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NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Plaintiff,

v.

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

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CAPE MAY
COUNTY
DOCKET NO. L-00272-23

CIVIL ACTION

PLAINTIFF'S ANSWER TO
DEFENDANT NORTH WILDWOOD'S
SECOND AMENDED COUNTERCLAIM

Pursuant to Rule 4:5-3, Plaintiff New Jersey Department of Environmental Protection ("Department" or "DEP"), answers Defendant City of North Wildwood's ("NWW") Second Amended Counterclaim, which is solely focused on an alleged breach of

contract claim regarding the improperly dated November 16, 2021 State Aid Agreement entered between DEP and NWW, as follows:

COUNTERCLAIM

SUMMARY OF ACTION

1. Denied as DEP is without knowledge and information sufficient to form a belief as to the truth of the allegations and denied that DEP has stifled NWW's ability to adequately protect itself and ameliorate the devastating effects of beach erosion.
2. The allegations set forth in paragraph 2 of the Second Amended Counterclaim are not directed at DEP and, therefore, do not require a response.
3. The allegations set forth herein are legal conclusions to which no response is required. All other characterizations by NWW with regard to "its incredulous determinations" are otherwise denied. Denied to the extent that the October 2022 Emergency Authorization Application is irrelevant to NWW's remaining counterclaim.
4. Admitted that NWW submitted a second Emergency Authorization Application on February 10, 2023, but denied that the 2023 Emergency Authorization Application is relevant to NWW's remaining counterclaim. The allegations related to NWW's beach conditions are not directed at DEP and, therefore, DEP can neither plead nor respond thereto.

5. Admitted and denied to the extent that the 2023 Emergency Authorization Application is irrelevant to NWW's remaining counterclaim.
6. Admitted that NWW has acted in defiance of DEP. Denied to the extent that paragraph 6 is irrelevant to NWW's remaining counterclaim.
7. Denied.
8. Denied.
9. Denied.
10. Denied.
11. Denied.

THE PARTIES

12. Admitted.
13. Admitted.

JURISDICTION AND VENUE

14. Admitted that the Superior Court has jurisdiction over suits arising from the Coastal Zone Management Rules and the Freshwater Wetlands Regulations. Denied to the extent that the remaining Counterclaim is not brought pursuant to either the Coastal Zone Management Rules or the Freshwater Wetlands Regulations; nonetheless, the Superior Court still has jurisdiction over a breach of contract claim.

15. Admitted per the Court's February 8, 2023 order entered by Judge Blee in CPM-C-55-22.

FACTS COMMON TO ALL COUNTS

North Wildwood's 2022 Emergency Authorization Application

16. Admitted that NWW submitted its 2022 Emergency Authorization Application, which sought to install a bulkhead in the area of 15th and 16th Avenues on October 5, 2022, but denied to the extent that this allegation is irrelevant to NWW's remaining counterclaim.
17. Admitted that the 2022 Emergency Authorization was submitted after the effects of Hurricane Ian that stalled off the mid-Atlantic Coast and denied that Hurricane Ian caused "catastrophic beach and dune erosion to North Wildwood's oceanfront." Denied to the extent that paragraph 17 is irrelevant to NWW's remaining counterclaim.
18. Admitted and denied to the extent that paragraph 18 is irrelevant to NWW's remaining counterclaim.
19. The allegations set forth in paragraph 19 are not directed at DEP and do not require a response. Denied to the extent that paragraph 19 is irrelevant to NWW's remaining counterclaim.
20. Denied and paragraph 20 is irrelevant to NWW's remaining counterclaim.

21. Admitted that this allegation was included in NWW's 2022 Emergency Authorization Application, but DEP is without sufficient knowledge to respond to the accuracy of this statement. Denied to the extent that paragraph 21 is irrelevant to NWW's remaining counterclaim.
22. Admitted that this was included in NWW's 2022 Emergency Authorization Application, but DEP is without sufficient knowledge to respond to the accuracy of this statement. Denied to the extent that paragraph 22 is irrelevant to NWW's remaining counterclaim.
23. Admitted and denied to the extent that paragraph 23 is irrelevant to NWW's remaining counterclaim.
24. Admitted that DEP denied the remainder of NWW's 2022 Emergency Authorization on October 12, 2022. Denied that the final agency determination was made on December 1, 2022. Denied to the extent that paragraph 24 is irrelevant to NWW's remaining counterclaim.
25. Denied and irrelevant to NWW's remaining counterclaim.
26. Denied and irrelevant to NWW's remaining counterclaim.
27. Denied and irrelevant to NWW's remaining counterclaim.
28. Denied as DEP is without knowledge as to what "effectively no dune and beach berm protection left" means and the allegation is irrelevant to NWW's remaining counterclaim.

