

IMO RIVER LOOKOUT ASSOCIATES LLC
1000 Portside Drive, Edgewater, NJ

1275 RIVER ROAD ASSOCIATES LLC
1000 Portside Drive, Edgewater, NJ

FRED DAIBES, individually
1000 Portside Drive, Edgewater, NJ

and

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION

ADMINISTRATIVE CONSENT ORDER

NEA150001 – 0213-02-0003.2

The New Jersey Department of Environmental Protection (the “Department” or “NJDEP”) is authorized to enter into this Administrative Consent Order (“ACO”) pursuant to the authority vested in the Commissioner of the Department by N.J.S.A. 13:1D-1 et seq., the Waterfront Development Act, N.J.S.A. 12:5-1, et seq., the Coastal Zone Management Rules, N.J.A.C. 7:7-1.1 et seq., and duly delegated to the Assistant Commissioner, Compliance & Enforcement pursuant to N.J.S.A. 13:1B-4.

FINDINGS

1. 1275 River Road Associates LLC owns the five acre property located at 1275 River Road; block 22, lots 1 and 4 in Edgewater Township, Bergen County (the “Site”).
2. River Lookout Associates LLC owns and operates the Le Jardin restaurant at this property.
3. Fred Daibes is the sole owner of 1275 River Road Associates LLC and River Lookout Associates LLC. Mr. Daibes, 1275 River Road Associates LLC, and River Lookout Associates LLC are hereinafter referred to as “Respondents.”
4. This entire property is within the Hudson River Waterfront Area, as defined in N.J.A.C. 7:7-9-46, and is a Regulated Waterfront Area as defined in N.J.A.C. 7:7-2.3(a)(3). Further, the entirety of this property is covered by coastal bluffs, as defined at N.J.A.C. 7:7-9.29.
5. In May 2001, NJDEP representatives visited the Site and determined that Respondents had incurred two violations of New Jersey environmental regulations. First, NJDEP determined

that Respondents had filled, regraded, reshaped and terraced the upland slope on the Site without NJDEP approval, in violation of N.J.A.C. 7:7-2.4(d). Second, NJDEP determined that Respondents had deposited soil and rip-rap below the mean high water line on the Site in State-owned riparian land without NJDEP approval, in violation of N.J.A.C. 7:7-2.4(c)(1).

6. On July 12, 2001, NJDEP issued a Notice of Violation ("NOV") to Respondents for the two violations observed during the May 2001 site visit.
7. On July 31, 2001, NJDEP representatives visited the Site again. NJDEP representatives observed that the previous violations had not been corrected, and also observed a new violation of N.J.A.C. 7:7-2.4(d); Respondents had created a 7,650 square foot ("sf") paved parking lot adjacent to Le Jardin.
8. In December 2002, Respondents submitted a Waterfront Development Permit application prepared by Boswell Engineering to NJDEP, seeking approval to keep the parking lot, proposing to construct an eight-foot wide segment of the Hudson River Waterfront Walkway along the shoreline of the Site, and proposing to fill in 1,640 sf offshore of the Site in order to construct the Walkway.
9. In May 2003, NJDEP issued a Waterfront Development Permit to Mr. Daibes, authorizing Mr. Daibes to keep the parking lot and to fill in 1,640 sf of the riparian land offshore of the property, and requiring Mr. Daibes to:
 - a. Replant and restore the disturbed coastal bluffs
 - b. Construct the Walkway as detailed in the approved Site Plan
 - c. Create an 8,200 sf shallow water area to mitigate the loss of 1,640 sf of riparian land
10. In June 2005, the Bureau of Tidelands issued a Tidelands Lease to Mr. Daibes, allowing him to occupy the 1,640 sf of riparian land detailed above.
11. NJDEP representatives visited the Site in November 2007. Based upon this site visit, NJDEP issued a Field NOV to Respondents alleging the following: "Failure to comply with the approved permit and plans #2013-02-0003.2 issued on 5/14/03. Specifically, for the clearing/grading/filing/rip-rap wall construction on the formerly wooded slope behind the restaurant and parking lot. This activity was not approved and not depicted on the approved permit or plans."
12. On February 25 and March 10, 2008, NJDEP representatives conducted follow-up inspections.
13. These representatives observed that Respondents had failed to complete the three requirements of the May 2003 Permit, in violation of N.J.A.C. 7:7-1.5(b). These representatives further observed that Respondents had cleared vegetation and graded slopes on about 26,660 sf of coastal bluffs on the southern half of the Site. NJDEP alleges that Respondents also filled 1.23 acres of the Hudson River beyond the allowed 1,640 sf, in violation of N.J.A.C. 7:7-27.2(b) and (c)8. Additionally, it was observed that the previously open deck or patio areas of the restaurant building had been enclosed, expanding the restaurant by 1,800 square feet.

