Avenue beach, the Lou Booth Amphitheater and Hereford Inlet.
7. It is admitted that the Department advised the applicant that the aforesaid application was deficient on May 6, 2020, but it is denied that the deficiencies noted therein were accurate.
8. The City is without sufficient knowledge to admit or deny that the Department conducted site investigations on April 28 and May 26, 2020. It is expressly denied that approximately eight acres of vegetated dunes, including approximately 6.7 acres of critical wildlife habitat and approximately 1.1 acres of freshwater wetlands throughout the North Wildwood oceanfront, had been disturbed or destroyed. It is also denied that the degree of dune disturbance in and around the Lou Booth Amphitheater and Surf Avenue area, if any, is accurately described.
9. The City is without sufficient knowledge to know what the Department documented regarding sand movement in and around Sea Port pier.
10. It is admitted that on June 6, 2020, the Department issued a Notice of Violation (NOV) based on alleged violations described in the paragraphs above.
11. The City is without sufficient knowledge to admit or deny that the Department conducted a site visit on June 8, 2020. Otherwise admitted.
12. It is admitted that on June 9, 2020, representatives of the City and the Department met on site to view then current public safety hazardous conditions. It is denied that said conditions were created by the City's unauthorized movement and stockpiling of sand. It is denied that the City destroyed 6.7 acres of dunes, as alleged. It is admitted that later that day, the City sent an e-mail to the Department indicating that the City planned to continue to move sand but would apply for an emergency authorization.



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13. It is admitted that on June 10, 2020, the City requested an emergency authorization for public safety to complete the distribution of the remaining sand stockpiled along the oceanfront and to grade that sand at various locations between 2nd and 26th Avenues, and to establish a flagged buffer line located 25 feet waterward of the visible limit of remaining vegetated dunes, to utilize the stockpiled sand for continued beach replacement and grading and to retain 75,000 c.y. for future erosion events. It is denied that the City placed sand within dunes, wetlands and critical wildlife habitat areas landward of the authorized sand locations unless the delineated approved locations rather subject to erosion or were currently under water, in which case the City had no choice.
14. The City is without sufficient knowledge to admit or deny that Department staff conducted a site inspection on June 12, 2020 and/or to admit or deny the Department's findings. It is admitted that none of the work alleged to have occurred was authorized on emergency authorization.
15. It is admitted that the City, through counsel, requested a status update on the emergency authorization request.
16. It is admitted that on June 17, 2020, the City provided a plan to the Department depicting a 25' offset to the dunes.
17. It is admitted that on June 22, 2020, DEP issued a reminder letter to the City of the then past due requirement to submit all supplemental information related to the June 6, 2020 NOV, which was otherwise due to be submitted on or about June 16, 2020.
18. It is admitted that on June 24, 2020, the Department issued an emergency authorization for a one-time slope adjustment to the sand stockpiles between 12th and 14th Avenues and 16th and 22nd Avenues. The balance of the paragraph is admitted.
19. The City is without sufficient knowledge to admit or deny that the Department conducted a site visit on June 24, 2020.
20. The City is without sufficient knowledge to admit or deny that the Department conducted a site inspection on June 29, 2020. The balance of paragraph 20 is denied.
21. It is admitted that on July 14, 2020, the City provided initial response to the Department's June 6, 2020 NOV.



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22. It is admitted that on September 17, 2020, the Department issued a second NOV.
23. It is admitted that on September 23, 2020, the City advised the Department that the City's beaches had been experiencing erosion, that an area between 12th and 14th Avenues was subject to direct wave attack and that jersey barriers had been placed on the beach south of 12th Avenue to provide protection to the dune system at that location.
24. The City is without sufficient knowledge to admit or deny that the Department conducted a site inspection on September 24, 2020.
25. It is admitted that on October 5, 2020, the Department issued a third NOV for placement of concrete Jersey barriers on the beach between 12th and 13th Avenues.
26. It is admitted that on October 9, 2020, the City responded to the third NOV, arguing that a CAFRA Permit and/or Emergency Authorization should not be required and that the City intended to keep the Jersey barriers in place for the remainder of the hurricane season. It is further admitted that the City did not submit a permit application and that the jersey barriers were removed from the beach by February, 2021.
27. It is admitted that on October 16, 2020, the City provided a response to the Department's second NOV.
28. It is admitted that on October 21, 2020, the Department met with the City to discuss various compliance matters as set forth in that paragraph.
29. It is admitted that on November 20, 2020, the City submitted a CAFRA and Freshwater Wetland Permit application for the purpose of legalizing the previously constructed bulkhead between 3rd and 5th Avenues and 5th and 13th Avenues and to obtain approvals for a proposed bulkhead adjacent to the boardwalk between 13th and 25th Avenues. It is admitted that the City was subsequently notified on December 3, 2020 that the application had been determined to be deficient, but it is denied that the application is in fact deficient.
30. It is admitted that on December 8, 2020, the Department approved an emergency authorization authorizing various shore protection activities.
31. It is admitted that on August 12, 2021, the Department issued a CAFRA/Waterfront Development Permit legalizing the beach nourishment activities authorized by the prior emergency authorizations.



Cullen | Dykman

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32. It is admitted that on July 27, 2022, the Department issued a CAFRA NOV as the City's beach and dune maintenance permit had expired on June 8, 2022. It is admitted that a beach and dune maintenance permit application was submitted on December 16, 2022 and is under review at this time.
33. It is admitted that on October 3, 2022, the City's consultant advised the Department that the area near the beach patrol building at 15th Avenue was sustaining dune losses and storm damages due to Hurricane Ian and indicated that an emergency authorization would likely be needed.
34. It is admitted that on October 4, 2022, the City responded indicating that the Department would "expedite review of any submitted emergency authorization requests". It is further admitted that the City's consultant was provided specific guidance regarding what the Department characterized as acceptable emergency beach restoration activities and indicated that those alternatives should be considered prior to placement of a bulkhead.
35. It is admitted that on the evening of October 5, 2022, the City requested an emergency authorization to conduct multiple emergency shore protection measures in response to Hurricane Ian's storm damage, as enumerated in the paragraph.
36. It is admitted that on October 6, 2022, the Department requested clarification from the City on what "reshaping the dune scarp" entailed.
37. It is admitted that on October 7, 2022, the Department issued an emergency authorization to remove a damaged walkway and to install jersey barriers while insuring no dune disturbance. It is admitted that the City had already completed the installation of the jersey barriers prior to receiving the emergency authorization. It is admitted that the emergency authorization requires a complete CAFRA and Freshwater Wetland Permit application be submitted no later than January 7, 2023 and that to date no such application has been submitted.
38. It is admitted that on October 7, 2022, the Department's Division of Resilience Engineering and Construction issued a letter reiterating that an emergency authorization is required prior to conducting any regulated activities.
39. It is admitted that on October 12, 2022, the Department sent an e-mail to the City indicating that the proposed installation of 404 linear feet of bulkhead at the beach patrol building, the reshaping of the dune scarp and reconstruction of vehicular beach access at 25th Avenue were not eligible for emergency authorization. It is



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expressly denied that the City had not demonstrated that there was an imminent threat to loss of life or property at the time that the emergency authorization was sought.

40. The City is without sufficient knowledge to admit or deny that on October 20, 2022, the Department conducted a site inspection.
41. It is admitted that on October 21, 2022, the City's attorney advised the Department that the City had completed the regrading of the dune and that because of supply chain issues the bulkhead materials were not available but should be within 30 days of that date.
42. It is admitted that on October 27, 2022, the Department sent an e-mail to the City's attorney requesting a meeting to discuss the alleged deficiencies in its 2020 pending bulkhead application.

D. Defenses to each finding of fact and penalty assessment in the enforcement document:

1. All of the alleged CAFRA, Flood Hazard Area and Freshwater Wetland violations are as a direct result of the failure of the State of New Jersey to honor its statutory and contractual obligations to construct a beach and berm capable of protecting the City from direct wave attack.
2. All of the actions taken by the City to protect its beaches, dunes, infrastructure and other public and private property are protected by the doctrine of unavoidable necessity.
3. All actions by the City to protect, preserve and augment its beaches and dunes were taken with the knowledge of the Department's Division of Coastal Engineering, as a result of which the Department is estopped from taking this enforcement action.
4. The Department's estimates as to the amount of dune and wetland disturbance, particularly at the north end of the City's beaches, are erroneous, arbitrary and capricious.
5. The penalty assessments are arbitrary, capricious and unreasonable and are based on inaccurate data, particularly as to the amount of dune area and wetland area that were destroyed as a result of natural processes and erosion.



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- E. Information supporting the request:** none at this time.
- F. Estimate of the time required for the hearing:** 30 days.
- G. Barrier free hearing location:** not required.
- H. The City is willing to discuss settlement with the Department prior to the processing of its hearing request.**

A copy of this hearing request is being provided to Michele Kropilak, Manager, Bureau of Coastal and Land Use Compliance and Enforcement, to Colleen Keller, Assistant Director, Division of Land Resource Protection and to Kevin Terhune, Deputy Attorney General, as required by the Adjudicatory Hearing Checklist.

Sincerely,
CULLEN AND DYKMAN LLP

A handwritten signature in blue ink that reads 'Neil Yoskin'.

Neil Yoskin

NY/cl
Enclosures
cc (via e-mail):
City of North Wildwood



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION
Watershed & Land Management
Division of Land Resource Protection
501 East State St, PO Box 420, 501-2A
Trenton, New Jersey 08625
Tel. (609) 984-3444

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

SHAWN M. LATOURETTE
Commissioner

January 11, 2023

CERTIFIED MAIL/RRR & Via email
7017 2620 0000 1758 0251

Honorable Patrick Rosenello, Mayor
City of North Wildwood
901 Atlantic Avenue
North Wildwood, New Jersey 08260

RE: Administrative Order and Notice of Civil Administrative Penalty Assessment
Block 291.01 Lot 1; Block 315.02, Lot 1; Block 316.02, Lot 1;
Block 317.02, Lots 1 & 2; Block 317.03, Lot 1; Block 289.03, Lot 1
North Wildwood City, Cape May County
PEA230001-0507-03-0009.3

Dear Mayor Rosenello:

Enclosed for service upon you is an Administrative Order and Notice of Civil Administrative Penalty Assessment issued by the Department.

Contained within the enclosed document is a notice and instructions for requesting an Administrative Hearing. Failure to request a hearing within 35 days as per instructions will result in the loss of your right to a hearing.

If you have any questions concerning the Administrative Order and Notice of Civil Administrative Penalty Assessment, please contact Michele Kropilak of my staff at michele.kropilak@dep.nj.gov or by letter at the address above.

Sincerely,

A handwritten signature in cursive script, appearing to read "JM", likely representing Jennifer Moriarty.

Jennifer Moriarty, Director
Division of Land Resource Protection

c: Kimberly Cahall, NJDEP, OEP
Dennis Reinknecht, NJDEP, DREC
Kevin Terhune, NJOAG, DOL-EEEEJ
Neil Yoskin, Esq., Cullen & Dykman LLP



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF COASTAL AND LAND USE COMPLIANCE &
ENFORCEMENT

Toms River Office

1510 Hooper Avenue, Suite 140

Toms River, New Jersey 08753

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PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

SHAWN M. LATOURETTE
Commissioner

January 11, 2023

CERTIFIED MAIL/RRR & Via email
7017 2620 0000 1758 0251

IN THE MATTER OF	:	
	:	
	:	
City of North Wildwood	:	ADMINISTRATIVE ORDER
901 Atlantic Avenue	:	AND
North Wildwood, New Jersey 08260	:	NOTICE OF CIVIL ADMINISTRATIVE
	:	PENALTY ASSESSMENT
	:	

ID # PEA230001-0507-03-0009.3

This Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) is issued pursuant to the authority vested in the Commissioner of the New Jersey Department of Environmental Protection (hereinafter, NJDEP or the Department) by N.J.S.A. 13:1D-1, et seq., and the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., (“FHA”) and the rules promulgated at N.J.A.C. 7:13-1 et seq., the Coastal Area Facility Review Act N.J.S.A. 13:19-1 et seq. (“CAFRA”) and rules promulgated at N.J.A.C. 7:7-1 et seq., and the Freshwater Wetlands Protection Act (N.J.S.A. 13:9B-1 et. seq.) and the rules promulgated at N.J.A.C. 7:7A-1, et. seq., and duly delegated to the Assistant Commissioner, Watershed and Land Management and her assignees pursuant to N.J.S.A. 13:1B-4.

FINDINGS

1. The City of North Wildwood, hereinafter “Respondent,” owns the oceanfront beach and dune property located at Block 291.01, Lot 1; Block 315.02, Lot 1; Block 316.02, Lot 1; Block 317.02, Lots 1 & 2; Block 317.03, Lot 1, Block 289.03, Lot 1, North Wildwood City, Cape May County, hereinafter the “site”.
2. On December 1, 2014, the Department’s Division of Land Resource Protection (DLRP) issued a CAFRA and Freshwater Wetland Permit (File # 0507-03-0009.2 CAF140001, FWW140001 & FWW140002) to the Respondent, which authorized street and utility reconstruction, beachfront storm sewer/outfall reconstruction, construction of a multi-use path from 5th to 15th Avenues and widening of sidewalks between 1st and 2nd Avenues in North Wildwood. The freshwater wetlands buffer for the wetlands was identified as exceptional resource value and designated as 150 feet wide. Pre-construction condition #2 of this permit required that prior to site preparation, the permittee shall complete a transition area and adjacent freshwater wetland conservation restriction and file the completed restriction with the Cape May County Clerk’s Office preserving the freshwater wetlands and transition areas located within the existing dunes. A copy of the recorded restriction was also required to be submitted to the Department prior to construction. The freshwater wetlands

conservation restriction was not filed as required by the Freshwater Wetland Permit and construction has been completed. The Respondent's counsel admitted in an August 17, 2020 letter to DEP that a conservation restriction was drafted at the time but the Respondent has failed to file the conservation restriction with the Cape May County Clerk's Office to date.

3. On June 9, 2017, the DLRP issued a CAFRA and Waterfront Development permit to the Respondent, File #0507-03-0009.3 (CZM170001) for routine beach and dune maintenance and on June 29, 2018, DLRP issued a CAFRA and Waterfront Development Permit File #0500-07-0006.3 (CAF180001, WFD180001) for sand back passing which included the harvesting of sand from the City of Wildwood and the deposition of that sand in specifically designated areas only on the beach waterward toe of the dunes in North Wildwood between 2nd and 26th Avenues in accordance with NJDEP approved location plans. These permits do not authorize any disturbance to existing dunes, wetlands or stockpiling of sand and are valid for 5 years.
4. On December 19, 2017, the Respondent submitted a jurisdictional determination request to DLRP to determine if proposed concrete and composite decking surrounding the beach patrol building at 15th Ave at the oceanfront required an NJDEP coastal permit. The DLRP issued a Coastal Jurisdictional Determination letter, File #0507-03-0009.2 (APD170001) on August 14, 2019, that a CAFRA permit would be required for the decking. As seen on Nearmap aerial imagery from March 6, 2017, the Respondent had already constructed approximately 4, 216 square feet of concrete and composite decking at the beach patrol building without obtaining the required CAFRA permit.
5. On July 10, 2019, DLRP issued a Freshwater Wetlands Letter of Interpretation File #0507-03-0009.2 FWW180001 to the Respondent for a portion of the site that identified freshwater wetlands and transition areas near the Lou Booth Amphitheatre and within and surrounding the dunes to the north of the beach patrol building at 15th Avenue.
6. On April 3, 2020, the Respondent submitted a CAFRA and Freshwater Wetlands permit application, File #0507-03-0009.4 (LUP200001), to DLRP to construct ADA and other improvements at the 22nd Avenue beach, the Lou Booth Amphitheatre and Hereford Inlet.
7. The DLRP advised the Respondent that the application was deficient on May 6, 2020. There were numerous deficiencies, including, but not limited to, inaccurate plan submittals that did not depict all existing structures or freshwater wetlands and transition area disturbances. The Respondent was advised that bike, concrete and other pathways, foot showers and stairs were constructed without prior CAFRA authorization and may need to be removed and/or be legalized if the Respondent can demonstrate compliance with the Coastal Zone Management Rules at N.J.A.C. 7:7 and Stormwater Rule, N.J.A.C. 7:8. On March 31, 2022, the Respondent submitted information to address some of the deficiencies. As a result, the DLRP issued another deficiency letter on April 7, 2022. As of this date, the application remains deficient and is awaiting additional information from the Respondent.
8. On April 28 and May 26, 2020, in response to calls to the Department's Communication Center of alleged unauthorized dune disturbance at the site, the Department's Bureau of Coastal & Land Use Compliance & Enforcement (CLUE) conducted site investigations and determined that approximately 8 acres of vegetated dunes, including approximately 6.7 acres of critical wildlife habitat and approximately 1.1 acres of freshwater wetlands, throughout the North Wildwood oceanfront had been destroyed and numerous structures had been constructed on the site without NJDEP authorization. These unauthorized structures included a vinyl and steel oceanfront bulkhead from approximately 3rd Avenue to almost 13th Avenue, gazebos, sheds, shower platforms, bike paths, walkways, concrete landing with flagpole and other improvements along the oceanfront, including dune disturbance/removal in and around the Lou Booth Amphitheatre and Surf Avenue area.
9. CLUE documented that the Respondent had graded and removed approximately 0.57 acres of the dune adjacent to and waterward of Seaport Pier just prior to the opening of Seaport Pier in spring of 2018 and was now stockpiling back passed sand within this area, had altered or removed vegetated dunes during the unauthorized

construction of the various bulkhead segments from 2012 to 2020, including the removal of approximately 0.58 acres of prior dune/beach area to install an irregularly shaped bulkhead and create a park area on the oceanfront between 5th and 7th Avenues, and also placed some of the harvested sand from Wildwood in large stockpiles on top of approximately 6.7 acres of existing vegetated dunes from 7th Avenue south towards 13th Avenue in 2020. Placement of the stockpiled sand on top of the vegetated dunes and in other locations on the beach and dunes throughout the site were not authorized by any NJDEP permit or in compliance with any approved permit or plan. In late spring of 2020, these large stockpiles of harvested sand were graded waterward of the unauthorized steel bulkhead destroying the mature, densely vegetated dunes between 7th Avenues and 13th Avenues. Additional unauthorized large stockpiles of sand remained throughout the site at this time.

10. Based on the violations described in paragraphs above, the Department issued a June 6, 2020 CAFRA, Freshwater Wetlands and Flood Hazard Area Notice of Violation ("NOV") to the Respondent. In the NOV, the Department advised that all unauthorized activities must cease immediately, and that Respondent was not to conduct any regulated activities except in compliance with valid NJDEP land use permits in accordance with approved plans. The June 6, 2020 NOV requested a response within 10 days and copies of all work/site plans, as built surveys, planning board and local/county/federal/state approvals for the unauthorized work as well as a list of all contractors, their contracts, and identify the specific projects completed for the Respondent related to the NOV.
11. On June 8, 2020, CLUE visited the site to assess site conditions. Sand grading of the stockpiles within the area of vegetated dunes near 11th and 12th Avenues was still underway. The same day, the Department again advised the Respondent via e-mail that the work in progress was not authorized by any permit and must stop immediately or additional enforcement action would be taken. CLUE proceeded to City Hall and met with the City Administrator and via telephone with the City's attorney. Both were advised that the work underway was not in compliance with the sand back passing permit and that all work must cease and a restoration plan should be submitted within 10 days as required by the June 6, 2020 NOV. Subsequent to this meeting, the City's attorney emailed NJDEP and admitted that the City's position is that due to storm erosion, by the time the sand was harvested from Wildwood to be brought to North Wildwood there was no room to place it other than on what remained of the vegetated dunes. The City felt the remaining sand stockpiles were unstable and proposed to stop working at the 12th Avenue site, but be allowed to complete work from 17th -23rd Avenues, and suggested a site meeting be scheduled immediately to discuss further. The Department did not agree to any continuation of site work. The Respondent's attorney requested a thirty-day extension to respond to the NOV and a meeting to further discuss the NOV and path forward. No thirty-day extension was granted by the Department at this time.
12. On June 9, 2020, the Respondent and Department staff met on site to view current the public safety hazardous conditions created by the Respondent's unauthorized movement and stockpiling of sand. The Respondent was concerned about the remaining large stockpiles of sand that had not yet been distributed and graded, which might be susceptible to erosion and collapse, and presented a public safety hazard. The Department advised the Respondent to close off or fence the areas of safety concern and stop work, prepare and/or provide surveys documenting the location of the dunes prior to the commencement of this year's back passing, and stake the area 25 feet waterward of the remaining dunes so that they would not be impacted/excavated. The Department advised that the stockpiled sand should remain in place and eventually be utilized to begin restoration of the 6.7 acres of dunes that were destroyed by the Respondent. It was also recommended that the Respondent submit an emergency authorization request to address the alleged public safety hazard, and once submitted, DLRP agreed to expedite review of same. Later that day, the Department received an email from the Respondent that they planned to continue to move sand but would apply for an emergency authorization.
13. On June 10, 2020, the Respondent requested an emergency authorization for public safety to complete the distribution of the remaining sand stockpiled along the oceanfront and to grade that sand between 2nd and 26th Avenues. The Respondent proposed to establish a flagged buffer line located 25 feet waterward of the visible limit of remaining vegetated dunes and utilize the stockpiled sand for continued beach placement and grading, and also planned to retain 75,000 cubic yards of sand for future erosion events. The Respondent expected the

work to be completed by June 14, 2020 and did not submit a site/work plan. The Department did not authorize any continuation of the sand movement or grading at that time. The Respondent acknowledged that their NJDEP approved plans delineated areas to place the sand waterward of all existing dunes, however in late 2019 and 2020, the Respondent instead placed the harvested sand landward of the authorized sand locations within dunes, wetlands and critical wildlife habitat areas because the delineated approved locations were either subject to erosion or currently underwater. The Respondent agreed to coordinate on the submittal of a restoration and/or mitigation plan for the areas impacted. DLRP continued to request a plan depicting the proposed limits of sand removal/transfer from the stockpiled areas.

14. On June 12, 2020, CLUE staff conducted a site inspection and determined that the Respondent was continuing to conduct unauthorized regulated activities despite being advised by the Department on multiple occasions to stop working. Specifically, the Respondent had continued to move sand from the large stockpiles near 21st and 22nd Avenues, grading those areas level, and placing and grading the harvested sand at the oceanfront between 2nd and 7th Avenues. None of the work was in compliance with any permits/approved plans and no emergency authorization had been issued for this activity to date.
15. On June 15, 2020, through counsel, Respondent requested a status update on the emergency authorization request. CLUE staff responded and once again asked that the Respondent provide a plan depicting the proposed limits of sand removal from the stockpiles and limits of the area to be transferred to. The Respondent was again reminded that the ongoing work was not in compliance and subject to enforcement action.
16. On June 17, 2020, the Respondent's attorney provided a plan depicting a 25-foot offset to the dunes. This plan did not address where the sand was to be placed or to what elevation/slope the sand would be graded to. Sand transfers and grading were still ongoing. DLRP staff advised once again that the ongoing work should cease, and only a one-time grading of the waterward slope of the stockpiles to address safety concerns would be authorized, and the remaining sand stockpiles should not be moved or graded any further so that the sand could be utilized to address all violations.
17. On June 22, 2020, through its counsel, DEP issued a reminder letter to the Respondent's attorney of the now past due requirement to submit all supplemental information related to the June 6, 2020 NOV. This information had been due within 10 days of the NOV (on June 16, 2020). The letter also reiterated that no extension had been provided to respond to the NOV.
18. On June 24, 2020, the DLRP issued an Emergency Authorization (File # 0500-07-0006.3 CAF200001) for a one-time slope adjustment to the sand stockpiles between 12th and 14th Avenues and 16th and 22nd Avenues to address the public safety concerns. The Emergency Authorization included specific limitations to the sand movement/grading and sand stockpile slopes and specifically directed that no grading or sand removal/movement shall occur beyond what was necessary to create a 5:1 slope to the sand stockpiles and 7:1 slope at the beach accessways for public safety. The Emergency Authorization allowed the Respondent to place limited excess sand within 75 feet of the steel bulkhead between 8th and 12th Avenues only. The elevation of the beach area was required to be no lower than 7 feet NAVD88, North American Vertical Datum of 1988, which is the standard used by surveyors to measure elevation. The Emergency Authorization specifically prohibited the continued removal, relocation, filling and grading of all stockpiled sand, or the continued movement of stockpiled sand beyond the limits above related to public safety and had to be completed within 60 days. The Respondent was required to submit a CAFRA and Waterfront Development permit application to the Department within 90 days. The Respondent was advised that the work authorized under the Emergency Authorization did not satisfy any of June 6, 2020 NOV compliance requirements to correct the violations.
19. On June 24, 2020, CLUE conducted a site inspection and observed sand being transported to, placed and graded between 3rd and 14th Avenues, without a valid NJDEP permit and in violation of the June 24, 2020 Emergency Authorization.