29. Admitted that NWW included such information in its 2022 Emergency Authorization Application. Denied that a breach condition was imminent. Denied to the extent that paragraph 29 is irrelevant to NWW's remaining counterclaim.
30. Neither admit nor deny as additional information is needed. Denied to the extent that paragraph 30 is irrelevant to NWW's remaining counterclaim.
31. Neither admit nor deny as additional information is needed. Denied to the extent that paragraph 31 is irrelevant to NWW's remaining counterclaim.
32. Neither admit nor deny as additional information is needed and DEP is without knowledge of what may happen in the upcoming Nor'easter and winter storm seasons. Denied to the extent that paragraph 32 is irrelevant to NWW's remaining counterclaim.

North Wildwood's 2023 Emergency Authorization Application

33. Admitted. Denied as irrelevant to NWW's remaining counterclaim.
34. Neither admit nor deny as additional information is needed and the allegations in paragraph 34 are not directed at DEP so no response is required. Denied as irrelevant to NWW's remaining counterclaim.

35. Neither admit nor deny as additional information is needed and the allegations in paragraph 35 are not directed at DEP so no response is required. Denied as irrelevant to NWW's remaining counterclaim.
36. Neither admit nor deny as additional information is needed and the allegations in paragraph 36 are not directed at DEP so no response is required. Denied as irrelevant to NWW's remaining counterclaim.
37. Neither admit nor deny as additional information is needed and the allegations in paragraph 37 are not directed at DEP so no response is required. Denied as irrelevant to NWW's remaining counterclaim.
38. Neither admit nor deny as additional information is needed and the allegations in paragraph 38 are not directed at DEP so no response is required. Denied as irrelevant to NWW's remaining counterclaim.
39. Neither admit nor deny as additional information is needed and the allegations in paragraph 39 are not directed at DEP so no response is required. Denied as irrelevant to NWW's remaining counterclaim.
40. Admitted that the 2023 Emergency Authorization Application included a request for the six activities listed. Denied as irrelevant to NWW's remaining counterclaim.

41. Denied and irrelevant to NWW's remaining counterclaim.
42. Neither admit nor deny as additional information is needed and the allegations in paragraph 42 are not directed at DEP so no response is required. Denied to the extent that paragraph 42 is irrelevant to NWW's remaining counterclaim.
43. Neither admit nor deny as additional information is needed and the allegations in paragraph 43 are not directed at DEP so no response is required. Denied to the extent that paragraph 43 is irrelevant to NWW's remaining counterclaim.
44. Neither admit nor deny as additional information is needed and the allegations in paragraph 44 are not directed at DEP so no response is required. Denied to the extent that paragraph 44 is irrelevant to NWW's remaining counterclaim.
45. Neither admit nor deny as additional information is needed and the allegations in paragraph 45 are not directed at DEP so no response is required. Denied to the extent that paragraph 45 is irrelevant to NWW's remaining counterclaim.
46. Neither admit nor deny as the allegations in paragraph 46 are not directed at DEP so no response is required. Denied to the extent that paragraph 46 is irrelevant to NWW's remaining counterclaim.
47. Neither admit nor deny as additional information is needed and the allegations in paragraph 47 are not directed at DEP

so no response is required. Denied to the extent that paragraph 47 is irrelevant to NWW's remaining counterclaim.

48. Admitted that the 2023 Emergency Authorization references the denial of the 2022 Emergency Authorization. Denied that the 2022 Emergency Authorization was improperly denied. DEP denies the remainder of the allegations in paragraph 48. Denied to the extent that paragraph 48 is irrelevant to NWW's remaining counterclaim.

49. The allegation in paragraph 49 is not directed at DEP so no response is required and is irrelevant to NWW's remaining counterclaim.

50. The allegation in paragraph 50 is not directed at DEP so no response is required and is irrelevant to NWW's remaining counterclaim.

51. The allegation in paragraph 51 is not directed at DEP so no response is required and is irrelevant to NWW's remaining counterclaim.

