Jordan M. Rand, Esquire
KLEHR HARRISON
HARVEY BRANZBURG LLP
10000 Lincoln Drive East
Marlton, NJ 08053
(856) 486-7900
jrand@klehr.com
Attorneys for Plaintiff

John Scott Abbott, Esquire
LAW OFFICES OF JOHN SCOTT ABBOTT
9 South Washington, Suite One
Margate, NJ 08402
(609) 823-4495
Margate City Solicitor

MARGATE CITY, Plaintiff, v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and WEEKS MARINE, INC. Defendants.	NEW JERSEY SUPERIOR COURT ATLANTIC COUNTY CHANCERY DIVISION GENERAL EQUITY Docket No.

BRIEF IN SUPPORT OF ORDER TO SHOW CAUSE

Plaintiff, Margate City, New Jersey ("**Margate**" or the "**City**"), hereby files this Brief in Support of its Order to Show Cause against the Defendants, the New Jersey Department of Environmental Protection ("**DEP**") and Weeks Marine, Inc. ("**WMI**") (collectively, "**Defendants**").

"Fool me once, shame on me. Fool me twice, shame on you. Fool me three times, shame on both of us." - Stephen King

I. INTRODUCTION

This Court acknowledged over a year ago that the Absecon Island Coastal Storm Risk Reduction Project (the "**Project**") would cause "a drainage issue that needs to be resolved." Through two prior rounds of litigation, the DEP and the United States Army Corps of Engineers (the "**Corps**") denied that fact. They were wrong.

Absent immediate action, the results of this incomprehensible miscalculation will afflict the entirety of Margate's beaches. The DEP, the agency charged with safeguarding New Jersey's natural resources, will likely contend a third time that they have not caused a drainage problem and, if they did, it is not irreparably harming Margate. For the DEP to suggest that its wholesale degradation of natural resources is not irreparable harm is ironic. It is also, for the third time, wrong. Margate is not asking for money damages. It is simply asking the Court to make this stop, immediately.

"Downbeach Buzz," July 31, 2017
(http://downbeachbuzz.com/army-corp-dune-plan-flooding-half-margate-beaches/)

Commissioned by Margate Commissioners and Mayor (July 31, 2017)

II. FACTS

The Corps finished designing the Project over 20 years ago, in 1996. The Project calls for the construction of 12.75-foot high, 80-foot wide sand dunes on the beaches of all four Absecon Island municipalities - Atlantic City, Ventnor, Margate and Longport. The DEP has consistently sought to impose the Project by force, without regard to the United States

Constitution, state eminent domain law or the real-world consequences of the Project for those who will have to deal with them every day for the next 50 years.[1]

In 2014, after the DEP purported to take easements to Margate's beaches by "Administrative Orders," the City sued the Corps and the DEP in federal court and forced the DEP to comply with Constitutional Due Process principles by following Eminent Domain Act procedures.[2]

On October 8, 2015, the DEP initiated eminent domain proceedings against Margate in this Court.[3] Margate, as it had for 20 years, contended that the Project would cause serious drainage problems because the Project did not account for the City's existing drainage plan.[4] This Court held evidentiary proceedings on February 4, 5 and 8, 2016.[5] The Corps and the DEP presented innumerable witnesses who denied that the Project would have negative drainage ramifications.[6] Though this Court "acknowledge[d] that there [was] a drainage issue to be resolved [, it was] satisfied that the Army Corps [was] committed to work with Margate in correcting the drainage problems." On April 11, 2016, this Court therefore held that the DEP was permitted to condemn easements to Margate's breaches to build the Project.

On October 20, 2016, private Margate taxpayers (the "**Taxpayers**") filed a second lawsuit in which the Project's drainage consequences were again at issue. *See Erlbaum et al. v. DEP*, No. C-75-16 (removed to United States District of New Jersey, Docket No. 1:16-cv-08198).[7] The Taxpayers challenged the Project as, among other things, an imminent public

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1 Affidavit of Mayor Michael Becker ("**Becker Aff.**"), attached as Exhibit "A."
2 *Id.*
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*

nuisance and sought an injunction barring Project commencement until the Corps and the DEP had resolved the Project's incompatibility with the City's drainage plan.[8]