20. On June 29, 2020, CLUE conducted a site inspection and observed sand grading was ongoing at 12th Avenue not in compliance with any NJDEP approvals. This site inspection also confirmed that unauthorized transport, placement, filling and grading of sand had now occurred within a combined total area of approximately 12 acres of beach and prior dune areas throughout the North Wildwood oceanfront. The previously stockpiled sand had now been graded throughout the City's beach and prior dune area, beyond the approved areas listed within the June 24, 2020 Emergency Authorization. Substantial grading and removal of the stockpiled sand between 13th and 15th Avenues had occurred beyond the grading and sand movement authorized under the June 24, 2020 Emergency Authorization.
21. On July 14, 2020, the Respondent provided an initial response to the June 6, 2020 NOV and admitted work was completed without the required permits, but did not explain how the violations would be resolved, either via a timeframe for permit application submittal or restoration as needed. No other responsive documents were submitted at this time. Legal counsel for the Department advised the Respondent via email later that day that the response by the Respondent was incomplete and requested all responsive documents to address the NOV.
22. On September 17, 2020, the Department issued a second NOV (File# 0507-03-0009.3 PEA200002) to the Respondent for continuing and new violations at the site since June 6, 2020, including non-compliance with the June 24, 2020 Emergency Authorization (File# 0500-07-0006.3 CAF200001). The second NOV advised the Respondent to cease unauthorized grading and sand movement activities, and either submit a permit application to attempt to legalize the unauthorized work or submit a restoration plan to remove all unauthorized structures and restore the site. In addition, the Department reminded the Respondent that a CAFRA and Waterfront Development permit application was required no later September 24, 2020 in accordance with the June 24, 2020 Emergency Authorization.
23. On September 23, 2020, the Respondent's attorney advised the Department that the site had been experiencing erosion, the bulkhead between 2nd and 12th Avenues was subject to both direct wave attack and water was up to the bulkhead in these locations, and that jersey barriers had been placed south of 12th Avenue on the beach to provide protection to the dune system south of this location adjacent to the unauthorized bulkhead.
24. On September 24, 2020, CLUE conducted a site inspection and observed the unauthorized placement of concrete jersey barriers on the beach between 12th and 13th Avenues within a CAFRA regulated area.
25. On October 5, 2020, the Department issued a third NOV (File# 0507-03-0009.3 PEA200001) to the Respondent for placement of concrete "jersey" barriers on the beach between 12th and 13th Avenues without CAFRA permit approval in violation of N.J.A.C. 7:7-2.2. The NOV required either the removal of the jersey barriers or obtaining a CAFRA permit for them.
26. On October 9, 2020, the Respondent's attorney provided a response to the third NOV issued October 5, 2020, arguing that a CAFRA permit and/or emergency authorization should not be required, and that the Respondent intends to keep the jersey barriers in place for the remainder of the hurricane season. The Respondent did not submit a permit application, but the jersey barriers were removed from the beach by February 2021.
27. On October 16, 2020, the Respondent's attorney provided a response to the second NOV issued September 17, 2020 and admitted that the Respondent took actions that were outside the scope of the permit(s) and acknowledged disturbing the dunes, wetlands and wetland transition areas. Through counsel, the Respondent further conceded that the terms and conditions of the June 24, 2020 Emergency Authorization were not complied with because it felt they were outdated and obsolete upon issuance.
28. On October 21, 2020, the Department met with the Respondent to provide additional compliance assistance. The Respondent advised that it planned to submit an after the fact permit application for the existing unauthorized bulkhead together with a request to extend the bulkhead south the entire length of the City's oceanfront. and intended to add and address many of the other unauthorized structures within the pending deficient permit application File #0507-03-0009.4 (LUP200001), noted in paragraph 6. The Respondent

planned to apply for another permit or emergency authorization within 60 days for the upcoming round of back passing, thereby curing any alleged violations by way of that application. The Department requested the Respondent address, a holistic approach, including long and short-term resolution of all the violations by October 30, 2020, and advised that the permit applications must address the disturbance of dunes, wetlands, wetland transition areas, and critical wildlife habitat. Dune removal near Seaport Pier was discussed; and CLUE agreed to provide documentation of the removal to the Respondent, which was provided on October 29, 2020. On November 9, 2020, Respondent's attorney sent a letter to NJDEP that acknowledged the approximately 0.57 acre dune adjacent to Seaport Pier had been graded, removed and relocated landward by the Respondent without DEP permit approval.

29. On November 20, 2020, the Respondent submitted a CAFRA and Freshwater Wetlands permit application (File #0507-03-0009.6 LUP20001) to attempt to legalize a previously constructed vinyl bulkhead between 3rd and 5th Avenues and steel bulkhead between 5th and 13th Avenues; and to obtain approvals for a proposed steel bulkhead adjacent to the boardwalk between 13th and 25th Avenues. The permit application and submitted plans included information related to the dates of unauthorized installation for each segment of bulkhead as well as the lengths and materials installed. Specifically, 229 linear feet of vinyl bulkhead was installed from 3rd to 4th Avenues between 11/27/2012-12/09/2012, 267 linear feet of vinyl bulkhead was installed from 4th to 5th Avenues between 11/27/2017-05/06/2018, 630 linear feet of steel bulkhead was installed from 5th to 7th Avenues between 11/27/2017-05/06/2018, and 1,614 linear feet of steel bulkhead was installed from 7th to 13th Avenues between 11/08/2019 – 5/5/2020. The Respondent was notified that this application was determined to be deficient on December 3, 2020. As of this date, the application requires additional information from the Respondent prior to review.
30. On December 8, 2020, DLRP approved an Emergency Authorization, File #0500-07-0006.4 CAF200001, to conduct a sand back passing project in response to a request submitted by the Respondent to harvest sand from Wildwood, temporarily stockpile the material in Wildwood, place temporary jersey barriers waterward of existing piers from 23rd Aves to 26th Avenues to protect truck access, stockpile the sand on the beach between 17th and 23rd Avenues and 7th and 13th Avenues not closer than 15 feet to the existing seaward dune toe and then deposit and grade the sand on the beach between 5th Avenues and 17th Avenues in North Wildwood. In addition, the Respondent was required to reestablish a dune from 16th Avenue north to 12th Avenue with an elevation of 14.75 feet NAVD88, and a 25-foot wide dune crest. The Respondent was required to provide before and after surveys to the Department and comply with all other conditions, including submission of a complete CAFRA and Waterfront Development permit application within 90 days. Multiple modifications and approvals were provided to the Respondent for the December 8, 2020 Emergency Authorization into 2021.
31. On August 12, 2021, DLRP issued a CAFRA/Waterfront Development Individual Permit, 0500-07-0006.4 LUP210001, which legalized the beach back passing and beach nourishment activities authorized by DLRP in the December 8, 2020, April 1, 2020 and May 19, 2021 Emergency Authorizations. The authorized activities include beach sand harvesting, temporary stockpiles, and maintenance of six (6) outfall structures between Leaming Avenue and Juniper Avenue in the City of Wildwood, and deposition and grading of beach sand, temporary stockpiles, construction access ways, jersey barriers, dune creation, and outfalls repair and abandonment between 2nd and 26th Avenue in the City of North Wildwood. The August 12, 2021 permit stipulates that the Respondent shall request and obtain written approval from the DLRP prior to conducting any work referenced in the permit for the duration of the permit. The permit specifically does not legalize any of the unauthorized activities cited within the June 6 and September 17, 2020 NOVs. On June 22, 2022, representatives from the Department met with NWW City representatives (including Mayor Rosenello) and their consultants to discuss the requested, required additional information for the pending CAFRA IP and FWW GP6A (DLRP File No. 0507-03-0009.4 LUP 200001) which has been deficient since 5/6/20.
32. On July 27, 2022, CLUE issued a CAFRA NOV File# 0507-03-0009.3 PEA220001 to the Respondent as the City's beach and dune maintenance permit, 0507-03-0009.3 CZM170001, had expired on June 8, 2022. The Respondent was advised that all beach and dune maintenance activities should cease immediately. The City's consultant responded and advised a CAFRA permit application was being prepared. A beach and dune

maintenance permit application File#0507-20-0001.2 LUP220001 was submitted on December 16, 2022 and is under DEP review at this time.

33. On October 3, 2022, the Respondent's consultant advised DLRP via email that the site, and specifically the area near the beach patrol building at 15th Avenue, was sustaining dune losses and storm damage due to Hurricane Ian and indicated that he and may apply for an emergency authorization. DLRP replied that day to advise that the DLRP was available for any questions, would review any submissions quickly and provided guidance on what information was required to be submitted to apply for an emergency authorization. Later that day, the Respondent's consultant advised that an emergency authorization would likely be needed because there was a concern for a breach of dune at the beach patrol building.
34. On October 4, 2022, DLRP responded to the Respondent's consultant and again advised that DLRP would expedite review of any submitted emergency authorization request and provided both day and evening contact phone numbers. DLRP advised that no work should be completed unless and until DLRP reviewed and provided either written or verbal authorization. The consultant was provided specific guidance from N.J.A.C. 7:7-10.3(b) regarding acceptable emergency beach restoration activities including placement of fill material, alongshore transfer of sand on the beach, placement of rock and/or sand filled geotextile tubes and advised that these activities should be considered prior to placement of a bulkhead which could increase erosion to adjacent areas.
35. On the evening of October 5, 2022, the Respondent requested an emergency authorization to conduct multiple emergency shore protection measures in response to Hurricane Ian storm damage. The request included placement of 400 linear feet of concrete jersey barriers at the inland toe of the dune from 15th to 16th Avenues at the beach patrol building, removal of timber decking walkway to allow for jersey barrier installment, installation of 404 linear feet of bulkhead in this location, reshaping the dune scarp and landward side of the dune to provide an angle of repose to the bulkhead in this location, and reconstruction of the vehicular beach accessway at 25th Avenue. The request stated that the deployment of the jersey barriers, relocation of the decking and the reshaping of the dune to stabilize the slope would commence immediately and be completed within one day and the installation of bulkhead and reconstruction of the accessways would commence upon receipt of materials and would require several weeks.
36. On October 6, 2022, the DLRP requested clarification via email on what "reshaping the dune scarp" entailed. The Respondent's consultant responded that that grading of the waterside side of the dune scarp would establish a stable slope so that continued collapse would not occur, and this may be needed on the landward side as well where the dune will meet the proposed bulkhead. The consultant opined that the grading may be covered by the August 12, 2021, back passing permit. The permit, however, specifically requires DLRP review and approval prior to conducting any work. The Respondent did not have any Department permit or approval to reshape the dune.
37. On October 7, 2022, DLRP issued an Emergency Authorization, File# 0507-03-0009.7 CAF220001 FWW220001, to remove the walkway and install the jersey barriers only, ensuring no dune disturbance. The other requests by the Respondent were under review, required additional information from the Respondent's consultant and not authorized at the time. The Respondent had already completed the installation of the jersey barriers prior to receipt of this Emergency Authorization. The October 7, 2022 Emergency Authorization requires a complete CAFRA and Freshwater Wetland permit application be submitted within 90 days (no later than January 7, 2023). To date, no CAFRA and Freshwater Wetland application has been submitted as required.
38. The Department's Division of Resilience Engineering & Construction (DREC) also issued a letter to the Respondent on October 7, 2022, reiterating that an emergency authorization from the DLRP is required prior to conducting regulated activities and the Respondent is not authorized to proceed until Department approval is provided. DREC has provided both technical and administrative assistance to the Respondent for several back passing permits. This letter also explained that emergency authorizations as outlined in N.J.A.C. 7:7-10.3(b) authorize certain emergency post storm measures designed to return the beach to pre-storm conditions,

such as placement of fill material, alongshore transfer of sand, placement of rock and/or geotextile tubes. The provision does not include placement of a bulkhead, which is likely to increase erosion to adjacent areas, and the Department can only approve such measures where the Respondent has demonstrated the alternatives are not feasible.

39. On October 12, 2022, the DLRP sent an email to the Respondent. DLRP determined that upon full review of all of information provided by the Respondent for the October 5, 2022 emergency authorization application, the installation of 404 linear feet of bulkhead at the beach patrol building, reshaping the dune scarp and dune to provide an angle of repose to the bulkhead in this location, and reconstruction of vehicular beach access at 25th Avenue were not eligible for an emergency authorization. Specifically, the 25th Avenue vehicular access was constructed without permit approval between 2013 and 2014 and was not able to be legalized via an emergency authorization, and other vehicle accessways are available adjacent to this area. The bulkhead and dune reshaping were also not eligible for an emergency authorization because it has not been demonstrated that there was an imminent threat to loss of life or property at the time and the Respondent advised the proposed bulkhead was not going to be installed immediately, but only after ordering materials. Emergency authorizations are intended for immediate action within 30 days, and the standards under N.J.A.C. 7:7-21.1(a) have not been demonstrated. As there was a pending deficient permit application (see paragraph 32) for the proposed bulkhead, the DLRP recommended the Respondent cure the deficiencies, and DLRP committed to expediting the technical review once the deficiencies were addressed. , the installation of a bulkhead would in fact worsen the erosion on site, which counsel for the Respondent acknowledged was a possibility in their October 20, 2022 letter to the Department. Alternative shore protection measures, including back passing for which the City holds a valid permit, must be conducted to determine the necessity of the proposed bulkhead and to determine which solution would have the least coastal impact on the adjacent beach and dune system as required by the Coastal Zone Management rules. To date, and more than two years later, the Respondent has not addressed all of the pending bulkhead permit application deficiencies. The Respondent was again advised that any regulated activity conducted without NJDEP approval would be subject to enforcement action including civil administrative penalties. To date, the Respondent has taken no formal action to object to or appeal this emergency authorization decision of ineligibility for the bulkhead, reshaping the dune and reconstruction of the vehicular access. for the bulkhead, reshaping the dune and reconstruction of the vehicular access.
40. On October 20, 2022, CLUE conducted a site inspection and observed the Respondent excavate sand from the beach berm near 11th Avenue, transport and place the excavated sand on the beach waterward of the dune between 14th and 16th Avenues. The sand was then graded into the dune scarp to reshape the dune in this location. The Respondent did not seek prior approval for this CAFRA regulated activity, and specifically advised the Department in their October 5, 2022 emergency authorization request that there was no available sand source. The Respondent was also specifically advised on October 7, 2022, that dune disturbance was not authorized. CLUE issued a CAFRA NOV to the Respondent, File# 0507-03-0009.3 PEA220002, for the unauthorized excavation, grading and reshaping of the dune without permit approval. The October 20, 2022 NOV advised the Respondent to cease the activity and attempt to obtain after the fact NJDEP permit approval. To date, no permit application has been submitted for this unauthorized CAFRA regulated activity.
41. On October 21, 2022, the Respondent's attorney advised the Department that the Respondent had completed the regrading of the dune and that because of supply chain issues the bulkhead materials were not yet available but should be within 30 days therefore the matter could be further discussed. The Respondent also disagreed that the bulkhead permit application remained deficient but provided no further information.
42. On October 27, 2022, the Department sent an email to the Respondent's attorney requesting a meeting to discuss the deficiencies in its 2020 pending bulkhead application. The email specifically identified the deficiencies cited on December 3, 2020 that have not been resolved. To date, the Respondent has not accepted the Department's offer to meet and discuss the bulkhead permit application deficiencies.
43. The following are violations the Department has identified to date:

CAFRA Violations

Violations of N.J.A.C. 7:7-2.1 and 2.2- engaging in a regulated activity within a CAFRA area without a coastal permit. Initiation of a regulated activity without a coastal permit is considered a violation of this chapter and shall subject the person or persons responsible for the regulated activity to enforcement action in accordance with N.J.A.C. 7:7-29

The following regulated activity occurred without NJDEP permit authorization:

- A. Vinyl bulkhead construction (approximately 496 linear feet x 2 ft wide) from 3rd to 5th Avenues
- B. Steel bulkhead construction (approximately 2244 linear feet x 2 ft wide) from 7th- 13th Avenues within a dune
- C. Removal of vegetation, filling and grading of the (now bulkheaded) beach and dune area (approximately 0.58 acres) from 5th to 7th Avenues, to create a park with playground, walkways and other amenities
- D. Construction and placement of crushed clam fill material (approximately 8,565 square feet) for the creation of path through the dune/CAFRA area from Surf Avenue to the Lou Booth Amphitheatre
- E. Construction and placement of a concrete landing and flagpole (approximately 96 square feet) within a dune adjacent to the Lou Booth Amphitheatre (LBA)
- F. Concrete sidewalk expansion at Surf Ave (approximately 1,084 square feet) connected to D.
- G. Concrete path construction (approximately 470 square feet) near intersection of 2nd Avenue & Ocean/LBA
- H. Removal of vegetation, grading and filling of the CAFRA area of Surf Ave and the construction of concrete & gravel for pathways, bike rack area (approximately 4234 square feet)
- I. Removal of vegetation, grading and filling of the CAFRA area for the construction and placement of a platform with benches (approximately 230 square feet)
- J. Construction of a gazebo at 1st Ave & Surf (approximately 598 square feet)
- K. Construction of a gazebo at 2nd Ave & JFK Blvd (approximately 357 square feet)
- L. Placement/construction of storage sheds/fenced storage area at the Beach Patrol building at 15th Avenue (approximately 4691 square feet)
- M. Construction of a composite 8' wide bike path adjacent to the boardwalk between 15th – 26th Avenues (approximately 13,104 square feet)
- N. Construction and placement of crushed clam fill material for the creation of a walkway between 15th -21st along the oceanfront (approximately 44, 981 square feet)
- O. Construction of composite walkways/foot showers and bench platforms along the oceanfront at multiple street end entrances to the beach (approximately 24, 264 square feet)
- P. Placement of concrete jersey barrier structures on the beach at 12th Avenue (approximately 300 square feet)
- Q. Construction of a vehicular accessway/filling and fencing on the beach at 25th Avenue (approximately 3,789 square feet)
- R. Excavation of sand from the beach berm at 11th Ave, transporting and filling the beach area between 14th and 16th Avenues, and then grading the sand landward into the dune scarp (approximately 3,969 square feet)

Violations of N.J.A.C 7:7-27.2 (c) 8 -failure to comply with the conditions of a CAFRA permit is a violation of the Coastal Zone Management Rules and is grounds for enforcement action under N.J.A.C. 7:7-29

- A. Failure to comply with CAFRA permit File #0507-03-0009.3 CZM170001 for beach and dune maintenance -including permit special conditions 4, 10 – special condition #4 requires all activities be conducted in accordance with best management practices as defined by the Department in N.J.A.C.7:7-10.2 for routine beach maintenance, at N.J.A.C.7:7-10.3 for emergency post storm beach restoration and N.J.A.C.7:7-10.4 for dune creation and

maintenance. Activities other than those outlined in these subchapters shall require additional authorization from the DLRP. Failure to receive such authorization prior to activities may warrant enforcement action. Special condition #10 states "bulldozing, excavation, grading, vegetation removal or clearing and relocation of existing dunes, whether existing or constructed in conjunction with this permit are not authorized under this general permit. Violations of these conditions and the permit include:

1. The stockpiling of sand on top of existing vegetated dunes and the subsequent vegetation removal, clearing, excavation, grading and removal of these dunes (approximately 6.7 acres) between 7th and 13th Avenues not in compliance with or authorized by the permit or plans.
 2. The removal of vegetation, filling, grading, removal and relocation of a dune area waterward of and adjacent to Seaport Pier (approximately 0.57 acres) not in compliance with or authorized by the permit or plan
- B. Failure to comply with CAFRA permit File #0507-03-0009.3 CZM170001 for beach and dune maintenance -including special condition #13 which states, "sand transfers to and from wetland areas that may exist on the beach are not authorized by this permit"- The Respondent first stockpiled sand on top of the existing vegetated dunes with wetland areas and then subsequently removed vegetation, cleared, excavated, graded and removed these dunes that contained freshwater wetland areas (approximately 1.1 acres) between 7th and 13th Avenues in violation of this permit condition.
- C. Failure to comply with the CAFRA sand back passing permit File#0500-07-0006.3 CAF180001 WFD180001 and standard condition #12 which states that the project does not propose disturbance within freshwater wetlands and standard condition #12 states "The permittee and its contractors and subcontractors shall comply with all conditions, site plans, and supporting documents approved by the permit. Any noncompliance with a permit constitutes a violation of this chapter and is grounds for enforcement action"- Violations of this permit include:
1. Harvested sand from Wildwood was transferred to and stockpiled within multiple beach and dune locations in North Wildwood not authorized by the permit or approved plans. The permit did not authorize stockpiling at all. The sand was to be placed in specifically designated beach berm areas as depicted on the approved plans and graded in the location where the sand was deposited. Instead, and in violation of the approved permit and plans, sand was stockpiled on top of existing vegetated dunes that included freshwater wetlands and were critical wildlife habitat between 7th and 13th Avenues (approximately 6.7 acres). This was not authorized by the permit or approved plans. The permit and approved plans for this permit do not depict stockpiling of sand on top of existing dunes or in wetlands. In addition, 1.7 acres of sand stockpiling occurred between 17th and 20th Avenues in a location not depicted or approved on the permit plans, and 1.3 acres of stockpiled sand was placed on the beach and dune between 13th and 15th Avenues in a location not depicted or approved by the permit or plans.
 2. Harvested sand from Wildwood was stockpiled within a 0.57 acre prior dune area adjacent to Seaport Pier, which is not in compliance with the approved permit and plans – this sand stockpile is outside of the approved areas depicted on the approved permit plans.
- D. Failure to comply with the June 24, 2020 Emergency Authorization File# 0500-07-0006.3 CAF200001 for a one-time slope adjustment to the sand stockpiles between 12th and 14th

Avenues and 16th and 22nd Avenues to address the public safety concerns. The Emergency Authorization included specific limitations to sand movement/grading and the sand stockpile slopes and specifically directed that no grading or sand removal/movement shall occur beyond what was necessary to create a 5:1 to the sand stockpiles and 7:1 slope at the beach accessways in this sand stockpile area for public safety. The sand stockpiles were to remain as stockpiles with limited slope grading for public safety. Any limited excess sand could be placed within 75 feet of the steel bulkhead between 8th and 12th Avenues only. The elevation of the beach area was required to be no lower than 7 feet NAVD88. The Emergency Authorization specifically did not allow the continued removal, relocation, filling and grading of all stockpiled sand, or the continued movement of stockpiled sand beyond the limits above related to public safety and had to be completed within 60 days. A complete CAFRA and Waterfront Development permit application was required to be submitted within 90 days, no later than September 24, 2020. No permit application was ever submitted for this Emergency Authorization. The Respondent continued to transport the sand stockpiles, place and grade the sand between 3rd and 14th Avenues, not in compliance with any of the NJDEP permits or the June 24, 2020 Emergency Authorization.

- E. Failure to comply with the Emergency Authorization, File# 0507-03-0009.7 CAF220001 FWW220001. The October 7, 2022 Emergency Authorization requires a complete CAFRA and Freshwater Wetland permit application be submitted within 90 days (no later than January 7, 2023). To date, no CAFRA and Freshwater Wetland application has been submitted as required.

Flood Hazard Area Violations

Violations of N.J.A.C. 7:13-2.1(a)- no person shall engage in a regulated activity in a regulated area without a flood hazard area permit or a coastal permit as required by N.J.A.C 7:7- following was constructed without permit authorization:

- A. Vinyl bulkhead construction (approximately 496 linear feet x 2 ft wide) from 3rd to 5th Avenues
- B. Steel bulkhead construction (approximately 2244 linear feet x 2 ft wide) from 7th- 13th Avenues
- C. Placement/construction of storage sheds/fenced storage area at the Beach Patrol building at 15th Avenue (approximately 4691 square feet)

Freshwater Wetland Violations

Violations of N.J.A.C. 7:7A-2.2(a)-the following activities are regulated when performed in a freshwater wetland and require prior permit approval for the Department: the removal, excavation, disturbance or dredging of soil, sand, gravel, or aggregate material of any kind; the drainage or disturbance of the water level or water table so as to alter the existing elevation of groundwater or surface water, regardless of the duration or such alteration; the dumping, discharging or filling with any material; the driving of pilings; the placing of obstructions, including depositing, constructing, installing or otherwise situating an obstacle which will affect the values or functions of a freshwater wetland; or the destruction of plant life which would alter the character of the freshwater wetlands; including killing vegetation by applying herbicides or by other means, the physical removal of wetland vegetation, and/or cutting of trees;

The following are unauthorized regulated activities in freshwater wetlands:

- A. The destruction of vegetation, filling of freshwater wetlands, excavation and grading within the dunes between 7th and 13th Avenues that contained freshwater wetlands (approximately 47, 792 square feet/1.1 acres) and also associated with the installation of the steel bulkhead based upon georeferenced freshwater wetlands delineated on DEP approved plans from permit File# 0500-

City of North Wildwood, PEA230001-0507-03-0009.3
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07-0006.1 CAF070001 WFD070001.

Violations of N.J.A.C. 7:7A- 2.3 (a)-the removal, excavation or disturbance of the soil; dumping or filling with any material; erection of structures; placement of pavements; destruction of plant life which would alter the existing pattern of vegetation within a freshwater wetland transition area are regulated activities which require prior permit approval form the Department.