14. Respondents' continued occupancy of the State-owned riparian land constitutes discharge of fill material into the waters of the United States, as defined at 40 C.F.R. 230.3.
15. Respondents subsequently built a retaining wall, partially on the State-owned riparian land.
16. In April 2008, NJDEP issued another NOV to Mr. Daibes regarding violations alleged by NJDEP in the inspections on February 25, 2008 and March 10, 2008. Specifically, NJDEP alleged: (a) that approximately 1.23 acres of fill was deposited without authorization, (b) that the area filled was on unconveyed tidelands, and (c) that the previously open deck or patio areas of the restaurant building had been enclosed, expanding the restaurant by 1,800 square feet.
17. In May 2011, NJDEP issued an Administrative Order and Notice of Civil Administrative Penalty Assessment ("AONOCAPA") to Respondents, ordering Respondents to correct all violations at the Site and assessing a \$1,917,176 penalty.
18. Respondents submitted a timely hearing request denying the allegations of liability in the AONOCAPA. NJDEP granted the request and the matter was transferred to the Office of Administrative Law.
19. NJDEP and Respondents now enter into this ACO to resolve the violations alleged in these Findings, without any admission of fault or liability.

IT IS HEREBY ORDERED AND AGREED:

HUDSON RIVER WATERFRONT WALKWAY CONSTRUCTION

20. Within one-hundred and twenty (120) days of completion of the Public Participation Process detailed in Paragraph 42 below, Respondents shall submit a complete design proposal to NJDEP Bureau of Coastal & Land Use Compliance & Enforcement for review and approval, as follows:
 - a. The design proposal shall be for construction of a segment of the Hudson River Walkway on the landward side of the retaining wall at the Site, connecting the Walkway segments on the adjoining properties on either side of the Site, in accordance with N.J.S.A. 7:7-9.46. The Walkway shall be a minimum of eight feet wide, with benches, trash receptacles, landscaping and lighting as originally proposed and approved by Waterfront Development Permit 0213-02-0003.2. The walkway shall also include perpendicular access from River Road to the waterfront as originally proposed and approved.
 - b. The design proposal shall include a plan to remove fill from State-owned riparian land waterward of the retaining wall, and to restore this area to tidal mudflats, except that fill necessary to stabilize the base of the retaining wall may be permitted to remain, subject to NJDEP approval of the design proposal.
21. NJDEP's approval of the design proposal referenced in paragraph 20 shall constitute NJDEP's approval of a Water Quality Certificate, under section 401 of the federal Clean Water Act, 33 U.S.C. § 1341, and N.J.A.C. 7:7-1.5. NJDEP approval of the design proposal

shall also constitute NJDEP determination that the proposed activity complies with the enforceable policies of New Jersey's approved coastal zone management program and that such activity will be conducted in a manner consistent with the program, as may be required by Section 307 of the federal Coastal Zone Management Act and 16 U.S.C. 1456(3)(A).