During injunction proceedings, Charles R. Dutill, II, P.E, testified on the Taxpayers' behalves that the Project would cause severe drainage problems.[9] Margate is designed so that storm water flows from Atlantic Avenue toward the beach, through scuppers in the City's continuous bulkhead system, onto the beach and then down grade into the ocean. [10] When storm water has not naturally flowed as intended, the City has historically dug channels from the scuppers vertically to the ocean. This drainage plan has always worked for the City.[11] Mr. Dutill explained that constructing a wall of dunes in the path of storm water flow would prohibit water from draining as intended, and that it would also prohibit the City from addressing ponding with channels because the City would not be permitted to channel through the dunes.[12] Most importantly, Mr. Dutill testified that the Project would cause bacteria-infested storm water to pond in between the dunes and the bulkhead, creating a lagoon the length of Margate that would reach depths of several feet, that would stagnate for days at a time and that would create a public health and safety hazard for men, women and particularly children.[13]

The Corps and the DEP presented expert after expert who testified that the Taxpayers' fears and the opinions rendered by Mr. Dutill were unfounded.[14]

On February 3, 2017, the United States District Court for the District of New Jersey agreed, holding that the Taxpayers' drainage concerns were "factually unsupportable" and denying the Taxpayer's petition for a preliminary injunction.

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8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*

In early July 2017, WMI commenced constructing the Project using the DEP's easements.[15] WMI has constructed dunes in the areas between Fredericksburg Avenue and Iroquois Avenue (the "**Project Area**"), which consists of approximately 18 blocks. Approximately 24 blocks remain.[16] Immediately after construction began, even prior to rain, the area between newly constructed dunes and the bulkheads was wet, as predicted by Mr. Dutill in Federal court.[17]

Photographed by Commissioner Maury Blumberg (July 12, 2017)

On July 23, 2017, a relatively minor rainfall hit Margate. In the Project Area, storm water ponded between the dunes and bulkhead, reached depths varying from several inches to approximately one foot and sat stagnant for days. In some locations, ponded water backed up through the scuppers and flooded private property,[18] as reported by the Press of Atlantic City in

15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*

its July 25, 2017 article, "Margate dunes project overflow angers homeowners," attached as Exhibit "B."

"Margate dune project overflow angers homeowners," The Press of Atlantic City (July 25, 2015) (http://www.pressofatlanticcity.com/news/margate-dunes-project-overflow-angers-homeowners/article_03469fdf-0d78-5a65-beef-f4c1165d1846.html)

Photographed by Commissioner Maury Blumberg (July 24, 2017)

