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**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  
LAW DIVISION:  
CAPE MAY COUNTY**

**DOCKET NO. L-272-23**

**CIVIL ACTION**

**SECOND AMENDED COUNTERCLAIM  
OF THE CITY 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. 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.

2. 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.

3. 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 15<sup>th</sup> and 16<sup>th</sup> Avenues.

4. 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").

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

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. In sum, 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**

12. 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.

13. 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**

14. 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).

15. 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**

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

17. 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.

18. 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

19. 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.

20. As further set forth in the 2022 Emergency Authorization Application, the subject area between 15<sup>th</sup> and 16<sup>th</sup> 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.

21. 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.

22. 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.

23. 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."

24. 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.

25. North Wildwood's 2022 Emergency Authorization Application should not have been denied.

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

27. 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.

28. Today, there is effectively no dune and beach berm protection left in place between

15<sup>th</sup> and 16<sup>th</sup> Avenues.

29. 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.

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

31. North Wildwood is now at the point where one moderate storm or even a few smaller storms will almost certainly result in a breach.

32. 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 15<sup>th</sup> and 16<sup>th</sup> Avenues will be unable to withstand the upcoming Nor'easter and winter storm seasons.

**North Wildwood's 2023 Emergency Authorization Application**

33. 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.

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

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

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

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

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

39. As noted in the 2023 Emergency Authorization Application, the cross-section area losses in the dune located between 13<sup>th</sup> and 14<sup>th</sup> Avenue are now even more pronounced than at 15<sup>th</sup> Avenue.

40. 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 12<sup>th</sup> and 13<sup>th</sup> Avenues – 16<sup>th</sup> 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 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, and 16<sup>th</sup> Avenues;
- 5) Removal and reinstallation of split rail fencing as necessary; and
- 6) Removal of the 15<sup>th</sup> Avenue ADA dune crossover beach access (if at risk of failure).

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

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

43. 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.

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



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

45. 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.

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

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

48. 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.

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

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

51. 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.

52. 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.



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

54. 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.

55. 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.

56. 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.

57. 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.

58. 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.

59. 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.

60. 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.

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

62. 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.

63. 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

64. 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.

65. 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

66. The above volumes total 928,077 CY.

67. 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.

68. 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.

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

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

71. 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.

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

73. 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 5<sup>th</sup> Avenue to 7<sup>th</sup> Avenue. This immediately proved to be successful.

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

75. 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.

76. 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.

77. 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 15<sup>th</sup> and 16<sup>th</sup> Avenues.

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

79. 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.”

80. 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).

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

82. 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.

83. As set forth in the 2023 Emergency Authorization Application, the freshwater wetlands transition areas between 13<sup>th</sup> and 15<sup>th</sup> 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.

84. 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.

85. 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.

86. 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.

87. 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.

88. 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.

89. 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 7<sup>th</sup> Avenue, but that access is frequently out of service due to persistent erosion and tidal conditions.

90. 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.

91. 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.

92. 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.

93. 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.

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

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

96. 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.

97. 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.

98. 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 3<sup>rd</sup> Avenue and 13<sup>th</sup> Avenue would have been destroyed.

99. 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.

100. 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.

101. 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.

102. 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.

103. 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**

104. 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]

105. 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**

106. 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.

107. 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.

108. 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.

109. 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.

110. 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.

111. 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.

112. 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**

113. 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.

114. 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.

115. 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 15<sup>th</sup> and 16<sup>th</sup> 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.

**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**

116. 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.

117. 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.

118. 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.

119. 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 15<sup>th</sup> and 16<sup>th</sup> Avenues immediately.

120. 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**

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

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

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

124. 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.

125. 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.

126. 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.

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

128. 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.



129. 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.

130. 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.

131. 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.

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

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

134. 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**  
**(Breach of Contract)**

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

136. On January 17, 2017, NJDEP and the U.S. Department of the Army entered into a "Project Partnership Agreement" pursuant to which NJDEP and the US Army Corps of engineers would implement the Hereford Inlet to Cape May Inlet, New Jersey Hurricane and Storm Damage Reduction Project in several communities, including north Wildwood. Annexed hereto as **Exhibit A** is the 2017 Project Partnership Agreement.

137. Article III, Paragraph A of the Project Partnership Agreement, obligates NJDEP (Referred to in the agreement as the "Non-Federal sponsor") to acquire any real property interests required for construction of the project.