52. Neither admit nor deny as additional information is needed and the allegation in paragraph 52 is not directed at DEP so no response is required. Denied to the extent that the allegation in paragraph 52 is irrelevant to NWW's remaining counterclaim.

53. Neither admit nor deny as additional information is needed and the allegation in paragraph 53 is not directed at DEP so no response is required. Denied to the extent that the allegation in paragraph 53 is irrelevant to NWW's remaining counterclaim.
54. The claim as stated does not require a response as DEP is without knowledge of this information and the claim is not directed at DEP. Denied to the extent that the allegation in paragraph 54 is irrelevant to NWW's remaining counterclaim.
55. The claim as stated does not require a response as DEP is without knowledge of this information and the claim is not directed at DEP. Denied to the extent that the allegation in paragraph 55 is irrelevant to NWW's remaining counterclaim.
56. The claim as stated does not require a response as DEP is without knowledge of this information and the claim is not directed at DEP. Denied to the extent that the allegation in paragraph 56 is irrelevant to NWW's remaining counterclaim.
57. Admitted that beach nourishment activity occurred during 2009 and 2010 via hydraulic pumping of sand and a series of sand harvesting operations from 2016 to present. The remainder of paragraph 57 requires no response as it is not directed at DEP. Denied to the extent that paragraph 57 is irrelevant to NWW's remaining counterclaim.

58. Neither admit nor deny as additional information is needed. Denied to the extent that paragraph 58 is irrelevant to NWW's remaining counterclaim.
59. No response is required as the allegations are not directed at DEP. Denied to the extent that paragraph 59 is irrelevant to NWW's remaining counterclaim.
60. Neither admit nor deny as additional information is needed and this information is not within DEP's control.
61. Neither admit nor deny as additional information is needed and this allegation is not directed at DEP so no response is required. Denied to the extent that paragraph 61 is irrelevant to NWW's remaining counterclaim.
62. Admitted to the extent that to DEP's knowledge, NWW has employed "backpassing," hydraulic beach fill, and on occasion, imported materials from quarries and that these methods are preferred by DEP. The remainder of paragraph 62 is denied. Denied to the extent that paragraph 62 is irrelevant to NWW's remaining counterclaim. Neither admit nor deny as additional information is needed.
63. Neither admit nor deny as additional information is needed and the allegations are not directed at DEP and not within DEP's control as NWW undertook these projects.

64. Neither admit nor deny as additional information is needed and the total cubic yards of material is not within DEP's control and therefore, does not require a response from DEP. DEP leaves NWW to its proofs that all the sand has been lost due to persistent erosion.
65. Neither admit nor deny as additional information is needed and the allegations are not directed at DEP. The information in paragraph 65 is solely within NWW's control and therefore, requires no response from DEP.
66. Denied.
67. No response is required as paragraph 67 is not directed at DEP and DEP leaves NWW to its own proofs.
68. No response is required as this allegation is not directed at DEP and DEP is without knowledge of this information.
69. The claim as stated does not require a response as it is not directed at DEP and DEP is without knowledge of this information.
70. Denied as the allegation is not directed at DEP and DEP is without knowledge of the context "effective" as used in the allegation and further denied as the allegation is irrelevant to NWW's remaining counterclaim.
71. Admitted to the extent that NWW has installed bulkheads since 2012. Denied as to remaining claims and to the extent the

allegations in paragraph 71 are irrelevant to NWW's remaining counterclaim.

72. Denied as the bulkhead between 3rd and 4th is vinyl and not steel and further denied to the extent the allegations in paragraph 72 are irrelevant to NWW's remaining counterclaim.
73. Admitted to the extent that NWW expanded the steel bulkhead from 5th Avenue to 7th Avenue. Denied as to remaining claims and to the extent the allegations in paragraph 73 are irrelevant to NWW's remaining counterclaim.
74. Admitted to the extent that NWW installed a steel bulkhead between 7th Avenue and 13th Avenue. Denied as to remaining claims and to the extent that the allegations in paragraph 74 are irrelevant to NWW's remaining counterclaim.
75. Denied and irrelevant to NWW's remaining counterclaim.
76. Neither admit nor deny, the claim as stated does not require a response and is irrelevant to NWW's remaining counterclaim.
77. Neither admit nor deny, the claim as stated does not require a response as the claim is not directed at DEP and is also irrelevant to NWW's remaining counterclaim. DEP is also without knowledge as to why NWW's 2020 permit application "dragged on" as alleged.
78. No response is required as the claim is not directed at DEP and is irrelevant to NWW's remaining counterclaim.