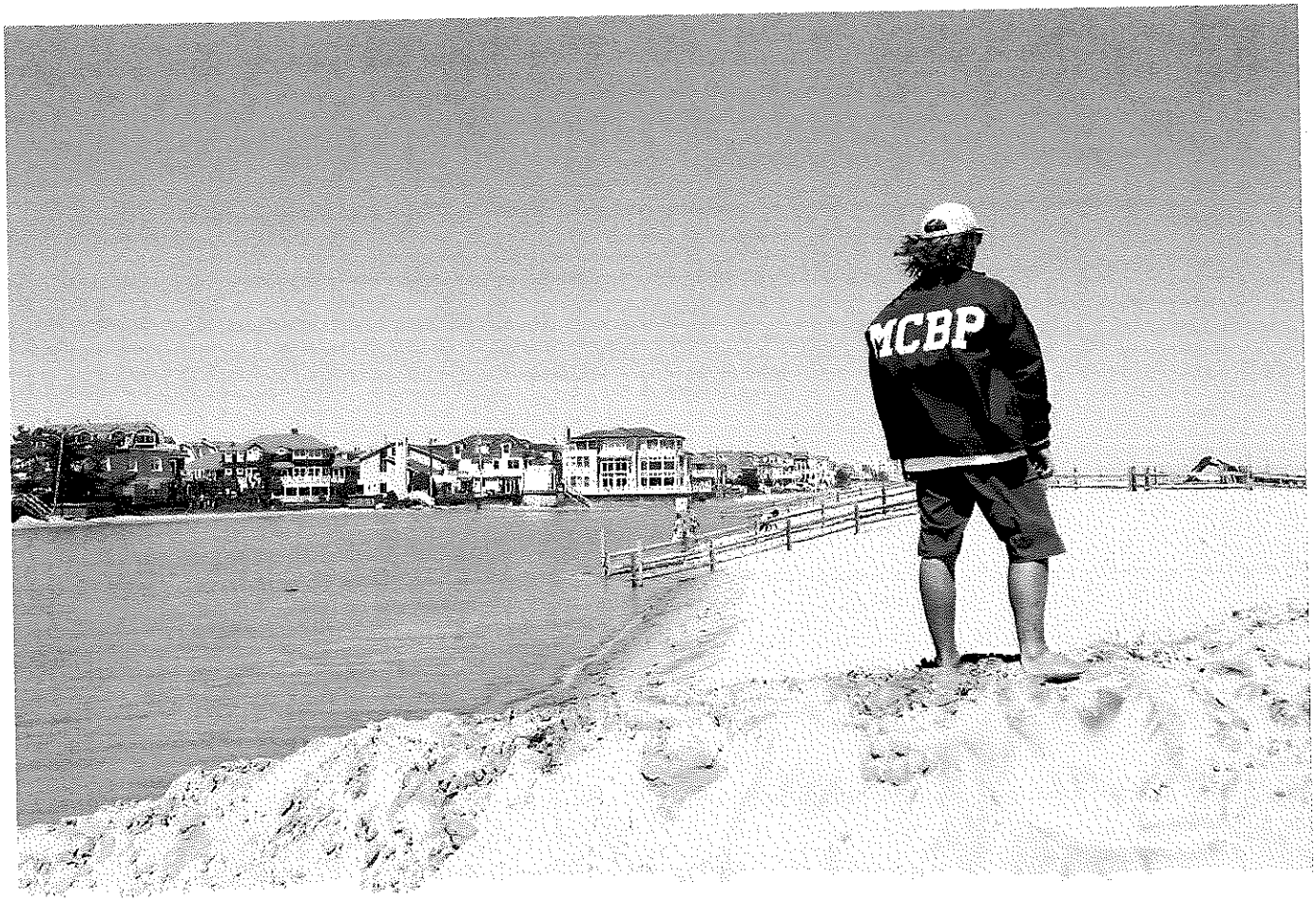
While the Corps and DEP had testified in federal court that conditions this severe would not occur and that minor ponding would percolate within 24-36 hours, these prognostications proved false.[19] In the days that followed the July 23, 2017 rainfall, ponding remained between the dunes and the bulkheads through the portion of the Project Area where construction had occurred.[20] On July 28, 2017, ponded water from the prior rain had still not fully percolated into the ground.[21]

Photographed by Commissioner Maury Blumberg (July 28, 2017 prior to rainfall)

19 Becker Aff.
20 *Id.*
21 *Id.*

Following the July 28, 2017 rainfall, ponding has reached depths over two feet and remained for nearly five days.[22]

[22] *Id.*



"Crowds protest dunes over public health concerns," Press of Atlantic City (July 31, 2017) (photographs from July 30, 2017, two days after rain) (http://www.pressofatlanticcity.com/pac/crowds-protest-margate-dunes-over-public-health-concerns/article_d375fcbe-7ace-5a15-856f-326a268c4cbe.html) (attached as Exhibit "C")

"Beach behind the dune turns into a lake following 8-hour rainfall," The Current (July 29, 2017) (http://www.shorenewstoday.com/downbeach/news/beach-behind-the-dune-turns-into-a-lake-following-/article_2b43392f-2fbc-5e85-8130-45158b26b0b1.html) (attached as Exhibit "D")

The City has commissioned aerial photography through the use of a drone. As of July 31, 2017, this photography revealed that three days after the rain, massive ponding remained across approximately the entire 18 blocks of the Project Area.[23]

As of August 1, 2017, the ponding remained, even as the DEP attempted to pump ponded water into the ocean at the risk of contaminating the ocean and closing more beaches.[24] Between August 1 and August 2, 2017, the DEP and WMI pumped stagnant storm water runoff that had been standing in the lakes at the foot of Margate's beaches for four to five days into the ocean. Still, the beach remains wet with ponding and water saturation between the bulkhead and dunes in the Project Area.

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23 Becker Aff.