138. North Wildwood, which is obligated to provide a portion of the non-federal funding for the project, is a direct beneficiary and third-party beneficiary of the Project Partnership Agreement

139. The State Aid Agreements between the DEP and North Wildwood, executed on May 21, 2009 and November 16, 2021 respectively, provide 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. Annexed hereto as **Exhibits B** and **C** are the State Aid Agreements, executed on May 21, 2009, and November 16, 2021, respectively.

140. The NJDEP has breached its contractual obligations under the Project Partnership Agreement and the State Aid Agreements by failing to acquire required easements in connection with the Hurricane Storm Damage Reduction Project.

141. In the alternative, NJDEP breached its contractual obligations under the 2021 State Agreement in part because that Agreement incorporated by reference the contractual obligations that were set originally forth in the Project Partnership Agreement and the prior State Aid Agreement. Notably, the seventh "whereas" of the 2021 State Aid Agreement references the Project partnership Agreement.

142. 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 in an effort to preserve and maintain its beaches.

143. As a result of the NJDEP's breach of the Project Partnership Agreement and the State Aid Agreements, 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.

**CULLEN & DYKMAN LLP**

*Attorneys for Defendant-Counterclaimant City of North Wildwood*

By: \_\_\_\_\_

ANTHONY S. BOCCHI



Dated: July 28, 2023

**JURY DEMAND**

Defendant-Counterclaimant the City of North Wildwood demands a trial by jury as to all issues so triable.

**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*

By: \_\_\_\_\_

ANTHONY S. BOCCHI



Dated: July 28, 2023

# **EXHIBIT A**

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 17<sup>th</sup> 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 Hereford 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 material is available.

d. Any credit afforded under the terms of this Agreement for the costs of relocation 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.  
7<sup>th</sup> 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

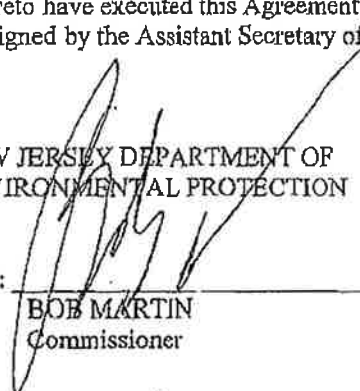
The Non-Federal Sponsor intends to fulfill fully its obligations under this Agreement. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the legislature of the State of New Jersey, where creating such an obligation would be inconsistent with New Jersey Constitution Article 8, Section 2, Paragraphs 2 and 3, NJ.S.A. 59:13-1 et seq., and NJ.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

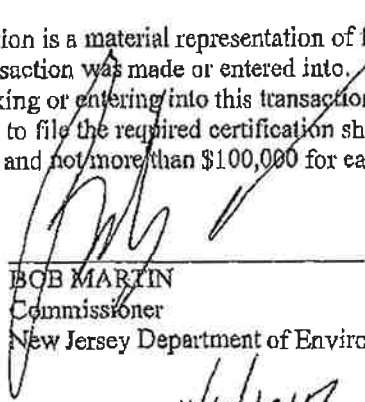
The undersigned certifies, to the best of his or her knowledge and belief that:

(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: 1/11/2017



**EXHIBIT B**

STATE AID AGREEMENT  
BETWEEN  
THE DEPARTMENT OF ENVIRONMENTAL PROTECTION  
AND  
THE CITY OF NORTH WILDWOOD  
PROJECT NO. 4174-04  
NORTH WILDWOOD BEACH NOURISHMENT PROJECT

THIS AGREEMENT made and executed this 21<sup>st</sup> day of May, Two Thousand and Nine 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", OFFICE OF ENGINEERING AND CONSTRUCTION, hereinafter called the "Office".