79. Admitted in part that the definition of a freshwater wetlands transition area was included in the 2023 Emergency Authorization Application. Denied to the extent that this claim is a legal conclusion and therefore, does not require a response. Denied to the extent that the claim in paragraph 79 is irrelevant to NWW's remaining counterclaim.
80. Admitted in part that a Letter of Interpretation Line Verification ("LOI") was issued by DEP on July 10, 2019 that verified the limits and resource value of the interdunal wetland area between 14th and 15th Avenues and denied to the extent that paragraph 80 is irrelevant to NWW's remaining counterclaim.
81. Admitted that the LOI classified the wetland area to be of intermediate resource value with an associated 50-foot transition area and denied to the extent that paragraph 81 is irrelevant to NWW's remaining counterclaim.
82. Denied that the immediately adjacent interdunal freshwater wetland between 13th to 14th Avenues exhibits similar characteristics as the verified wetland area between 14th to 15th Avenues as "characteristics" is not defined and denied to the extent that paragraph 82 is irrelevant to NWW's remaining counterclaim.

83. Admitted that portions of the 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. The remaining portions of the allegations in paragraph 83 are denied. Further denied that the entire paragraph 83 is irrelevant to NWW's remaining counterclaim.
84. No response is required as this claim is not directed at DEP and not within DEP's knowledge. Paragraph 84 is also irrelevant to NWW's remaining counterclaim.
85. Denied and irrelevant to NWW's remaining counterclaim.
86. No response is required as paragraph 86 is not directed at DEP and is irrelevant to NWW's remaining counterclaim.
87. Denied and irrelevant to NWW's remaining counterclaim.
88. Denied and irrelevant to NWW's remaining counterclaim.
89. No response is required as paragraph 89 is not directed at DEP and not within DEP's knowledge. Denied to the extent that paragraph 89 is irrelevant to NWW's remaining counterclaim.
90. Neither admit nor deny as additional information is needed and paragraph 90 is not directed at DEP so no response is required. Denied to the extent that paragraph 90 is irrelevant to NWW's remaining counterclaim.

91. No response is required as paragraph 91 is not directed at DEP and not within DEP's knowledge and control. Paragraph 91 is also irrelevant to NWW's remaining counterclaim.
92. No response is required as paragraph 92 is not directed at DEP and not within DEP's knowledge and control. Denied to the extent that paragraph 92 is irrelevant to NWW's remaining counterclaim.
93. No response is required as paragraph 93 is not directed at DEP and not within DEP's knowledge and control. Denied to the extent that paragraph 93 is irrelevant to NWW's remaining counterclaim.
94. No response is required as paragraph 94 is not directed at DEP and not within DEP's knowledge and control. Denied to the extent that paragraph 94 is irrelevant to NWW's remaining counterclaim.
95. No response is required as paragraph 95 is not directed at DEP and not within DEP's knowledge and control. Denied to the extent that paragraph 95 is irrelevant to NWW's remaining counterclaim.
96. No response is required as paragraph 96 is not directed at DEP and not within DEP's knowledge and control. Denied to the extent that paragraph 96 is irrelevant to NWW's remaining counterclaim.

97. No response is required as paragraph 97 is not directed at DEP and not within DEP's knowledge and control. Denied to the extent that paragraph 97 is irrelevant to NWW's remaining counterclaim.
98. No response is required as paragraph 98 is not directed at DEP and not within DEP's knowledge and control. Denied to the extent that paragraph 98 is irrelevant to NWW's remaining counterclaim.
99. Denied and irrelevant to NWW's remaining counterclaim.
100. Denied.
101. No response is required as paragraph 101 is not directed at DEP.
102. Admitted that New Jersey's oceanfront beaches extend 127 miles from Cape May to Sandy Hook, spanning four counties and nearly 100 municipalities. Denied that all oceanfront beaches require periodic restoration and nourishment.
103. Admitted that both the Federal Government and State Government have programs for funding and conducting beach restoration and maintenance. Denied as to the remainder of paragraph 103.

The New Jersey Shore Protection Program

104. No response is required as paragraph 104 provides for a legal conclusion.

105. No response is required as paragraph 105 provides for a legal conclusion.

The Federal Shore Protection Program for New Jersey

106. Admitted in part that the Project is a 50-year program for the reconstruction and periodic nourishment of beaches extending from Townsends Inlet in Northern Cape May County south to Cape May Inlet, that the Federal Government will contribute 65% of the Federal Project cost, with the non-federal (i.e. state) sponsor responsible for 35%, and that the Project includes NWW. Denied to the extent that the Project was solely authorized per the Water Resource Development Act of 1999, Public Law 106-53.