24 *Id.*

Photographed by City Engineer Edward Walberg, P.E. (August 2, 2017)

Charles R. Dutill, II, P.E. is a Professional Engineer who has been licensed to practice since 1982. He is licensed in New Jersey and has 38 years of experience specializing in civil and environmental engineering, as well as in hydrology.[25]

On July 31, 2017 and August 1, 2017, the City performed water quality testing on the ponded water between the dunes and bulkheads in the Project Area, specifically at Huntingdon, Delevan, and Argyle Avenues (the "**Testing**").[26] On August 2, 2017, he reviewed the Testing results.[27]

The DEP's bathing water quality standards require beach closures 104 enterococci per 100 milliliters of sample.[28]

The Testing revealed that the ponded water in Margate at Huntingdon Avenue ranged from approximately four to 20 times the allowable limit. While the readings at two other locations, Argyle and Delevan Avenues, were within allowable tolerances, the readings at Huntingdon, the extent to which water has been ponding on the beach and the health and safety hazards associated with standing water that is warm and stagnant require immediate action.[29]

This ponded water is not safe for human contact or ingestion. Adults who ingest this water will likely get sick, and adults who walk in this water with open wounds will be prone to infection. In general, those most at risk include the young, the elderly and those with compromised immune systems. Children are even more prone to both health issues, as they are more likely to ingest the water as they lay, sit and swim in the water.[30]

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25 Dutill Affidavit, attached as Exhibit "E."
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.*

The problems now viewable in Margate, and the health and safety hazards associated with them, are among the concerns I expressed when I previously testified on these subjects.[31] Dumping this water into the ocean will likely lead to higher levels of ocean contamination at some locations, and could result in additional beach closures.[32]

31 *Id.*
32 *Id.*

The DEP voiced these concerns to the Corps. On September 22, 2014, William Dixon, DEP Manager, Bureau of Coastal Engineering, wrote to Frank Master, Corps Chief, Civil Works Program Branch, as follows: "I am writing to you regarding the [Project]. The Bureau of Coastal Engineering is requesting the Corps evaluate if the proposed [Project] will increase stormwater elevations landward of the proposed dune and [Project] limit, specifically within the City of Margate...The [DE}] will not assume any responsibility or liability for increased stormwater elevations due to the [Project]. If the [Project] will increase stormwater elevations, we request that the Corps design and construct, during initial construction, a storm water management system that will alleviate any increase in stormwater elevations landward of the dune and [Project] limit. As you know, this [Project] is out for advertisement, and as such prompt review is required...". This letter is attached as Exhibit "F."

On October 24, 2014, four days before Project bids were scheduled to be opened, Kenneth Goldberg, Corps Chief, Programs and Project Management Branch, responded to Mr. Dixon, stating: "Our rainfall runoff modeling of multiple rain events, including a number of extreme events, shows that there is ***no increase*** in water surface over the existing conditions on any of the streets adjacent to the beaches." (emphasis added). This letter is attached as Exhibit "G." Interestingly, Mr. Goldberg ignored Mr. Dixon's request to assess storm water elevation from the dune landward, focusing only on the street and not the beach.

Residents and visitors are therefore at imminent risk of harm.[33] Those who must wade through these pools to get to the dunes and then the beach risk physical injury and disease. All of this is in addition to a danger that even a lay person can readily observe – the danger of small children drowning.[34] While the City continues to do everything it can to address these public

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33 Becker Aff.

34 *Id.*

safety concerns, it is clear that a long-term solution is required. The omnipresent specter of injury and disease in a heavily trafficked public beach is irreparable harm, as is the total degradation and loss of that invaluable natural resource.

The Project has therefore created a public nuisance that threatens the health and safety and Margate residents and visitors every day that it persists. The defendants must be immediately enjoined from continuing to use the DEP's easements to perpetuate, and even exacerbate, this public nuisance..

III. ARGUMENT

A. Standard

"Preliminary injunctions are ordinarily granted for the necessary protection of property and rights to or connected with property pending the final hearing, and for the purpose of preserving the status quo, in order that a decree on final hearing may be effective." *Bd. of Health of Pompton Lakes v. E.I. Du Pont De Nemours Powder Co.*, 79 N.J.Eq. 31, 32 (Ch. 1911). To issue a preliminary injunction, a court must consider four factors: "(1) whether an injunction is necessary to prevent irreparable harm; (2) whether the legal right underlying the applicant's claim is unsettled; (3) whether the applicant has made a preliminary showing of a reasonable probability of ultimate success on the merits; and (4) the relative hardship to the parties in granting or denying injunctive relief." *Rinaldo v. RLR Investment, LLC*, 904 A.2d 725, 731 (N.J. Super. Ct. A.D. 2006). An immediate temporary restraint may be issued on notice to the opposing parties or where there is a showing of immediate, irreparable harm. R. 4:52-1(a). Here, there is both.