WHEREAS, The City of North Wildwood requested state aid assistance for a beach nourishment project along the Atlantic Ocean in the City of North Wildwood; and

WHEREAS, the Office 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 Office approved State Aid grants in Fiscal Years 2004 and 2006 in the total amount of \$7,312,500.00 of estimated eligible project costs to the City of North Wildwood for beach nourishment work; and

WHEREAS, on December 15, 2008 the New Jersey Department of Environmental Protection issued CAPRA and Waterfront Development Permit #0500-07-0006.1 (CAF/WFD 070001) along with the associated Water Quality Certificate for the nourishment of the North Wildwood beachfront; and

WHEREAS, the Office advertised the project on March 5, 2009 in conjunction with the Upper Township and Sea Isle City beach nourishment project; and

WHEREAS, the Borough of Stone Harbor beach nourishment project was bid as optional work pending receipt of federal and state permit authorization; and

WHEREAS, the Office received bids for the project on April 1, 2009, with the apparent low base bid of \$20,554,651.40 from Great Lakes Dredge and Dock Company, LLC; and

WHEREAS, the total mobilization and demobilization costs will be shared evenly between the participating municipalities; and

WHEREAS, the total state and local estimated project cost for the City of North Wildwood portion of the project is \$10,913,859.33; and

WHEREAS, additional cost shared state funds have been allocated to the City of North Wildwood as per Appendix A; and

WHEREAS, the Office, pursuant to said approval by the Department, will execute a formal contract for construction of the project in compliance with public contract laws; and

WHEREAS, the cost sharing of this construction shall be 75% State and 25% City of North Wildwood; and

WHEREAS, State Aid funding shall be utilized for actual construction work and materials. No funds shall be paid for administrative costs, permits, engineering, or legal fees; and

WHEREAS, the Department and the Municipality must provide public access to and use of the North Wildwood beachfront and Atlantic Ocean benefited by the project in accordance with State laws and regulations; and

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

WHEREAS, the Municipality has approximately 4,929 public parking spaces on the streets, avenues, drives, and municipal parking lots within ¼ mile inland of the project area; and

WHEREAS, the Municipality currently provides public access points and crossovers to the beachfront at: 2nd Avenue & Ocean Avenue; 3rd Avenue & J.F. Kennedy Boulevard/Beach Drive; 4th Ave & J.F. Kennedy Boulevard/Beach Drive; 5th Avenue & J.F. Kennedy Boulevard/Beach Drive (Pedestrian/Vehicular); 6th Avenue & J.F. Kennedy Boulevard/Beach Drive; 7th Avenue & J.F. Kennedy Boulevard/Beach Drive (Handicap); 8th Avenue & J.F. Kennedy Boulevard/Beach Drive; 9th Avenue & J.F. Kennedy Boulevard/Beach Drive; 10th Avenue & J.F. Kennedy Boulevard/Beach Drive (Handicap); 11th Avenue & J.F. Kennedy Boulevard/Beach Drive; 12th Avenue & J.F. Kennedy Boulevard/Beach Drive; 13th Avenue & J.F. Kennedy Boulevard/Beach Drive; 14th Avenue; 15th Avenue (Handicap @ Lifesaving Station); 16<sup>th</sup> Avenue & Boardwalk (Pedestrian/Vehicular); 17th Avenue & Boardwalk; 18th Avenue & Boardwalk; 19th Avenue & Boardwalk (Between 19th & 18th); 20th Avenue & Boardwalk (Handicap); 21st Avenue & Boardwalk; 22nd Avenue & Boardwalk (Pedestrian/Vehicular - Between 22nd & 21st); 23rd Avenue & Boardwalk (Between 23rd & 22nd); 25th Avenue & Boardwalk (Between 25th & 24th); 26th Avenue & Boardwalk (Between Juniper Avenue and 26th Avenue); and

WHEREAS, the Municipality currently provides restroom facilities at: 1st and Surf Avenues, 2nd and Ocean Avenues, 3rd Avenue (on the beach), 7th Avenue and J. F. Kennedy Boulevard, 10th Avenue (on the beach), 15th Avenue (at the Lifeguard Headquarters), 20th Avenue (on the beach), 25th Avenue (on the boardwalk) and Old New Jersey and Spruce Avenues (municipal lot); and

NOW THEREFORE, both parties hereto do mutually agree as follows:

(1) Municipality shall provide easements for the properties listed in Appendix B and, in accordance with the terms of Appendix C, necessary for public access to and use of the entire beachfront and tidal lands. These easements shall also provide construction access necessary for initial construction, renourishment activities, and maintenance, including providing access to the Office, the Department, and the Army Corps of Engineers, their representatives, agents, contractors and assigns. Municipality shall provide through these easements, 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 Sea Beach Amaranth management plan developed under (7) below, to the Office, the Department, and the Army Corps of Engineers, their agents, employees, and contractors. The certification that perpetual easements in accordance with Appendix C have been obtained and recorded shall be provided to the Office prior to construction.