The following are unauthorized regulated activities in freshwater wetland transition areas:

- A. The destruction of vegetation, filling of freshwater wetlands transition areas, construction of a bulkhead and composite bike paths, excavation and grading within the dunes containing transition areas and landward of the dunes and bulkhead and between 7th and 13th Avenues that contained exceptional resource value freshwater wetlands transition areas (approximately 6.7 acres) based upon site plans submitted with CAFRA and Freshwater Wetlands permit application (File #0507-03-0009.6 LUP20001)

Violations of N.J.A.C. 7:7A-20.2 (c) 8- any noncompliance with a permit constitutes a violation of this chapter and is grounds for enforcement action under N.J.A.C. 7:7A-22-

The following are permit violations:

- A. Violation of pre-construction condition #2 of CAFRA and Freshwater Wetland Permit File# 0507-03-0009.2 CAF140001, FWW140001 & FWW140002 which required that prior to site preparation, the Respondent shall complete a transition area and adjacent freshwater wetland conservation restriction and file the completed restriction with the Cape May County Clerk's Office preserving the freshwater wetlands and exceptional resource value transition areas located within the existing dunes and a copy of the recorded restriction shall be submitted to the Department. The freshwater wetlands conservation restriction was not filed.
44. Based on the facts set forth in these FINDINGS, the Department has determined that the Respondent has violated the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq., and the regulations promulgated pursuant thereto, N.J.A.C. 7:7 et seq., the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., ("FHA") and the rules promulgated at N.J.A.C. 7:13-1 et seq. and the Freshwater Wetlands Protection Act (N.J.S.A. 13:9B-1 et. seq.) and the rules promulgated at N.J.A.C. 7:7A-1 et. seq.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

45. The Respondent shall comply with the following:

- a. Immediately cease any and all NJDEP unauthorized regulated activities at the site.
- b. Do not conduct any additional unauthorized regulated activities on site. Ensure NJDEP permit authorization is obtained prior to conducting any NJDEP regulated activity and comply with all NJDEP issued permits and approved plans.
- c. Within 30 days of receipt of this document, submit a proposal to CLUE for review and approval for full restoration of the site. The proposal must include complete details as to how the Respondent will restore the CAFRA, flood hazard areas, dunes, beaches, freshwater wetlands, transition areas and critical wildlife habitat to their pre-disturbance condition and remove and restore all violations/unauthorized structures identified in paragraph 49. The restoration plan must include the following:

- Removal of all unauthorized fill material and structures, and restoration of all disturbed areas to pre-disturbance grades;
- A description of how the disturbed area will be re-graded to re-establish pre-disturbance topography and hydrology;
- A stabilization plan prepared in accordance with the “Standards for Soil Erosion and Sediment Control in New Jersey”;
- A planting plan that includes a list of all indigenous plant species (use of non-native and invasive species is prohibited) intended to recreate the pre-existing vegetation type including the pattern and spacing of these plantings;
- A preventative maintenance plan to ensure success of the restoration project;
- A time schedule for implementation and completion of all aspects of the restoration work;
- The restoration proposal must insure 85% survival and 85% vegetative coverage of the plantings after 3 complete growing seasons. Monitoring reports shall be provided yearly, for 3 years, to CLUE documenting the success of the restoration. Should the approved restoration plan, as implemented, fail to achieve this requirement, the Respondent will be required to implement corrective actions at CLUE’s direction to achieve 85% survival and vegetative cover.
- Should CLUE determine that the restoration proposal is inadequate or incomplete, CLUE shall provide comments to the Respondent. Within 10 calendar days of receipt of CLUE’s comments, the Respondent shall submit a revised restoration proposal that conforms to the CLUE’s comments. The determination as to whether or not the restoration proposal as resubmitted conforms to CLUE’s comments shall be made solely by CLUE.
- The restoration proposal must be approved by CLUE prior to implementation. Upon CLUE approval, the Respondent(s) shall implement the approved restoration plan in accordance with the approved time schedule.
- Upon successful completion of restoration of all freshwater wetland and transition areas as determined by the Department, a conservation restriction shall be filed with the Cape May County Clerk’s Office using the Department approved template.

OR

Submit complete application(s) for the appropriate CAFRA, Freshwater Wetlands and/or Flood Hazard permit(s) and/or cure all deficiencies to any pending permit application(s) to the Department’s Division of Land Resource Protection to attempt to legalize all of the violations identified in paragraph 49. Permit review may result in approval, partial approval, withdrawal or denial. Within 45 days of issuance of the permit decision or withdrawal of the permit application, any activity or structure that does not attain complete permit approval must be either 1) removed from the site and the area restored to its authorized condition as required by the Department; or 2) altered to comply with the conditions and requirements of the NJDEP permit approval.

46. This Order shall be effective upon receipt by the Respondent or someone on the Respondent’s behalf authorized to accept service.

NOTICE OF CIVIL ADMINISTRATIVE PENALTY ASSESSMENT AND
NOTICE OF RIGHT TO A HEARING

47. Pursuant to N.J.S.A. 13:19-18, N.J.A.C. 7:7-29.1 et seq., N.J.S.A. 13:9B-1 et. seq., N.J.A.C. 7:7A-1 et. seq., N.J. S.A. 58:16A-50 et seq and N.J.A.C. 7:13-1 et seq. and based upon the above FINDINGS, the Department has determined that a civil administrative penalty is hereby assessed against the Respondent in the amount of **\$8,661,000.00**. The Department's rationale for the civil administrative penalty is set forth in the attachment and incorporated herein.
48. Pursuant to N.J.S.A 13:19-18, N.J.S.A 13:9B-1 et seq., and N.J.S.A. 58:16A-50 et seq., the Department may, in addition to any other civil administrative penalty assessed, include as a civil administrative penalty the economic benefit (in dollars) which a Respondent has realized as a result of not complying with, or by delaying compliance with, the requirements of the Act.
49. Pursuant to N.J.S.A. 52:14B-1 et seq., N.J.A.C. 7:7-29.2, N.J.S.A 13:9B-1 et seq., and N.J.S.A. 58:16A-50 et seq., Respondent is entitled to request a hearing. The Respondent shall, in its request for a hearing, complete and submit the enclosed ADMINISTRATIVE HEARING REQUEST AND CHECKLIST TRACKING FORM along with all required information. Submittal or granting of a hearing request does not stay the terms or effect of this ORDER.
50. If no request for a hearing is received within 35 calendar days from receipt of this AONOCAPA, it shall become a Final Order upon the 36th calendar day following its receipt, and the penalty shall be due and payable.
51. If a timely request for a hearing is received, payment of the penalty is due when the Respondent receives a notice of the denial of the request, or, if the hearing request is granted, when the Respondent withdraws the request or abandons the hearing, or, if the hearing is conducted, when the Respondent receives a final decision from the Commissioner in this matter.
52. Payment shall be made by check payable to Treasurer, State of New Jersey and shall be submitted along with the enclosed Enforcement Invoice to:

Department of Treasury
Division of Revenue
P.O. Box 417
Trenton, NJ 08646-0417

GENERAL PROVISIONS

53. This AONOCAPA is binding on the Respondent, their principals, directors, officers, agents, successors, assigns, employees, tenants, any trustee in bankruptcy or other trustee, and any receiver appointed pursuant to a proceeding in law or equity.
54. No obligations imposed by this AONOCAPA are intended to constitute a debt which should be limited or discharged in a bankruptcy proceeding. All obligations are imposed pursuant to the police powers of the State of New Jersey, intended to protect the public health, safety, welfare, and the environment.
55. This AONOCAPA is issued only for the violations identified in the FINDINGS herein above and that violations of any statutes, rules or permits other than those herein cited may be cause for additional enforcement actions, either administrative or judicial, being instituted. By issuing this AONOCAPA, NJDEP does not waive its rights to initiate additional enforcement actions.
56. Neither the issuance of this AONOCAPA nor anything contained herein shall relieve the Respondent of the

obligation to comply with all applicable laws, including but not limited to the statutes and regulations cited herein.

- 57. The Respondent is not entitled to approval of any permit application(s) submitted pursuant to requirements contained herein. In the event the Department determines that regulated activities do not meet the requirements for permit approval, full restoration of the unauthorized disturbance will be required.
- 58. Pursuant to N.J.S.A. 13:19-18(e), N.J.S.A 13:9B-1 et seq., and N.J.S.A. 58:16A-50 et seq, any person who violates the provisions of the Act, or any code, rule regulation or order promulgated or issued pursuant thereto, or who fails to pay a civil administrative penalty in full, shall be subject, upon order of the court, to a civil penalty not to exceed \$25,000 for each violation. Each day during which the violation continues constitutes an additional, separate, and distinct offense.
- 59. Pursuant to N.J.S.A.13:9B-21, N.J.S.A 58:16A-63and N.J.S.A. 13:19-18 any person who willingly or negligently violates the provisions of the FWPA, CAFRA, FHACA, or any code, rule, regulation, administrative order or court order, promulgated or issued pursuant thereto, shall be guilty, upon conviction, of a crime of the third degree.

DATE: _____

Katrina Digitally signed by
Angarone Katrina Angarone
Date: 2023.01.11
15:50:51 -05'00'

Katrina Angarone, Assistant Commissioner
Watershed and Land Management

City of North Wildwood

Watershed & Land Management
File# PEA230001-0507-03-0009.3

CAFRA PENALTY RATIONALE
FOR FAILURE TO OBTAIN A PERMIT PRIOR TO CONDUCTING REGULATED ACTIVITIES

Pursuant to N.J.A.C. 7:7-29.5, the Department has determined that the base, or daily, penalty shall be determined by totaling the points assigned as follows: (1) **Type**- conducting a regulated activity without a permit or violation of a permit condition (2) **Conduct**; (3) **Seriousness**; and (4) **Duration**.

Pursuant to N.J.A.C. 7:7-29.5(b), each violation of N.J.A.C. 7:7-2.1/2.2 shall constitute an additional, separate and distinct violation.

1. **Type of Violation**: Conducting a regulated activity without a permit.

The Department has categorized the unpermitted unauthorized activities that have occurred:

1. The construction of bulkhead "A":

- i. The construction 630 linear feet x 2ft wide of steel bulkhead between 5th to 7th Avenue, within a prior dune area. (approx. 1260 sq ft) The described length of this bulkhead is based on information contained in the "Combined Environmental Impact Statement and Compliance Statement Pursuant to N.J.A.C. 7:7 and 7:7A dated 11/17/2020, prepared by van note-harvey associates.

2. The construction of bulkhead "B":

- i. The construction of approximately 1,614 linear feet x 2ft wide of steel bulkhead from 7th to 13th Avenue within a prior dune area. (approx. 3228 sq ft) The described length of this bulkhead is based on information contained in the "Combined Environmental Impact Statement and Compliance Statement Pursuant to N.J.A.C. 7:7 and 7:7A dated 11/17/2020, prepared by van note-harvey associates.

3. The construction of bulkhead "C":

- i. The construction of approximately 229 linear feet x 2ft wide of vinyl bulkhead along the oceanfront from 3rd to 4th avenues, waterward of the existing bulkhead on a beach. (approx. 458 sq ft) The described length of this bulkhead is based on information contained in the "Combined Environmental Impact Statement and Compliance Statement Pursuant to N.J.A.C. 7:7 and 7:7A dated 11/17/2020, prepared by van note-harvey associates.

4. The construction of bulkhead "D":

- i. The construction of approximately 267 linear feet x 2ft wide of vinyl bulkhead along the oceanfront from 4th to 5th avenues, waterward of the existing bulkhead on a beach (approx. 534 sq ft) The described length of this bulkhead is based on information contained in the "Combined Environmental Impact Statement and Compliance Statement Pursuant to N.J.A.C. 7:7 and 7:7A dated 11/17/2020, prepared by van note-harvey associates

5. The destruction/removal/disturbance of dune with or without construction throughout North Wildwood:

- i. The removal of vegetation, filling and grading of the (now bulkheaded) beach and dune area (approx. 0.58 acres) from 5th to 7th Avenue, to create a park with playground, walkways and other amenities.
- ii. The placement of crushed clam fill material for the creation of a path through approx. 8,565 sqft of dune/CAFRA area from Surf Ave to the Lou Booth Amphitheater.
- iii. The excavation of beach berm at 11th Avenue and the transport and placement of the excavated sand between 14th-16th Avenues, including grading the sand landward into the dune scarp impacting approx. 3,969 sqft of beach/dune in a CAFRA area.

6. For the construction and placement of miscellaneous unauthorized structures:

- i. The placement of an approx. 96 sqft concrete landing/flagpole adjacent to the Lou Booth Amphitheater.
- ii. The 1,084 sqft expansion of concrete sidewalk at Surf Avenue leading to the path through the dune that leads to the Lou Booth Amphitheater.
- iii. The construction of a 470 square of concrete path in a CAFRA area near the intersection of 2nd & Ocean. (adjacent to amphitheater)
- iv. The construction of a 357 sqft roof covered gazebo structure at the intersection of 2nd and JFK Blvd.
- v. The construction of approx. 4,216 sqft of concrete walkway and composite walkway at the Beach Patrol building at 15th Avenue.
- vi. The placement/construction of approx. 4,691 sqft of storage sheds and fenced storage area at the Beach Patrol building at 15th Avenue.
- vii. The placement/construction of an approx. 8' wide composite bike path between 15th & 21st along the oceanfront. (approx. 13,104 sqft)
- viii. The placement of approx. 44,981 sqft of crushed clam fill material for the creation of a walkway between 15th and 21st along the oceanfront.
- ix. The removal of vegetation, grading, and filling of a CAFRA area at the intersection of 1st & Surf: specifically, the placement of concrete & gravel for pathways and a bike rack area within a 4,234 sqft area.
- x. The clearing of vegetation and grading of a CAFRA area at the intersection of 1st & Surf: Specifically, the placement of an approx. 230 sqft platform with benches.
- xi. Construction of a 598 sqft roofed gazebo at 1st & Surf
- xii. The construction of 24,264 sqft of composite walkways/ shower platforms/ bench platforms etc. along the oceanfront at multiple street end entrances to the beach.

2. Conduct:

- Minor: any conduct not identified as major or moderate point = 1 point
- Moderate: any unintentional but foreseeable act or omission = 2 points
- Major: any intentional, deliberate, purposeful, knowing or willful act or omission = 5 points

The conduct for the above-mentioned activities have been determined as the following:

- | | | |
|--|---|-------------------|
| 1. For the construction of bulkhead "A" | The conduct of the Respondent is considered to be Moderate | = 2 points |
| 2. For the construction of bulkhead "B" | The conduct of the Respondent is considered to be Moderate | = 2 points |
| 3. For the construction of bulkhead "C" | The conduct of the Respondent is considered to be Moderate | = 2 points |
| 4. For the construction of bulkhead "D" | The conduct of the Respondent is considered to be Moderate | = 2 points |
| 5. For the destruction/disturbance of dune with or without construction | The conduct of the Respondent is considered to be Moderate | = 2 points |
| 6. For the construction and placement of miscellaneous unauthorized structures: | The conduct of the Respondent is considered to be Moderate | = 2 points |

3. Seriousness:

The seriousness factor of the violation is assigned points as provided below and shall be based on the a) size of violation and b) whether the activity was conducted in a Special Area or resource.

a. Size:

i.	a violation impacting >200,000 sqft	= 13 points
ii.	a violation impacting >150,000 sqft up to and including 200,000 sqft	= 12 points
iii.	a violation impacting >100,000 sqft up to and including 150,000 sqft	= 11 points
iv.	a violation impacting >70,000 sqft up to and including 100,000 sqft	= 10 points
v.	a violation impacting >40,000 sqft up to and including 70,000 sqft	= 9 points
vi.	a violation impacting >20,000 sqft up to and including 40,000 sqft	= 8 points
vii.	a violation impacting >10,000 sqft up to and including 20,000 sqft	= 7 points
viii.	a violation impacting > 5,000 sqft up to and including 10,000 sqft	= 6 points
ix.	a violation impacting >2,000 sqft up to and including 5,000 sqft	= 5 points
x.	a violation impacting > 750 sqft up to and including 2,000 sqft	= 4 points
xi.	a violation impacting >500 sqft up to and including 750 sqft	= 3 points
xii.	a violation impacting >50 sqft up to and including 500 sqft	= 2 points
xiii.	a violation impacting up to and including 50 sqft	= 1 point

The size of the following violations are determined as follows:

- 1. For the construction of bulkhead "A" =**
630 linear feet x 2ft wide of steel bulkhead from 5th to 7th Avenue (1260 sq ft) = 4 points
- 2. For the construction of bulkhead "B"**
1,614 linear feet x 2ft wide of steel bulkhead from 7th to 13th Avenue (3228 sq ft) = 5 points
- 3. For the construction of bulkhead "C"**
229 linear feet x 2 ft wide of vinyl bulkhead from 3rd to 4th Avenue (428 sq ft) = 2 points
- 4. For the construction of bulkhead "D"**
267 linear feet x 2 feet wide of vinyl bulkhead from 4th to 5th Avenue (534 sq ft) = 3 points
- 5. For the destruction/grading of dune/construction**
 - i. The removal of vegetation, filling and grading of the (now bulkheaded) beach/ dune area (approx. 0.58 acres) from 5th to 7th Avenue, to create a park with playground, walkways and other amenities. = 8 points
 - ii. The placement of crushed clam fill material for the creation of a path through approx. 8,565 sqft of dune and CAFRA area from Surf Ave to the Lou Booth Amphitheater. = 6 points
 - iii. The excavation of beach at 11th Ave and the placement of the excavated sand between 12th-16th Ave and grading the sand landward into the dune scarp impacting approx. 3,969 sqft of beach/dune in a CAFRA area. = 5 points
- 6. For the construction and placement of miscellaneous unauthorized structures:**
 - i. The placement of an approx. 96 sq ft concrete landing/flagpole adjacent to the Lou Booth Amphitheater. = 2 points
 - ii. The 1,084 sq ft expansion of concrete sidewalk at Surf Avenue leading to the path through the dune that leads to the Lou Booth Amphitheater. = 4 points
 - iii. The placement of a 470 sq ft of concrete path in a CAFRA area near the intersection of 2nd & Ocean. (adjacent to amphitheater) = 2 points
 - iv. The construction of a 357 sq ft roof covered gazebo structure at the intersection of 2nd and JFK Blvd. = 2 points
 - v. The construction of approx. 4,216 sq ft of concrete walkway and composite walkway at = 5 points

the Beach Patrol building at 15th Avenue.

- vi. The placement/construction of approx. 4,691 sq ft of storage sheds/fenced storage area at the Beach Patrol building at 15th Avenue. = 5 points
- vii. The placement/construction of an approx. 8' composite bike path between 15th & 21st along the oceanfront. (approx. 13,104 sq ft) = 7 points
- viii. The placement of approx. 44,981 sq ft of crushed calm shell fill material for the creation of a walkway between 15th and 21st along the oceanfront = 9 points
= 5 points
- ix. The removal of vegetation, grading and filling of a CAFRA area at the intersection of 1st & Surf. Specifically, the placement of concrete and gravel for pathways and a bike rack area within an approx. 4,234 sqft area = 2 points
- x. The removal of vegetation, grading and filling of a CAFRA area at the intersection of 1st & Surf, Specifically, the construction and placement of an approx.. 230 sqft platform with benches
- xi. Construction of a 598 sq ft gazebo at 1st and Surf = 3 points
- xii. The construction of 24,264 sq ft of composite walkways/ shower platforms/ bench platforms etc. along the oceanfront at multiple street end entrances to the beach. = 8 points

c. Special Areas(s)

In addition to the points assessed above, violations conducted in a special area or resource included in N.J.A.C. 7:7-9 shall be assessed an additional one point per special area or resource. The following Special Areas were impacted:

N.J.A.C.	Bulkhead "A"	Bulkhead "B"	Bulkhead "C"	Bulkhead "D"	Dune Disturbance	Miscellaneous Structures
<u>7:7-9.16 Dunes</u>	X	X			X	
<u>7:7-9.22 Beaches</u>	X		X	X	X	
<u>7:7- 9.25 Flood Hazard Areas</u>	X	X	X	X	X	X
<u>7:7 9.27 Wetlands</u>						
<u>7:7- 9.28 Wetland Buffers</u>		X				
Total Point(s)	3	3	2	2	3	1

Each special area impacted is 1 point

TOTAL POINTS-SERIOUSNESS:

Seriousness Total
(Special Area + Size Total)

1. For the construction of bulkhead "A" = 7 points

2. For the construction of bulkhead "B" = 8 Points

- 3. For the construction of bulkhead “C”** = 4 Points
- 4. For the construction of bulkhead “D”** = 5 Points
- 5. For the destruction/grading of dune and other special areas**
- i. The removal of vegetation, filling and grading of the (now bulkheaded) beach and dune area (approx. 0.58 acres) from 5th to 7th Avenue, to create a park with playground, walkways and other amenities. (3 special areas-dune, beach, flood hazard area) = 11 Points
 - ii. The placement of crushed clam fill material for the creation of a path through approx. 8,565 sqft of dune and CAFRA/FHA area from Surf Ave to the Lou Booth Amphitheater. (2 special areas-dune, flood hazard area) = 8 Points
 - iii. The excavation of beach at 11th Ave and the placement of the excavated sand between 12th-16th Ave and grading the sand landward into the dune scarp impacting approx. 3,969 sqft of beach/dune in a CAFRA area. (3 special areas-dune, beach, flood hazard area) = 8 Points
- 6. For the construction and placement of miscellaneous unauthorized structures:**
- i. The placement of an approx. 96 sqft concrete landing/flagpole adjacent to the Lou Booth Amphitheater. = 3 Points
 - ii. The 1,084 sqft expansion of concrete sidewalk at Surf Avenue leading to the path through the dune that leads to the Lou Booth Amphitheater. = 5 Points
 - iii. The placement of a 470 square of concrete path in a CAFRA area near the intersection of 2nd & Ocean. (adjacent to Lou Booth Amphitheatre) = 3 Points
 - iv. The construction of a 357 sqft roof covered gazebo structure at the intersection of 2nd and JFK Blvd. = 3 Points
 - v. The construction of approx. 4,216 sqft of concrete walkway and composite walkway at the Beach Patrol building at 15th Avenue. = 6 Points
 - vi. The placement/construction of approx. 4,691 sqft of storage sheds at the Beach Patrol building at 15th Avenue. = 6 Points
 - vii. The placement/construction of an approx. 8' wide composite bike path between 15th & 25th along the oceanfront. (approx. 13,104 sqft) = 8 Points
 - viii. The placement of approx. 44,981 sqft of crushed clam fill material for the creation of a walkway between 15th and 21st along the oceanfront. = 10 Points
 - ix. The removal of vegetation, grading and filling of a CAFRA area at 1st & Surf: Specifically, the placement of concrete and gravel for pathways and a bike rack area within an approx.. 4,234 sqft area = 6 Points
 - x. The removal of vegetation and grading of a CAFRA area at 1st & Surf: Specifically, the construction and placement of an approx. 230 sqft platform with benches. = 3 points
 - xi. Construction of a approx.598 sqft gazebo at 1st & Surf = 4 points

- xii. Construction of approx. 24,264 sqft of composite walkways/shower/bench platforms along the oceanfront at multiple street end entrances to the beach. = 9 points

The total number of points calculated for Type, Conduct and Seriousness of the violations and the amount of daily penalty utilizing the Coastal Zone Management Penalty Assessment Table below is as follows:

COASTAL ZONE MGMT
PENALTY ASSESSMENT TABLE

<u>Total Points</u>	<u>Penalty Amount</u>
1 - 3	\$500
4 - 6	\$1,000
7 - 8	\$2,000
9 - 10	\$3,000
11 - 12	\$6,000
13 - 14	\$8,000
15 - 16	\$10,000
17 - 19	\$15,000
20 - 22	\$20,000
23 or more	\$25,000

	TOTAL POINTS (CONDUCT + SERIOUSNESS)	PENALTY AMOUNT PER DAY
1. For the construction of bulkhead "A" The construction 630 linear feet x 2 ft wide of steel bulkhead between 5 th to 7 th Avenue, within a prior beach and dune area.	= 9 points	\$3,000.00
2. For the construction of bulkhead "B" The construction of approximately 1,614 linear feet x 2 ft wide of steel bulkhead from 7 th to 13 th Avenue.	= 10 Points	\$3,000.00
3. For the construction of bulkhead "C" The construction of approximately 229 linear feet x 2 ft wide of vinyl bulkhead along the oceanfront from 3 rd to 4 th avenues along, waterward of the existing bulkhead	= 6 Points	\$1,000.00
4. For the construction of bulkhead "D" The construction of approximately 267 linear feet x 2 ft wide of vinyl bulkhead along the oceanfront from 4 th to 5 th avenues, waterward of the existing bulkhead.	= 7 Points	\$2,000.00
5. For the destruction of dunes		
i. The removal of vegetation, filling and grading of the (now bulkheaded) beach and dune area (approx. 0.58 acres) from 5th to 7th Avenue, to create a park with playground, walkways and other amenities.	= 13 Points	\$8,000.00
ii. The placement of crushed clam fill material for the creation of a path through approx. 8,565 sqft of beach, dune, and CAFRA area from Surf Ave to the Lou Booth Amphitheater.	= 10 Points	\$3,000.00

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iii. The excavation of beach at 11th Ave and the transport/placement of the excavated sand between 14th-16th Ave, including grading the sand landward into the dune scarp impacting approx. 3,969 sqft of beach/dune in a CAFRA area. = **10 Points** **\$3,000.00**

6. For the construction and placement of miscellaneous unauthorized structures:

- i. The placement of an approx. 96 sqft concrete landing/flagpole adjacent to the Lou Booth Amphitheater. = **5 Points** **\$1,000.00**
- ii. The 1,084 sqft expansion of concrete sidewalk at Surf Avenue leading to the path through the dune that leads to the Lou Booth Amphitheater. = **7 Points** **\$2,000.00**
- iii. The placement of a 470 square of concrete path in a CAFRA area near the intersection of 2nd & Ocean. (adjacent to amphitheater) = **5 Points** **\$1,000.00**
- iv. The construction of a 357 sqft roof covered gazebo structure at the intersection of 2nd and JFK Blvd. = **5 Points** **\$1,000.00**
- v. The construction of approx. 4,216 sqft of concrete walkway and composite walkway at the Beach Patrol building at 15th Avenue = **8 Points** **\$2,000.00**
- vi. The placement/construction of approx. 4,691 sqft of storage sheds at the Beach Patrol building at 15th Avenue. = **8 Points** **\$2,000.00**
- vii. The placement/construction of an approx. 8' wide composite bike path between 15th & 21st along the oceanfront.(approx. 13,104 sqft) = **10 Points** **\$3,000.00**
- viii. The placement of approx. 44,981 sqft of crushed clam fill material for the creation of a walkway between 15th and 21st along the oceanfront. = **12 Points** **\$6,000.00**
- ix. The removal of vegetation, grading and filling of a CAFRA area at 1st & Surf: Specifically, the placement of concrete & gravel for pathways and a bike rack area within 4,234 sqft = **8 Points** **\$2,000.00**
- x. The clearing of vegetation and grading of a CAFRA area at 1st & Surf: Specifically, the placement of approx. 230 platform with benches = **5 Points** **\$1,000.00**
- xi. Construction of an approx. 598 sqft gazebo at 1st & Surf = **6 Points** **\$1,000.00**
- xii. The construction of 24,264 sqft of composite walkways/ shower platforms/ bench platforms etc. along the oceanfront at multiple street end entrances to the beach. = **11 Points** **\$6,000.00**

4. Duration:

Pursuant to N.J.A.C. 7:7-29.5(c), the Department is authorized to assess a daily penalty, as each day during which the violations continue or remain in place without the required permit shall constitute an additional, separate and distinct offense.

The Department hereby exercises its discretion to assess a penalty for 1 day per month per violation.