107. No response is required as the allegation asserted in paragraph 107 is not directed at DEP.

108. No response is required as the allegations asserted in paragraph 108 are not directed at DEP and denied to the extent that the paragraph mischaracterizes the non-federal sponsor responsibilities as required by the PPA as all of the non-federal sponsor responsibilities are delegated to New Jersey and New Jersey then delegates some of those duties and responsibilities to the towns via a state aid agreement, which may include real estate, funding, and public access/use. Further denied to the extent that it was DEP's decision to

not require the towns to pay during initial construction of the Project and not the federal government.

109. Admitted.

110. No response is required as the allegation asserted in paragraph 110 is not directed at DEP.

111. Denied.

112. Denied and DEP is without knowledge of the amount of money NWW spent on trucking sand from Wildwood.

Hurricane Ian's Impacts on North Wildwood

113. DEP is without sufficient knowledge and information to form a belief as to the truth of the allegations set forth in paragraph 113 and no response is required. Denied to the extent that the allegations in paragraph 113 are irrelevant to NWW's remaining counterclaim.

114. Admitted to the extent that the remnants of Hurricane Ian stalled off of the mid-Atlantic coast and denied as to the remainder of paragraph 114. Denied to the extent that paragraph 114 is irrelevant to NWW's remaining counterclaim.

115. Admitted that NWW filed an Emergency Authorization application after Hurricane Ian and denied as to the remainder of paragraph 115. Denied to the extent that paragraph 115 is irrelevant to NWW's remaining counterclaim.

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. Admitted that USACE and DEP will be expending in excess of \$20 million and denied to the remaining allegations in paragraph 116, including "longstanding problem of the severe erosion of beaches and dunes of NWW and adjoining municipalities" as DEP is without knowledge of what "longstanding problem" means.
117. Admitted that the Project will use a combination of various coastal protection measures, including beach nourishment, dune creation, and will entail long-term maintenance. Admitted that the Project will contain long-term maintenance backed by federal and state dollars in the form of periodic nourishment. Denied that the Project includes bulkhead installation. The remaining allegation in paragraph 117 that "this is the long-term remedy to beach erosion that North Wildwood so desperately needs" does not require a response as it is not directed at DEP.
118. Denied as the allegation in paragraph 118 is not directed at DEP and does not require a response and is also irrelevant to NWW's remaining counterclaim.
119. No response is required as DEP is without knowledge and information sufficient to form a belief as to the truth of the allegations set forth in paragraph 119. Denied to the

extent that paragraph 119 is irrelevant to NWW's remaining counterclaim.

120. Denied as the allegations in paragraph 120 are not directed at DEP and do not require a response and are also irrelevant to NWW's remaining counterclaim.

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. No response is required as NWW's filing speaks for itself.
122. No response is required as NWW's filing speaks for itself.
123. Admitted that DEP issued AONOCAPAs to NWW but denied as irrelevant to NWW's remaining counterclaim because Judge Blee by order dated June 20, 2023, dismissed all of NWW's counterclaims referencing the AONOCAPAs.
124. Admitted that the AONOCAPA was issued but denied as irrelevant to NWW's remaining counterclaim because Judge Blee by order dated June 20, 2023, dismissed all of NWW's counterclaims referencing the AONOCAPAs.
125. Admitted that the AONOCAPA was issued but denied as irrelevant to NWW's remaining counterclaim because Judge Blee by order dated June 20, 2023, dismissed all of NWW's counterclaims referencing the AONOCAPAs.

126. Admitted that the AONOCAPA was issued but denied as irrelevant to NWW's remaining counterclaim because Judge Blee by order dated June 20, 2023, dismissed all of NWW's counterclaims referencing the AONOCAPAs.
127. Admitted but denied as irrelevant to NWW's remaining counterclaim because Judge Blee by order dated June 20, 2023, dismissed all of NWW's counterclaims referencing the AONOCAPAs.
128. Denied and irrelevant to NWW's remaining counterclaim.
129. Denied and irrelevant to NWW's remaining counterclaim.
130. Denied and irrelevant to NWW's remaining counterclaim.
131. Denied and irrelevant to NWW's remaining counterclaim.
132. Denied and irrelevant to NWW's remaining counterclaim.
133. Denied and irrelevant to NWW's remaining counterclaim.
134. Denied and irrelevant to NWW's remaining counterclaim.