(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. 7:7E-1 et seq.) including but not limited to: Coastal High Hazard Areas (7:7E-3.18); Erosion Hazard Areas (7:7E-3.19); Beaches (7:7E-3.22); Endangered or Threatened Wildlife or Plant Species Habitat (7:7E-3.38); Coastal Engineering (7:7E-7.11).

(3) All public access resulting from the operation of this Agreement shall be provided in a nondiscriminatory manner in accordance with law.

(4) If the Municipality does not fully comply with the above requirements the Municipality will be in breach of its obligations under this Agreement unless the Office, in its sole discretion, determines to extend the time for compliance. If the Office elects not to extend the time for compliance, the Municipality will be deemed in breach, and the Office may exercise any remedy available to it under this Agreement or at law or equity, including a remedy to require specific performance by the Municipality of its obligations under this Agreement.

(5) 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.

(6) Bulldozing, excavation or mechanical alteration of any dune is strictly prohibited, except as permitted by the Department's Standards for Beach and Dune Activities (N.J.A.C 7:7E-3A).

(7) The Municipality, pursuant to the Endangered Species Act (16 U.S.C. 1531, et seq.), its implementing regulations (50 CFR Part 17), and U.S. Fish and Wildlife Service documents 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*)" shall develop and implement one federally approved management plan entitled, "City of North Wildwood Beach Management Plan for the Protection of Listed Species" for the entire municipality. This plan shall satisfy both the state/municipal beach nourishment project as well as the federal seawall project. The plan shall be formally adopted through a memorandum of agreement among the Municipality, the Department's Division of Fish and Wildlife's Nongame Endangered Species Program, New Jersey Natural Lands Management Program and U. S. Fish and Wildlife Service. The Municipality has initiated contact with the U.S. Fish and Wildlife Service (Appendix D). The Municipality submitted a draft management plan on March 31, 2008. The Municipality must have a final adopted plan within 60 days of execution of this agreement.

Prior to the completion and adoption of a beach species management plan, the City of North Wildwood agrees to observe and implement the guidelines established by U.S. Fish & Wildlife Service as detailed in "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" (Appendix E) and to observe and implement the following U. S. Fish and Wildlife Service recommendations for protection of Sea Beach Amaranth in documented protective zones (as based on plant distribution from the last three (3) seasons or if a new plant were to grow):

- Beach raking is prohibited from the landward limit of the dune or seawall to the mean high water line from May 15 to December 1.
- Sand scraping or other mechanical manipulation of the beach is prohibited year round.
- Vehicle use is restricted to essential and emergency services, and to the area below the mean high water line, from May 15 to December 1.
- In areas of high pedestrian traffic, the Municipality does not object to the U. S. Fish and Wildlife Service erecting string and post symbolic fencing to route people away from the protective zones.
- Limit vegetation planting and sand fencing to dune areas, allowing the upper beach to remain unstable and sparsely vegetated. Use only native species of vegetation.

(8) The Municipality shall allow the Office, the Department, the Army Corps of Engineers, and their representatives, agents, contractors the right to access and conduct project operations along the beachfront during and after periods of construction, surveillance, monitoring, engineering and environmental data collection. Project operations shall include any activities necessary for effecting or verifying any provisions of this Agreement.

(9) The Office will pay 75% of the funding for the construction of this project and the Municipality will pay 25%, as per the Project Cost Sharing Analysis at Appendix A. The Municipality's share is to be paid to the Office in accordance with (10), (11), and (12) below. The cost of any engineering monitoring necessary for the project is not part of the cost to be shared under this Agreement. The Municipality is responsible for 100% of all costs associated with engineering design, preparation of plans, and completion of final specifications.

(10) The approximate total cost as detailed in Appendix A is estimated as follows: \$10,913,859.33.

(11) All project costs are estimates subject to adjustment by the Office, increases or decreases in equipment and material costs, and inflation, and are not to be construed as the total financial responsibilities of the State and the Municipality. The cost of the project may increase due to the erosion of the beachfront, linear footage of beachfront, increased quantity of sand required, cost for construction and cost of requested betterments, i.e. additional work to the project paid for at 100% cost by the municipality for non shore protection work. The final cost will be based on actual cost as documented by records maintained by the Office.