B. The Project's Drainage Consequences Are Irreparably Harming Margate's Beaches And The Men, Women and Children That Enjoy Them.

The wholesale degradation of a cherished natural resources by the very agency charged with protecting it is irreparable harm. No amount of money can undo this affront to Margate's beaches, not can it compensate visitors and residents for the widespread exposure to health and safety hazards in addition to the loss of use of the beach. And rather than slowing down and taking a pause to judiciously consider and resolve an undeniable problem that already stretches half the City of Margate, the defendants press on. If not restrained immediately, the disaster being inflicted by the Defendants will span the entire City without regard to consequence and with no plan in place to resolve the underlying problem. Surely, if it were a private party doing this to Margate's beaches, the DEP would not hesitate to call the harm irreparable. That it is the DEP acting does not change the truth. A rose is still a rose, and multi-mile long cesspool threatening human health and safety is still a multi-mile long cesspool threatening human health and safety.

"Beaches are a unique resource and are irreplaceable." *Matthews v. Bay Head Improvement Assn.*, 471 A.2d 355, 364 (N.J. 1984). Because beaches are "unique and highly in demand, there is growing concern about the reduced availability to the public of its priceless beach areas." *Id.* (quoting *Lusardi v. Curtis Point Prop. Owners Ass'n*, 430 A.2d 881 (N.J. 1981)). The loss of the ability to use and enjoy a beach, even temporarily, is accordingly an irreparable injury. As the court aptly explained in *Rivera v. United States*, 910 F.Supp. 239, 241-43 (D.V.I. 1996):

> Plaintiffs' loss of enjoyment of a treasured natural resource is not a loss for which money may compensate. This loss is not an economic loss. The loss of the use of Buck Island [beach] is not a mere inconvenience that this Court should treat as *de minimis*. It is not a loss to which this Court can attach a monetary sum as being

> proper recompense. Plaintiffs have no adequate remedy at law. An injunction is the only means of redress for the wrong done to plaintiffs by National Park employees preventing them from enjoying the bathing and recreational activities at Buck Island [beach].

See also Atlanta School of Kayaking v. Douglasville-Douglas County Water and Sewer Authority, 981 F.Supp. 1469, 1474 (N.D. Ga. 1997) ("Unlike in cases where monetary damages may suffice to compensate an individual for a right foregone, each run down the Dog River that plaintiffs cannot take not only has a pecuniary impact in loss of revenue but a nonpecuniary impact as well – the lack of enjoyment of a peculiar natural resource. Restriction of this natural resource causes unique, nonpecuniary, irreparable harm to the plaintiffs.").

Though beaches are precious natural resources, there is perhaps no more valuable resource than human health and safety. When the very nuisance degrading property also substantially increases the risks to human health and safety, that is the very definition of irreparable harm. The DEP itself has so argued successfully. *DEP v. Boro Auto Wrecking Co., Inc.*, 2006 WL 3007394, at *5 (N.J. Super. Ct. A.D. 2006) (affirming issuance of injunctive relief permitting DEP to decontaminate junkyard property where DEP argued that property contained hazardous substances and contaminated soil that presented "a substantial likelihood of harm to the public."); *see also Somerset Air Service Inc. v. Twp. of Bedminster*, 2006 WL 861498, at *4 (N.J. Super. Ct. Somerset County April 4, 2006) (granting preliminary injunction because termination of medical helicopter service unit constituted irreparable harm, namely "the danger of increased mortality to potential users of the service, [which] is as irreparable a harm as any that can be imagined.").

There is no question that irreparable harm is occurring everyday on Margate's beaches. The beach is becoming increasingly inaccessible, and those who live in the area or who visit the

beach are increasingly exposed to dangerous pools of contaminated, standing water. This is dangerous for adults who traverse the lagoon to get to the beach, and for children who may play in that bacteria-ridden water. While the DEP previously argued in other litigation that there was no irreparable harm because the 'fantastical' consequences predicted by Margate and the Taxpayers were mere 'speculation,' there can be no denying what is visible to the naked eye on Margate's beaches. It is an unmitigated disaster for the entire Margate community, and it is dangerous.

