State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

BOB MARTIN
Commissioner

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, COASTAL AND LAND USE COMPLIANCE AND ENFORCEMENT,	ADMINISTRATIVE ACTION FINAL DECISION OAL DKT NO. ECE-LU 11221-11 AGENCY REF. NO. PEA 100002-1107-10-0006.1

Petitioner,

v.

JOHN BLEIMAIER AND MARINA PUSHKAREVA,

Respondents.

This Order addresses the appeal by Respondents John Bleimaier and Marina Pushkareva of a May 4, 2011, Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) issued by the New Jersey Department of Environmental Protection (DEP)[1] directing restoration and assessing a civil administrative penalty of $16,000 for filling and grading within a delineated flood hazard area without a permit in violation of Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq. (FHACA) and implementing rules, N.J.A.C. 7:13-2.1(a) and N.J.A.C. 7:13-2.4(a)1 on property located in Lawrence Township, Mercer County.[2] Respondents claim that

[1]The caption and party references have been changed throughout this Final Decision to reflect that DEP is the Petitioner and John Bleimaier and Marina Pushkareva are the Respondents.

[2]The AONOCAPA also alleged that Respondents filled a freshwater wetlands transition area without a permit, in violation of N.J.A.C. 7:7A-2.6(a). The Department did not assess a separate penalty for this violation and the record does not contain any technical findings concerning freshwater wetlands, e.g., discussion of soil borings, hydrophytic plants and hydric soils. The Department's brief in support of its motion for summary decision stated that the remedy

the Department failed to meet its burden of proof to show the alleged quantity of fill had been placed on the property because the Department did not produce evidence of a change in the topography of the property. Respondents also claim that the filling they undertook was to repair flood damage to their property and that action does not require a permit.

FACTS AND PROCEDURAL BACKGROUND

Respondents own a residential property at 3612 Princeton Pike, Block 5101, Lot 30, in Lawrence Township, Mercer County (the Property). The Property adjoins the natural channel of Shipetaukin Creek in Lawrence Township and lies entirely within the mapped flood hazard area on the Department-adopted flood hazard area map for Shipetaukin Creek. On April 8, 2010, then-Lawrence Township Engineer, James Parvesse, received a telephone report of dump trucks entering the Property. Mr. Parvesse went to the Property and observed multiple piles of fill around the front, sides, and back of the residence, and a layer of fill covering a large area in the back yard, facing a wooded area. He also observed an idle bulldozer, a worker cutting trees, and two double-axle dump trucks delivering fill to the area at the back of the residence. Mr. Parvesse estimated the capacity of the dump trucks to be approximately 10 cubic yards each and the depth of fill already spread to be approximately 12 inches. Mr. Parvesse took four digital photographs that showed the fill piles and the newly spread fill, the dump truck unloading fill, and the worker cutting trees. Mr. Parvesse spoke to the resident at the Property, who said that she was the owner's daughter and that she had ordered the fill to be placed. Mr. Parvesse informed the owner's daughter that a permit was required to conduct the fill activity. She stated that she did not know she needed a permit, and agreed to stop the fill activity at once. On April 14, 2010, Mr. Parvesse notified the Lawrence

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sought for the flood hazard violation will also address the freshwater wetlands violation and that claim would not be further addressed. This Final Decision therefore does not address the freshwater wetlands allegation.

Township Police Department and DEP of the activity on the Property. DEP staff inspected the Property on April 29, 2010 and took photographs. On June 16, 2010, DEP issued a Notice of Violation to Respondents, citing them with unauthorized filling and directing them to obtain a permit and/or to submit a restoration plan for the Property.

DEP staff communicated with Respondents about the violations several times between June 16, 2010, and November 30, 2010. On November 30, 2010, Bureau of Coastal and Land Use Compliance and Enforcement Senior Environmental Specialist, Michael Palmquist, inspected the Property. Mr. Palmquist observed an area of fill at the back of the house that he determined, using a measuring wheel, was approximately 180 feet by 180 feet. He estimated the depth of fill to be approximately 12 inches and calculated the volume of fill to be 1,166 cubic yards.