(12) The Municipality's 25% share of the projected cost of the project is due to the Office no later than 30 days from the Municipality's receipt of the determination of low bid letter from the Office. The Office shall not execute a contract for construction of the project until the Municipality pays to the Office their respective 25% share of the contract amount. The cost of the project may increase due to unforeseen reasons and the final cost will be based on actual cost as documented by records maintained by the Office. The Office will invoice the Municipality for the Municipality's 25% share of any increase in project cost, prior to the closeout of the construction contract for the project. The Municipality shall make payment within 30 days of its receipt of the invoice, unless the Office agrees to a longer time period. 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 Office 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 accounting 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 Office 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 Office 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 Office to recover that share of the funding that the Municipality has failed to provide. Prior to instituting any action under this provision, the Office 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.

(13) If the Office fails to receive annual appropriations in amounts sufficient to meet the Office's project costs for the then current or upcoming fiscal year, the Office 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 Office 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.

(14) All notices under this agreement shall be sent in writing to:

For the Office:

David Rosenblatt, Administrator  
Office of Engineering & Construction  
1510 Hooper Avenue, Suite 140  
Toms River, New Jersey 08753

For the Municipality:

Janet H. Harkins, Clerk  
City of North Wildwood  
P.O. Box 499  
901 Atlantic Avenue  
North Wildwood, New Jersey 08260

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 Office or has entered into a compliance schedule, which is made a part of this Agreement and is attached hereto.

(15) The waiver of a breach of any of the terms or conditions of this Agreement by the Office shall not constitute a waiver of any subsequent breach. Any consent by the Office 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.

(16) 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.

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



(18) 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.

(19) This Agreement may be executed in counterparts.

(20) If any provision of this Declaration or the application thereof to any person or circumstances is found to be invalid, the remainder of the provisions of this Declaration 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.

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

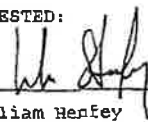
(22) Once the project is complete, the Municipality is responsible for all future maintenance and costs associated with upkeep and repair of the project.

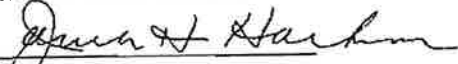
(23) All parties understand and agree that the intent of this project is to provide shoreline stabilization and storm damage reduction along the Atlantic Ocean. This project has been designed by the City of North Wildwood and reviewed by the Office. Due to natural forces and/or changing conditions, there is no guarantee that the beachfront will persist or maintain its engineering integrity and effectiveness post construction.

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

CITY OF NORTH WILDWOOD


ATTESTED:

BY   
William Henfey  
Mayor  
City of North Wildwood

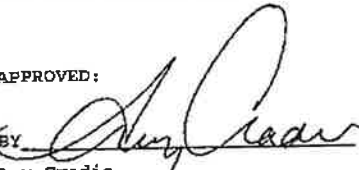
  
Janet H. Harkins  
Clerk  
City of North Wildwood

DEPARTMENT OF ENVIRONMENTAL PROTECTION  
OFFICE OF ENGINEERING & CONSTRUCTION  
STATE OF NEW JERSEY

ATTESTED:

BY   
David Rosenblatt  
Administrator  
Office of Engineering & Construction

APPROVED:

BY   
Amy Cradic  
Assistant Commissioner  
Natural & Historic Resources

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

\_\_\_\_\_  
Anne Milgram  
Attorney General of New Jersey

BY   
Deputy Attorney General

APPENDIX A

PROJECT 4174-04  
NORTH WILDWOOD BEACH NOURISHMENT PROJECT  
COST SHARING ANALYSIS

TOTAL ESTIMATED PROJECT COST: \$10,913,859.33

STATE AND MUNICIPAL BEACH NOURISHMENT COST SHARING:

The project cost for the beach nourishment is to be shared between the State of New Jersey and the City of North Wildwood as follows:

75% STATE OF NEW JERSEY SHARE	\$ 8,185,394.50
25% CITY OF NORTH WILDWOOD SHARE	\$ 2,728,464.83
TOTAL	\$10,913,859.33

## APPENDIX B

EASEMENTS WILL BE ACQUIRED FOR:

BLOCK	LOT	DESCRIPTION/REMARKS
<u>CITY OF NORTH WILDWOOD</u>		
288.02	1	PRIVATE-OBTAINED
289.03	1	PUBLIC-OBTAINED
290.01	1	PRIVATE-OBTAINED
291.01	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-NOT OBTAINED
<u>CITY OF WILDWOOD</u>		
248	1.02	PRIVATE-OBTAINED
278	1.01	PRIVATE-OBTAINED
280	1	PUBLIC-OBTAINED; TO BE RECORDED

## APPENDIX C

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 \_\_\_\_\_ 2009 BY AND

BETWEEN

THE CITY OF NORTH WILDWOOD, a Municipal Corporation of the State of New Jersey whose post office address is Municipal Clerk, 901 Atlantic Avenue, P.O. Box 499, North Wildwood, NJ 08260 referred to herein as the 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, P.O. Box 499, North Wildwood, NJ 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 parties hereto desire to participate with each other and/or the United States Army Corps of Engineers to construct the Hereford Inlet to Cape May Inlet Storm Damage Reduction Project and/or the North Wildwood Beach Replenishment Project, hereinafter "Project"; 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 State of New Jersey and/or the United States Army Corps of Engineers 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,

WHEREAS, this Deed of Easement will also serve to implement the Public Trust Doctrine and ensure permanent public access, use and enjoyment of the beach and ocean.

NOW, THEREFORE, in consideration of 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 Project, as in, on, over and across that land of the Property 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 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.
- i. Implement the Public Trust Doctrine and ensure permanent public access, use and enjoyment of the beach and ocean.

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 routinely 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 municipally owned 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 Municipality 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 Municipality.

**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 Grantee's 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 hereby.
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.

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 \_\_\_\_\_

Accepted by the  
City of North Wildwood,  
GRANTEE

Witnessed by:

BY: \_\_\_\_\_  
(Name of Official)

\_\_\_\_\_  
NOTARY PUBLIC OF THE  
STATE OF NEW JERSEY

Title \_\_\_\_\_

Date \_\_\_\_\_

Accepted by the  
State of New Jersey, GRANTEE

Witnessed by:

BY: \_\_\_\_\_  
David Rosenblatt, Administrator  
Office of Engineering &  
Construction

\_\_\_\_\_  
NOTARY PUBLIC OF THE  
STATE OF NEW JERSEY

Date \_\_\_\_\_

STATE OF NEW JERSEY, COUNTY OF CAPE MAY SS.:

I CERTIFY that on \_\_\_\_\_ 2009,

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;
- 2) signed, sealed and delivered this Deed of Easement as his or her act and deed;
- 3) holds the requisite ownership interest and authority to execute this Deed of Easement; and
- 4) made this Deed of Easement for the full and actual consideration as set forth herein.

\_\_\_\_\_  
NOTARY PUBLIC OF THE  
STATE OF NEW JERSEY

**APPENDIX D**

**US FISH AND WILDLIFE CONTACT INFORMATION**

U.S Fish and Wildlife Service  
New Jersey Field Office  
Clifford Day, Administrator  
927 North Main Street  
Bldg. D  
Pleasantville, NJ 08232  
(609) 646-9310

## APPENDIX B

U.S. Fish &amp; Wildlife Service

## Piping Plover

Atlantic Coast Population



### 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

(Also see additional Service guidance on [fireworks](#) and in the [1996 Revised Recovery Plan](#).)

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 11989<sup>(1)</sup> 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.

#### 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 period<sup>(2)</sup> usually lasts for 27-28 days. Piping plovers fledge only a single brood per season, but may reneest several times if previous nests are lost. Chicks are precocial<sup>(2)</sup> (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, Parterson 1988, Flemming et al. 1990, MacIvor 1990, Strauss 1990). 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 lines<sup>14</sup>, 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 (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 Disurbance), 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 fencing<sup>(6)</sup>. 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 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.<sup>(6)</sup>

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.

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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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.

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.

4. Wrack is organic material including seaweed, seashells, driftwood and other materials deposited on beaches by tidal action.

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.

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).

**Table 1. Summary of Chick Mobility Data**

Source	Location	Data
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 (p.23)	1989 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.
Loegering 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 $\leq 10$ m to $\leq 900$ m from their nests. In 7 of these instances, mortality occurred $\geq 200$ m from the nest.

