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PRELIMINARY STATEMENT

"With the purpose of preventing damage to the shores and beaches of the United States . . . , it is hereby declared to be the policy of the United States . . . to promote shore protection projects and related research that encourage the protection, restoration, and enhancement of sandy beaches, including beach restoration and periodic beach nourishment, on a comprehensive and coordinated basis by the Federal Government, States, localities, and private enterprises." 33 U.S.C. § 426e(a).

Long Beach Island ("LBI"), a narrow barrier island in Ocean County stretching approximately eighteen (18) miles along the Atlantic Ocean, is subject to constant erosion and the threat of severe coastal storms, thereby damaging a natural resource valuable to all the citizens of the State and threatening the safety and property of LBI residents. The New Jersey Department of Environmental Protection ("DEP") and the United States Army Corps of Engineers ("Army Corps") have responded to these threats by agreeing to implement the LBI Shore Protection Project (the "Project") - a 17-mile beach nourishment and replenishment project to protect the public health, safety, and economies of the shore communities on LBI.

By statute, the DEP is authorized to "undertake any and all actions and work essential" to fulfill its duty to protect the

State's coast from the damaging effects of coastal storms. N.J.S.A. 12:6A-1. Here, the DEP seeks to use this authority to gain immediate access to five private properties in the Borough of Surf City because Defendants, the owners of these properties, have not provided the access necessary for Project construction. The DEP seeks access to the Defendants' properties to abate what is, in effect, a public nuisance - i.e., a dune and beach system that provides inadequate protection from coastal storms that are a real and serious threat to Long Beach Island. The State intends to protect its citizens from this threat through the Project, which involves the extraction of public sand from an offshore borrow site on the ocean floor, and using the sand to enhance the existing dunes and widen the existing flat beach to protect against erosion and destruction caused by hurricanes, tropical storms, "nor'easters," and other coastal storms.

The Army Corps and the DEP have determined that construction should begin in Surf City, based upon their evaluation of various factors relevant to the successful construction of the Project. As part of the Project, the Army Corps requires DEP to provide access to the properties where the work will be performed, both for initial construction and subsequent replenishment activities, and perpetual easements preserving the project footprint for public use. Because the part of the Project funded for construction this fall/winter

requires dune enhancement on twenty-five oceanfront properties owned by private individuals (as well as municipally-owned land) in the Borough of Surf City, the DEP must obtain access to these properties. While twenty oceanfront property owners have signed the necessary easements, Surf City and the DEP have been unable to obtain the required easements from the Defendants - five oceanfront property owners out of the twenty-five private properties in this section of the Project.

At its core, this case involves the efforts of the State and Federal governments to abate a public nuisance to protect public and private property and the State's citizens from the ravages of coastal storms. Defendants' failure to grant access frustrates these efforts, threatening the Army Corps' and DEP's ability to complete the Project and potentially jeopardizing future funding of the Project. Thus, Plaintiffs seek an order from this Court granting immediate access to allow the Project to proceed.

STATEMENT OF FACTS

A. Risks Associated with Coastal Storms

Coastal storms are a constant threat to the New Jersey shore. Coastal storms, which include hurricanes, other tropical storm systems and "nor'easters," can produce extremely high winds, torrential rain (leading to flash floods), and tornadoes, and can drive oceanic storm surges onto coastal areas with catastrophic effects. (Certification of Thomas Herrington, Ph.D. ("Herrington Cert.") ¶ 4.) Coastal storms on the open seas produce large waves, heavy rains, and high winds, and can cause devastating effects when they make landfall. (Herrington Cert. ¶ 5.)

Coastal storms that make landfall can, among other things, directly damage or destroy buildings, vehicles, roads and bridges, and cause an increase in sea level. (Herrington Cert. ¶ 6.) More importantly, coastal storms can result in loss of human life or serious injury or illness due to drowning, flying debris, the infusion of disease (particularly when the destruction of sanitation facilities occurs during warm summer weather), outbreak of infections due to wading in sewage-polluted standing water, fires caused by damaged buildings and utilities, power outages that disrupt vital communication and hamper rescue efforts, and the destruction of access ways

complicating efforts to transport necessities such as food, clean water, temporary shelters, and medicine. (Herrington Cert. ¶ 8.)