On March 17, 2011, Mr. Palmquist met with Respondents at the site. At this meeting and in subsequent communications, Mr. Palmquist explained to Respondents that they must either obtain a permit for placing the fill in a flood hazard area, or remove the fill and restore the site. Mr. Palmquist also recommended to Respondents that they allow the Department to conduct testing on the Property to determine the amount of fill required to be removed. Respondents declined to do so, claiming that DEP did not have jurisdiction over their activity. They did not submit a restoration plan or apply for a permit for the fill.

On May 4, 2011, DEP issued the AONOCAPA to Respondents, assessing a penalty of $16,000 for the FHACA violation, and directing Respondents to submit a restoration plan and to implement that plan once approved by DEP.

On June 1, 2011, Petitioners filed their request for an administrative hearing, which DEP granted on June 23, 2011. The matter was referred to the Office of Administrative Law on September 21, 2011 and assigned to Administrative Law Judge (ALJ) Beatrice S. Tylutki. ALJ

Tylutki issued a prehearing order on December 8, 2011, outlining the issues to be resolved in the matter.

On January 19, 2012, Respondents filed a motion for summary decision, arguing that DEP failed to meet its burden of proof to show that the alleged quantity of fill was placed on the Property.[3] DEP cross-moved for summary decision on February 9, 2012, and Respondents filed a reply. In its motion, DEP argued that there was no factual dispute that Respondents placed and graded fill within a flood hazard area on the Property, and that the assessed penalties were reasonable under the statute. While the motions were pending, the parties agreed in June 2013 to attempt to settle the matter through DEP's alternative dispute resolution program. The parties met on June 27, 2013, and again on January 23, 2014, but the effort was not successful and the matter was returned to OAL.

In March 2014, while the cross-motions were pending, Respondents submitted a 1997 survey prepared by Princeton Junction Engineering, P.C., and a document entitled "Site Investigation Report for John K. Bleimaier, Lot-30, Block-5101, 3612 Princeton Pike, Lawrence Township, Mercer County, NJ" signed by Peter R. Eshewsky, and dated October 18, 2013, which they argued supported their claim that elevations on the Property had not changed as a result of their filling. DEP responded to the submission on April 2, 2014, and Respondents further replied on April 7, 2014.

ALJ Jeff Masin was assigned to the matter on March 14, 2016, to replace ALJ Tylutki, who was unable to decide the cross-motions for summary decision due to prolonged illness. ALJ Masin issued an Initial Decision on April 26, 2016.

[3]The Initial Decision states that Respondents' motion was filed January 19, 2012, although the papers indicate a date of December 30, 2011.

After a detailed review of the facts, including the observations of Mr. Parvesse and Mr. Palmquist, the ALJ found, based on the undisputed credible evidence, that fill was deposited on the Property on April 8, 2010 in an amount that exceeded that which could have been placed without a permit. The ALJ further found that there was no dispute as to any material fact concerning Respondents' liability for violating the FHACA, and granted DEP's motion for summary decision as to liability. The ALJ found that DEP met its burden of proof regarding the amount of fill placed on the Property, and further concluded that the penalty amount was authorized by amendments to the FHACA, see N.J.S.A. 58:16A-63(d), adopted through P. L. 2007, c. 246, the Environmental Enforcement Enhancement Act.

Respondents filed exceptions to the Initial Decision on May 8, 2016, arguing that (1) they did not receive adequate due process because the matter was pending for so long in OAL and because ALJ Masin, who was reassigned to decide the cross-motions for summary decision, was not sufficiently familiar with the record in the matter, (2) DEP's conduct in prosecuting the matter did not meet the "highest standards" in that DEP did not join the trucking company that delivered fill as a named respondent in the AONOCAPA and because a DEP supervisor showed bias toward Respondents by pursuing the action; (3) DEP did not meet its burden of proof to show the alleged quantity of fill on the Property, (4) the October 18, 2013, site investigation report and 1997 survey they submitted to DEP in March 2014 are dispositive of the matter, and (5) because their actions were taken to restore flood damaged property, DEP's response was inconsistent with its own post-Hurricane Sandy policies governing flood hazard areas. DEP submitted a letter on May 2, 2016 requesting that the Initial Decision be adopted in full. DEP did not otherwise reply to Respondents' exceptions. As explained below, I ADOPT the Initial Decision.