**Table 2. Summary of Data on Distances at which Piping Plovers React to Disturbance**

Source	Location	Data
<b>Flushing of Incubating Birds by Pedestrians</b>		
Flemming et al. (p.326)	Nova Scotia	1988 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 (p.47)	1990 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).
Loefering (p.61)	1992 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 (p.93)	and 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 (p.72)	1993 Massachusetts	Mean flushing distance for incubating plovers was 24 m (n=31).
<b>Disturbance to Non-incubating Birds</b>		
Hoopes (p.89)	1993 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 (p.74)	1993b 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=183), 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.

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 Last updated May 28, 2000

## **EXHIBIT C**

**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 16<sup>th</sup> day of November,  
Two Thousand and Twenty One **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 DRAA 13 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 beach and oceanfront at: 2<sup>nd</sup> Avenue and Ocean Avenue; 3<sup>rd</sup> Avenue and J. F. Kennedy



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

WHEREAS, the Municipality currently provides seasonal permanent restroom facilities at: 7<sup>th</sup> Avenue and J. F. Kennedy Boulevard, 15<sup>th</sup> Avenue (at the lifeguard headquarters), and 25<sup>th</sup> 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, 15<sup>th</sup> Avenue (at the lifeguard headquarters), and 23<sup>rd</sup> 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  
CLIMATE AND FLOOD RESILIENCE  
DIVISION OF COASTAL ENGINEERING**

ATTESTED:

BY \_\_\_\_\_  
William T. Dixon  
Director  
Division of Coastal Engineering

APPROVED:

BY \_\_\_\_\_  
Dave Rosenblatt  
Assistant Commissioner  
Climate and Flood Resilience

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

Andrew J. Bruck  
Acting Attorney General of New Jersey

BY \_\_\_\_\_  
David C. Apy  
Assistant Attorney General

# CITY OF NORTH WILDWOOD

Cape May County, New Jersey

## RESOLUTION

### AUTHORIZING EXECUTION OF A STATE AID AGREEMENT IN CONNECTION WITH CONSTRUCTION OF THE HEREFORD INLET TO CAPE MAY INLET, NEW JERSEY HURRICANE AND STORM DAMAGE REDUCTION PROJECT, PROJECT NUMBER 6040-NW-1

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, the New Jersey Department of Environmental Protection, as the non-Federal sponsor, and the Army Corps of Engineers entered into a Project Partnership Agreement on January 17, 2017 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 Disaster Relief Appropriations Act of 2013, and for periodic renourishment, operation, and maintenance of the Project; and

WHEREAS, the New Jersey Department of Environmental Protection and the City of North Wildwood desire to enter into this State Aid Agreement, annexed hereto as Exhibit A, for the initial construction of this 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 City of North Wildwood 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 and City Clerk are duly authorized to execute this State Aid Agreement; and

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

WHEREAS, Council deems it prudent and advisable to authorize execution of the State Aid Agreement between the New Jersey Department of Environmental Protection and the City of North Wildwood for the Construction Of The Hereford Inlet To Cape May Inlet, New Jersey Hurricane And Storm Damage Reduction Project.

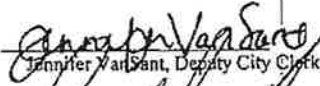
NOW, THEREFORE, BE IT RESOLVED, by the Members of Council of the City of North Wildwood, in the County of Cape May and State of New Jersey as follows:


- 1) All of the statements of the preamble are incorporated herein by this reference thereto as though the same were set forth at length.
- 2) The Mayor and City Clerk be and they hereby are authorized to execute a State Aid Agreement for the Construction of the Hereford Inlet to Cape May Inlet, New Jersey Hurricane and Storm Damage Reduction Project.
- 3) Said State Aid Agreement shall be annexed to and made part of this Resolution.

OFFERED BY: KANE SECONDED BY: BISHOP  
\*\*\*\*\*

I, Jennifer VanSant, Deputy City Clerk of the City of North Wildwood, in the County of Cape May, State of New Jersey, do hereby certify that the foregoing is a correct and true copy of a Resolution adopted by the Mayor and Council of the City of North Wildwood at a meeting duly held on the 16<sup>th</sup> day of November 2021.

Dated: November 16, 2021

Signed:   
Jennifer VanSant, Deputy City Clerk

APPROVED:   
Patrick T. Rosenello, Mayor

	Aye	Naye	Abstain	Absent		Aye	Naye	Abstain	Absent
Colomeo				X	Koehler	X			
Rullo				X	Bishop	X			
Kane	X				Zampirri	X			
Del Conte	X								