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Therefore, the Civil Administrative Penalty for unpermitted activities is as follows:

	Date Since Non-Compliance to Present	1 day/Per Month	Total Penalty
1. For the construction of bulkhead "A"	May 6, 2018	3K x 61 Months	\$183,000.00
2. For the construction of bulkhead "B"	May 5, 2020	3K x 35 Months	\$105,000.00
3. For the construction of bulkhead "C"	December 12, 2012	1K x 131 Months	\$131,000.00
4. For the construction of bulkhead "D"	May 6, 2018	2K x 61 Months	\$122,000.00
5. For the destruction of dunes			
i. The removal of vegetation, filling and grading of the (now bulkheaded) beach and dune area (approx. 0.58 acres) from 5th to 7th Avenue, to create a park with playground, walkways and other amenities.	March 10, 2018	8K x 63 Months	\$504,000.00
ii. The placement of crushed clam fill material for the creation of a path through approx. 8,565 sqft of beach, dune, and CAFRA area from Surf Ave to the Lou Booth Amphitheater.	March 22, 2016	3K x 88 Months	\$264,000.00
iii. The excavation of beach at 11 th Ave and the placement of the excavated sand between 12 th -16 th Ave, and grading the sand landward into the dune scarp impacting approx. 3,969 sqft of beach/dune in a CAFRA area.	October 20, 2022	3K x 2 Months	\$6,000.00
6. For the construction and placement of miscellaneous unauthorized structures:			
i. The placement of an approx. 96 sqft concrete landing/flagpole adjacent to the Lou Booth Amphitheater.	March 8, 2020	1K x 37 Months	\$37,000.00
ii. The 1,084 sqft expansion of concrete sidewalk at Surf Avenue leading to the path through the dune that leads to the Lou Booth Amphitheater.	March 10, 2018	2K x 63 Months	\$126,000.00
iii. The placement of a 470 square of concrete path in a CAFRA area near the intersection of 2nd & Ocean. (adjacent to amphitheater)	March 10, 2018	1K x 63 Months	\$63,000.00
iv. The construction of a 357 sqft roof covered gazebo structure at the intersection of 2nd and JFK Blvd.	March 6, 2017	1K x 76 Months	\$76,000.00
v. The construction of approx. 4,216 sqft of concrete/composite walkway at the Beach Patrol building at 15th Ave	March 22, 2016	2K x 88 Months	\$176,000.00
vi. The placement/construction of approx. 4,691 sqft of storage sheds/fenced storage area at the Beach Patrol building at 15th Avenue.	March 29, 2016	2K x 88 Months	\$176,000.00

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vii. The placement/construction of an approx. 8' wide composite bike path between 15th & 25th along the oceanfront. (approx. 13,104 sqft)	December 31, 2001	3K x 274 Months	\$822,000.00
viii. The placement of approx. 44,981 sqft of crushed clam fill material for the creation of a walkway between 15th and 21st along the oceanfront.	March 12, 2019	6K x 50 Months	\$300,000.00
ix. The removal of vegetation, grading, filling of a CAFRA area at 1 st & Surf. Specifically the placement of concrete and gravel for pathways and a bike rack within approx.. 4,234 sqft	March 12, 2019	2K x 50 Months	\$100,000.00
x. The clearing of vegetation and grading of a CAFRA area at 1 st & Surf. Specifically, the placement of a approx.. 230 sqft platform with benches	March 12, 2019	1K x 50 Months	\$50,000.00
xi. Construction of an approx.. 598 sqft gazebo at 1 st & Surf	March 6, 2017	1K x 76 Months	\$76,000.00
xii. The construction of 24,264 sqft of composite walkways/ shower platforms/ bench platforms etc. along the oceanfront at multiple street end 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. & N.J.A.C. 7:14 et. seq.)	March 10, 2018	6K x 63 Months	\$378,000.00

The Department at its discretion, may continue to assess daily penalties until the current violations are resolved to the Department's satisfaction.

**** In general, start dates for determining this penalty rationale have been based upon aerial photography and/or other documentation provided by the City or determined based upon site inspections. ****

**UNAUTHORIZED ACTIVITIES WITHOUT A CAFRA PERMIT –
TOTAL PENALTY ASSESSMENT:
\$3,619,000.00**

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**CAFRA PENALTY RATIONALE FOR
EMERGENCY AUTHORIZATION & PERMIT/CONDITION VIOLATIONS**

The Department has determined that the base, or daily, penalty shall be determined as follows:

(1) **Type-** violation of permit conditions (2) **Conduct**; (3) **Seriousness**; and (4) **Duration**.

1. **Type of Violation**: There are 4 violations of permits/permit conditions:

Violation 1

The following is combined as one violation for penalty assessment purposes:

Noncompliance with the Beach & Dune Maintenance Permit File# 0507-03-0009.3 CZM170001 and with its Special conditions 4 & 10. Special condition #4 states, "The proposed activities must be conducted in accordance with Best Management Practices as defined by the Department in the Rules on Coastal Zone Management in Standards applicable to routine beach maintenance (N.J.A.C. 7:7-10.2), Standards applicable to emergency post-storm beach restoration (N.J.A.C. 7:7-10.3) and Standards applicable to dune creation and maintenance (N.J.A.C. 7:7-10.4). Activities other than those outlined in these subchapters shall require additional authorization from the Program. Failure to receive such authorization prior to activities may warrant enforcement action by the Bureau of Coastal and Land Use Enforcement."

Per N.J.A.C. 7:7-10.2/10.3/10.4 -Standards for beach and dune activities: Bulldozing, excavation, grading, vegetation removal or clearing, and the relocation of the existing dunes is not authorized, and there shall be no disturbance to existing dunes. Special condition #10 states, "Bulldozing, excavation, grading, vegetation removal, or clearing and relocation of existing dunes, whether existing or constructed in conjunction with this permit are not authorized under this general permit." Dunes were destroyed, removed, relocated, cleared and graded throughout North Wildwood. Beach and dune areas were cleared, graded and activities conducted not in compliance with the permit or best management practices at N.J.A.C. 10.2-4

And noncompliance with the Sand Back Passing Permit File#0500-07-0006.3 CAF180001 WFD180001 Failure to comply with Standard condition #12 which requires the permittee to comply with all conditions, site plans, and supporting documents approved by the permit.

Stockpiles of sand were placed on top of approx. 6.7 acres of dunes between 7th & 13th Avenues and in stockpiled locations throughout the City that were not authorized by either the beach and dune maintenance permit or the sand back passing permit/approved plans. The stockpiled sand was then graded over the 6.7 acres of dune area, thus removing the existing dunes that also included critical wildlife habitat not in compliance with either permit or approved plans. See FINDINGS.

Violation 2

The vegetation removal, filling, relocation and grading of an approx. 0.57 acres dune adjacent to Seaport Pier occurred prior to issuance of the Sand back passing permit File#0500-07-0006.3 CAF180001 WFD180001 and is a violation of the Beach and Dune Maintenance CAFRA Permit File# 0507-03-0009.3 CZM170001 & special conditions 4 & 10

Violation 3

The following is combined as one violation for penalty assessment purposes:

Failure to comply with Special condition #13 of Beach and Dune Maintenance CAFRA permit 0507-03-0009.3 CZM170001. Special condition #13 states, "Sand transfers to or from wetland areas that may exist on the beach are not authorized by this permit." Sand was stockpiled on top of the vegetated dunes/wetlands and the wetlands were completely removed / destroyed between 7th and 13th Avenues (approx. 1.1 acres of freshwater wetlands)

Failure to comply with special condition #4 of Sand Harvesting/Sand Transfer Permit #: 0500-07-0006.3 CAF180001 & WFD180001. The permit states that the project does not propose disturbance within freshwater wetlands. Approx. 1.1 acres of freshwater wetlands were destroyed.

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Violation 4

Failure to comply with condition 5 of Emergency Authorization 0507-03-0009.7 CAF22001. A complete application for a CAFRA Individual Permit and a Freshwater Wetlands Permit was not submitted within 90 calendar days of the Department's authorization of the emergency permit.

2. **Conduct:** Conduct shall be classified as major, moderate or minor as follows:

- Major: any intentional, deliberate, purposeful, knowing or willful act or omission by the violator. The Department presumes all violations of Department permits or authorizations to be knowing violations.
- Moderate: any unintentional but foreseeable act or omission
- Minor: any conduct not identified as major or moderate point

Conduct for all permit violations is **MAJOR** as the Department presumes all violations of Department permits or authorizations to be knowing violations.

3. **Seriousness:** Seriousness shall be classified as major, moderate or minor as follows:

- Major: any violation which has caused or has the potential to cause serious harm to human health, safety, the Coastal regulatory program or the environment; or seriously deviates from the applicable law and/or condition. "Serious" deviations include but are not limited to those violations which are in complete contravention of the law, requirement and/or condition, and/or which severely impair or undermine the protection, operation, or intent of the law, requirement or condition. Violations of "major" seriousness include but are not limited to any unauthorized activity occurring within or impacting a Special Area, as defined in N.J.A.C. 7:7-9.
- Moderate: any violation which has caused or has the potential to cause substantial harm to human health, safety, the Coastal regulatory program or the environment; or substantially deviates from the applicable law and/or condition. "Substantial deviation" shall include, but not be limited to violations which are in substantial contravention of the law, requirement and/or condition, and/or which severely impair or undermine the protection, operation, or intent of the law, requirement and/or condition. The Department will consider a violation to be of moderate seriousness if limited solely to upland areas that are not designated as a wetland, or other Special Area, as defined in N.J.A.C. 7:7-9.
- Minor: any violation not described above as Major or Moderate.

The City has failed to comply with various Land Use permits / multiple permit conditions and the conditions of the issued Emergency Authorizations. The violations included unauthorized activities and impacts within multiple Special Areas as defined in N.J.A.C. 7:7-9, including dunes, beaches, wetlands, critical wildlife habitat and flood hazard areas and were in contravention of the approved permits.

The Seriousness of all permit violations is **MAJOR**.

The Department shall determine the applicable daily penalty amount from the Base Daily Penalty Matrix below:

		SERIOUSNESS		
		MAJOR	MODERATE	MINOR
CONDUCT	MAJOR	\$25,000	\$15,000	\$10,000
	MODERATE	\$15,000	\$7,500	\$5,000
	MINOR	\$10,000	\$5,000	\$1,000

**All permit violations are Major Conduct and Major Seriousness =
Daily Base Penalty \$25,000.00**

4. Duration:

Pursuant to N.J.A.C. 7:7-29.6(g), the Department is authorized to assess a daily penalty for the total number of calendar days during which each violation continued or remained in place without the required permit.

The Department is using its discretion to assess a daily base penalty of \$25,000.00 per month for violations 1-3.

The Department is using its discretion to assess a daily base penalty of \$25,000.00 for one day of penalty for violation 4.

EACH violation of any permit, permit condition, or requirement issued pursuant to N.J.S.A. 13:19-1 et seq. and/or N.J.S.A. 12:5-3 et seq. or N.J.S.A. 13:9A-1 et seq. or any permit, condition or requirement issued by the Department pursuant thereto, shall constitute an additional, separate and distinct violation. Where any requirement of these statutes or any regulation, rule, permit condition, or order adopted pursuant thereto, may pertain to more than one act, condition, or occurrence, the failure to comply with such requirement as it pertains to each such act, condition, or occurrence shall constitute an additional, separate and distinct violation.

The Department is using its discretion to combine/collectively issue a violation/penalty assessment for similar violations of both the Beach and Dune Maintenance Permit CAFRA permit # 0507-03-0009.3 CZM170001, and Sand Back Passing Permit CAFRA/WFD Permit #: 0500-07-0006.3 CAF180001 & WFD180001 rather than each violation of each permit as noted below.

	Date Since Non-Compliance	1 Day/Month to Present	TOTAL PENALTY AMOUNT
<p><u>Violation 1</u> Combined Noncompliance with the Beach & Dune Maintenance Permit File# 0507-03-0009.3 CZM170001 and with its Special conditions 4 & 10 of & noncompliance with the Sand Back Passing Permit File#0500-07-0006.3 CAF180001 WFD180001 Failure to comply with Standard condition #12 which requires the permittee shall comply with all conditions, site plans, and supporting documents approved by the permit.</p>	April 16, 2020	25K x 35 Months	\$875,000.00
<p>Stockpiles of sand were placed on top of approx. 6.7 acres of dunes between 7th & 13th Avenues and in stockpiled locations throughout the City that were not authorized by either the beach and dune maintenance permit or the sand back passing permit/plans.</p>			

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The stockpiled sand was then graded over the 6.7 acres of dune area, thus removing the existing dunes that also included critical wildlife habitat not in compliance with either permit or approved plans.

Violation 2

The vegetation removal, filling, relocation and grading of an approx. 0.57 acres dune adjacent to Seaport Pier occurred prior to issuance of the Sand back passing permit and is a violation of the Beach and Dune Maintenance Permit & special conditions 4 & 10

June 19, 2018 25K x 59 Months **\$1,475,000.00**

Violation 3 Combined Noncompliance with Special condition 13 of the Beach & Dune Maintenance Permit that states sand transfers to and from wetland areas that may exist on the beach are not authorized and noncompliance with the Sand Back Passing Permit and plans which states that the project does not propose to disturb freshwater wetlands. The approved plans do not authorize placement of sand in wetland areas. Sand was transferred on top of 1.1 acres of wetlands from 7th – 13th Avenues destroying the wetlands.

April 16, 2020 25K x 35 Months **\$875,000.00**

Violation 4 – Failure to comply with condition 5 of Emergency Authorization 0507-03-0009.7 CAF22001. A complete application for a CAFRA Individual Permit and a Freshwater Wetlands Permit was not submitted within 90 calendar days of the Department's authorization of the emergency permit.

January 5, 2023 25K x 1 Days **\$25,000.00**

TOTAL CAFRA Civil Administrative Penalty violations of Emergency Authorization/ CAFRA Permits/permit conditions = \$3,250,000,000.00

TOTAL CAFRA PENALTY ASSESSMENT

**UNAUTHORIZED ACTIVITIES WITHOUT A CAFRA PERMIT
 PENALTY ASSESSMENT: \$3,619,000.00**

**VIOLATION OF CAFRA PERMIT & EMERGENCY AUTHORIZATION
 PENALTY ASSESSMENT: \$3,250,000,000.00**

TOTAL CAFRA PENALTY ASSESSMENT: \$6,869,000.00

FLOOD HAZARD AREA CONTROL ACT (FHACA) PENALTY RATIONALE
FOR FAILURE TO OBTAIN A PERMIT PRIOR TO CONDUCTING REGULATED ACTIVITIES

Pursuant to N.J.A.C. 7:13-24.5, the Department has determined that the base, or daily, FHACA penalty shall be determined by totaling the points assigned as follows: (1) **Type**- conducting a regulated activity without a permit or violation of a permit condition (2) **Conduct**; (3) **Seriousness** – a. Floodway Impacts; b. Flood Fringe Impacts; c. Area of Riparian Disturbance; d. Severity of Riparian Disturbance; and e. Impacts to Other Special Resources of Concern; (4) **Duration**.

Pursuant to N.J.A.C. 7:13-24.5(b), each violation of N.J.A.C. 7:13-2.1 shall constitute an additional, separate and distinct violation.

1. **Type**: Conducting a regulated activity without a permit

The Department has categorized the unpermitted unauthorized activities that have occurred:

1. The construction of bulkhead “A”:

- i. The construction 630 linear feet x 2 feet wide of steel bulkhead between 5th to 7th Avenue, within a prior dune area. The described length of this bulkhead is based on updated information contained in the “Combined Environmental Impact Statement and Compliance Statement Pursuant to N.J.A.C. 7:7 and 7:7A dated 11/17/2020, prepared by van note-harvey associates. (approx. 1260 sq ft)

2. The construction of bulkhead “B”:

- i. The construction of approximately 1,614 linear feet x 2 feet wide of steel bulkhead from 7th to 13th Avenue within a prior dune area. The described length of this bulkhead is based on updated information contained in the “Combined Environmental Impact Statement and Compliance Statement Pursuant to N.J.A.C. 7:7 and 7:7A dated 11/17/2020, prepared by van note-harvey associates. (approx.. 3,228 sq ft)

3. The construction of bulkhead “C”:

- i. The construction of approximately 229 linear feet x 2 feet wide of vinyl bulkhead along the oceanfront from 3rd to 4th avenues, waterward of the existing bulkhead on a beach. The described length of this bulkhead is based on updated information contained in the “Combined Environmental Impact Statement and Compliance Statement Pursuant to N.J.A.C. 7:7 and 7:7A dated 11/17/2020, prepared by van note-harvey associates. (approx. 458 sq ft)

4. The construction of bulkhead “D”:

- i. The construction of approximately 267 linear feet x 2 ft wide of vinyl bulkhead along the oceanfront from 4th to 5th avenues, waterward of the existing bulkhead on a beach. The described length of this bulkhead is based on updated information contained in the “Combined Environmental Impact Statement and Compliance Statement Pursuant to N.J.A.C. 7:7 and 7:7A dated 11/17/2020, prepared by van note-harvey associates. (approx 534 sq ft)

5. The constructions of sheds at 15th Avenue.

- i. The placement/construction of approx. 4,691 sqft of storage sheds at the Beach Patrol building at 15th Avenue.

2. Conduct of the Respondent:

Major:	any intentional, deliberate, purposeful, knowing, or willful act or omission	= 5 points
Moderate:	any unintentional but foreseeable act or omission	= 2 points
Minor:	any conduct not identified as Major or Moderate	= 1 point

1. **The construction of bulkhead "A"**
 The conduct of the Respondent(s) is considered to be **Moderate** = 2 Points
2. **The construction of bulkhead "B"**
 The conduct of the Respondent(s) is considered to be **Moderate** = 2 Points
3. **The construction of bulkhead "C"**
 The conduct of the Respondent(s) is considered to be **Moderate** = 2 Points
4. **The construction of bulkhead "D"**
 The conduct of the Respondent(s) is considered to be **Moderate** = 2 Points
5. **The construction of sheds at 15th Avenue**
 The conduct of the Respondent(s) is considered to be **Moderate** = 2 Points

3. **Seriousness:**

- a. **Channel Impacts:** The Department shall assign points as follows for channel impacts:
 - i. Up to and including 75 linear feet of channel impacts = 1 point
 - ii. Greater than 75 linear feet and up to and including 300 linear feet of channel impact = 3 points
 - iii. Greater than 300 linear feet of channel impacts = 5 points

Channel impacts were not identified for the referenced violations. 0 points.

- b. **Floodway Impacts:** The Department shall assign points as follows for floodway impacts:
 - i. Up to and including 25 cubic yards of fill or obstruction = 1 point
 - ii. Greater than 25 cubic yards and up to and including 100 cubic yards of fill or obstruction = 3 points
 - iii. Greater than 100 cubic yards of fill or obstruction = 5 points
 - AND iv. Construction of a habitable building or addition within the floodway = 5 points
 - AND v. Construction of any other structure having a footprint greater than 150 sq. ft. = 3 points

Floodway impacts were not identified for the referenced violations. 0 points.

- c. **Flood Fringe Impacts:** The Department shall assign points as follows for impacts within the flood fringe:
 - i. Greater than 5 cubic yards up to and including 50 cubic yards of fill or obstruction = 1 point
 - ii. Greater than 50 cubic yards up to and including 200 cubic yards of fill or obstruction = 3 points
 - iii. Greater than 200 cubic yards of fill or obstruction = 5 points
 - AND iv. Construction of a structure constructed with 1st floor at or above flood hazard elevation = 2 points
 - v. Construction of a habitable structure constructed with 1st floor below flood hazard elevation = 5 points

AND vi. Construction of any other structure constructed without a permit that does not comply with N.J.A.C. 7:13

= 3 points

vii. Construction of any other structure constructed without a permit that does comply with N.J.A.C. 7:13

= 1 point

Pursuant to the Findings, the flood fringe impacts are:

1. The construction of bulkhead "A"

The construction of the bulkhead was completed without a coastal permit in violation of N.J.A.C. 7:13

= 3 Points

2. The construction of bulkhead "B"

The construction of the bulkhead was completed without a coastal permit in violation of N.J.A.C. 7:13

= 3 Points

3. The construction of bulkhead "C"

The construction of the bulkhead was completed without a coastal permit in violation of N.J.A.C. 7:13

= 3 Points

4. The construction of bulkhead "D"

The construction of the bulkhead was completed without a coastal permit in violation of N.J.A.C. 7:13

= 3 Points

5. The construction of sheds at 15th Avenue

The obstruction caused by the construction of the sheds and associated fencing is estimated to be in excess of 200 cubic yards AND the construction of the sheds was completed without a coastal permit in violation of N.J.A.C. 7:13

= 8 Points

d. Area of Riparian Disturbance: The Department shall assign points as follows for an impact to a riparian zone, such as the clearing cutting, and/or removal of vegetation, the construction, reconstruction, relocation, or enlargement of the footprint of any structure, and all site preparation such as excavation, filling, and grading of any kind within the riparian zone.

i. Greater than 400 sqft up to and including 7,000 sqft

= 1 point

ii. Greater than 7,000 sqft up to and including 15,000 sqft

= 2 points

iii. Greater than 15,000 sqft and greater

= 3 points

Riparian zone impacts were not identified for the referenced violations. 0 points.

e. Severity of Riparian Disturbance: The Department shall assign points as follows based on the area disturbed and the type of vegetation disturbed.

i. The existing shrub layer within the riparian zone has been removed and the herbaceous layer remains

= 1 point

- ii. The riparian zone has been clear-cut of existing woody vegetation (trees and shrubs) with stumps remaining = 2 points
- iii. The riparian zone has been clear-cut of existing woody vegetation and stumped with the removal of the root, or vegetation otherwise destroyed by being buried under fill = 3 points

Riparian zone impacts were not identified for the referenced violations. 0 points.

- f. Violations located in State Owned Tidelands: The Department shall assign 1 point for violations located within State-owned Tidelands area for which a current tidelands instrument has not been obtained or for which payment is in arrears.

Tidelands impacts were not identified for the referenced violations. 0 points.

- g. Impacts to Resources of Concern: The Department shall assign one (1) point for each of the following special areas or resources in which the unauthorized activity occurred, or which was adversely impacted by the unauthorized activity:

- i. A regulated water identified as Trout Production or Trout Maintenance, or which contains other fishery resources;
- ii. A regulated waters designated as Category One;
- iii. A regulated water within the Central Passaic Basin, as defined at N.J.A.C. 7:13-1.2;
- iv. A regulated water that is a present or documented habitat for threatened or endangered species;
- vi. A channel or floodway;
- vii. The portion of the riparian zone within 25 feet of the top of bank of a regulated water.

Impacts to Resources of Concern were not identified for the referenced violations. 0 points.

The total number of points calculated for Type, Conduct and Seriousness of the violations and the amount of daily penalty utilizing the Flood Hazard Area Control Act Penalty Assessment Table below is as follows:

FHACA PENALTY ASSESSMENT TABLE

<u>Total Points</u>	<u>Penalty Amount</u>
1-3	\$ 500
4-6	\$ 1,000
7-8	\$ 2,000
9-10	\$ 3,000
11-12	\$ 6,000
13-14	\$ 8,000
15-16	\$10,000
17-19	\$15,000
20-22	\$20,000
23 or more	\$25,000

**TOTAL POINTS
(CONDUCT +
SERIOUSNESS) PENALTY
AMOUNT
PER DAY**

1. For the construction of bulkhead "A"

The construction 630 linear feet of steel bulkhead between 5th to 7th Avenue, within a flood hazard area.

= 5 points

\$1,000.00

City of North Wildwood, PEA230001-0507-03-0009.3
 Page 33 of 40

- 2. **For the construction of bulkhead "B"**
 The construction of approximately 1,614 linear feet of steel bulkhead from 7th to 13th Avenue within a flood hazard area. = 5 Points \$1,000.00
- 3. **For the construction of bulkhead "C"**
 The construction of approximately 229 linear feet of vinyl bulkhead along the oceanfront from 3rd to 4th avenues along, waterward of the existing bulkhead, within a flood hazard area. = 5 Points \$1,000.00
- 4. **For the construction of bulkhead "D"**
 The construction of approximately 267 linear feet of vinyl bulkhead along the oceanfront from 4th to 5th avenues, waterward of the existing bulkhead, within a flood hazard area. = 5 Points \$1,000.00
- 5. **For the construction of sheds at 15th Avenue**
 The placement/construction of approx. 4,691 sqft of storage sheds at the Beach Patrol building at 15th Avenue. = 10 Points \$3,000.00

4. Duration of the violation:

Pursuant to N.J.A.C. 7:13-24.5(c), the Department is authorized to assess a daily penalty, as each day during which the violation continues or remains in place without the required permit shall constitute an additional, separate and distinct offense.

The Department hereby exercises its discretion to assess a penalty for 1 day per month per violation. Therefore, the Civil Administrative Penalty for unpermitted activities is as follows:

	Date Since Non-Compliance to Present	1 day/Per Month	Total Penalty
1. For the construction of bulkhead "A"	May 6, 2018	1K x 61 Months	\$61,000.00
2. For the construction of bulkhead "B"	May 5, 2020	1K x 35 Months	\$35,000.00
3. For the construction of bulkhead "C"	December 12, 2012	1K x 131 Months	\$131,000.0
4. For the construction of bulkhead "D"	May 6, 2018	1K x 61 Months	\$61,000.00
5. For the construction of sheds/fenced storage area at 15 th Avenue	March 29, 2016	3K x 88 Months	\$264,000.00

The Department at its discretion, may continue to assess daily penalties until the current violations are resolved to the Department's satisfaction.

**** In general, start dates for determining this penalty rationale have been based upon aerial photography and/or other documentation provided by the City or determined based upon site inspections. ****

**UNAUTHORIZED ACTIVITIES WITHOUT A FHACA PERMIT –
 TOTAL PENALTY ASSESSMENT:
 \$552,000.00**

**FRESHWATER WETLANDS PROTECTION ACT (FWPA) PENALTY RATIONALE
 FOR FAILURE TO OBTAIN A PERMIT PRIOR TO CONDUCTING REGULATED ACTIVITIES**

Pursuant to N.J.A.C. 7:7A-22.7, the Department has determined that the base, or daily, FWPA penalty shall be determined by totaling the points assigned as follows: (1) **Type**- conducting a regulated activity without a permit or violation of a permit condition (2) **Conduct**; (3) **Seriousness** – a. acreage of wetlands and/or transition area impacted and b. resource value classification; (4) **Duration**.