22. Within ninety (90) days of approval of the design proposal by the Bureau of Coastal & Land Use Compliance & Enforcement, Respondents shall submit complete applications for all required State and Federal permits and approvals including, but not necessarily limited to, Soil Erosion and Sediment Control, any local approvals that may be necessary, and required Tidelands Conveyances. The application to the New Jersey Tidelands Resource Council ("TRC") shall be for:
 - a. Approval of Respondents' occupation of State-owned riparian land since November 2007.
 - b. Approval of Respondents' occupation of the State-owned riparian land that Respondents will occupy under the project proposed in paragraph 20 above.
23. Within sixty (60) days of TRC's approval of the applications submitted in Paragraph 22, above, and after all Federal, State and local permits and approvals necessary to construct the project as described in Paragraph 20 are obtained, Respondents shall by appropriate instrument convey in favor of NJDEP a public access easement and conservation restriction to be recorded with the deed for the property within 30 days of all approvals referenced in this Paragraph. Said instrument shall encompass a minimum of thirty feet from the waterward face of the retaining wall and shall provide for unrestricted public access along the walkways and the perpetual maintenance of the walkway and improvements by Respondents or their successor in interest. Such conveyance shall be in a standard form provided by NJDEP or in an alternate form specifically approved by NJDEP. A draft of the conveyance shall be submitted to NJDEP for review and approval prior to recording. The conveyance may permit a crossing of the easement for a subsequent development, provided such crossing does not unduly impede public access along the walkway, and is subject to prior approval of NJDEP in the form of a Waterfront Development Permit.
24. Respondents shall make timely and complete submissions of all information requested by NJDEP or the Tidelands Resource Council in connection with the submissions detailed in paragraphs 20 and 22.
25. Upon approval of the applications detailed in paragraphs 20 and 22, and after all Federal, State and local permits and approvals necessary to construct the project are obtained, Respondents shall, within one year of any final approval, complete removal of fill as detailed in paragraph 20b. and construction of the Walkway segment as approved pursuant to paragraph 20a. Also, within 90 days of the approval of the applications detailed in paragraphs 20 and 22, Respondents shall submit a mitigation proposal in regard to any fill material necessary to stabilize the base of the retaining wall referenced in paragraph 20b. The mitigation proposal shall comply with the "Requirements for intertidal and subtidal shallows and tidal water mitigation" at N.J.A.C. 7:7-17.11.
26. Any future development at 1275 River Road in Edgewater, or the riparian land offshore of that property, must comport exactly with the terms of this ACO and with approvals issued by

NJDEP and the Tidelands Resource Council following appropriate application by Respondents.

SUPPLEMENTAL ENVIRONMENTAL PROJECT

27. Respondents may submit a proposal to further off-set the assessed penalty below, by proposing and completing a Supplemental Environmental Project ("SEP") that involves the restoration or construction of an off-site section of the Hudson River Waterfront Walkway, that is not otherwise required by the Department as a result of an existing easement or as a condition of a permit. Any such proposal must be submitted within one year of this ACO becoming final and shall include the following:
- a. Name and contact information of personnel responsible for implementing the SEP
 - b. Identification of all persons/entities who will make application for any required permits and authorizations
 - c. Project description and location(s)
 - d. projected start date
 - e. projected completion date (not to exceed 3 years)
 - f. description of project deliverables
 - g. project milestones and timeline for reaching each milestone
 - h. timeline for submitting interim and final verification of project milestones to DEP for review
 - i. detail of projected costs
 - j. a summary of project benefits
 - k. identification of parties that benefit from the project
 - l. copy of any agreement/s reached with any other property owner/s who possess legal authority to provide access to lands to be used in completion of the SEP project
28. Upon approval of the SEP by the Department, Respondent may satisfy up to \$718,941 of the penalty amount by satisfactorily completing the SEP approved by the Department in accordance with paragraph 27. Respondent agrees to complete the SEP in its entirety, regardless of whether the final costs of the SEP exceed the original projected costs. Credits against the penalty shall be on a dollar-for-dollar basis, not to exceed \$718,941. By signing this ACO Respondent certifies that it has not commenced performance of the SEP.
29. By signing this ACO, Respondent certifies that the SEP is not required by any federal, state, or local law or regulation, nor is it required by any other agreement, grant or as injunctive relief in this or any other case.
30. Respondent acknowledges that it is solely responsible for completing the SEP project. Any transfer of funds, tasks, or otherwise by Respondent to a third party, shall not relieve Respondent of its responsibility to complete the SEP as described in this ACO.
31. In the event Respondent publicizes the SEP or the SEP results, Respondent shall state that the project is part of a settlement of an enforcement action.
32. Respondent shall notify the Department once the SEP is completed and shall include with that notification an accounting of the actual expenditures made in carrying out the SEP. In