B. Erosion Potential and Storm Frequency on LBI

The State of New Jersey, and LBI in particular, repeatedly have suffered the damaging effects of coastal storms. In 1944 and 1962, catastrophic storms battered LBI, causing houses to float off their foundations, washing away whole sections of beach, and cutting new inlets through the island. (Herrington Cert. ¶ 13.) The 1962 storm stands as the most devastating coastal storm in New Jersey's recorded history, drowning seven people, uprooting over 600 houses, and tearing LBI into six pieces. (Herrington Cert. ¶ 15.)

After a period of almost thirty years of relative calm following the 1962 storm, a series of three very destructive storms struck the New Jersey coast over the fifteen months from October 1991 to December 1992. (Herrington Cert. ¶ 16.) The last of these storms was the most significant "nor'easter" to occur since 1962. (Ibid.) Coinciding with a full lunar eclipse and lasting for 140 hours and twelve tidal cycles, elevated water levels persisted for over five days. (Ibid.) Waves in excess of thirty feet were measured offshore. (Ibid.) The combination of large waves and elevated water level once again

completely eroded the beaches and breached the coastal dunes. (Ibid.) New Jersey sustained damage of approximately \$500 million (1992 value) from the storm, one quarter of which occurred on LBI. (Ibid.)

In addition to such massive storms, smaller, more frequent storm events also take an erosive toll on the LBI shoreline. (Herrington Cert. ¶ 17.) Most recently, storms causing significant flooding and property damage struck the New Jersey coast in 1994, 1996, and 1998. (Ibid.) While no major storms have struck coastal New Jersey since the 1992 storm, large storms tend to be clustered together in a relatively short period of years. (Ibid.)

C. Congressional Authorization to Undertake Shore Protection Measures

Due to the constant coastal erosion caused by storms large and small, certain beaches and dunes need to be replenished to protect shore communities. (Herrington Cert. ¶ 9; Certification of David Rosenblatt ("Rosenblatt Cert.") ¶ 14.) The United States Congress has recognized that conservation, protection, and development of the nation's beaches is a vital national interest:

With the purpose of preventing damage to the shores and beaches of the United States, its Territories and possessions and promoting and encouraging the healthful recreation of the

people, it is hereby declared to be the policy of the United States, subject to this Act, to promote shore protection projects and related research that encourage the protection, restoration, and enhancement of sandy beaches, including beach restoration and periodic beach nourishment, on a comprehensive and coordinated basis by the Federal Government, States, localities, and private enterprises. [33 U.S.C. § 426e(a)].

The Army Corps is the Federal entity that undertakes these shore protection projects. (Rosenblatt Cert. ¶ 14.) Such projects are authorized in the federal Water Resources Development Acts ("WRDA"), which Congress has passed every few years to authorize and direct the hundreds of projects undertaken by the Army Corps. See, e.g., WRDA of 2000, Pub. L. No. 106-541, 114 Stat. 2572.

D. Shore Protection in New Jersey

In New Jersey, the DEP, through its Bureau of Coastal Engineering, operates New Jersey's Shore Protection Program. (Rosenblatt Cert. ¶ 4.) The Shore Protection Program was created to protect life and property along the New Jersey coast, preserve the vital coastal resources of New Jersey, and maintain safe and navigable waterways throughout the State. (Ibid.) To that end, the Bureau of Coastal Engineering administers shore protection and coastal dredging projects throughout the State. (Ibid.)

The Legislature has granted the DEP broad authority over all State shore protection efforts. Specifically, N.J.S.A. 12:6A-1 authorizes and empowers the DEP to:

repair, reconstruct, or construct bulkheads, seawalls, breakwaters, groins, jetties, beachfills, dunes and any or all appurtenant structures and work, on any and every shore front along the Atlantic ocean, in 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. [N.J.S.A. 12:6A-1] [emphasis added].