Pursuant to N.J.A.C. 7:13-22.7(b), each violation of N.J.A.C. 7:7A-2.1 shall constitute an additional, separate and distinct violation.

1. **Type**: Conducting a regulated activity without a permit

The Department has categorized the unpermitted unauthorized activities that have occurred – no Freshwater Wetland Permit was obtained to remove/disturb/fill and construct a bulkhead within these freshwater wetlands and/or transition areas:

1. **The destruction of Freshwater Wetlands associated with the construction of bulkhead “B”, sand backpassing & beach and dune maintenance activities:**
 - i. The removal of vegetation, filling, and grading of approximately 1.1 acres of regulated freshwater wetlands in the dune area for the construction of approximately 1,614 linear feet of steel bulkhead from 7th to 13th Avenue, sand back passing and beach and dune maintenance within this area. The described length of this bulkhead is based on information contained in the “Combined Environmental Impact Statement and Compliance Statement Pursuant to N.J.A.C. 7:7 and 7:7A dated 11/17/2020, prepared by Van Note-Harvey Associates.
2. **The destruction of Freshwater Wetlands Transition Area associated with the construction of bulkhead “B”, sand back passing and beach and dune maintenance activities:**
 - i. The removal of vegetation, filling, and grading of approximately 6.7 acres of regulated freshwater wetland transition areas in a beach and dune area for the construction of approximately 1,614 linear feet of steel bulkhead from 7th to 13th Avenue within a prior dune area. The described length of this bulkhead is based on information contained in the “Combined Environmental Impact Statement and Compliance Statement Pursuant to N.J.A.C. 7:7 and 7:7A dated 11/17/2020, prepared by Van Note-harvey Associates.

2. **Conduct**:

Minor: any conduct not identified as major or moderate point	= 1 point
Moderate: any unintentional but foreseeable act or omission	= 2 points
Major: any intentional, deliberate, purposeful, knowing or willful act or omission	= 5 points

The conduct for the above-mentioned activities have been determined as the following:

- | | | |
|--|---|------------|
| 1. For destruction of Freshwater Wetlands | The conduct of the Respondent is considered to be Moderate | = 2 points |
| 2. For destruction of Transition Areas | The conduct of the Respondent is considered to be Moderate | = 2 points |

3. **Seriousness**:

The seriousness factor of the violation is assigned points as provided below and shall be based on the type, size, and location of the violation and the acreage of wetlands and/or transition areas impacted and the resource value of the freshwater wetland.

City of North Wildwood, PEA230001-0507-03-0009.3
 Page 35 of 40

a. Acreege of wetlands and/or transition areas impacted:

- i. a violation impacting > 7 acres = 7 points
- ii. a violation impacting > 4 acres feet up to and including 7 acres = 6 points
- iii. a violation impacting > 2 acres up to and including 4 acres = 5 points
- iv. a violation impacting > 1 acres up to and including 2 acres = 4 points
- v. a violation impacting > 0.5 acres up to and including 1 acre = 3 points
- vi. a violation impacting > 0.25 acre up to and including 0.5 acre = 2 points
- vii. a violation impacting up to and including 0.25 acre = 1 point

- 1. **For destruction of Freshwater Wetlands** Per the freshwater wetlands area depicted on the plans for NJDEP permit approval #0500-07-0006.1 CAF070001 and WFD 070001, the estimated impact is approximately 1.1 acres = 4 points
- 2. **For destruction of Transition Areas** Based on the presence of freshwater wetlands in each disturbed vegetated dune area, transition area is estimated to be approximately 6.7 acres = 6 points

b. Resource value classification:

- i. a violation impacting exceptional resource value wetlands = 7 points
- ii. a violation impacting intermediate resource value wetlands = 6 points
- iii. a violation impacting ordinary resource value wetlands = 5 points
- iv. a violation impacting exceptional resource value transition areas = 4 points
- v. a violation impacting intermediate resource value transition areas = 3 points

- 1. **For destruction of Freshwater Wetlands** Pursuant to NJDEP Permit# 0507-03-0009.2 CAF140001 & FWW140001, which established a 150ft transition area, the resource value is determined to be **Exceptional** = 7 points
- 2. **For destruction of Transition Areas** Pursuant to NJDEP Permit# 0507-03-0009.2 CAF140001 & FWW140001, which established a 150ft transition area, the resource value is determined to be **Exceptional** = 4 points

TOTAL POINTS-SERIOUSNESS:

Seriousness Total
(Acreege + Resource Value)

- 1. **For the destruction of Freshwater Wetlands** = 11 points
- 2. **For the destruction of Transition Areas** = 10 Points

The total number of points calculated for Type, Conduct and Seriousness of the violations and the amount of daily penalty utilizing the Freshwater Wetlands Protection Act Penalty Assessment Table below is as follows:

FRESHWATER WETLANDS PROTECTION ACT
 Penalty Assessment Table

<u>Total Points</u>	<u>Penalty Amount</u>
17	\$25,000.00
16	\$23,000.00
15	\$21,000.00
14	\$19,000.00
13	\$17,000.00

City of North Wildwood, PEA230001-0507-03-0009.3
 Page 36 of 40

12	\$15,000.00
11	\$13,000.00
10	\$11,000.00
9	\$10,000.00
8	\$9,000.00
7	\$8,000.00
6	\$6,000.00
5	\$5,000.00
4	\$4,000.00
3	\$3,000.00

	TOTAL POINTS (CONDUCT + SERIOUSNESS)	PENALTY AMOUNT PER DAY
1. For the destruction of Freshwater Wetlands The destruction of approximately 1.1 acres of freshwater wetlands.	= 13 points	\$17,000.00
2. For the destruction of Transition Areas The destruction of approximately 6.7 acres of transition areas.	= 12 Points	\$15,000.00

4. Duration of the violation:

Pursuant to N.J.A.C. 7:7A-22.7(c), the Department is authorized to assess a daily penalty, as each day during which the violation continues or remains in place without the required permit shall constitute an additional, separate and distinct offense.

The Department hereby exercise its discretion to assess a penalty for 1 day per month per violation. Therefore, the Civil Administrative Penalty for unpermitted activities is as follows:

	Date Since Non- Compliance to Present	1 day/Per Month	Total Penalty
1. For the destruction of Freshwater Wetlands	May 5, 2020	17K x 35 Months	\$595,000.00
2. For the destruction of Transition Areas for the construction of bulkhead "B"	May 5, 2020	15K x 35 Months	\$525,000.00

The Department at its discretion, may continue to assess daily penalties until the current violations are resolved to the Department's satisfaction.

**** In general, start dates for determining this penalty rationale have been based upon aerial photography and/or other documentation provided by the City or determined based upon site inspections. ****

**UNAUTHORIZED ACTIVITIES WITHOUT A FRESHWATER WETLANDS PERMIT –
\$1,120,000.00**

City of North Wildwood, PEA230001-0507-03-0009.3
Page 37 of 40

**FRESHWATER WETLANDS PROTECTION ACT PENALTY RATIONALE FOR
PERMIT CONDITION VIOLATIONS**

The Department has determined that the base, or daily, penalty shall be determined as follows:

(1) **Type**- violation of permit conditions (2) **Conduct**; (3) **Seriousness**; and (4) **Duration**.

1. **Type of Violation**: There is 1 violation of a Freshwater Wetland permit and its permit conditions:

Violation

Failure to comply with Freshwater Wetland Permit Condition #10 of Bike Path, Sidewalk and Utility Reconstruction Permit #: 0507-03-0009.2 CAF140001 & FWW140001 & FWW140002. Permit Condition #10 states, "Prior to site preparation, the permittee shall complete a transition area and adjacent freshwater wetland area conservation restriction and file the completed restriction with the Office of the Cape May County Clerk." This conservation restriction was required to preserve and document the location of freshwater wetlands and transition areas within the oceanfront existing dunes in North Wildwood. The conservation restriction was not filed with the Office of the Cape May County Clerk.

2. **Conduct**: Conduct shall be classified as major, moderate or minor as follows:

- Major: any intentional, deliberate, purposeful, knowing or willful act or omission by the violator. The Department presumes all violations of Department permits or authorizations to be knowing violations.
- Moderate: any unintentional but foreseeable act or omission
- Minor: any conduct not identified as major or moderate point

Conduct for all permit violations is **MAJOR** as the Department presumes all violations of Department permits or authorizations to be knowing violations.

3. **Seriousness**: Seriousness shall be classified as major, moderate or minor as follows:

- Major: any violation which has caused or has the potential to cause serious harm to human health, safety, property, the Freshwater Wetlands Protection Act regulatory program or the environment; or seriously deviates from the applicable law and/or condition. "Serious" deviations include but are not limited to those violations which are in complete contravention of the law, requirement and/or condition, and/or which severely impair or undermine the protection, operation, or intent of the law, requirement or condition. Violations of "major" seriousness include but are not limited to:
- i. Any activity that negatively affects water quality;
 - ii. Clearing, grading, or filling of freshwater wetlands;
 - iii. Clearing, grading, or filling of transition areas when done in conjunction with such activities in freshwater wetlands;
 - iv. Clearing, grading, filling, or disturbance of freshwater wetlands and/or transition areas in excess of that authorized by a permit or plan;
 - v. Failure to timely record a conservation restriction or easement, and the property has been sold or transferred;
 - vi. Failure to report the presence of a historic resource during construction and/or the destruction of a historic resource without Department approval;

- vii. Failure to comply with a historic resource of mitigation requirement; and
- viii. Failure of an applicant or permittee to provide information upon request to determine compliance with any applicable law and/or condition

Moderate: any violation which has caused or has the potential to cause substantial harm to human health, safety, the Freshwater Wetlands Protection Act regulatory program or the environment; or substantially deviates from the applicable law and/or condition. "Substantial deviation" shall include, but not be limited to violations which are in substantial contravention of the law, requirement and/or condition, and/or which severely impair or undermine the protection, operation, or intent of the law, requirement and/or condition, and/or that substantially impair or undermine the protection, operation, or intent of N.J.S.A. 13:9B-1 et seq., or 58:10A-1 et seq., or any regulation, rule, or permit condition issued by the Department pursuant thereto. The Department shall consider a violation that is limited solely to the transition area but is not associated with a permit to be of moderate seriousness. Violations of moderate seriousness include, but are not limited to:

- i. Failure to notify the Department of commencement of construction;
- ii. Failure to transfer a permit in accordance with this chapter; and
- iii. Failure to timely record a conservation restriction or easement, and the property has not been sold or transferred.

Minor: seriousness shall apply to any violation not described above as Major or Moderate.

The City has failed to comply with Freshwater Wetland Permit Condition #10 of Bike Path, Sidewalk and Utility Reconstruction Permit #: 0507-03-0009.2 CAF140001 & FWW140001 & FWW140002. Permit Condition #10 states, "Prior to site preparation, the permittee shall complete a transition area and adjacent freshwater wetland area conservation restriction and file the completed restriction with the Office of the Cape May County Clerk." This conservation restriction was required to preserve and document the location of freshwater wetlands and transition areas within the oceanfront existing dunes. The conservation restriction was not filed as required by the permit. The Seriousness of this permit violations is **MODERATE**.

The Department shall determine the applicable daily penalty amount from the Base Daily Penalty Matrix below:

		SERIOUSNESS		
		MAJOR	MODERATE	MINOR
CONDUCT	MAJOR	\$25,000	\$15,000	\$10,000
	MODERATE	\$15,000	\$7,500	\$5,000
	MINOR	\$10,000	\$5,000	\$1,000

**Major Conduct and Moderate Seriousness =
 Daily Base Penalty \$15,000.00**

City of North Wildwood, PEA230001-0507-03-0009.3
Page 39 of 40

4. Duration:

Pursuant to N.J.A.C. 7:7A-22.8(g), the Department is authorized to assess a daily penalty for the total number of calendar days during which each violation continued or remained in place without the required permit.

The Department is using its discretion to assess a daily base penalty of \$15,000.00 per year of violation.

Failure to comply with Freshwater Wetland Permit Condition #10 of Bike Path, Sidewalk and Utility Reconstruction Permit #: 0507-03-0009.2 CAF140001 & FWW140001 & FWW140002. Permit Condition #10 states, "Prior to site preparation, the permittee shall complete a transition area and adjacent freshwater wetland area conservation restriction and file the completed restriction with the Office of the Cape May County Clerk." This conservation restriction was required to preserve and document the location of freshwater wetlands and transition areas within the oceanfront existing dunes. The conservation restriction was not recorded.	December 1, 2014	15K x 8 Years	\$120,000.00
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TOTAL Civil Administrative Penalty for violations of Freshwater Wetland Permit conditions = \$120,000.00

TOTAL FRESHWATER WETLAND PENALTY ASSESSMENT

UNAUTHORIZED ACTIVITIES WITHOUT A FRESHWATER WETLANDS PERMIT PENALTY ASSESSMENT: \$1,120,000.00

VIOLATION OF FRESHWATER WETLAND PERMIT CONDITION PENALTY ASSESSMENT: \$120,000.00

TOTAL FRESHWATER WETLAND PENALTY ASSESSMENT: \$1,240,000.00

AONOCAPA TOTAL CIVIL ADMINISTRATIVE PENALTY ASSESSMENT

TOTAL CAFRA PENALTY ASSESSMENT: \$6,869,000.00

TOTAL FLOOD HAZARD AREA/ FHACA PENALTY ASSESSMENT: \$552,000.00

TOTAL FRESHWATER WETLAND/FWPA PENALTY ASSESSMENT: \$1,240,000.00

CAFRA + FHACA + FWPA = \$8,661,000.00

City of North Wildwood, PEA230001-0507-03-0009.3
Page 40 of 40

Administrative Request Checklist and Tracking Form

I. Document Being Appealed: EA ID # PEA230001-0507-03-0009.3

Date Document Issued

II. Person Requesting Hearing (Each Respondent named in the Enforcement Document, who wants to contest the Enforcement Document must individually file a hearing request):

_____ Name/Company	_____ Name of Attorney (if applicable)
_____ Address	_____ Address
_____ Telephone #	_____ Telephone #

Please Include the Following Information As Part of Your Request:

- A. The date the alleged violator received the Enforcement Document.
- B. A copy of the Enforcement Document and a list of all issues being appealed.
- C. An admission or denial of each of the findings of fact, or a statement of insufficient knowledge;
- D. The defenses to each of the findings of fact in the enforcement document;
- E. Information supporting the request;
- F. An estimate of the time required for the hearing;
- G. A request, if necessary, for a barrier-free hearing location for physically disabled persons;
- H. A clear indication of any willingness to negotiate a settlement with the Department prior to the Department's processing of your hearing request to the Office of Administrative Law; and
- I. This form, completed, signed and dated with all of the information listed above, including attachment, to:

- 1. New Jersey Department of Environmental Protection
Office of Legal Affairs
Attention: Adjudicatory Hearing Requests
401 E. State Street, P.O. Box 402
Trenton, New Jersey 08625
- 2. Michele Kropilak, Manager
Bureau of Coastal and Land Use Compliance and Enforcement
1510 Hooper Avenue, Suite 140
Toms River, New Jersey 08753
- 3. Colleen Keller, Assistant Director
Division of Land Resource Protection
501 East State Street
Mail Code 501-02A, PO Box 420
Trenton, New Jersey 08625-0420

IV. Signature: _____

Date: _____

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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

INVOICE NO.
230042560

ENFORCEMENT-FRESHWATER WETLANDS

Program Interest
NORTH WILDWOOD CITY OCEANFRONT BEACH North Wildwood, NJ. 08260 0507-03-0009.3

Type of Notice
ORIGINAL (NON-INITIAL)

Amount Due
\$ 1,240,000.00

Billing Date
01/10/23

Due Date
02/20/23

NJEMS Bill ID
000000251065500

Summary	
Total Amount Assessed	1,240,000.00
Amount Received Before Creating Installment Plan (if installment plans is allowed)	0.00
Amount Transferred To Installment Plan	1,240,000.00
Installment Amount	0.00
Total Amount Credited	0.00
Total Amount Debited (Other Than Amounts Assessed)	0.00
Total Amount Due	1,240,000.00

REMINDER:

YOU CAN PAY THIS BILL ONLINE WITH A CREDIT CARD OR E-CHECK.
 GO TO [HTTP://WWW.NJ.GOV/DEP/ONLINE](http://www.nj.gov/dep/online) AND CLICK PAY A PAPER INVOICE.
 THE SYSTEM WILL ASK FOR THE INVOICE NUMBER THAT IS FOUND AT THE TOP-RIGHT CORNER OF THIS BILL.
 THERE IS NO FEE FOR PAYING VIA E-CHECK; FOR CREDIT CARD USE, 2.0% OF THE TOTAL + \$.50 IS CHARGED.
 TO PAY BILL BY MAIL SEND A CHECK PAYABLE TO TREASURER-STATE OF NEW JERSEY.
 WRITE INVOICE NUMBER AND PROGRAM INTEREST NUMBER ON CHECK.
 RETURN CHECK WITH BOTTOM PORTION OF THIS INVOICE TO THE NJ DEPARTMENT OF TREASURY.
 IF YOU HAVE QUESTIONS SEE BACK OF INVOICE FOR CONTACT INFORMATION.

See Back Of Page for Billing Inquiries

INVOICE NO.
230042560

D9901F (R 3/14/02)

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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

INVOICE NO.
230042560

ENFORCEMENT-FRESHWATER WETLANDS

NJEMS Bill ID
000000251065500

Program Interest ID
0507-03-0009.3

Type of Notice
ORIGINAL (NON-INITIAL)

Billing Date
01/10/23

Due Date
02/20/23

Amount Due
\$ 1,240,000.00

For name and/or address change, check box and write corrections on the back of this invoice.

DO NOT FOLD, BEND OR MARK

Enter the Amount of your payment → \$

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RETURN THIS PORTION with your check made payable to:

TREASURER - STATE OF NEW JERSEY
 and mail to:
 NJ DEPARTMENT OF TREASURY
 DIVISION OF REVENUE
 PO BOX 417
 TRENTON, NJ 08646-0417



NORTH WILDWOOD CITY

901 ATLANTIC AVE
 North Wildwood

NJ 08260-5778

EP10000500071000031000000009100311111124000000000092300425602C42

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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

INVOICE NO.

230042560

ENFORCEMENT-FRESHWATER WETLANDS

Program Interest
NORTH WILDWOOD CITY OCEANFRONT BEACH North Wildwood, NJ. 08260 0507-03-0009.3

Type of Notice
ORIGINAL (NON-INITIAL)

Amount Due
\$ 1,240,000.00

Billing Date
01/10/23

Due Date
02/20/23

NJEMS Bill ID
000000251065500

AONOCAPA
Prescribed Enforcement Action

ASSESSMENTS

Start-End Date: 01/10/2023-01/10/2023 Activity: PEA230001

Assessment Type: PENALTY(Freshwater Wetlands)

Status: Open (Pending Payment)

Regulatory Basis:

Amount: \$ 1240000.00

Total Amount Assessed: \$ 1,240,000.00

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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

INVOICE NO.
230042550

ENFORCEMENT-STREAM ENCROACHMENT

Program Interest
NORTH WILDWOOD CITY OCEANFRONT BEACH North Wildwood, NJ. 08260 0507-03-0009.3

Type of Notice
ORIGINAL (NON-INITIAL)

Amount Due
\$ 552,000.00

Billing Date
01/10/23

Due Date
02/20/23

NJEMS Bill ID
000000251065600

AONOCAPA
Prescribed Enforcement Action

ASSESSMENTS

Start-End Date: 01/10/2023-01/10/2023 Activity: PEA230001
 Assessment Type: PENALTY(Flood Hazard) Status: Open (Pending Payment) Amount: \$ 552000.00
 Regulatory Basis: Total Amount Assessed: \$ 552,000.00

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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

INVOICE NO.
230042550

ENFORCEMENT-STREAM ENCROACHMENT

Program Interest
NORTH WILDWOOD CITY
OCEANFRONT BEACH
North Wildwood, NJ. 08260
0507-03-0009.3

Type of Notice
ORIGINAL (NON-INITIAL)

Amount Due
\$ 552,000.00

Billing Date
01/10/23

Due Date
02/20/23

NJEMS Bill ID
000000251065600

Summary	
Total Amount Assessed	552,000.00
Amount Received Before Creating Installment Plan (if installment plans is allowed)	0.00
Amount Transferred To Installment Plan	552,000.00
Installment Amount	0.00
Total Amount Credited	0.00
Total Amount Debited (Other Than Amounts Assessed)	0.00
Total Amount Due	552,000.00

REMINDER:

YOU CAN PAY THIS BILL ONLINE WITH A CREDIT CARD OR E-CHECK.
 GO TO HTTP://WWW.NJ.GOV/DEP/ONLINE AND CLICK PAY A PAPER INVOICE.
 THE SYSTEM WILL ASK FOR THE INVOICE NUMBER THAT IS FOUND AT THE TOP-RIGHT CORNER OF THIS BILL.
 THERE IS NO FEE FOR PAYING VIA E-CHECK; FOR CREDIT CARD USE, 2.0% OF THE TOTAL + \$.50 IS CHARGED.
 TO PAY BILL BY MAIL SEND A CHECK PAYABLE TO TREASURER-STATE OF NEW JERSEY.
 WRITE INVOICE NUMBER AND PROGRAM INTEREST NUMBER ON CHECK.
 RETURN CHECK WITH BOTTOM PORTION OF THIS INVOICE TO THE NJ DEPARTMENT OF TREASURY.
 IF YOU HAVE QUESTIONS SEE BACK OF INVOICE FOR CONTACT INFORMATION.

See Back Of Page for Billing Inquiries

INVOICE NO.
230042550

D9901F (R 3/14/02)

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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

INVOICE NO.
230042550

ENFORCEMENT-STREAM ENCROACHMENT

NJEMS Bill ID
000000251065600

Program Interest ID
0507-03-0009.3

Type of Notice
ORIGINAL (NON-INITIAL)

Billing Date
01/10/23

Due Date
02/20/23

Amount Due
\$ 552,000.00

For name and/or address change, check box and write corrections on the back of this invoice.

DO NOT FOLD, BEND OR MARK

Enter the Amount of your payment →

\$

RETURN THIS PORTION

with your check made payable to:

TREASURER - STATE OF NEW JERSEY
and mail to:

NJ DEPARTMENT OF TREASURY
DIVISION OF REVENUE
PO BOX 417
TRENTON, NJ 08646-0417



NORTH WILDWOOD CITY

C1

901 ATLANTIC AVE
North Wildwood

NJ 08260-5778

EP100005000710000310000000091003111110552000000000082300425505C18

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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
 _____ ENFORCEMENT - CAFRA CCMRE FUND

INVOICE NO.
 230042520

Program Interest
NORTH WILDWOOD CITY
OCEANFRONT BEACH
North Wildwood, NJ. 08260
0507-03-0009.3

Type of Notice
ORIGINAL (NON-INITIAL)

Amount Due
\$ 6,869,000.00

Billing Date
01/10/23

Due Date
02/20/23

NJEMS Bill ID
000000251065400

Summary	
Total Amount Assessed	6,869,000.00
Amount Received Before Creating Installment Plan (if installment plans is allowed)	0.00
Amount Transferred To Installment Plan	6,869,000.00
Installment Amount	0.00
Total Amount Credited	0.00
Total Amount Debited (Other Than Amounts Assessed)	0.00
Total Amount Due	6,869,000.00

REMINDER:
 MAKE CHECKS PAYABLE TO: TREASURER - STATE OF NEW JERSEY
 WRITE PROGRAM INTEREST ID ON YOUR CHECK (SEE BOTTOM STUB)
 RETURN THE BOTTOM STUB WITH YOUR PAYMENT
 MAIL PAYMENT AND STUB TO NJ DEPARTMENT OF TREASURY (SEE BOTTOM STUB)

See Back Of Page for Billing Inquiries

INVOICE NO.
 230042520

D9901F (R 3/14/02)

Let's protect our earth



NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
 _____ ENFORCEMENT - CAFRA CCMRE FUND

INVOICE NO.
 230042520

NJEMS Bill ID
000000251065400

Program Interest ID
0507-03-0009.3

Type of Notice
ORIGINAL (NON-INITIAL)

Billing Date
01/10/23

Due Date
02/20/23

Amount Due
\$ 6,869,000.00

For name and/or address change, check box and write corrections on the back of this invoice.

DO NOT FOLD, BEND OR MARK

Enter the Amount of your payment →

\$

RETURN THIS PORTION

with your check made payable to:

TREASURER - STATE OF NEW JERSEY
 and mail to:
 NJ DEPARTMENT OF TREASURY
 DIVISION OF REVENUE
 PO BOX 417
 TRENTON, NJ 08646-0417



NORTH WILDWOOD CITY

C0

901 ATLANTIC AVE
 North Wildwood

NJ 08260-5778

EP100005000710000310000000091003111111686900000000052300425203C02

Let's protect our earth



NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

INVOICE NO.
230042520

ENFORCEMENT - CAFRA CCMRE FUND

Program Interest
NORTH WILDWOOD CITY OCEANFRONT BEACH North Wildwood, NJ. 08260 0507-03-0009.3

Type of Notice
ORIGINAL (NON-INITIAL)

Amount Due
\$ 6,869,000.00

Billing Date
01/10/23

Due Date
02/20/23

NJEMS Bill ID
000000251065400

AONOCAPA
Prescribed Enforcement Action

ASSESSMENTS

Start-End Date: 01/10/2023-01/10/2023 Activity: PEA230001

Assessment Type: PENALTY(CAFRA-CCMRE FUND)

Regulatory Basis:

Status: Open (Pending Payment)

Amount: \$ 6869000.00

Total Amount Assessed: \$ 6,869,000.00



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

Neil Yoskin, Esq.
Partner
Email: nyoskin@cullenllp.com

February 13, 2023

Via e-mail (Gary.Brower@dep.nj.gov) and Overnight Delivery

Office of Legal Affairs
New Jersey DEP
401 E State St; Mail Code 401-04L
PO Box 402
Trenton, NJ 08625-0402

Attn: Adjudicatory Hearing Requests

RE: Administrative Order and Notice of Civil Administrative Penalty Assessment
PEA 230001-PI93926
Block 291.01, Lot 1; Block 317.03, Lot 1
City of North Wildwood, Cape May County
ADJUDICATORY HEARING REQUEST

Dear Sir/Madam:

This office represents the City of North Wildwood (“City” or “North Wildwood”) in connection with the above-referenced matter. The City hereby requests a hearing in connection with the \$1,216,813 Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) issued on January 27, 2023. The AONOCAPA alleges violations of the Water Pollution Control Act and Water Quality Planning Act in connection with construction and operation of sewage generating structures associated with Seaport Pier. The request is made within 20 days of service of the penalty assessment and is, therefore, timely. The following information is provided in accordance with the Administrative Hearing Request Checklist and Tracking Form.

