

UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY CAMDEN VICINAGE
MARGATE CITY, NEW JERSEY, et al., Plaintiffs, v.
UNITED STATES ARMY CORPS OF ENGINEERS, et al., Defendants.

Civil Action No. 14-7303 (RMB/JS) OPINION

Appearances: Thomas S. Biemer, Esquire Jordan M. Rand, Esquire Dilworth Paxson LLP 1500 Market Street, Suite 3500E Philadelphia, Pennsylvania 19102 Attorneys for Plaintiffs Anne B. Taylor, AUSA Irene E. Dowdy, AUSA Office of the U.S. Attorney District of New Jersey P.O. Box 2098 Camden, New Jersey 08101 Attorneys for U.S. Army Corps of Engineers John J. Hoffman, Acting Attorney General of New Jersey Kristina Lee Miles, Esquire New Jersey Department of Law and Public Safety P.O. Box 093 Trenton, New Jersey 08625 Attorneys for Commissioner Bob Martin and New Jersey Department of Environmental Protection

Bumb, United States District Judge: 1

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Court has found that Plaintiffs have not established that the construction of the Project would unreasonably interfere with their use of Margate beach.

Additionally, both cases involve total restrictions of access to natural resources. The plaintiffs in Rivera, for instance, were not permitted to access the beaches on the entirety of Buck Island at any time during a partial government shutdown in violation of a U.S. Virgin Islands statute intended to protect the public's right to use and enjoy the islands' beaches and shorelines. *Id.* Likewise, the plaintiffs in Atlanta School of Kayaking were "effectively [] banned from canoeing or kayaking on the Dog River" altogether. 981 F. Supp. at 1471.

Even if the Court were to credit all of Mr. Dutil's

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opinions, Plaintiffs would not be forced to endure a blanket ban on their use of the beach. At worst, the Project may cause a partial disruption of Plaintiffs' access to the beach. This does not constitute irreparable harm. See *Am. Whitewater v. Tidwell*, 2010 WL 5019879, at *11-12 (D.S.C. Dec. 2, 2010).⁶

In any event, the Defendants have repeatedly and consistently pledged that they will assist Margate in alleviating any increase in drainage problems, ponding, or flooding that occur as a result of the Project's construction.

Mr. Watson even testified that the Corps would be willing to put in place temporary solutions to resolve drainage issues, if

⁶ In *American Whitewater*, the court considered a motion for a preliminary injunction by plaintiffs seeking to enjoin defendants from prohibiting floating on a certain portion of the Chattooga River. 2010 WL 5019879, at *1-3. The court denied the motion for a preliminary injunction, finding that plaintiffs had failed to establish irreparable harm. *Id.* at *11-12. The court's instructive and persuasive reasoning bears repeating:

Understandably, Plaintiffs are disappointed in not being able to freely access this portion of the river as they would like. However, Plaintiffs are not denied total use of a natural resource as was the case in Rivera. Plaintiffs have access to the Chattooga River to experience floating on the lower portion of the river and experience different ORVs [Outstanding Remarkable Values] in other areas. Unlike the cases cited above, Plaintiffs present this court with only a partial loss of opportunity to participate in one particular activity. Plaintiffs are not being denied the opportunity to enjoy the resource on a wholesale basis[.]

Id. at *12 (distinguishing Rivera, 910 F. Supp. 239).

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necessary, such as digging a hole through the dune in an emergency situation. PI Hrg. Tr. 224:8-15 (Watson). Finally, even if Plaintiffs' fears of extreme ponding, flooding, and drainage problems occur, the problems can be remedied with a monetary damages award--specifically, the cost to construct and implement Mr. Walberg's proposed drainage system, as discussed above. In the end, Plaintiffs' alleged harm, to the extent it materializes, is compensable with monetary damages. Accordingly, for each of the foregoing reasons, the Court finds that Plaintiffs have failed to establish that they will suffer actual, imminent, and irreparable harm absent an injunction. Any harm Plaintiffs may suffer is speculative and compensable with monetary damages.

C. Balance of the Harms and the Public Interest

"In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." Winter, 555 U.S. at 24

(internal citations and quotations omitted). Where the government is the nonmoving party, courts may consider the balancing of the harms and the public interest together. See *Nken v. Holder*, 556 U.S. 418, 435 (2009) ("... the traditional

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stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. These factors merge when the Government is the opposing party.").

Plaintiffs contend that the balance of hardship favors an injunction because Margate beach will be turned, effectively, into a "lagoon" and "junkyard" if the Project is constructed.

The Court has already found that Plaintiffs have failed to meet their burden. Defendants, on the other hand, argue that the speculative harms alleged by seven private individuals fail to outweigh the financial harms to Defendants if the Project is delayed. Under the relevant construction contracts, Defendants must pay large monetary penalties to the contractors if construction of the Project is delayed. Dixon Decl. ¶¶ 79-81.

Plaintiffs urge the Court not to consider these financial harms to the Defendants because they are purportedly self-imposed.

Defendants also argue that construction of the Project is in the public interest and that an injunction delaying or blocking the Project's construction would, in fact, endanger the public. The Project is designed to protect several municipalities--indeed, all of Absecon Island--from the devastating effects of storm events. It was designed and approved by Congress to protect the residents, as well as the beaches and property, of Absecon Island, including the residents, beaches, and property of Margate.

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The Court has considered the testimony and evidence presented by the parties, as well as the parties' briefing. On the one hand, Defendants have established a strong public interest in the timely and cost-efficient construction of the Project. On the other hand, Plaintiffs have failed to establish that the Project will likely create a public nuisance. At most, Plaintiffs have set forth fears about increased drainage and

ponding problems, which, while genuinely expressed, **are factually unfounded**. In any case, Defendants have committed to addressing any exacerbated drainage and ponding issues that may occur after the dunes are constructed. Accordingly, the Court finds that the speculative harms to the Plaintiffs, seven private individuals, do not outweigh the public interest in protecting all citizens, beaches, and property of Absecon Island, as well as the financial penalties that Defendants would incur if the Project were enjoined. These factors, too, weigh heavily against the issuance of a preliminary injunction.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Application for a Preliminary Injunction [Docket No. 5] is DENIED. An appropriate Order shall issue on this date.

s/Renée Marie Bumb RENÉE MARIE BUMB UNITED STATES DISTRICT JUDGE Dated 2/3/17