New Jersey's Shore Protection Program often involves participation in shore protection projects that are authorized by the United States Congress and managed by the Army Corps. (Rosenblatt Cert. ¶ 5.) In such Federal projects, the State of New Jersey serves as the "non-Federal Sponsor," which requires the State to provide 35% of the project funding and perform other project-related tasks. (Ibid.) See also 33 U.S.C. § 2213(c)(5). The State's portion of the funding is then allocated through a cost-sharing agreement where the local municipalities involved in the project contribute 25% of the State's share. (Rosenblatt Cert. ¶ 5.)

Beach nourishment and replenishment projects begin with the initial placement of sand along beach and dunes that have experienced erosion. (Rosenblatt Cert. ¶ 21.) Sources of sand

for such projects can include a local source such as a neighboring beach or sandbar, a dredged source such as a nearby inlet or waterway, an inland source such as a mining quarry or, as used most commonly in large-scale projects, an offshore source such as a borrow site along the ocean bottom. (Ibid.) This sand can be brought in with trucks or barges, hydraulically pumped, or any combination of the above, and is then spread evenly along the beach and piled up into dunes stabilized with snow fences and dune grass. (Ibid.) These beach nourishment projects generally extend many years beyond the initial placement of sand because, as nourished beaches undergo erosion, they must be maintained and restored through beach re-nourishment. (Ibid.)

Running parallel to the shoreline, coastal dunes play a vital role in protecting the land, along with its inhabitants and structures, against the high potential for dangerous surf and storm surge caused by significant storm events and other erosive factors. (Rosenblatt Cert. ¶ 13; Herrington Cert. ¶ 7.)

E. LBI Shore Protection Project

The LBI Shore Protection Project was formally authorized by the Water Resources and Development Act ("WRDA") of 2000, Pub. L. No. 106-541, 114 Stat. 2572, section 101(a)(1).¹

The formal authorization of the LBI Shore Protection Project followed a multi-year study of the risks faced by this section of the New Jersey shore. The Project itself is the culmination of years of research and study by the Army Corps and the DEP of LBI's shoreline erosion problems. In March 1995, the Army Corps completed a preliminary study that identified possible solutions to the erosion problems facing LBI. (Rosenblatt Cert. ¶ 19.) This preliminary study also determined that an engineering solution was in the Federal interest. (Ibid.)

Based on the recommendations from the 1995 preliminary study, the Army Corps prepared the "Barnegat Inlet to Little Egg Inlet, New Jersey, Final Feasibility Report and Integrated Environmental Impact Statement, September 1999" ("Army Corps Feasibility Study"). (Rosenblatt Cert. ¶ 18.) The Army Corps Feasibility Study examined the magnitude and effect of shoreline erosion problems on LBI and identified beach nourishment as a

¹ In the WRDA of 2000, the LBI Shore Protection Project is identified as the Barnegat Inlet to Little Egg Inlet, New Jersey Shore Protection Project. Pub. L. No. 106-541, 114 Stat. 2572, sec. 101(a)(1).

solution to these problems. (Ibid.)

The construction plan of the LBI Shore Protection Project consists of beach and dune construction using hydraulic pumping to transport sand from an offshore borrow site to the shoreline of the municipalities of Long Beach Township, Harvey Cedars, Surf City, Ship Bottom, and Beach Haven. (Rosenblatt Cert. ¶ 22.) According to the Army Corps Feasibility Study, this plan requires approximately 4.95 million cubic yards of sand for initial berm (i.e., beach) placement and 2.45 million cubic yards for dune placement. (Rosenblatt Cert. ¶ 23.) Approximately 1.9 million cubic yards of sand will be needed for periodic beach and dune replenishment every seven (7) years for the 50-year life of the project. (Ibid.)

In 2000, the total cost of the Project was estimated to be \$51,203,000, consisting of an estimated Federal cost of \$33,282,000 and an estimated non-Federal cost of \$17,921,000. This included an estimated average annual cost of \$1,751,000 for periodic nourishment over the 50-year life of the project, consisting of an estimated annual Federal cost of \$1,138,000 and an estimated annual non-Federal cost of \$613,000. WRDA of 2000, Pub. L. No. 106-541, sec. 101(a). (Rosenblatt Cert. ¶ 24.) Due to inflation and increased construction costs, the current estimated cost of the initial beach fill for the entire Project has risen from \$51,203,000 to approximately \$71,200,000, which

costs are to be shared 65% by the federal government and 35% by the State. (Rosenblatt Cert. ¶ 25.)