Count One
(Breach of Contract)

135. DEP repeats its responses to the foregoing paragraphs of the Counterclaim as if set forth herein at length.
136. DEP admits that it entered the Project Partnership Agreement with the U.S. Army Corps of Engineers on January 17, 2017 and the terms of the Project Partnership Agreement speak for itself.
137. Admitted.

138. Denied.

139. Denied.

140. Denied.

141. Denied.

142. DEP is without knowledge and information sufficient to form a belief as to the truth of the allegations set forth in paragraph 142 and as such, no response is required.

143. Denied.

JURY DEMAND

DEP objects to NWW's demand for a trial by jury as such request is prohibited by the New Jersey Contractual Liability Act, N.J.S.A. 59:13-4, and in violation of Court Rule 4:35-1 as such demand cannot be made for the first time on second amendment.

AFFIRMATIVE DEFENSES

First Affirmative Defense

(Actions Authorized by Law)

1. The Department's actions at all times were lawful and were performed pursuant to applicable laws, statutes, and rules, and therefore are valid as a matter of law.

Second Affirmative Defense

(Failure to State a Claim)

2. NWW's Second Amended Counterclaim fails to state a claim upon which relief can be granted.

Third Affirmative Defense

(Improper Interpretation of the Project Partnership Agreement)

3. NWW's interpretation of the Project Partnership Agreement is incorrect as a matter of law.

Fourth Affirmative Defense

(Improper Interpretation of the 2009 State Aid Agreement)

4. NWW's interpretation of the 2009 State Aid Agreement is incorrect as a matter of law.

Fifth Affirmative Defense

(Improper Interpretation of the improperly dated 2021 State Aid Agreement)

5. NWW's interpretation of the improperly dated 2021 State Aid Agreement is incorrect as a matter of law.

Sixth Affirmative Defense

(Unclean Hands)

6. NWW's Second Amended Counterclaim in whole or in part is barred by the doctrine of unclean hands.

Seventh Affirmative Defense

(Bad Faith)

7. NWW's Second Amended Counterclaim is barred by NWW's own illegal, bad faith, and tortious conduct.

Eighth Affirmative Defense

(No breach of contract - 2009 State Aid Agreement)

8. DEP has not breached the 2009 State Aid Agreement and actually acquired all the easements and completed the project pursuant to the 2009 State Aid Agreement and as a result, NWW is not entitled to damages or any other relief.

Ninth Affirmative Defense

(No breach of contract - 2021 State Aid Agreement)

9. DEP has not breached the improperly identified 2021 State Aid Agreement because it currently has nine out of the ten necessary easements and as a result, NWW is not entitled to damages or any other relief.

Tenth Affirmative Defense

(No breach of contract - Project Partnership Agreement)

10. DEP has not breached the Project Partnership Agreement and as a result, NWW is not entitled to damages or any other relief.

Eleventh Affirmative Defense

(lack of standing - Project Partnership Agreement)

11. NWW lacks standing to sue under the Project Partnership Agreement as the Agreement itself states that there shall be no third-party beneficiaries.

Twelfth Affirmative Defense

(lack of standing - 2009 State Aid Agreement)

12. NWW lacks standing to sue under the 2009 State Aid Agreement pursuant to the statute of limitations of the New Jersey Contractual Liability Act, N.J.S.A. 59:13-5(b), as the 2009 State Aid Agreement and any breach thereof is beyond the statute of limitations.

Thirteenth Affirmative Defense

(Immunity from punitive and consequential damages arising out of contract)

13. NWW cannot recover punitive or consequential damages arising out of an alleged breach of contract with DEP as outlined in the New Jersey Contractual Liability Act, N.J.S.A. 59:13-3.

Fourteenth Affirmative Defense
(Substantial Compliance)

14. DEP has substantially complied with both the improperly identified 2021 State Aid Agreement and the 2017 Project Partnership Agreement.

Fifteenth Affirmative Defense
(failure to identify date of breach of contract)

15. NWW has failed to identify the date of the breach of contract for the 2009 State Aid Agreement, the improperly identified 2021 State Aid Agreement, and the 2017 Project Partnership Agreement as required by the New Jersey Contractual Liability Act, N.J.S.A. 59:13-5.