Even if the images emanating from Margate every day in the press did not fit the very definition of irreparable harm, the public interest involved requires a finding that this prong of the preliminary injunction analysis has been met. *See Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 803 (3d Cir. 1989) ("As the Supreme Court has observed, parts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.").

C. The Interruption of Free Access To The Sea Is A Well-Settled Public Nuisance, As Is Margate's Right To Enjoin It.

The New Jersey Supreme Court has specifically relied on the principle "that the interruption of free access to the sea is a public nuisance...". *Matthews*, 471 A.2d at 364 (quotations omitted). Accordingly, Margate's right to abate this public nuisance is clear. This factor weighs in favor of an injunction.

D. Margate Has A Reasonable Probability Of Success On The Merits.

As a matter of fact, there can be no denying that the Project has transformed a beautiful beach into a dangerous, inaccessible storm water detention basin. As a matter of law, this is a clear public nuisance. Margate has a reasonable probability of success on the merits.

The "historical focus of public nuisance prosecutions included such behaviors as…the ***maintenance of a pond breeding malarial mosquitos…disseminating bad odors…and obstruction of a public highway or a navigable stream.***" *In re Lead Paint Litigation*, 924 A.2d 484, 495 (N.J. 2007) (emphasis added). Essential "to the concept of a public nuisance tort…[has been] the fact that it has historically been linked to the use of land by the one creating the nuisance." *Id.* "The link to land may arise either because the nuisance is on that person's land, as in a mosquito pond, or because an activity conducted on that land interferes with a right of the general public, as in a stream-polluting business." *Id.*

These centuries-old principles have been codified in the Restatement (Second) of Torts § 821B ("**§ 821B**"). *Id.* at 496. That section states:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
>
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

There are therefore three elements of a modern public nuisance claim: (1) a right of the general public; (2) an interference with it; and (3) the interference is unreasonable. Margate has established all three.

With respect the first element, the general public's right to the "use of a public bathing beach" is a right common to the general public. *In re Lead Paint Litigation*, 924 A.2d at 497

(quoting Restatement (Second) Torts § 821B, cmt. g); *see also Matthews*, 471 A.2d at 363-66 (discussing at length public's right to access and enjoy beaches). Accordingly, there is no question that the public's right to use and enjoy Margate's beaches is a right common to the general public within the scope of § 821B(1).

With respect to the second element, it is clear that the impact of the Project is interfering with the public's right to use and enjoy the beach. "An invasion of one's interest in the use and enjoyment of land resulting from another's interference with the flow of surface water may constitute a nuisance…". Restatement (Second) Torts § 833. Where the implicated land right is "a right common to all members of the public," like the right to use and enjoy the beach, the interference is a nuisance. *Id.* at cmt. a. Accordingly, Margate has established an interference.

As to the third element, whether an interference is "unreasonable" depends upon "such factors as the amount of harm caused, the foreseeability of the harm which results, the purpose or motive with which the possessor acted, and all other relevant matter." *Board of Ed. of Borough of Manasquan v. State Dept. of Transp.*, 351 A.2d 17, 20 (N.J. 1976) (quotations omitted).

Margate has established that the Defendants' interference with Margate's storm water management plan, and its resultant impact on public beaches, is unreasonable. With respect to § 821B(2)(a), the Defendants' conduct involves a significant interference with the public health, safety and comfort. With respect to § 821B(2)(c), these conditions persist for days at a time, and that condition will follow every rainfall ***over the next 50 years***. This interference is not only foreseeable, Margate has been telling the DEP and the Corps that this would happen for 20 years. In the Taxpayers' final pleading in Federal court, the Taxpayers even wrote: "Should the Court find that the Defendants have made the more compelling case [concerning drainage ramifications], it must be noted that, as in *Menges*, the Defendants 'have received a warning.' 67

A.2d at 361." The only parties who did not foresee exactly what has happened are the Corps and the DEP.

This unreasonable interference is akin to that enjoined in *Southampton Township v. Scott*, 91 N.J.Eq. 443 (Ch. 1920). In *Scott*, the Chancery Court restrained a landowner from plowing his land in a manner that impacted the town's drainage plan and caused flooding on public roads. More specifically, the township operated two roads adjacent to the defendant's property, digging ditches and gutters alongside the roads for drainage. *Id.* at 444. The defendant removed fences on his property and plowed his property to its outer boundary, causing dirt to accumulate in the drainage basins. *Id.* The defendant also built a driveway, creating a dam across one of the gutters and further obstructing storm water drainage flow. *Id.* "The result of these acts [had] been to interfere with the drainage of roads, and at times to cause the sides of the roads to be overflowed, and on one or two occasions the water covered the crown [of the road]." *Id.* at 445.