LEGAL DISCUSSION

The issues under review are whether Respondents placed fill in a flood hazard area on the Property without a permit in violation of the FHACA and implementing rules, specifically, N.J.A.C. 7:13-2.1(a) and -2.4(a)(1), and whether DEP the penalty assessed was appropriate for the violation. I find that the ALJ correctly concluded that DEP met its burden of proof in showing that Respondents placed fill on the property in violation of the FHACA, and that DEP reasonably assessed the penalty of $16,000 for the violations.

I further find that the ALJ correctly decided the matter on cross-motions for summary decision pursuant to OAL's Uniform Administrative Procedure Rules at N.J.A.C. 1:1-12.5(b). That rule states that summary decision may be entered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Summary decision in administrative proceedings parallels summary judgment in the courts. Rotelle v. NJDEP, 92 N.J.A.R.2d (EPE) 107 February 24, 1992, Initial Decision, April 13, 1992, Final Agency Decision. Summary judgment is

> designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.

[Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954).]

Administrative disputes may be summarily decided when they do not involve disputed facts. In re Xanadu Project at Meadowlands Complex, 415 N.J. Super. 179, 203 (App. Div. 2010). In a motion for summary judgment, the moving party has the burden of showing that there are no material facts in dispute. Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995).

Here, both parties claimed there were no material facts in dispute. Respondents do not deny that fill was placed on the property; rather, they argue that DEP failed to prove that the quantity of fill placed exceeded the amount of five cubic yards that can be placed pursuant to the permit-by-rule at N.J.A.C. 7:13-7.2(b)3 because DEP did not introduce any evidence of topography before and after the filling. They also claimed that the filling they undertook is acceptable flood mitigation under the FHACA.

Respondents' Liability under the Flood Hazard Area Control Act

Under the FHACA, DEP regulates land use and development in flood-prone areas "in the interest of the safety, health, and general welfare of the people of the State." DEP is authorized to delineate floodways to preserve the flood carrying capacity of natural streams, N.J.S.A. 58:16A-52, and to regulate the use of land in any delineated floodway. N.J.S.A. 58:16A-55.

DEP has adopted rules intended to "minimize damage to life and property from flooding caused by development within fluvial and tidal flood hazard areas, to preserve the quality of surface waters, and to protect wildlife and vegetation that exist within and depend upon such areas for sustenance and habitat." N.J.A.C. 7:13-1.1(c). The purpose and scope provisions of the rules note that development within flood hazard areas without proper controls increases the intensity and frequency of flooding by reducing flood storage, increasing stormwater runoff and obstructing the movement of floodwaters. N.J.A.C. 7:13-1.1(c)1. Further, the indiscriminate disturbance of vegetation adjacent to surface waters destabilizes the banks of channels and other surface waters, leading to increased erosion and sedimentation that exacerbates the intensity and frequency of flooding and reduced filtration of stormwater runoff. N.J.A.C. 7:13-1.1 (c)2.

Subject to certain conditions, property owners may place up to five cubic yards of fill in a flood hazard area under the permit-by-rule set forth at N.J.A.C. 7:13-7.2(b)3.[4] For fill in excess of five cubic yards, landowners must apply to DEP for either a general permit authorization, N.J.A.C. 7:13-8.1, or an individual permit, N.J.A.C. 7:13-9.1, depending on the project.

The certifications submitted by DEP established that the Property is situated in a delineated flood hazard area and that Respondents filled and graded the regulated area on the Property with an estimated 1,166 cubic yards of fill. DEP's witnesses observed active dumping of fill as well as newly-spread fill and deep tire marks through the new fill.

As the ALJ found, Respondents offered no certifications or affidavits in support of their motion for summary decision or in opposition to DEP's certifications. Under the Uniform Administrative Procedure Rules,

> Motions and answering papers shall be accompanied by all necessary supporting affidavits and briefs or supporting statements. All motions and answering papers shall be supported by affidavits for facts relied upon which are not of record or which are not the subject of official notice. Such affidavits shall set forth only facts which are admissible in evidence under N.J.A.C. 1:1-15, and to which affiants are competent to testify. Properly verified copies of all papers or parts of papers referred to in such affidavits may be annexed thereto.
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> [N.J.A.C. 1:1-12.4].