Sixteenth Affirmative Defense
(lack of subject matter jurisdiction)

16. The Court lacks subject matter jurisdiction over the alleged breach of the 2017 Project Partnership Agreement given that the Agreement was entered between DEP and the United States Army Corps of Engineers, which is a federal agency. The Court also lacks subject matter jurisdiction regarding any requested relief based on facts that seek equitable relief that was previously dismissed by Judge Blee on June 20, 2023, including any relief related to the aforementioned AONOCAPAs.

Seventeenth Affirmative Defense

(failure to seek appropriate relief)

17. NWW fails to seek the appropriate relief of specific performance for DEP's alleged breach of contract and is generally not entitled to damages when specific performance can cure NWW's alleged harm and particularly when NWW seeks damages for conduct that predates the complete execution of the State Aid Agreement, which occurred on March 1, 2022.

Eighteenth Affirmative Defense

(seeking relief that predates the State Aid Agreement)

18. NWW cannot seek relief for activities and conduct that predated the execution of the State Aid Agreement on March 1, 2022 and to which such activity and conduct are unrelated to the State Aid Agreement.

Nineteenth Affirmative Defense

(excuse and failure to perform is conditioned on actions outside of DEP's control)

19. In the alternative, DEP was unable to perform under the 2022 State Aid Agreement until commitments, in the form of State Aid Agreements, from the other required municipalities identified in the Project Partnership Agreement had not been fully executed and it was unclear to DEP if the Project would proceed because these other State Aid Agreements needed to be entered as the Project is predicated on an island-wide

protective measure and all four towns' commitment for the Project to proceed. To ensure that the Project could move forward, DEP continued its engagement with Lower Township and Wildwood City so that those State Aid Agreements were executed. The other towns (Lower Township and Wildwood City) finally executed their respective State Aid Agreements on March 28, 2023, which means the Project can now proceed and DEP is actively moving forward with the process to acquire all the necessary easements for the entire Project, including the one additional easement needed in NWW. As such, the execution of the other State Aid Agreements by Lower Township and Wildwood City with DEP was a condition precedent for DEP to continue the easement acquisition process for the Project, including the remaining easement in NWW.

Twentieth Affirmative Defense

(relief beyond the scope of DEP's expectations when entered the State Aid Agreement)

20. It was not DEP's expectation when it entered the 2022 State Aid Agreement that any alleged breach of the Agreement by DEP would require DEP to pay damages for activity and conduct outside the scope of the Agreement and to which predated the execution of the Agreement.

Twenty-first Affirmative Defense

(Waiver)

21. NWW waived any breach of contract claim and request for damages as not having properly followed the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 to -13, and having filed an amended notice of claim that includes the 2009 State Aid Agreement and the 2017 Project Partnership Agreement, which does not comply with the Contractual Liability Act. NWW's failure to timely file a notice of claim pursuant the Contractual Liability Act within 90 days of the accrual of the breach of contract for all three contracts, waives NWW's claim and request for damages. NWW also failed to wait ninety days from the filing of the notice of claim to file suit.

Twenty-second Affirmative Defense

(estoppel)

22. NWW obtained the benefits of the 2009 State Aid Agreement. Since the Hereford Project is moving forward, NWW will also be obtaining the benefits of the 2022 State Aid Agreement.

Twenty-third Affirmative Defense

(laches)

23. NWW's Second Amended Counterclaim is barred by the doctrine of laches because NWW unreasonably delayed bringing their claims against the 2009 State Aid Agreement and waited until DEP filed suit to enjoin NWW from installing a bulkhead to bring the counterclaim without having first properly filed a

notice of claim pursuant to the New Jersey Contractual Liability Act, N.J.S.A. 59:13-5.

ADDITIONAL DEFENSES

24. The Department reserves the right to assert additional defenses based on information learned or obtained during discovery.

WHEREFORE the Department demands that the Second Amended Counterclaim be dismissed, or that judgment be entered in the DEP's favor, and against NWW.

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Dianna E. Shinn

Dianna E. Shinn
Deputy Attorney General

DATED: September 1, 2023

DESIGNATION OF TRIAL COUNSEL

Pursuant to Rule 4:25-4, Deputy Attorney General Dianna E. Shinn is designated as trial counsel for Plaintiff in this action.

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Dianna E. Shinn

DATED: September 1, 2023

Dianna E. Shinn
Deputy Attorney General