The court held that it was "obvious" that "the acts complained of constituted a public nuisance." *Id.* The court explained that "[t]he creation of the dangerous condition is sufficient; it is not necessary to wait until some travelers have actually sustained damage to person or property therefrom." *Id.* Thus, the creation of a dangerous condition that threatens "serious public injury" requires injunctive relief. *Id.* at 447; *see also Sheppard*, 617 A.2d at 668-69 (reversing trial court denial of permanent injunction enjoining municipality from permitting changes to drainage system to result in diversion of storm water onto plaintiffs' properties).

Widespread degradation of Margate's beaches alone is a clear public nuisance, and it has already occurred. The substantially increased risk to human health and safety caused by the Project is also a public nuisance, and the Court need not and should not wait for people to get sick or hurt to hold as much. The public nuisance tort was conceived precisely to address

dangerous, disgusting pools of bacteria-breeding, standing water like the one that thousands of people have been enduring across almost a mile of Margate beach for days at a time since the Project began. Margate is likely to prevail on the merits.

E. The Relative Hardship To Margate Absent An Injunction Is Greater Than The Hardship Upon The Defendants If An Injunction Issues.

Absent an injunction, the Project will cause 200-foot wide pools of water several feet deep to stretch the length of the beach in Margate when it rains and for days afterwards. This is not a prediction. It is a mere extrapolation of what has undeniably occurred at every location where the Project has been built. The beach will become increasingly unusable. People will become increasingly in danger of getting hurt or sick. As to these facts, there can be no legitimate debate.

The DEP will likely argue that the delay damages that it will have to pay WMI counsel against an injunction. This argument fails for two reasons. First, risk to human life and safety, particularly of the magnitude at issue, is weightier than whatever damages the DEP may have to pay. Second, the DEP cannot use its own decision to ignore decades of warning that exactly this result would ensue if the Project was constructed as designed. When a defendant's alleged harm is of its own making, it cannot tip the balance of the harms in the defendant's favor. *KOS Pharma., Inc. v. Andrx Corp.*, 369 F.3d 700, 728 (3d Cir. 2004) ("We have often recognized that the injury a defendant might suffer if an injunction were imposed may be discounted by the fact that the defendant brought the injury upon itself."); *Opticians Ass'n of Am. v. Ind. Opticians of Am.*, 920 F.2d 187, 197 (3d Cir. 1990) (reversing denial of injunction because, where harm appeared equal as to both parties, balance favored injunction where defendant "openly, intentionally, and illegally appropriated the Guild marks, despite being warned not to. By virtue

of this recalcitrant behavior, the [defendant] can hardly claim to be harmed, since it brought any and all difficulties occasioned by the issuance of an injunction upon itself.").

The DEP's claimed hardships should fall on deaf ears. In *Lou Menges Organization, Inc. v. North Jersey Quarry Co.*, the court denied a preliminary injunction based on predicted consequences of quarry operations but counseled that it "was perhaps unnecessary but precautious to remark that the alertness of the plaintiffs ought not to be ignored in any further litigation that may hereafter arise out of a realistic development of the general subject matter of this action." This Court should not permit the DEP to escape Margate's repeated attempts to avoid this very set of circumstances. As in *Menges*, "the defendant ha[d] received a warning." *Id.*

IV. CONCLUSION

The defendants' use of Margate's beach as a storage basin for contaminated storm water for days at a time whenever it rains threatens human health and safety and renders Margate's beaches increasingly unusable. This is a public nuisance. And it must be restrained.

KLEHR HARRISON HARVEY BRANZBURG LLP
Attorneys for Plaintiff

Dated: August 4, 2017

Jordan M. Rand, Esquire

CERTIFICATE OF SERVICE

I, Jordan M. Rand, hereby certify that on August 3, 2017, I caused a true and correct copy of the foregoing Brief in Support of Order to Show Cause and Supporting papers to be sent via overnight mail to:

New Jersey Department of Environmental Protection
c/o Office of the Attorney General
25 Market Street
Trenton, NJ 08625

Weeks Marine, Inc.
4 Commerce Drive
Cranford, NJ 07016

JORDAN M. RAND