- I. **Permit decision being appealed:** January 27, 2023 AONOCAPA, EA ID No. PEA 230001-PI93926 NWW (copy attached).



II. Persons requesting hearing:

City of North Wildwood
 10th & Atlantic Avenue
 North Wildwood, New Jersey 08260
 Attn: Nicolas Long, City Administrator

Name of Attorney:

Neil Yoskin, Esq.
 Cullen and Dykman LLP
 229 Nassau Street
 Princeton, New Jersey 08542
 609-279-0900

Please include the following information as party of your request.

- A. Date the enforcement document was received: On or about January 27, 2023**
- B. A copy of the enforcement document is attached.**
- C. List of issues being appealed and admission or denial of each of the findings of fact, or statement of insufficient knowledge:**

1. It is admitted that the City of North Wildwood owns Seaport Pier and the property located at Block 291.01, Lot 1 and Block 317.03, Lot 1. It is further admitted that BG Capital, LLC leases a portion of the site from the City. It is admitted, to the best of the City's knowledge, that Joseph Byrne and Daniel Govberg are partners of BG Capital.
2. It is admitted that Seaport Pier was originally constructed as a private fishing pier and was acquired by North Wildwood in May, 1955 through tax foreclosure. The balance of the findings in Paragraph 2 of the AONOCAPA are admitted.
3. It is admitted that on September 5, 2017, BG Capital and North Wildwood entered into a Lease Agreement for the development and operation of a restaurant, bar, swimming pool and club, concert venue and entertainment center with related improvements it is further admitted that the Lease contained an option for BG Capital to purchase the site from the City, and included the requirement that all necessary permits and approvals would be obtained by BG Capital.
4. The City is without sufficient knowledge to admit or deny that the pool pier constructed by BG Capital is or is not located within a sewer service area.
5. The City is without sufficient knowledge to admit or deny that in October, 2017, JB Richards Construction LLC, of which Joseph Byrne is a managing member, submitted a CAFRA Permit application for the expansion of the pool pier.
6. It is admitted that JB Richards Construction LLC began construction on Seaport Pier in late 2017 and on the pool pier in early 2018.
7. The City is without sufficient knowledge to admit or deny that on January 3, 2018, the Department issued a CAFRA Permit to BG Capital for the activities listed in Paragraph 7 of the AONOCAPA.



8. It is admitted that on April 4, 2019, the Department granted a CAFRA Permit modification allowing a 2850 s.f. expansion on the southern end of the pool pier.
9. The City is without sufficient knowledge to admit or deny that on April 28, May 26 and June 2, 2020 Department staff conducted site investigations and determined that multiple structures and utility connections have been constructed without an authorization from the Department. The City is without sufficient information to admit or deny the balance of Paragraph 9 of the AONOCAPA.
10. It is admitted that on July 14, 2020, the Department issued Notice of Violations to BG Capital and to the City for various alleged violations of the Water Pollution Control Act, the Water Quality Planning Act and various implementing regulations.
11. The City is without sufficient knowledge to admit or deny that on July 17, 2020, BG Capital responded to the Department indicating that it would “promptly address all matters.”

D. Defenses to each finding of fact and penalty assessment in the enforcement document:

1. It is denied that the City in any way has violated the Water Pollution Control Act, the Water Quality Planning Act and their implementing regulations.
2. The issuance of the AONOCAPA more than two years after the matters complained of was brought for the sole and express purpose of retaliating against the City of North Wildwood for litigation unrelated to the subject matter of the AONOCAPA.
3. In light of the time that has passed since the matters in question and the interactions of the Department with BG Capital, the Department is estopped from issuing the penalty assessment.
4. Both the factual findings underpinning the AONOCAPA, and the calculation of the penalties are arbitrary, capricious, unreasonable and otherwise not in accordance with law.
5. The City of North Wildwood is not responsible for the operations of any of the treatment works in question.
6. Compliance is within the sole and exclusive control of BG Capital.

E. Information supporting the request: To be supplied.

F. Estimate of the time required for the hearing: 3 days.

G. Barrier free hearing location: not required.

H. Indication of willingness to negotiate a settlement: Yes.



A copy of this hearing request is being provided to Bryan Barrett, Chief of the Southern Bureau of Water Compliance and Enforcement, as required by the Hearing Request Checklist and Tracking Form, and to the persons copied on the Department's January 27, 2023 letter to North Wildwood Mayor Patrick Rosenello.

Sincerely,
CULLEN AND DYKMAN LLP

/s/ Neil Yoskin

Neil Yoskin

NY/cl

Enclosures

cc (via e-mail):

City of North Wildwood

Bryan Barrett, Chief, Southern Bureau of Water Compliance and Enforcement

Sean Moriarty, NJDEP

Kimberly Cahall, NJDEP

Elizabeth Dragon, NJDEP

Katrina Angarone, NJDEP

Craig Dorsett, NJDEP

Patricia Gardner, NJDEP

Thomas Larocco, Cape May County MUA (tomlarocco@cmcmua.com)

Mark Austin, USEP (Austin.Mark@epa.gov)

Lyndsy Newcomb, Esq. (LNewcomb@mchlegal.com)

William Kaufmann, Esq. (WKaufmann@NDG.com)



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NEIL YOSKIN
 PARTNER
 NYoskin@cullenllp.com

February 28, 2023

Via e-mail (Gary.Brower@dep.nj.gov) and Overnight Delivery

Office of Legal Affairs
 New Jersey DEP
 401 E State St; Mail Code 401-04L
 PO Box 402
 Trenton, NJ 08625-0402

Attn: Adjudicatory Hearing Requests

RE: Administrative Order and Notice of Civil Administrative Penalty Assessment
 City of North Wildwood / Seaport Pier
 PEA 230001-0507-03-0009.4
 Block 291.01, Lot 1; Block 317.03, Lot 1
 City of North Wildwood, Cape May County
ADJUDICATORY HEARING REQUEST

Dear Sir/Madam:

This office represents the City of North Wildwood (“City” or “North Wildwood”) in connection with the above-referenced matter. The City hereby requests a hearing in connection with the \$2,941,000 Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) issued on January 24 2023. The AONOCAPA alleges violations of the Coastal Area Facility Review Act, the Flood Hazard Area Control Act and in connection with the construction of various structure structures on Seaport Pier. The request is made within 35 days of service of the AONOCAPA and is, therefore, timely. The following information is provided in accordance with the Administrative Hearing Request Checklist and Tracking Form.

- I. **Decision being appealed:** January 24, 2023 AONOCAPA, EA ID No. PEA 230001-0507-03-0009.4 copy attached).



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Page 2
February 28, 2023

II. Persons requesting hearing:

City of North Wildwood
10th & Atlantic Avenue
North Wildwood, NJ 08260
Attn: Nicolas Long, City Administrator

Name of Attorney:
Neil Yoskin, Esq.
Cullen and Dykman LLP
229 Nassau Street
Princeton, NJ 08542
609-279-0900

Please include the following information as part of your hearing request.

- A. Date the enforcement document was received:** On or about January 26, 2023
- B. A copy of the enforcement document is attached.**
- C. List of issues being appealed and admission or denial of each of the findings of fact, or statement of insufficient knowledge:**
 - 1. It is admitted that the City of North Wildwood owns Seaport Pier and the property located at Block 291.01, Lot 1 and Block 317.03, Lot 1. It is further admitted that BG Capital, LLC leases a portion of the site from the City. It is admitted, to the best of the City's knowledge, that Joseph Byrne and Daniel Govberg are partners of BG Capital.
 - 2. It is admitted that Seaport Pier is listed in the City's ROSI.
 - 3. Admitted.
 - 4. Admitted.
 - 5. The City is without sufficient knowledge to admit or deny that newly constructed improvements are no located in a sewer service area.
 - 6. The City is without sufficient knowledge to admit or deny that in October, 2017, JB Richards Construction LLC, of which Joseph Byrne is a managing member, submitted a CAFRA Permit application for the expansion of the pool pier.
 - 7. Admitted.



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8. The City is without sufficient knowledge to admit or deny that on January 3, 2018, the Department issued a CAFRA Permit to BG Capital for the activities listed in the AONOCAPA. As for the remainder of the allegation, the CAFRA Permit speaks for itself.
9. The City is without sufficient knowledge to form an opinion as to the truth of the matters asserted.
10. The City is without sufficient knowledge to form and opinion as to the truth of the matters asserted.
11. It is admitted that on June 6, 2020, the Department issued Notice of Violations to BG Capital and to the City for various alleged violations of CAFRA and the FHACA.
12. Admitted.
13. Admitted.
14. The City is without sufficient knowledge to form an opinion as to the truth of the matters asserted.
15. It is admitted that the City issued the referenced building permit. The City is without sufficient knowledge to form an opinion as to the remainder of the matters asserted.
16. The City is without sufficient knowledge to form an opinion as to the truth of the matters asserted.
17. It is admitted that the listed violations are those which the Department alleges to have occurred.
18. It is denied that City, as a co-permittee and owner of the site, has committed the alleged violations.



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D. Defenses to each finding of fact and penalty assessment in the enforcement document:

1. It is denied that the City in any way has violated CAFRA, the Flood Hazard Area Control Act and their implementing regulations.
2. The issuance of the AONOCAPA more than two years after the matters complained of was brought for the sole and express purpose of retaliating against the City of North Wildwood for litigation unrelated to the subject matter of the AONOCAPA.
3. In light of the time that has passed since the matters in question and the interactions of the Department with BG Capital, the Department is estopped from issuing the penalty assessment.
4. Both the factual findings underpinning the AONOCAPA, and the calculation of the penalties are arbitrary, capricious, unreasonable and otherwise not in accordance with law.

E. Information supporting the request: To be supplied.

F. Estimate of the time required for the hearing: 3 days.

G. Barrier free hearing location: not required.

H. Indication of willingness to negotiate a settlement: Yes.

A copy of this hearing request is being provided to the Director of the Division of Land Resource Protection, as required by the Adjudicatory Hearing Request Checklist and Tracking Form, and to the following persons copied on the Department's January 24, 2023 letter to North Wildwood Mayor Patrick Rosenello: Michele Kropilak, Manager, Bureau of Coastal and Land Use Compliance and Enforcement, Colleen Keller, Assistant Director, Division of Land Resource



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Protection, Kimberly Cahall, NJDEP/OEP, Kevin Terhune, Deputy Attorney General, Robert Guzek, NJDEP/OTPLA, Carlton Dudley, NJDEP/WRM, Lyndsy Newcomb, Esq.

Sincerely,
CULLEN AND DYKMAN LLP

A handwritten signature in blue ink, appearing to read 'Neil Yoskin', written over a light blue horizontal line.

Neil Yoskin

NY/cl
Enclosures
cc (via e-mail):

City of North Wildwood
William Kauffman, Esq.
Director, Division of Land Resource Protection
Michele Kropilak, Manager, Bureau of Coastal and Land Use Compliance and Enforcement
Colleen Keller, Assistant Director, Division of Land Resource Protection
Kimberly Cahall, NJDEP/OEP
Kevin Terhune, Deputy Attorney General
Robert Guzek, NJDEP/OTPLA
Carlton Dudley, NJDEP/WRM
Lyndsy Newcomb, Esq.

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
R. J. Hughes Justice Complex
25 Market Street, P.O. Box 093
Trenton, New Jersey 08625-0093
Attorney for Plaintiff State of New Jersey
Department of Environmental Protection

By: Dianna E. Shinn (242372017)
Deputy Attorney General
(609) 376-2789

NEW JERSEY DEPARTMENT OF,
ENVIRONMENTAL PROTECTION,

Plaintiff,

v.

CITY OF NORTH WILDWOOD, "XYZ
CONTRACTORS" 1-10, "JOHN
AND/OR JANE DOES" 1-10

Defendants,

SUPERIOR COURT OF NEW JERSEY
CAPE MAY COUNTY - CHANCERY
DIVISION

DOCKET NO. CPM-C-55-22

Civil Action

CERTIFICATION OF PETER RAMOS

PETER RAMOS, of full age, certifies and says:

1. I am employed as the Deputy Director, Division of Risk Management at the State of New Jersey Department of the Treasury.

2. By virtue of my position, I am familiar with and have access to the State of New Jersey's records regarding all notices of tort claim received thereby.

3. A search of our system database and files reveals that the State of New Jersey did not receive a notice of tort claim with regard to any of the allegations from Defendant City of North

Wildwood or anyone on their behalf in accordance with the New Jersey Contractual Liability Act, N.J.S.A. 59:13-5 et seq.

4. Pursuant to N.J.S.A. 59:13-5 et seq., public entities, such as the State of New Jersey, may by rule or regulation adopt forms specifying information to be contained in claims filed against it or its employee(s). Pursuant to this statute, the State of New Jersey is entitled to a particular Notice of Claims form, which provides specific details that enable it to initiate a satisfactory investigation of the alleged claims.

5. I am aware that the Defendant, in the above-captioned matter, claims damages in the amount of \$15 million as a result of certain allegations in its counterclaim filed February 17, 2023.

6. At the present time, State of New Jersey still has not received the Notice of Claim form in accordance with N.J.S.A. 59:13-5 et seq., from Defendant.

7. The State of New Jersey never received motion papers or any other documentation claiming "sufficient reasons constituting extraordinary circumstances" from Defendant or anyone on their behalf that would excuse Defendant's failure to file a proper and complete notice of claim with the State of New Jersey.

8. The Defendant's failure to serve a proper and complete notice of claim has made it difficult for the State of New Jersey to determine the extent of liability to which it is exposed as a result of Defendant's counterclaims.

I certify that the foregoing statements made by me are true to the best of my knowledge. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Peter Ramos

PETER RAMOS, C.P.M.
Deputy Director
Division of Risk Management
NJ Department of the Treasury

Dated: March 15, 2023

SUPERIOR COURT OF NEW JERSEY, CAPE MAY COUNTY
CHANCERY DIVISION
Docket No. C-55-22

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Plaintiff,

v.

CITY OF NORTH WILDWOOD, "XYZ
CORPORATIONS" 1-10; and "JOHN
AND/OR JANE DOES" 1-10,

Defendants.

Civil Action

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO
DISMISS DEFENDANT CITY OF NORTH WILDWOOD'S COUNTERCLAIMS

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Plaintiff
R.J. Hughes Justice Complex
25 Market Street, PO Box 093
Trenton, NJ 08625-0093
(609) 376-2789
Dianna.Shinn@law.njoag.gov

Dianna E. Shinn (242372017)
Deputy Attorney General
On the Brief

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PRELIMINARY STATEMENT

The New Jersey Department of Environmental Protection ("DEP") filed a summary action for a preliminary injunction and temporary restraints to enforce its final agency decision. The DEP denied the City of North Wildwood's ("NWW") October 2022 emergency authorization application ("EA") that sought approval to install a bulkhead on its beach. DEP appropriately determined that installation of a bulkhead pursuant to an EA is not warranted given that DEP determined that dunes provided sufficient shore protection after Hurricane Ian and that other non-structural shore protection measures are available to NWW.

On February 1, 2023, the Court granted DEP's relief. The Court's determined that NWW had already violated environmental statutes and regulations by performing other regulated activities on the shore without approvals, and that NWW would need a DEP permit before installing a bulkhead. The Court also directed NWW to file a new EA application with DEP.

DEP has worked, and remains committed to working with NWW to confront any concerns regarding shore protection while also complying with the environmental laws of the State. Instead of constructively working with DEP to explore and implement non-structural solutions to their beachfront erosion, NWW filed multiple counterclaims seeking to nullify DEP's statutory role in shore protection, avoid NWW's own municipal responsibilities to

maintain the beach, and dodge liability for past environmental violations. NWW also improperly alleges that DEP has an obligation pursuant to the Public Trust Doctrine to create and/or maintain NWW's municipal beach and provide funding for the same. As a result, DEP is compelled to file this motion to dismiss in lieu of answer pursuant to R. 4:6-2. Based on review of the information submitted within the EA, NWW did not demonstrate that installation of a bulkhead in this area was the only emergency shore protection option and a bulkhead may in fact increase erosion in this area causing additional environmental harm.

This case is simple. The Court lacks jurisdiction over NWW's counterclaims. NWW is attempting to circumvent the administrative review process and the Appellate Division's exclusive jurisdiction to review final agency actions by attempting to attack the merits DEP's decisions regarding both the October 2022 and February 2023 EA applications. NWW is also seeking relief beyond the scope of this Court's equitable jurisdiction, which includes improperly asking the Court to allow NWW to install a bulkhead without DEP permit approval and order DEP to undertake discretionary action by providing NWW with funding from the Shore Protection Fund for beach nourishment. As such, the Court should dismiss NWW's counterclaims with prejudice pursuant to R. 4:6-2(e).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On December 6, 2022, DEP filed an Order to Show Cause and Verified Complaint pursuant to R. 4:67-6, seeking temporary restraints and a preliminary injunction to enjoin NWW from: (1) installing a bulkhead on the beach between 15th and 16th Avenues until it has received permit approval from the DEP, (2) engaging in any further excavation, placement, or regrading of sand between 14th and 16th Avenues until it has a DEP permit to do so, and (3) engaging in any oceanfront construction, reshaping of the dunes, and or reconstruction of access points at 16th and 25th Avenues until it has a DEP permit to do so. See NJ ECourts Transaction ID # CHC2022292395, dated December 7, 2023.

On January 4, 2023, NWW filed opposition to DEP's application for preliminary injunctive relief and filed a motion for leave to file a Counterclaim in DEP's summary proceeding. In addition to a claim for damages for the breach of the SAA entered into between DEP and NWW, NWW requested the extraordinary relief that this Court use its broad equitable powers to authorize the installation of a bulkhead along 15th and 16th Avenues without DEP authorization, and claimed that DEP was in breach of its obligations pursuant to the Public Trust Doctrine. See NJ ECourts Transaction ID #s CHC20232403 and CHC2022232435, dated January 4, 2023.

After oral argument held on February 1, 2023, the Court granted the relief sought in DEP's Order to Show Cause and Verified

Complaint seeking temporary restraints, and entered a preliminary injunction enjoining NWW from: (1) installing a bulkhead on the beach between 15th and 16th Avenues until it has received permit approval from the DEP; (2) engaging in any further excavation, placement, or regrading of sand between 14th and 16th Avenues until it has a DEP permit to do so; and (3) engaging in any oceanfront construction, reshaping of the dunes, and or reconstruction of access points at 16th and 25th Avenues until it has a DEP permit to do so. The Court granted this relief pursuant to express statutory authority to enjoin noncompliance with the Coastal Area Facilities Review Act ("CAFRA") and the Coastal Zone Management Rules ("CZM Rules"). 55-19 - 56-23.¹ The Court also granted leave to NWW to file its Counterclaim in the present proceeding. Finally, the Court directed NWW to file a new EA application with DEP within ten days seeking authorization to, in part, install a bulkhead for two municipal blocks, at 15th/16th Avenues. Shinn Certification Exhibit B.

On February 10, 2023, NWW filed the new EA application with DEP seeking to install a bulkhead spanning four municipal blocks, from 12th/13th Avenues through 16th Avenue. See Shinn Certification, Exhibit C. On February 24, 2023, DEP denied the requested relief in the EA application. See Shinn Certification, Exhibit D.

¹ See Certification of DAG Dianna Shinn, ("Shinn Certification"), Exhibit A for a copy of the Transcript.

On February 14, 2023, NWW filed its Answer with Counterclaim. Then, on February 17, 2023, NWW filed an Amended Answer with Counterclaim asserting three additional counterclaims against DEP. See Shinn Certification, Exhibit E. In Count One of its Counterclaim, NWW requests that the Court stand in the shoes of DEP and authorize specific oceanfront construction, including installation of a bulkhead between 15th and 16th Avenues, without a DEP permit or emergency authorization. In Count Two, NWW seeks \$21,000,000 in damages from DEP for the alleged breach of the State Aid Agreement ("SAA") between DEP and NWW. In Count Three, NWW seeks declaratory relief that DEP has breached its obligations under the Public Trust Doctrine by failing to promote, protect and safeguard the public's rights and provide reasonable public access to the oceanfront and provide funding for this purpose. Count Four seeks a declaratory judgment for DEP to provide NWW with funding for shore protection and unrelatedly asserts that NWW does not need to pay any of the fines in three recently issued Administrative Orders and Notice of Civil Administrative Penalty Assessment ("AONOCAPAs") to NWW for prior violations that are not part of this litigation. Count Five alleges that DEP's failure to provide NWW with funding has caused NWW's oceanfront to erode and endanger public and private property creating a nuisance. Lastly, Count Six alleges DEP violated the Administrative Procedures Act ("APA"), N.J.S.A. 52:14B-1 et seq., by failing to adopt regulations

regarding the use of state aid for shore protection projects pursuant to the Shore Protection Fund, N.J.S.A. 13:19-16.1, and, again, asserts NWW is not responsible for the assessed fines in the recently issued AONOCAPAs. Id.

On February 24, 2023, the Court held a case management conference in part to discuss the finality of the Court's February 1, 2023 Order that stated the Order was a Final Judgment. The Court determined that its February 1, 2023 Order was not a Final Judgment. See Shinn Certification ¶ 8.

STANDARD OF REVIEW

NWW'S counterclaims fail to articulate a legal basis for any of the relief sought against DEP and should be dismissed with prejudice. See R. 4:6-2(e).

In reviewing a motion to dismiss a complaint pursuant to R. 4:6-2(e), the court must examine the legal sufficiency of the facts alleged on the face of the complaint. Printing Mart v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989); see also Nostrame v. Santiago, 213 N.J. 109, 126-27 (2013). The court "searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim...." Ibid. (internal quotation omitted). "For purposes of analysis plaintiffs are entitled to every reasonable inference of fact." Ibid. However, if the complaint states no basis for relief and discovery would not provide one, dismissal of

the complaint is appropriate. See Camden Cnty. Energy Recovery Assocs. v. Dep't of Env'tl. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999). A pleading must be dismissed pursuant to R. 4:6-2(e) where the plaintiff is not entitled to the relief requested under any set of facts that could be proved consistent with the allegations in the complaint. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005); see also Rieder v. State Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987) (a complaint must be dismissed "where the factual allegations are palpably insufficient to support a claim upon which relief can be granted").

A claim cannot survive if the complaint alleges only conclusory allegations without presenting sufficient facts to support a cause of action. Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188 (App. Div. 2012). The plaintiff's obligation on a motion to dismiss is "not to prove the case but only to make allegations, which, if proven, would constitute a valid cause of action." Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005), citing Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001). A court must dismiss a complaint if the plaintiff fails to articulate a legal basis entitling it to relief. Camden County Energy Recovery Assocs., L.P. v. New Jersey Dep't of Env'tl. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999). A court should dismiss a complaint when even discovery will not provide a

basis for relief. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005).

It is therefore in the court's discretion to dismiss the counterclaim with prejudice if it determines that the counterclaim "would not be fruitful" given the nature of the claim and allegations. Johnson v. Glassman, 401 N.J. Super. 222, 246-47 (App. Div. 2008).

Here, NWW fails to allege facts that, even if presumed true, support a cause of action in all six counts of its Counterclaim. NWW seldom cites a specific Constitutional, statutory, regulatory, or common law provision that would give rise to a cause of action, and DEP is left to speculate about what causes of action are being leveled against it. Additional discovery will also not provide a basis for relief for any of the counts. As such, NWW's counterclaims should be dismissed with prejudice for failing to articulate a legal basis for its requested relief.

ARGUMENT

POINT I

NWW IMPROPERLY REQUESTS THE COURT TO ALLOW THE CONSTRUCTION OF A BULKHEAD WITHOUT A DEP PERMIT

In Count One of its Counterclaim, NWW asks the Court to authorize installation of a bulkhead without any approvals from DEP. However, the law of the case precludes this because the Court has already previously found that NWW needs a DEP permit to install

a bulkhead in the coastal zone. See Lombardi v. Masso, 207 N.J. 517, 538 (2011) (quoting In re Estate of Stockdale, 196 N.J. 275, 311 (2008)) (finding that the law-of-the-case “is a non-binding rule intended to ‘prevent relitigation of a previously resolved issue’” in the same case). The Court also lacks jurisdiction to examine the merits of both the October 2022 and February 2023 EA applications and DEP’s decisions denying them. That responsibility lies solely with the DEP. NWW’s extraordinary request for the Court to allow it to install a bulkhead without the proper DEP permits is beyond the constitutional scope of the Court’s equitable powers.

A. The Court has already determined as a matter of law that NWW needs a DEP permit to install a bulkhead and this finding should not be relitigated.

Count One of NWW’s Counterclaim has already been litigated and decided by the Court in DEP’s favor and constitutes the law of the case. Id. As outlined in the Court’s February 1, 2023 Order, NWW cannot install a bulkhead at 15th and 16th Avenues until it has permit approval from DEP to do so. As such, there is nothing left to litigate before the Court regarding Count One, and allowing Count One to proceed is inviting reconsideration of the Court’s February 1, 2023 Order.