the event that Respondent fails to comply with any of the terms or provisions of this ACO relating to the performance of the approved SEP and/or to the extent that the actual expenditures for the SEP do not equal the amount of credit described in Paragraph 28, above, Respondent shall be liable for stipulated penalties according to the provisions set forth below:

- i. If Respondent fails to complete the SEP in accordance with the proposal approved by the Department in Paragraph 28, above, the Respondent shall pay as stipulated penalty the remainder of the SEP value plus 25% of the estimated SEP cost.
- ii. If the SEP is completed in accordance with the provisions outlined above, but the Respondent spent less than \$718,941, to complete the SEP, Respondent shall pay the difference between \$718,941 and the amount spent to complete the SEP to the "Treasurer, State of New Jersey" within 60 days of SEP completion.

PENALTY PAYMENT

33. Respondents shall pay a penalty of \$958,588, subject to reduction by \$718,941 in accordance with paragraphs 27, 28 and 32 above. To that end:

- i. \$239,647 of the penalty shall be paid as follows: (1) an initial payment of \$119,823.50 within thirty (30) days after notification that this ACO has become final at the conclusion of the public participation process pursuant to paragraph 41, below; and (2) a second payment of \$119,823.50 within 90 days of this ACO becoming final. Payment shall be made by a cashier's or certified check payable to the "Treasurer, State of New Jersey" and shall be submitted to the address on the enclosed payment invoice.
- ii. In the event that Respondents fail to submit a SEP proposal within one year, as described in paragraph 27, Respondents shall pay the remainder of the penalty (\$718,941) in three (3) installments of \$239,647 each, the first installment of which shall be due within 30 days of DEP notification to Respondents that they have failed to meet the deadline required by paragraph 27. The second installment shall be due 120 days after DEP notification, and the third and final installment shall be paid 210 days after DEP notification.

34. If Respondents fail to complete the requirements of Paragraphs 20 through 25 of this ACO, and/or fail to pay the civil penalties described in Paragraph 33, Respondents shall be in default of this ACO, and the Department may thereafter take action to collect the full amount of civil penalties assessed in the May 2011 AONOCAPA, along with any other appropriate relief, by instituting civil proceedings in Superior Court pursuant to R. 4:67 and R. 4:70 of the New Jersey Rules of Court.

RESOLUTION OF AONOCAPA

35. NJDEP and Respondents agree that this ACO resolves all issues raised by NJDEP in the May 2011 AONOCAPA, subject to the public participation process pursuant to paragraph 41, below.

STIPULATED PENALTIES

36. In the event that Respondents fail to act in accordance with the terms and conditions of this ACO, stipulated penalties shall be paid to NJDEP by Respondents as set forth below. Each deadline or schedule not complied with shall be considered a separate violation. Payment of stipulated penalties shall be made according to the following schedule:

Calendar Days After Due Date	Stipulated Penalties
1 - 7	\$100.00 per calendar day
8 - 14	\$200.00 per calendar day
15 over	\$500.00 per calendar day

37. Any stipulated penalty for failure to comply with this ACO shall be due and payable thirty (30) calendar days following receipt of a written demand from NJDEP. Payment of stipulated penalties shall be made by a cashier's or certified check payable to the "Treasurer, State of New Jersey" and shall be submitted to the address on the enclosed payment invoice provided in the demand letter.
38. For the failure to timely pay stipulated penalties pursuant to the preceding paragraphs, NJDEP may take action to collect same, including, but not limited to, instituting civil proceedings to collect such penalties pursuant to R. 4:67 and R. 4:70 or assess civil administrative penalties for violations of this ACO.
39. The payment of stipulated fees does not alter Respondents' responsibility to complete all the requirements of this ACO.