In support of their motion, Respondents included what they claimed to be photographs of a neighboring property and the "most recent photographs of the property," but these photographs were not supported by affidavit or certification. In March 2014, Respondents submitted the 1997 survey, supplemented by the more recent October 2013 site investigation, purporting to show that topography on the Property had not changed since the 1997 survey. Neither the 1997 survey nor the

[4] A regulated activity that meets the requirements of a permit-by-rule may be conducted without prior Department approval. N.J.A.C. 7:13-7.1(c).

2013 report was certified by the drafter, Peter R. Eshewsky, PLS, nor did Mr. Eshewsky certify as to his credentials.

The report states: "[i]t is the opinion of this office that current topographic conditions on the subject property are in general conformance with those depicted on the aforementioned [1997 survey]. Fill material introduced to the property since 1997 appears to have a diminimus affect [sic] on grading and drainage as observed on the property at the time of the site investigation." Respondents assert that the survey and report by Mr. Eshewsky are "uncontroverted topographic evidence" that no alteration of topography has occurred on the Property. Petitioners failed to provide any other form of authentication for these documents.

I concur with the ALJ that Respondents have failed to address or refute any of DEP's evidence showing that fill was placed on the property in 2010 in excess of that which would have been allowed without the need for a permit. Mr. Eshewsky's October 18, 2013 letter was not based on knowledge of fill placed on the property and in fact stated that any amount of additional fill between 1997 and 2013 "could not be determined in the field due to the period of time which has elapsed since the fill was introduced." Even assuming that the report and survey had been authenticated, they do not controvert DEP's visual and documentary evidence. Both Mr. Parvesse and Mr. Palmquist observed a depth of fill of approximately 12 inches behind the residence at the Property. Mr. Palmquist used this measurement and the dimensions of the property to determine the approximately 1,100 cubic yards of fill that had been deposited into the flood hazard area of Shipetaukin Creek. I therefore conclude that the ALJ correctly determined that DEP met its burden of proof to show that the fill placed on the Property exceeded the amount that would have been allowed without a permit, and that, in filling and grading the flood hazard area on the Property, the Respondents violated the FHACA. I ADOPT the ALJ's conclusion as to Respondents' liability.

Respondents claim in their exceptions that they were prejudiced by the lengthy delay in disposing of the matter and that the ALJ who heard the motions was not sufficiently familiar with the record. Delay in the matter was caused in part by the illness of the initially assigned ALJ; however, during the time the case was pending, the parties were engaged in settlement discussions as well as mediation at DEP. Further, the OAL rules permit the substitution of an ALJ in a matter, see N.J.A.C. 1:1-14.13(b) (1) and (2). Once it was determined that the initially assigned ALJ could not complete the case, it was promptly reassigned and the motions decided. My separate review of the record and the Initial Decision concludes that Respondents' claim is unsubstantiated. No further discussion is necessary on this point.

Respondents claim that DEP's January 24, 2013 Statement of Imminent Peril,[5] which allowed DEP to adopt emergency rules to address the need to repair, reconstruct, and elevate structures in flood hazard areas, is inconsistent with the position taken in this enforcement proceeding, is without merit. Neither the Statement of Imminent Peril nor the rules that followed allow for filling of the flood hazard area without a permit, as occurred on Respondents' Property. Moreover, the violation under review here predated Hurricane Sandy by more than two years. The Statement of Imminent Peril has no applicability to the facts of this case.

Respondents' claim of bias in their exceptions is by reference to the Memorandum of DEP's Peter Keledy, dated October 12, 2010, provided in discovery (DEP-039 to DEP-040) and a separate Memorandum from the Manager of Coastal and Land Use Enforcement to DEP Management (DEP-007 to DEP-008) requesting that the AONOCAPA be transferred to the Division of Law for assignment. The Keledy memorandum recites the discussion that took place during Mr. Keledy's inspection of the Property in advance of a meeting with Respondents to discuss the site conditions.

[5]The full reference is "Statement of Imminent Peril to Public Health, Safety and Welfare Mandating Adoption of Amendments to the Existing Flood Hazard Area Control Act Rules at N.J.A.C. 7:13 by Emergency Procedures."