On February 1, 2023, the Court, on DEP’s application for a summary proceeding pursuant to R. 4:67-6, granted the relief sought in DEP’s Order to Show Cause and Verified Complaint seeking

temporary restraints and preliminary enjoined NWW from: (1) installing a bulkhead between 15th and 16th Avenues until it has received permit approval from the DEP; (2) engaging in any further excavation, placement, or regrading of sand between 14th and 16th Avenues until it has a DEP permit to do so; and (3) engaging in any oceanfront construction, reshaping of the dunes, and or reconstruction of access points at 16th and 25th Avenues until it has a DEP permit to do so. See Shinn Certification, Exhibit B. The Court found that, as a matter of law, DEP was entitled to temporary restraints and a preliminary injunction because NWW violated DEP statutes and regulations.

In Count One of its Counterclaim, NWW prays for nearly the same relief that the Court provided in its ruling on February 1, 2023.² Though the relief NWW seeks in conjunction with its February 2023 EA application is slightly different than the relief it seeks in conjunction with its October 5, 2022 EA application³, in Count One NWW generally relies on the same set of facts outlined in DEP's Order to Show Cause and Verified Complaint to support its argument. See Counterclaim, ¶¶ 18-31. The Court's February 1, 2023 ruling

² In its February 10, 2023 EA request, NWW sought substantially the same relief as it did in its October 2, 2022 EA request. The only difference of any substance is that the February EA request sought installation of a slightly longer bulkhead. This difference is immaterial for the purpose of whether the Court's prior February 1, 2023 decision controls as the law of the case.

³ The Court should find that the October 2022 EA application and the relief sought is now moot because NWW filed the superseding February 2023 EA application as directed by the Court.

dealt with the same parties, similar issues, the same oceanfront location, and similar proposed oceanfront construction. As such, by allowing Count One to proceed, the Court would be inviting reconsideration of its February 1, 2023 Order, which is inconsistent with the current law of this case that NWW needs a DEP permit to install a bulkhead in the coastal zone. To date, NWW has no permit authorization from DEP to install a bulkhead.

Even if the Court were to find that the requested relief in Count One is not precluded by its February 1, 2023 Order, Count One still fails to state a claim that could be granted by the Court. While it is true that a chancery court possesses broad equitable powers, and that it has great flexibility to devise a remedy where equity so requires, this authority is not unlimited. See Hedges v. Dixon City, 150 U.S. 182, 192 (1893) (finding that "equity follows the law . . ."). The Court cannot circumvent the discretionary authority that the Legislature has granted to the DEP, and any equitable relief must be consistent with the law and not violate DEP statutes or regulations. See Ironbound Health Rights Advisory Commission v. Diamond Shamrock Chemical Company, 216 N.J. Super. 166, 176 (App. Div. 1986) (holding that a judicial order compelling an executive agency to take discretionary action violates the separation of powers afforded by the New Jersey Constitution). As such, the Court should dismiss Count One because the Court has already determined in this matter NWW needs a DEP

permit to install a bulkhead in the coastal zone.

B. The Court lacks subject matter jurisdiction over state agency actions and in particular the February 2023 EA application and decision.

To the extent that Count One relies on the February 2023 EA application and denial, the Court lacks subject matter jurisdiction over state agency actions, including the February EA. Permit applicants and authorization applicants have a right to an adjudicatory administrative hearing under the CZM Rules to contest any Department decision to issue or deny a permit pursuant to the act. N.J.A.C. 7:7-28.1. See also N.J.S.A. 52:14B-3.1(b).

The Appellate Division has exclusive subject matter jurisdiction over state agency actions. Specifically, "appeals may be taken to the Appellate Division as of right . . . to review final decisions or actions of any state administrative agency or officer." R. 2:2-3(a)(2). In addition, the Appellate Division may grant leave to appeal in the interest of justice. R. 2:2-3(a)(2). If NWW does not want to seek administrative review of the denial, it may attempt to seek Appellate Review of the February 2023 EA decision in the interest of justice. R. 2:2-3(a)(2).

NWW cannot however circumvent the administrative process or the Appellate Division's exclusive jurisdiction by filing a counterclaim in DEP's action to enforce a final agency action.⁴

⁴ To the extent NWW is relying on facts related to the October 5, 2022 EA application in support of Count One, the Court should find it does

The merits of a permitting decision are not within the Court's jurisdiction. As such, the Court should dismiss Count One.

C. Review of a final agency action is not justiciable before the Court.

Count One of NWW's Counterclaim improperly requests the Court to re-review the merits of a DEP final agency action, which is not justiciable before the Court as a matter of law and which the Court has already enforced. DEP's Order to Show Cause and Verified Complaint was filed pursuant to R. 4:67-6, and the trial court's powers are limited to enforcement of DEP's denial of NWW's October 5, 2022 EA request for an emergency bulkhead. See New Jersey Dep't of Env'tl. Prot. v. Mazza & Sons, Inc., 209 N.J. Super. 13, 22-23 (App. Div. 2009).

"Rule 4:67-6(c)(3) does not permit a trial court to inquire into the validity of an agency order. The Rule simply gives agency orders the force of law with all of the law's panoply of power to punish for contempt." State Farm Mut. Auto Ins. Co. v. State, 118

not have jurisdiction over the merits of DEP's decision regarding the October 2022 EA application as NWW failed to timely challenge the merits of that decision. The October 2022 EA decision was published in the DEP Bulletin on October 19, 2022 and NWW had thirty days to file an administrative hearing. N.J.A.C. 7:7-28.1(b) or it could have attempted to invoke the Appellate Division's exclusive jurisdiction in the interest of justice. R. 2:2-3(a)(2). Since NWW failed to do either, the October 5, 2022 EA decision became a final agency action to which NWW cannot challenge the underlying decision in Count One. New Jersey Dep't of Env'tl. Prot. v. Mazza & Sons, Inc., 209 N.J. Super. 13, 22-23 (App. Div. 2009) (finding that a defendant "cannot simply disregard the final agency action, wait for the agency to bring an enforcement action under Rule 4:67-6 in a trial court, and then challenge the agency action in defense of the enforcement action").

N.J. 336, 344 (1990). R. 4:67-6(c)(3) states in pertinent part that "the validity of an agency order shall not be justiciable in an enforcement proceeding." Rather, pursuant to R. 2:2-3(a), the Appellate Division has exclusive jurisdiction to review the merits of final state agency determinations. Matter of Valley Road Sewage Co., 295 N.J. Super. 278, 290-91 (App. Div. 1996), aff'd 154 N.J. 224 (1998) (holding that only the Appellate Division has jurisdiction to review the merits of a final State agency action and that such review by a trial court is precluded by R. 4:67-6(c)(3)); State Farm v. Dept. of Public Advocate, 227 N.J. Super. 99, 131 (App. Div. 1988), aff'd 118 N.J. 336, 344 (1990); Dept. of Community Affairs v. Wertheimer, 177 N.J. Super. 595 (App. Div. 1980). The Court is also not permitted to replace its judgment for DEP's when DEP is the State Agency statutorily tasked with making permitting decisions pursuant to CAFRA and the CZM Rules, including EA applications. See In re Protest of Coastal Permit Program Rules, 354 N.J. Super. 293, 358 (App. Div. 2002) (finding that the powers delegated to EP by CAFRA "extend well beyond protection of the natural environment and require DEP to regulate land use within the coastal zone.); see also Pinelands Pres. Alliance v. N.J. Dep't of Env'tl. Prot., 436 N.J. Super. 510, 524 (App. Div. 2014) (finding that Courts "extend substantial deference to an agency's interpretation and application of its own regulations, particularly on technical matters within the agency's

special expertise."); see also In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 488-89 (2004).

As such, NWW cannot re-litigate DEP's decision on its October 5, 2022 EA application, let alone request that the Court make an independent assessment of the viability of its proposed oceanfront construction *ab initio*. Count One of NWW's Counterclaim specifically seeks the Court's permission to perform oceanfront construction, including the permanent installation of a bulkhead, all of which are regulated activities that require permit approval by DEP under CAFRA and the CZM Rules. The Court on February 1, 2023 rendered a decision enforcing DEP's final agency decision denying NWW EA approval to install a bulkhead at 15th and 16th Avenues and ordered that NWW cannot perform such work until it has a DEP permit to do so. Count One of the Counterclaim once again requests to build a bulkhead without a permit, except now more than double the length of the structure enjoined on February 1, 2023. The Court found then, and the Court should find again, that it lacks jurisdiction to re-litigate the merits of DEP's decision to deny this requested relief in the October 5, 2022 EA application. As a matter of law, the merits of DEP's decision on NWW's EA application cannot be re-litigated via NWW's Counterclaim.

D. The relief sought is beyond the constitutional scope of the Court.

Article 3, paragraph 1 of the New Jersey Constitution sets forth that,

The powers of the government shall be divided among three distinct branches, the legislative, executive and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

New Jersey Constitution of 1947, Art. III, para 1.

DEP is a principal department within the Executive Branch of the New Jersey State government vested with the authority to conserve and protect natural resources, protect the environment, prevent pollution, and protect the public health and safety. N.J.S.A. 13:1D-9. DEP has exclusive authority to review permit applications under the CAFRA and EA applications brought pursuant to the CZM Rules. N.J.S.A. 13:19-5. Substantial deference to DEP's expertise in regard to construction of coastal facilities is essential to the protection of the environment and the State's natural resources. Recognizing this, the Legislature designated DEP as the exclusive discretionary authority to consider CAFRA permits and review EA applications related to the CZM Rules. N.J.S.A. 13:19-5; see also In re Protest of Coastal Permit Program Rules, 354 N.J. Super. 293, 337 (App. Div. 2002) (DEP must make permit findings and "CAFRA does not authorize DEP to subdelegate" this power).

The Court cannot exercise unconstitutional authorization through the use of its equitable powers to allow NWW to install a bulkhead without proper permit approval. The Court has jurisdiction pursuant to R. 4:67-6(c)(1) to enforce final agency actions, not compel a State agency to make them. See Ironbound Health Rights Advisory Commission v. Diamond Shamrock Chemical Company, 216 N.J. Super. 166, 176 (App. Div. 1986) (holding that a judicial order compelling an executive agency to take discretionary action violates the separation of powers afforded by the New Jersey Constitution). Indeed, even the merits of those final agency orders are not reviewable in enforcement actions in Superior Court. R. 4:67-6(c)(3). Therefore, the Court should find that it does not have jurisdiction to grant NWW's requested relief in Count One and dismiss Count One with prejudice.

POINT II

DEP DID NOT BREACH THE STATE AID AGREEMENT AND NWW'S CLAIM IS PREMATURE.

Count Two, which seeks reimbursement of costs borne by NWW for conducting beach replenishment as a result of DEP's alleged failure to obtain easements pursuant to the State Aid Agreement ("SAA") entered on March 1, 2022 between DEP and NWW necessary for the larger Hereford Inlet Project with the U.S. Army Corps of Engineers is not ripe for adjudication before the Court and as such, the Court lacks jurisdiction to adjudicate it at this time.

Count Two also fails as a matter of law because DEP has not breached the SAA and NWW has failed to properly assert a claim for damages.

A. DEP has not breached the SAA.

The Court should preclude NWW from refiling Count Two even after the CLA notice period has run because, as a matter of law, DEP has not breached the SAA with NWW. Specifically, there is no due date in the SAA by which DEP is required to obtain the required easements located in NWW. To prevail on a breach of contract claim, NWW must prove that: (1) a valid contract existed between NWW and DEP, (2) DEP failed to perform a defined obligation under the contract, and (3) that breach caused NWW damages. EnviroFinance Grp., LLC v. Envntl. Barrier Co., LLC, 440 N.J. Super. 325, 345 (App. Div. 2015). Moreover, "a contract must be construed as a whole and the intention of the parties is to be collected from the entire instrument and not from detached portions." Washington Const. Co. v. Spinella, 8 N.J. 212, 217 (1951). An interpretation that gives a "reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, unlawful, or of no effect." Anfield v. Love, 5 N.J. Super. 347, 351 (App. Div. 1949). When the terms of a contract are clear, the court must enforce them as written. E. Brunswick Sewerage Auth. v. E Mill Associates, Inc., 365 N.J. Super. 120, 125 (App. Div. 2004). A clear contract is not rendered ambiguous

by one party's unreasonable interpretation. Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997). Instead, both interpretations of the contract must reflect a reasonable reading of the contractual language. Powell v. Alemaz, Inc., 335 N.J. Super. 33, 44 (App. Div. 2000).

Here, the Court need only to look at the plain language of the SAA to find that DEP has not breached the SAA with NWW. By filing Count Two in its Counterclaim, NWW is admitting that the SAA between NWW and DEP is a valid contract. The Court must then review the plain language of the SAA to determine if DEP has breached the SAA by taking NWW's claim as true that DEP has failed to obtain the necessary easements in NWW as listed in Appendix D of the SAA.⁵ Paragraph One of the SAA indicates that DEP, in cooperation with NWW, "shall acquire the perpetual easements for the private properties listed in Appendix D necessary for construction, renourishment activities, and maintenance of the Project, and in some cases for the borrowing, excavating, and removing of sand and soil. The Municipality shall provide to the Department perpetual easements on or across any municipally owned properties also listed in Appendix D." There is no date certain in this paragraph or any other paragraph in the SAA by which DEP

⁵ NWW fails to provide the correct version of the SAA that includes Appendix D listing the easements in NWW that are critical facts for Count Two. The Court should dismiss Count Two for failure to provide sufficient facts to support Count Two. See Shinn Certification, Exhibit F.

is required to obtain these easements. When there is no time by which performance is required in a contract, a reasonable time is the standard for performance. See Becker v. Sunrise at Elkridge, 226 N.J. Super. 119, 129 (1998). The Court should take judicial notice that the SAA was entered between NWW and DEP on March 1, 2022. N.J.R.E. 201(b)(1), (2). This is a little over a year ago and as such, even if the Court takes NWW's allegation as true that DEP has failed to obtain the easements in NWW, the Court should find as a matter of law that DEP still has still has a reasonable amount of time to obtain the easements in the SAA. Moreover, the time has not run for DEP to perform its obligations under the SAA, and any contract claim has not accrued. As such, the Court should find that DEP has not breached the SAA, and Counterclaim Count Two should be dismissed with prejudice for failure to state a claim upon which relief can be granted.

B. NWW has not asserted a claim for damages for which relief can be granted.

NWW is seeking \$21 million in damages as a result of DEP's alleged failure to obtain the easements in NWW. This is allegedly for the money spent by NWW for beach nourishment activities since 2012. The SAA specifically states in paragraph seventeen that "This Agreement will take effect upon execution by all parties and will remain in effect, except as otherwise provided in the Agreement, and can be amended by agreement of the parties." While

NWW contends that the SAA was fully executed on November 16, 2021, the fully executed SAA was not entered until March 1, 2022. See Shinn Certification at Exhibit F. As a result, any damages derived from a breach of the SAA could not start accruing until after March 1, 2022.⁶ The Court should find that, if a breach is proven, NWW is only entitled to specific performance as a remedy and not damages because it's claim is that DEP has failed to obtain easements pursuant the SAA. As such, specific performance related to DEP's obligation to obtain the easements under the SAA is the only appropriate relief. See Goodell v. Monroe, 87 N.J. Eq. 328, 335 (E. & A. 1917) (finding that "a court of equity will often direct performance of such a contract because, when there is no excuse for the failure to perform, equity regards and treats as done what, in good conscience, ought to be done"). The SAA does not relieve NWW of its obligation to maintain its own beach or create a new obligation for DEP to do so. The SAA is limited to addressing the construction of a discrete project. Thus, the Court should find as a matter of law that NWW is not entitled to damages

⁶ NWW contends that for the year 2022, it was required to place 361,221 CY of sand back-passing. NWW fails to provide the specific cost for this back-passing project in 2022. Additionally, DEP is not obligated by statute to provide municipalities with funding for back-passing projects. Beach maintenance is the responsibility of the municipality. See Borough of Avalon v. Dep't of Env'tl. Prot., 403 N.J. Super. 590, 599-600 (App. Div. 2008); see also N.J.S.A. 40:61-22.20. Even if the Court allows Count Two to proceed, the Court should find that the scope of damages must be limited to only damages accrued after any breach of the SAA, which would mean nothing before March 1, 2022.

for actions that pre-dated the execution of the SAA and do not result from the alleged SAA breach. Because NWW has not asserted a claim for damages under the SAA for which relief could be granted, the Court should dismiss Count Two with prejudice.

C. The Court lacks jurisdiction over Count Two because it is not ripe for adjudication pursuant to the CLA.

Count Two of NWW's Counterclaim alleges a contractual violation. Therefore, NWW must follow the Contractual Liability Act's ("CLA") procedures in order to state a claim upon which relief can be granted against a public entity. See N.J.S.A. 59:13-1 to 10. NWW has acknowledged this requirement by filing a notice for its breach of contract claim on January 18, 2023, which was after it filed its motion for leave to file a Counterclaim. Only "after the expiration of 90 days from the date the notice of claim is received by the contracting agency, [may the plaintiff] file suit." N.J.S.A. 59:13-5. However, while notice has been filed, NWW cannot even file its claim for breach of the SAA until the expiration of ninety (90) days following the filing of the notice. So, Count Two of NWW's counterclaims may not be filed until April 18, 2023. N.J.S.A. 59:13-5. Therefore, the Court currently lacks jurisdiction to adjudicate Count Two and, as such, it should be dismissed.

The CLA's requirements in N.J.S.A. 59:8-8 are applicable here. N.J.S.A. 59:13-5 of the CLA provides that a contract claim

is "forever barred" if the claimant does not file the required notice with the public entity within ninety (90) days of the claim's accrual, except as otherwise provided in N.J.S.A. 59:13-6. In other words, a complaint fails to state a claim upon which relief can be granted if a claimant does not properly file the CLA notice in accord with N.J.S.A. 59:13-5 or N.J.S.A. 59:13-6. As noted above, NWW's notice of claim is currently not ripe for adjudication. As such, the Court should dismiss Count Two.

POINT III

NWW FAILS TO PLEAD A FACTUAL BASIS TO SUPPORT ITS CLAIM THAT DEP HAS BREACHED ITS OBLIGATIONS UNDER THE PUBLIC TRUST DOCTRINE.

Count Three of NWW'S Counterclaim fails to state a claim and articulate any legal basis for declaratory relief that DEP has breached its obligations under the Public Trust Doctrine by failing to promote, protect and safeguard the public's rights and provide reasonable public access to the oceanfront and provide NWW funding for beach nourishment. The pleading is conclusory and fails to provide sufficient facts to support NWW's claims that DEP failed to provide the public reasonable access to NWW's oceanfront pursuant to the Public Trust Doctrine or that DEP has affirmative, nondiscretionary obligations to provide NWW financial aid from the Shore Protection Fund for beach nourishment. DEP has no Public Trust obligation to create and/or maintain a municipal beach or provide funding for the same. Borough of Avalon v. Dep't of Env'tl.

Prot., 403 N.J. Super. 590, 599-600 (App. Div. 2008).

NWW alleges that DEP's failure to provide or seek funding for the adequate replenishment of NWW's beaches has resulted in or will result in all or a portion of its beaches being periodically closed to the public. However, as a threshold matter, NWW fails to set forth how the lack of funds has actually restricted the public's access to the oceanfront and the time periods when access was restricted. Moreover, Count Three is devoid of critical facts to support its claim that DEP has denied NWW access to the ocean. NWW fails to articulate which areas of the beach were closed off and to describe the lack of access to the ocean. For instance, it is unclear whether only the perpendicular accessways closed or whether the public could not reach the sand by the ocean. If the public could still reach the sand by ocean via other perpendicular accessways there would be no Public Trust Doctrine violation. Raleigh Ave. v. Beach Ass'n v. Atlantis Beach Club, Inc., 370 N.J. Super. 171, 187 (App. Div. 2004). Moreover, NWW cannot support a claim that DEP has an affirmative obligation to perform maintenance on NWW's municipally-owned oceanfront or compel DEP to provide discretionary funding for any beach restoration or maintenance projects that NWW chooses to implement. Since Count Three lacks grounding in either law or facts supporting NWW's contention that the public has been denied reasonable access to NWW's oceanfront, the Court should dismiss Count Three because NWW fails to state a

claim upon which relief can be granted.

A. The Public Trust Doctrine does not require DEP to provide NWW with beach nourishment.

The Public Trust Doctrine provides the public with reasonable access to the sea. Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 324 (1984). The public has a right to use the tidal lands and waters "for navigation, fishing, and recreational uses, including bathing, swimming and other shore activities." Id. However, Coastal municipalities maintain "exclusive control over municipally-owned beaches" and ["i]t is the municipality, not the DEP, that owns and operates and therefore bears responsibility for the management of its beaches." Borough of Avalon v. Dep't of Env'tl. Prot., 403 N.J. Super. 590, 599-600 (App. Div. 2008); see also N.J.S.A. 40:61-22.20. Indeed, the Public Trust Doctrine applies in equal measure to municipalities, obligating them to maintain reasonable access to their beaches. Van Ness v. Borough of Deal, 78 N.J. 174, 180 (1978) (an area "under municipal ownership and dedication[] is subject to the Public Trust Doctrine" so "all have the right to use and enjoy it"); Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 308-09 (1972) ("where the upland sand area is owned by a municipality" and is "dedicated to public beach purposes" the public trust doctrine applies).

Through CAFRA, the Legislature authorized DEP to regulate

development that may impact the coastal area. This development includes "the grading, excavation or filling on beaches or dunes." N.J.S.A. 13:19-3. DEP's review process as to permits to develop a beach or dune area considers the Public Trust Doctrine by analyzing whether there will be an impact to the public's access to the beach. N.J.S.A. 13:19-10(h); N.J.S.A. 13:1D-153.

NWW admits in its Counterclaim that it has tried to remediate the erosion issues NWW has faced, including conducting beach nourishment projects. See Counterclaim, ¶¶ 60-71. NWW, like all other coastal municipalities, requires CAFRA permits to conduct beach maintenance. DEP fulfills its Public Trust obligation by reviewing these and other coastal permits for public access. As such, DEP has no Public Trust obligation as alleged by NWW (creating municipal beaches/providing funding for the same), especially along a municipal beach where the municipality must also follow the Public Trust Doctrine. Borough of Avalon v. Dep't of Env'tl. Prot., 403 N.J. Super. 590, 599-600 (App. Div. 2008). NWW in fact admits it has this obligation in Count Three. See Counterclaim, ¶ 152.

Further, the relief that NWW is requesting would require the Court to fashion an entirely new obligation under the Public Trust Doctrine that would improperly extend the Public Trust Doctrine well beyond the boundaries that the Legislature intended by establishing that DEP "has the duty to make all tidal waters and

their adjacent shorelines available to the public to the **greatest extent practicable...**" (emphasis added). N.J.S.A. 13:1D-150. Erosion is the result of natural forces and it would be impracticable for the Court to create such an obligation that the Public Trust Doctrine requires DEP to maintain all the oceanfront beaches in the State and/or provide all municipalities along tidal waters with funding for shore protection. The New Jersey coastal area is a dynamic system in a constant state of flux, where tidal forces result in both accretion and erosion of sand. No baseline exists that could be used to establish the amount of beach that would be maintained in perpetuity. This is evidenced by the requirement that the responsible government entity provide the public with "reasonable" access to the ocean determined, in part, by the "extent and availability of publicly-owned upland sand area." Matthew v. Bay Head Improv. Assn., 95 N.J. 306, 324 (1984).

The Court should find as a matter of law that DEP cannot violate the Public Trust Doctrine for allegedly failing to provide NWW with beach nourishment, including funding for the same. Indeed, the opposite is true because DEP ensures that the Public Trust Doctrine is not violated and that public access is not inhibited when municipalities propose development in a coastal area via the permitting process, including proposing to build a bulkhead in a coastal area.

B. The public has "reasonable" access to the beach via various

access points.

The Public Trust Doctrine requires the responsible government entity to provide the public with "reasonable" access to the ocean. Matthews v. Bay Head Improv. Asso., 95 N.J. 306, 324 (1984). Raleigh Ave. v. Beach Ass'n v. Atlantis Beach Club, Inc. held that there was reasonable access to satisfy the public's right to the use and enjoyment of the beach when there was perpendicular access at one avenue entrance and unlimited parallel access along the beach. Raleigh Ave. v. Beach Ass'n v. Atlantis Beach Club, Inc., 370 N.J. Super. 171, 187 (App. Div. 2004). Even if there had been a denial of public access at 15th and 16th Avenues on an unspecified date, such a denial of access does not violate the Public Trust Doctrine as a matter of law.⁷ The SAA outlined on pages three and four the twenty access points and crossovers to the beach and oceanfront NWW provides the public. See Shinn Certification, Exhibit F. Because there is a significant amount of other perpendicular accessways NWW provides to the public aside from 15th and 16th Avenues, DEP has not denied the public reasonable access to NWW's oceanfront and, therefore, has not violated the Public Trust Doctrine.

C. Count Three is not ripe for judicial review because it alleges future denials of access.

⁷ NWW fails to allege on what date(s) DEP denied the public access to the beach at 15th and 16th Avenues.

NWW cannot argue future, potential denials of access as the underlying basis for the Court to find DEP has violated the Public Trust Doctrine. The Court cannot make a declaration that carries the force of a final judgment "upon a state of facts which is future, contingent and uncertain." Lucky Calendar Co. v. Cohen, 20 N.J. 451, 454 (1956) (quoting Tanner v. Boynton Lumber Co., 98 N.J. Eq. 85, 89 (Ch. 1925)). Moreover, the court is barred from making advisory opinions and should avoid adjudicating premature and abstract disagreements. See Abbott Labs. v. Gardner, 387 U.S. 136, 148, 87 S. Ct. 1507, 1515 (1967). Thus, Count Three is not ripe for judicial review. See N.J. Turnpike Auth. v. Parsons, 3 N.J. 235, 241 (1949) (finding that a declaratory judgment claim is ripe when there is an actual controversy.)

POINT IV

NWW INAPPROPRIATELY SEEKS AN ORDER OF MANDAMUS AGAINST DEP TO PROVIDE FUNDING FROM THE SHORE PROTECTION FUND.