FORCE MAJEURE

40. If any event occurs which Respondents believe will or may cause delay in the achievement of any provision of this ACO, Respondents must notify NJDEP in writing to the contact address below within seven (7) calendar days of the delay or anticipated delay, as appropriate, referencing this paragraph and describing the anticipated length of the delay, the precise cause or causes of the delay, any measures taken or to be taken to minimize or prevent the delay, and the time required to take any such measure to prevent or minimize any such delay. All necessary actions shall be taken to prevent or minimize any such delay.
41. If NJDEP finds (a) that the notice requirements of the preceding paragraph have been fully complied with and; (b) that any delay or anticipated delay has been or will be caused by fire, flood, riot, strike, any restrictions imposed in any Federal, State or local approval required to complete the activities required, or any act of God, act of War including Terrorism, or any unforeseen work stoppage or construction delay, or other circumstances beyond the control of Respondents; and (c) that all necessary actions to prevent or minimize the delay have been taken, NJDEP shall extend the time for performance hereunder for a period no longer than the delay resulting from such circumstances. If NJDEP determines that the above notice requirements of the preceding paragraph have not been complied with, or if the event causing the delay is not beyond the control of Respondents, or that all necessary actions to prevent or minimize the delay have not been taken, failure to comply with the provisions of this ACO shall constitute a violation of the requirements of the ACO. The burden of proving that any delay is caused by circumstances beyond the control of Respondents and that all necessary actions were taken to prevent or minimize the delay shall rest with Respondents. Increase in the cost or expenses incurred in fulfilling the requirements of this ACO shall not be a basis

for an extension of time. Delay in an interim requirement shall not automatically justify or excuse delay in the attainment of subsequent requirements.

PUBLIC PARTICIPATION PROCESS

42. Notice of this ACO shall be published in the DEP Bulletin and will be subject to a thirty (30) day public comment period pursuant to N.J.A.C. 7:7-28.4(b)(2). Notice of this settlement will be published following signature by all parties.
- i. If there are no changes to the settlement pursuant to this public participation process, then NJDEP shall notify Respondents via certified mail, and the public participation process shall conclude and the ACO shall become final upon Respondent's receipt of certified mail notice from NJDEP that there are no changes proposed to the ACO.
 - ii. If NJDEP proposes to make changes to this ACO pursuant to this public participation process, then NJDEP shall notify Respondents of the proposed change by certified mail. If NJDEP's proposed changes are agreed to by Respondents, then this ACO, as modified in writing, shall become final and the public participation process shall conclude upon signature of the modified ACO by all parties;
 - iii. If NJDEP proposes to make changes to this ACO pursuant to the public participation process pursuant to paragraph 42b, and such changes are not agreed to within a reasonable period of time, not to exceed thirty (30) days after Respondents receive notice of the NJDEP's proposed changes by certified mail, this ACO shall become null and void, and Respondent's shall have the right to request a hearing regarding the 2012 AONOCAPA.

BANKRUPTCY

43. If any of Respondents initiate a bankruptcy proceeding before completing any requirement of this ACO, then:
- a) The completion of Paragraphs 20 through 25 of this agreement constitute sufficient cause for relief from the automatic stay provisions of 11 U.S.C. 362(a), and
 - b) All still-outstanding payments under Paragraph 36 shall be treated as administrative and/or priority claims against the Debtor.

RESERVATION OF RIGHTS

44. NJDEP reserves the right to require Respondents to take additional measures should NJDEP determine that such measures are necessary to protect human health and/or the environment. Nothing in this ACO constitutes a waiver of any statutory right or enforcement power of NJDEP to require such additional measures should NJDEP determine that they are necessary, nor a waiver of any defenses thereto.