The DEP, as the non-federal sponsor for this project, signed a Project Cooperation Agreement ("PCA") with the Army Corps on August 17, 2005. (Rosenblatt Cert. ¶ 26.) The PCA serves as the framework for the joint effort by the Army Corps and the DEP for the Project's initial construction and periodic beach re-nourishment. Through the PCA, the Army Corps, who performs and/or contracts out construction of the Project, imposes a number of requirements upon DEP based on federal law. (Rosenblatt Cert. ¶ 27.)

Pursuant to the PCA and federal law, the Army Corps requires DEP to provide temporary access for initial construction, as well as perpetual easements granting access for future re-nourishment and for public use of the Project footprint. (Rosenblatt Cert. ¶ 28.) If the requirements set forth in the PCA are not met by the DEP, the Army Corps is capable of carrying forward previous years' funding. (Rosenblatt Cert. ¶ 31.) However, the Army Corps may decide not to fund the LBI Shore Protection Project in its entirety if work does not begin this fall, or if all currently allocated funds are not spent. (Ibid.) Presently, the Army Corps faces significant competing demands for funding, including shore protection projects in other vulnerable coastal areas of the United States,

as well as operations overseas. (Ibid.)

F. Surf City Section of the LBI Shore Protection Project

The Army Corps and the DEP have determined that construction should begin with the Surf City portion of the Project, based upon their evaluation of various factors relevant to the successful completion of Project. The factors include a number of engineering concerns, the availability of construction access, and the existence of adequate public access to the beach. (Rosenblatt Cert. ¶ 34.) From an engineering standpoint, a primary consideration is that the beach profile of Surf City is relatively stable and able to hold sand in place to serve as the primary foundation for replenishing the remaining portions of LBI as the entire Project proceeds. (Ibid.)

The Surf City section of the Project is broken down into two sub-sections: (1) an area running through approximately the southern two-thirds of Surf City, extending south from 18th Street to the Surf City-Ship Bottom border (the "Southern Surf City Project Area"); and (2) an area running through approximately the northern one-third of Surf City, extending north from 18th Street to 25th Street (the "Northern Surf City Project Area"). (Rosenblatt Cert. ¶ 42.) The Southern Surf City Project Area and the eastern part of the Northern Surf City Project Area are municipally owned, and Surf City has provided

the DEP with the required easement. (Rosenblatt Cert. ¶ 43.) In the Northern Surf City Project Area, however, some of the dune construction and enhancement will occur on parts of twenty-five oceanfront properties owned by private individuals.² (Rosenblatt Cert. ¶ 36.) Thus, pursuant to the PCA and federal law, the DEP must provide the Army Corps with access to the twenty-five properties in the Northern Surf City Project Area before construction can begin in this area. (Rosenblatt Cert. ¶ 54.)

On August 29, 2006, the Army Corps opened the contractors' bids for the initial phase of the Project. (Rosenblatt Cert. ¶ 60.) Based on the bids received and the Project funds available, the Army Corps and the DEP estimate that construction of both the Southern Surf City Project Area and the Northern Surf City Project Area can be completed this fall/winter. (Rosenblatt Cert. ¶¶ 57, 58.) At present, the Army Corps has authorized construction to begin in the Southern Surf City Project Area on November 1, 2006. (Rosenblatt Cert. ¶ 60.) In order for construction to proceed in the Northern Surf City Project Area this fall/winter, the Army Corps must authorize that construction by December 1, 2006. (Rosenblatt Cert. ¶ 61.)

² Of course, the owners of oceanfront property will benefit most directly from the storm protection offered by the Project. Oceanfront properties are closest to and in the direct path of high surf and storm surges, and would suffer the most immediate and severe damage. (Herrington Cert. ¶ 23.)