A court may not order an executive agency to undertake a discretionary action. NWW is seeking such a mandamus remedy in Counts three through six of its Counterclaim. Since NWW is seeking relief which cannot be granted, these Counts should be dismissed with prejudice.

Several of NWW's counts relate to DEP's discretionary shore protection funding. Count Three of NWW's Counterclaim requests a declaratory judgment that DEP has breached the Public Trust

Doctrine and has an affirmative obligation to provide NWW with financial aid. Count Four alleges that DEP has failed to provide NWW with funding and has an affirmative obligation to do so pursuant to N.J.S.A. 12:6A-1 and N.J.S.A. 13:19-16.1(b). Count Four should be dismissed because the plain language of N.J.S.A. 12:6A-1 and N.J.S.A. 13:19-16.1(b) do not affirmatively require DEP to provide NWW with financial assistance for shore protection. Count Five alleges that DEP's failure to provide NWW with funding has caused its beaches to erode and endanger public and private property creating a nuisance. Finally, Count Six asserts that DEP has failed to propose and adopt regulations regarding the use of funds from the Shore Protection Fund in violation of the APA. The requested relief in each of these Counts seeks to compel DEP to take a certain action: providing NWW with financial aid for shore protection. This mandamus remedy is impermissible. Loigman v. Twp. Comm. of the Twp. of Middletown, 297 N.J. Super. 287, 299-300 (App. Div. 1997). NWW is really seeking to compel DEP to undertake discretionary action to reach a specific result, which the Court cannot grant.

Mandamus is a common law prerogative writ that directs "government officials to carry out required ministerial duties." Caporusso v. N.J. Dep't of Health & Senior Servs., 434 N.J. Super. 88, 100 (App. Div. 2014). Granting a mandamus action should only occur "1) to compel specific action when the duty is ministerial

and wholly free from doubt, and 2) to compel the exercise of discretion, but not in a specific manner.” Loigman, 297 N.J. Super. at 299. A ministerial duty is defined as “one that ‘is absolutely certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion.’” Vas v. Roberts, 418 N.J. Super. 509, 522 (App. Div. 2011) (citations omitted). The second component of a mandamus action orders a discretionary function, “but does not seek to interfere with or control the mode and manner of its exercise or to influence or direct a particular result.” Switz v. Middletown, 23 N.J. 580, 587 (1957).

An action for mandamus is rarely granted. Courts have denied mandamus requests to require the DEP to dredge navigational channels by a date certain in Twp. of Neptune v. State, Dep’t of Env’tl. Prot., 425 N.J. Super. 422, 434-37 (App. Div. 2012) or to pay out a full compensation from an insurance liability fund in Ivy Hill Park Apartments v. N.J. Prop. Liab. Ins. Guar. Ass’n, 221 N.J. Super. 131, 141 (App. Div. 1987).

In Counts Three through Six, NWW asks the Court to order DEP to undertake a specific discretionary action and provide it with funding from the Shore Protection Fund for beach nourishment. But there exists no statutory or common law obligations for DEP to

provide funding for the specific beachfront construction projects selected by NWW to maintain its beach. While N.J.S.A. 13:19-16.1 creates the Shore Protection Fund, which the DEP's Commissioner uses to fund shore protection projects across the State, it creates no affirmative duty for DEP to provide funding to any particular municipality.⁸ Thus, the distribution of these funds is purely discretionary and not ministerial. Vas v. Roberts, 418 N.J. Super. 509, 522-23 (App. Div. 2011) (duty to pay salary is ministerial set by Constitution). While DEP has endeavored to assist coastal communities with obtaining funding for said projects, NWW has cited neither a statutory nor common law obligation requiring DEP to pay for those projects, nor any factual basis that the Commissioner has abused this discretion or that DEP has otherwise breached any funding obligations which could otherwise assist NWW.

NWW also fails to allege any facts in its counterclaims indicating that NWW requested funding from the Shore Protection Fund and DEP indicated no funding was available. Even if these

⁸ By way of background for the Court, the Shore Protection Fund was created in 1993 and is funded from annual state appropriations and realty transfer fees. The fund is administrated by DEP to implement beach nourishment shore protection projects throughout the State. DEP may use funds from the Shore Protection Fund to satisfy non-federal cost-share requirements for projects constructed by the U.S. Army Corps. of Engineers in partnership with the State, as well as to provide funding to local municipalities for the construction of shore protection projects completed in partnership between the State and the municipality. See Shore Protection Program, DEPARTMENT OF ENVIRONMENTAL PROTECTION DIVISION OF COASTAL ENGINEERING, <https://www.nj.gov/dep/shoreprotection/funding.htm> (last visited March 15, 2023).

facts were alleged, Counts Three through Six still fail as a matter of law because this funding is available to all municipalities along New Jersey's coastline and DEP must use its discretion to determine how this funding should be allocated for shore protection projects along the entire New Jersey coastline, each of which may face storm damage vulnerabilities. Creating an affirmative obligation that DEP must provide each municipality that requests funding from the Shore Protection Fund with such funding would be impracticable and impossible for DEP to fulfill given that the Shore Protection Fund is currently capped at \$25 million per year.⁹ See Camden v. Byrne, 82 N.J. 133, 158 (1980) (finding that the "fiscal constraints to be imposed upon local governments are matters of legislative, not judicial, prerogative"). See also Loigman v. Bd. of Chosen Freeholders of Cnty. of Monmouth, 329 N.J. Super. 561, 566 (App. Div. 2000) (holding that determinations regarding appropriations "constitute a purely political decision and an exercise of government discretion" and court would not "substitute" its "judgment for that of those to whom budget matters

⁹ DEP is limited to the appropriated amount of funding in the Shore Protection Fund, which is currently \$25 million per year. See Shore Protection Program, DEPARTMENT OF ENVIRONMENTAL PROTECTION DIVISION OF COASTAL ENGINEERING, <https://www.nj.gov/dep/shoreprotection/funding.htm> (last visited March 15, 2023). There is more need than available funding to support municipalities with shore protection projects. NWW's real contention is not with DEP, but with the Legislature for the amount of funding for the Shore Protection Fund. This is why there are presently Bills S24491 and A3535 pending in the Legislature to increase the Shore Protection Fund from \$25 million to \$50 million per year.

have been entrusted"). It is common knowledge that municipalities apply to DEP for funding for projects from the Shore Protection Fund that go unfunded. Because NWW inaccurately asserts in Counts Three through Six that DEP has an affirmative obligation to provide it with funding for shore protection, these Counts should be dismissed.

POINT V

NWW HAS FAILED TO ARTICULATE A VIABLE NUISANCE CLAIM AND LACKS STANDING TO BRING SUCH A CLAIM BECAUSE THE STATE IS IMMUNE FROM LIABILITY PURSUANT TO THE TORT CLAIMS ACT.

NWW is allegedly seeking a preliminary and permanent injunction against DEP, along with compensatory and consequential damages and costs NWW has expended to abate the public and private nuisance that DEP has allegedly caused by not awarding NWW with discretionary funding to assist with maintaining its beaches, which has resulted in erosion. Both the public and private nuisance claims of Count Five fail and should be dismissed with prejudice.

Count Five is not ripe for the Court's review because NWW has failed to file the mandatory notice pursuant to the Tort Claims Act ("TCA"). N.J.S.A. 59-8-8. Even if the Court determined the claim is ripe for review, DEP is immune from liability under the Tort Claims Act and because it is immune, NWW lacks standing to

bring Count Five. Therefore, NWW cannot meet the elements of a nuisance claim.

A. Count Five must be dismissed because NWW failed to file a Tort Claims Notice pursuant to N.J.S.A. 59:8-8.

To the extent that Count Five is read to raise a tort claim, it fails. NWW failed to comply with the mandatory notice provisions of the TCA and, therefore, Count Five must be dismissed.

Under the New Jersey TCA, a plaintiff may not bring suit against a public entity or public employee unless the plaintiff presented the public entity or public employee with a pre-suit notification of the claim. N.J.S.A. 59:8-3. The claim must be in writing, Velez v. City of Jersey City, 358 N.J. Super. 224, 238 (App. Div. 2003), *aff'd.*, 180 N.J. 284 (2004), and the filing of a complaint is not a substitute for the TCA's notice requirements. Guzman v. City of Perth Amboy, 214 N.J. Super. 167, 171-72 (App. Div. 1986).

Notice is more than a mere procedural formality. Its purposes are distinct from the filing of a complaint, and the benefits mandated by the Legislature will be irretrievably lost if the provision is not enforced.

One purpose of notice to a public entity is to provide the entity with prompt notice of the claim so that it can adequately investigate the facts and prepare a defense. 1972 Task Force Comment to N.J.S.A. 59:8-3. Notice also gives the entity the

opportunity to settle a meritorious claim early, saving the costs of litigation to both the entity and the claimant. Ibid. Further, notice provides the public entity a chance to correct the conditions or practices that led to the claim and informs the public entity in advance of financial liability it may be expected to meet. Velez, 180 N.J. at 290; Beauchamp v. Amedio, 164 N.J. 111, 121-22 (2000). None of these purposes were served here, where NWW did not file a notice of claim. In light of these purposes, the notice provisions of the TCA are more than mere technicalities.

Here, NWW failed to provide the State with a notice of claim. Peter Ramos, the Deputy Director, Division of Risk Management at the State of New Jersey Department of the Treasury, certified that his office did not receive a notice of claim from NWW. See Certification of Peter Ramos. As recognized in Guzman, NWW's Counterclaim cannot serve as a substitute for a properly filed notice of claim. Therefore, NWW has not complied with the mandatory statutory notice requirements of the TCA, and Count Five should be dismissed.

B. The State is immune from tort liability pursuant to the TCA.

The liability of public employees and public entities, including the State and its agencies, is controlled by the New Jersey TCA, N.J.S.A. 59:1-1 et seq. Generally, the TCA reflects the considered legislative response to the judicial abrogation of

the traditional doctrine of sovereign immunity in Willis v. Department of Construction and Economic Development, 55 N.J. 534 (1970). The TCA states that a public entity is not liable for an injury caused by an act or omission except as otherwise provided by the TCA. N.J.S.A. 59:2-1a. Thus, under the TCA, immunity is the rule and liability is the exception. When determining claims under the TCA, courts "should [determine] *whether an immunity applies and if not, should liability attach.*" Troth v. State, 117 N.J. 258, 265-66 (1989) (emphasis in original). Therefore, if the State is immune and thus not liable, NWW cannot succeed on the merits of Count Five, and it should be dismissed with prejudice. Here, the State's immunity is embodied in N.J.S.A. 59:4-8 and N.J.S.A. 59:4-9, which relate to immunity for unimproved land, and N.J.S.A. 59:2-3, which deals with discretionary activities.

N.J.S.A. 59:4-8 states, "Neither a public entity nor a public employee is liable for an injury caused by a condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach." Additionally, N.J.S.A. 59:4-9 states, "[n]either a public entity nor a public employee is liable for any injury caused by a condition of the unimproved and unoccupied portions of the tidelands and submerged lands, and the beds of navigable rivers, streams, lakes, bays, estuaries, inlets and straits owned by the State." NWW's pleading is unclear if its alleged injury is erosion

or failure for DEP to provide it with funding to deal with erosion of its beaches. In either event, where the injury is caused by an alleged dangerous condition that is a natural element of the unimproved land, the public entity is immune from liability. Aversano v. Palisades Interstate Parkway Comm'n, 362 N.J. Super. 266, 270 (App. Div. 2003); see also Fleuhr v. City of Cape May, 159 N.J. 541, 545 (1999) (finding a surfer's injuries were caused by ocean waves, which were a natural condition); Kowalsky v. Long Beach Twp., 72 F.3d 385, 390 (3d Cir. 1995) (finding that injuries to swimmers were caused by ocean waves, which were "acts of nature"). Tort immunity applies to the upland beach under N.J.S.A. 59:4-8 or to the tidally flowed area under N.J.S.A. 59:4-9.

NWW admits that its beaches are subject to natural forces, which cause erosion. See Counterclaim, ¶ 105. DEP's alleged failure to not provide NWW with shore protection funding did not result in the erosion. Rather, as NWW points out, erosion is a natural phenomenon. As a result, the Court should find that DEP is immune from liability because the erosion is a natural element of the unimproved land and thus, dismiss Count Five with prejudice.

A public entity is also immune from liability for discretionary activities. N.J.S.A. 59:2-3. To the extent that Count Five is relying on NWW's claim that DEP has refused to provide it with funding for shore protection measures, as already explained in-depth in this brief, funding from the Shore Protection

Fund is a completely discretionary action by DEP. N.J.S.A. 59:2-3(a) provides that "a public entity is not liable for an injury from the exercise of judgment or discretion vested in the entity." As already explained, DEP is limited to the yearly appropriation provided by the Legislature for the Shore Protection Fund. There is more need for funding for shore protection measures across the State than there is funding provided by the Legislature. Moreover, N.J.S.A. 59:2-3(b) provides, "A public entity is not liable for legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature." N.J.S.A. 59:2-3(d) provides, in part, "A public entity is not liable for the exercise of discretion when, in the face of competing demands, it determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the public entity was palpably unreasonable." All of these are relevant here.

The Legislature sets the funding level for the Shore Protection Fund and DEP has no control over this. DEP has discretion in how the funds from the Shore Protection Fund are used across the entire State. As such, the Court should find that DEP is immune from liability for not providing NWW with discretionary funding pursuant to N.J.S.A. 59:2-3(a) or (b). This is similar to Mitchell v. Trenton, in which the Appellate Division

ruled that the trial judge appropriately found that the City of Trenton was immune from liability pursuant to N.J.S.A. 59:2-3(d) because the City had a limited annual budget for street repairs and there was no room in the budget to repair curbing, which caused Plaintiff's injury. Mitchell v. Trenton, 163 N.J. Super. 287, 291-912 (App. Div. 1978). Moreover, the court pointed to the legislative comment to N.J.S.A. 59:2-3(d) from May, 1972, that states, "Subsection (d) specifies certain discretionary activities of a public entity which lend themselves to a very limited judicial review." Id. at 291. The court further explained that "We conclude that reasonable minds could not differ in this case as to the application of this statutory standard. Much of the essence of urban government today is the exercise of discretion in allocation of increasingly scarce economic resources." Id. at 291-92. See also Dix Bros. v. State, 182 N.J. Super. 268 (Law. Div. 1981) (finding that the State's decision not to order hunting of deer was a high-level policy decision and discretionary act pursuant to N.J.S.A. 59:2-3). DEP is faced with a limited annual budget set by the Legislature. There is more demand for shore protection funding than funding available. As such, the Court should find that DEP is immune from liability for not providing NWW with funding from the Shore Protection Fund for beach nourishment.

Courts will also not find an activity to be a public nuisance, "when the activity is subject to a comprehensive legislative and regulatory scheme." In re Lead Paint Litigation, 191 N.J. 405, 424 (2007). In Twp. of Neptune v. State, Dep't of Env'tl. Prot., the Appellate Division held that because the State's navigational channels are governed by statutes and administrative regulations, the DEP's failure to dredge the Shark River Bay cannot be a public nuisance. Twp. of Neptune v. State, Dep't of Env'tl. Prot., 425 N.J. Super. 422, 434-37 (App. Div. 2012). Similarly, the funding process pursuant to the Shore Protection Fund is governed by N.J.S.A. 13:19-16.1 and 16.2. Therefore, the Court should find that DEP's alleged failure to provide NWW with funding for shore re-nourishment is not a public nuisance.

To the extent that NWW's public nuisance claim is predicated on DEP's denial of its October 2022 EA application or any other permit application, the Court should find that DEP is immune from liability pursuant to N.J.S.A. 59:2-5. N.J.S.A. 59:2-5 provides that "a public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization where the public entity or public employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked." This immunity is based on the "unlimited

exposure to which public entities would otherwise be subjected if they were liable for the numerous occasions on which they issue, deny, suspend, or revoke permits and licenses. Ball v. N.J. Bell Tel. Co., 207 N.J. Super. 100, 110 (App. Div. 1986). The Supreme Court of New Jersey further found that the purpose of immunity pursuant to N.J.S.A. 59:2-5 is "to protect the licensing function and to permit it to operate free from possible harassment and the threat of tort liability." Malloy v. State, 76 N.J. 515, 521 (1978). DEP is therefore immune from liability regarding its denial of NWW's October 2022 EA application.

C. Since the State is immune under the TCA, NWW does not have standing to bring, and cannot meet the elements of, a public nuisance claim.

Since DEP is immune from liability, as discussed supra, NWW fails to meet the elements of a public nuisance, even with a liberal reading of its counterclaim.

New Jersey has adopted the Restatement (Second) of Torts iteration of public nuisance, which defines a public nuisance as:

- (1) A public nuisance is an unreasonable interference with a right common to the general public.
- (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect

and, as the actors knows, or has reason to know, has a significant effect upon the public right.

[Restatement (Second) of Torts § 821B (1979); see also In re Lead Paint Litigation, 191 N.J. 405, 424-25 (2007).]

In New Jersey, a public nuisance "is related to conduct, performed in a location within the actor's control, which has an adverse effect on a common right." In re Lead Paint Litigation, 191 N.J. 405, 429 (2007).

Moreover, NWW must have suffered a special injury entitling it to seek damages under a public nuisance claim. In re Lead Paint Litigation, 191 N.J., supra at 429. A special injury is a "suffered harm of a kind different from that suffered by other members of the public." Restatement (Second) of Torts § 821C (1979). NWW lacks standing to sue DEP for public nuisance because the DEP is immune from liability pursuant to the TCA, N.J.S.A. 59:4-8, 59:4-9, 59:2-3, and 59:2-5. As a result of DEP's immunity, NWW will not be able to show a "special injury" required for a claim of public nuisance. Therefore, the Court should find that NWW cannot sustain an action seeking injunctive relief and damages against DEP, and should dismiss Count Five because NWW cannot succeed on the merits of its claim.

Additionally, NWW's claim of a public nuisance for DEP's alleged failure to provide it with funding for beach nourishment fails as a matter of law because NWW has not suffered a special

injury that is different from other municipalities as required. In re Lead Paint Litigation, 191 N.J., supra at 429. Funding from the Shore Protection Fund can be used across the State, and each shore municipality has the possibility of receiving or not receiving such funds from DEP. As such, there is no special injury that NWW has experienced by not receiving funding. Therefore, the Court should find that NWW has failed to state a claim upon which relief can be granted as to a public nuisance claim and dismiss Count Five.

D. NWW cannot meet the elements of a private nuisance claim.

A claim for private nuisance requires "an unreasonable interference in a person's private use and enjoyment of their land, either intentionally or negligently." Ross v. Lowtiz, 222 N.J. 494, 505 (2015). The person's conduct must be the legal cause of the nuisance. Id. at 505-06. Here, as discussed in-depth supra, DEP is immune from liability pursuant to the TCA. To the extent the private nuisance claim is relying on the natural forces of erosion, NWW cannot meet the elements of a private nuisance because any interference is neither an intentional nor negligent act of DEP. Therefore, the Court should dismiss Count Five for failure to state a claim upon which relief can be granted.

POINT VI

NWW HAS FAILED TO ARTICULATE A VIABLE CLAIM THAT DEP HAS VIOLATED THE APA AND THE COURT LACKS JURISDICTION TO GRANT SUCH RELIEF.

Count Six alleges that the APA requires DEP to propose and adopt regulations to place limits on the use of state aid for shore protection projects regarding the non-federal share of a federally undertaken project. This Court lacks jurisdiction over Count Six because the Appellate Division has exclusive jurisdiction over state agency action, including rulemaking pursuant to the APA. Even if the Court finds it can exercise its jurisdiction, NWW fails to state a cognizable claim that satisfies Metromedia, Inc. v. Dir., Div. of Tax, requiring DEP to undergo formal rulemaking regarding the disbursement of funds from the Shore Protection Fund.

A. Count Six of NWW's Counterclaim must be dismissed because the Appellate Division has exclusive jurisdiction over state agency actions.

Claims regarding rulemaking are squarely within the Appellate Division's exclusive jurisdiction because such decisions are undertaken only by State administrative agencies, N.J.S.A. 52:14B-4, and have State-wide implications. Specifically, "appeals may be taken to the Appellate Division as of right . . . to review final decisions or actions of any state administrative agency or officer." R. 2:2-3(a)(2). This extends "not only to State agency action, but also agency inaction" of the type NWW alleges here. Pressler & Verniero, Current N.J. Court Rules, cmt. 3.1 on R. 2:2-3 (2023).

Count Six challenges DEP's non-action as to rulemaking. Thus, it is not cognizable in the Superior Court, Chancery Division, because exclusive jurisdiction resides in the Appellate Division. See R. 2:2-3(a)(2). This constitutionally-based exclusive jurisdiction cannot be circumvented by NWW seeking a declaratory judgment that DEP violated the APA when the relief that is actually sought is quasi-judicial, ministerial or discretionary agency action. See Beaver v. Magellan Health Servs., 433 N.J. Super. 43-442 (App. Div. 2013), certif. den. 317 N.J. 293 (2014). Because only the Appellate Division has subject matter jurisdiction over any rulemaking allegations, Count Six must be dismissed by the Court.

B. DEP's process for distributing funds from the Shore Protection Fund does not constitute de facto rulemaking.

Even if the Court finds it has jurisdiction over Count Six, NWW fails to demonstrate that DEP's Shore Protection Fund annual monetary distribution must undergo formal rulemaking procedures, particularly as to DEP's ability to provide funding for federally undertaken projects - like the Hereford Inlet Project NWW raised in its pleadings which has benefitted NWW directly. See Counterclaim, ¶ 111.

Rulemaking is required when an agency's decision:

- (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group;
- (2) is intended to be applied generally and uniformly to all similarly

situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

[Metromedia, Inc. v. Dir., Div. of Tax, 97 N.J. 313, 331-32 (1984).]

None of the Metromedia factors are present here. As to the first three factors, the Shore Protection Fund must be used for the limited purpose of shore protection projects associated with "the protection, stabilization, restoration or maintenance of the shore..." N.J.S.A. 13:19-16.1(b) (1). DEP's annual funding determinations do not apply to a "large segment of" the "general public," cannot be prospective in nature due to their annual nature, and do not apply generally and uniformly to all entities that might receive funding. Metromedia, at 331; see also N.J.S.A. 13:19-16.1(b) (authorizing DEP to allocate monies for projects "of an emergency nature").

Regarding the fourth Metromedia factor, the plain language of N.J.S.A. 13:19-16.1 and 16.2 do not require DEP to undertake rulemaking and instead expressly authorize DEP to use the funding for "the nonfederal share of any State-federal project." N.J.S.A.

13:19-16.1(b). Rules allowing DEP to provide a federal cost-share from the Fund are unnecessary because the statute directly authorizes these actions. And the fifth and sixth Metromedia factors are not present because DEP has not changed its policy as to how it allocates funding. Indeed, DEP was financially assisting municipalities decades before the Shore Protection Fund was created in 1993. See State v. Atlantic City, 23 N.J. 337 (1957) (regarding State and municipal funding for federal shore protection project). Thus, DEP's shore protection fund distribution process, particularly as to federally sponsored projects, is not subject to APA rulemaking and Count Six should be dismissed.

POINT VII

NWW HAS FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES TO CHALLENGE THE AONOCAPAs.

Even if the Court finds it has jurisdiction over Counts Four and Six in NWW's Counterclaim, which it does not, NWW is improperly seeking relief in both Counts by asking the Court to rule that NWW has no duty to pay any of the assessed administrative penalties in the three AONOCAPAs. As a threshold matter, the inclusion of the AONOCAPAs in both Counts is completely unrelated to the alleged causes of actions in both Counts. The AONOCAPAs were issued to NWW for violations of numerous DEP statutes and regulations for violations dating back to 2020. These AONOCAPAs have no relation

to DEP's alleged failure to provide NWW with funding for shore protection pursuant to N.J.S.A. 12:6A-1 or N.J.S.A. 13:19-16.1(b), nor do they have any relation to DEP's alleged failure to adopt regulations regarding the use of funding for shore protection projects. The underlying facts and violations of the AONOCAPAs are not before the Court for adjudication and not in NWW's Amended counterclaims. DEP's summary action did not seek relief based on the AONOCAPAs.

The Court should find that NWW has failed to exhaust its administrative remedies, and that any relief NWW seeks from the AONOCAPAs must be sought in the administrative court. Ripeness for judicial review requires the exhaustion of available administrative remedies. Garrow v. Elizabeth General Hospital & Dispensary, 79 N.J. 549, 559 (1979). The doctrine of exhaustion of administrative remedies upholds several public policies. First, it "ensures that claims will be heard by a body possessing expertise in the area." City of Atlantic City v. Laezza, 80 N.J. 255, 265 (1979). It also "allows the parties to create a factual record necessary for meaningful appellate review." Ibid. Finally, it eliminates the need to resort to the courts, where the agency decision might satisfy the parties and thus moot the factual or legal issue raised. Id. at 265. In any case amenable to administrative review, a court should first consider whether

exhaustion of administrative remedies will serve the interests of justice. Abbott v. Burke, 100 N.J. 269, 297 (1985).

NWW has already filed an administrative hearing request for each of the three AONOCAPAs and will have the opportunity to present its defenses in the administrative proceedings. See Shinn Certification Exhibit G. NWW's attempt to circumvent administrative review to seek relief from the Court that it does not need to pay the fines in the AONOCAPAs is improper. The Court should dismiss NWW's Counterclaims that are related to the AONOCAPAs for NWW's failure to exhaust its administrative remedies.¹⁰

CONCLUSION

For the foregoing reasons, the Court should dismiss NWW's Counterclaim, with prejudice, pursuant to Rule 4:6-2(e).

Respectfully submitted,

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¹⁰ As repeatedly represented to the Court, the Court lacks jurisdiction to adjudicate the merits of a final agency decision. NWW should continue to seek adjudication of the AONOCAPAs in an administrative hearing to which a final agency decision will be rendered by the Commissioner that NWW may appeal to the Appellate Division. The Appellate Division has exclusive jurisdiction regarding final agency actions. See R. 2:2-3(a)(2).