45. Nothing in this ACO shall preclude NJDEP from taking immediate action or seeking injunctive relief to protect the public health, safety, or welfare or from taking enforcement action for matters not set forth in the Findings referenced in this ACO.

GENERAL PROVISIONS

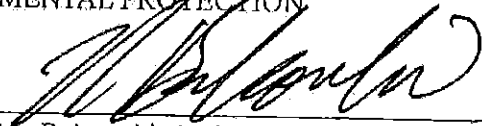
46. This ACO represents the complete and integrated agreement of the parties, and shall inure to the benefit of the State of New Jersey, NJDEP, and their divisions, agencies and respective successors, and shall bind the Signatory(ies) and their respective agents, successors, assignees and any trustee in bankruptcy or receiver appointed pursuant to a proceeding in law or equity.
47. This ACO shall not relieve Respondents from obtaining and complying with all applicable federal, state and local permits as well as all applicable statutes, codes, rules, regulations and orders, including but not limited to the statutes and regulations cited herein.
48. All obligations of this ACO are imposed pursuant to the police powers of the State of New Jersey for the enforcement of the law and the protection of public health, safety, welfare and the environment.
49. The Signatories hereby agree to comply with this ACO, which shall be fully enforceable as a final agency order in the Superior Court of New Jersey, under R. 4:67 and R. 4:70. The Signatories agree not to contest the terms or conditions of this ACO in any action to enforce its provisions.
50. If any provision of this ACO is found to be invalid or unenforceable, the remainder of this ACO shall not be affected thereby and each provision of this ACO shall be valid and enforced to the fullest extent permitted by law. NJDEP does however retain the right to terminate the remainder of this ACO if after such finding, it determines that the remaining ACO does not serve the purpose for it was intended.
51. No modification or waiver of this ACO shall be valid except as authorized by NJDEP in writing.
52. This ACO shall be governed and interpreted under the laws of the State of New Jersey.
53. This ACO may be executed in counterparts, each of which shall be deemed an original and all of which shall constitute one and the same instrument, and shall become effective when counterparts have been signed by each of the parties and delivered to the other parties; it being understood that all Parties need not sign the same counterparts. The exchange of copies of this ACO and of signature pages by facsimile transmission (whether directly from one facsimile device to another by means of a dial-up connection or whether mediated by the worldwide web), by electronic mail in "portable document format" (".pdf") form, or by any other electronic means intended to preserve the original graphic and pictorial appearance of a document, or by combination of such means, shall constitute effective execution and delivery of this ACO as to the parties and may be used in lieu of the original ACO for all purposes. Signatures of the parties transmitted by facsimile shall be deemed to be their original signatures for all purposes.

54. The undersigned warrant that they are authorized to sign this ACO and bind themselves, their successors, assignees, and/or trustees to comply with the terms and provisions of this ACO. This ACO shall become final upon signature of both parties, subject to the public participation process in paragraph 42, above.

FOR NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Dated:

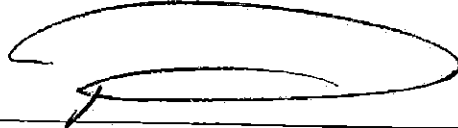
06/13/17


Ray Bukowski, Assistant Commissioner
Compliance & Enforcement

FOR RIVER LOOKOUT ASSOCIATES LLC

Dated:

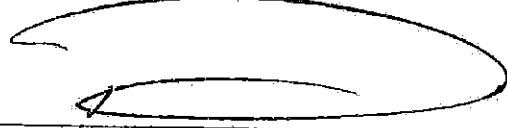
April 3, 2017


Fred Daibes
Managing Member

FOR 1275 RIVER ROAD ASSOCIATES LLC

Dated:

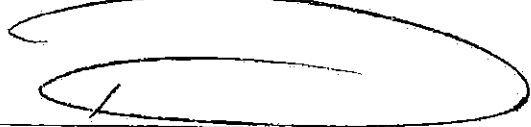
April 3, 2017


Fred Daibes
Managing Member

FOR FRED DAIBES

Dated:

April 3, 2017


Fred Daibes