The memorandum reports that the meeting concluded with no agreement as to restoration or pursuit of a permit to legalize the filling. The latter memorandum is merely the vehicle by which the case was transmitted from DEP to the Division of Law. There is no evidence of bias in either communication and I find, further, that the record fully supports the conclusions reached by the ALJ. I note, further, that Respondents are the Property owners and responsible for the fill that they made arrangements to have brought to the Property. The separate conduct of the commercial entity that delivered fill to the Property was not before the OAL and no further discussion is necessary here. As set forth in the discussion below on penalties, Respondents were assessed a minimal penalty for unintentional but foreseeable conduct and that penalty does not support a case of bias against the Respondents.

PENALTY DETERMINATION

The ALJ found that DEP's $16,000 penalty for the FHACA violations was proper based on the uncontroverted evidence of the amount of fill and application of DEP's penalty matrix. As discussed below, I ADOPT the ALJ's conclusion that the penalty was properly assessed.

The EEEA, enacted on January 4, 2008, modified the enforcement provisions of the FHACA. The EEEA authorized DEP to assess civil administrative penalties for violations of the FHACA, and increased the amount of penalties DEP could assess to up to $25,000 for each violation, for each day that the violation continues. N.J.S.A. 58:16A-63(d). The EEEA also authorized the DEP to require the restoration of the area which is the site of the violation. N.J.S.A. 58:16A-63(b)(4).

The EEEA directed DEP to adopt rules governing the range of civil administrative penalties based on the type, seriousness, duration of the violation, and the conduct of the violator, but also

provided that, prior to adoption of the rules DEP is authorized to assess penalties on a case-by-case basis up to a maximum of $25,000 per day for each violation based on these same criteria, i.e., type, seriousness, duration of the violation, and the conduct of the violator. N.J.S.A. 58:16A-63(d).

DEP assessed the penalty using the "FHACA Penalty Calculation for Conducting Regulated Activities without a Permit" as set forth in the AONOCAPA. DEP assigned points using the criteria set forth in the EEEA: "type," "conduct," and "seriousness." DEP assigned zero points for the type of violation, i.e., conducting a regulated activity without a permit. DEP assessed 2 points for "moderate" conduct, finding that the activity was an "unintentional but foreseeable act or omission." DEP assessed 4 points for the "seriousness" based on the impacts of the violation to the flood fringe, which was estimated to be over 1,001 cubic yards. DEP then determined the base penalty using the Flood Hazard Act Penalty Assessment Table. The combined six points carry a penalty of $4,000. The base penalty was assessed for each day of the violation, or the "duration" in accordance with the EEEA. Although the Department could have assessed a penalty for each day from June 16, 2010, DEP exercised its discretion and assessed a penalty for only 4 days for a total penalty of $16,000.

Respondents argued that the penalty may not be imposed absent due process, and that DEP must disclose the facts and evidence upon which penalty decisions are made. Here, Respondents were informed multiple times, between when the NOV was issued in June 2010 and when the AONOCAPA was issued in May 2011, that the FHACA rules required a permit for the fill activity on the Property. Throughout their communications with DEP, Respondents maintained that they did not need a permit. Both the NOV and AONOCAPA contained descriptions of DEP's findings and citations to the law and rules violated. In addition, DEP engaged in multiple discussions with Petitioners in an attempt to resolve the matter. Further, Respondents have been heard in the OAL,

where DEP has presented substantial evidence of the filling and volume of fill placed on the Property. Based on the evidence presented, which the Respondents had the opportunity to controvert, the ALJ found against them. I find that DEP provided adequate notice of the penalties and the Respondents received due process in this enforcement action.

The penalty is expressly authorized by the EEEA, which allows for the assessment of up to $25,000 for each violation of the FHACA, for each day that the violation continues. Based on the amount of fill placed on the Property, which DEP staff determined to be in excess of 1,000 cubic yards, DEP assessed a penalty of $4,000 per each day of violation, for a total of 4 days. DEP's exercise of discretion is well within the authority granted by the EEEA.

CONCLUSION

For the reasons set forth therein and above, I ADOPT the Initial Decision granting the Department's motion for summary decision and denying Respondents' cross-motion for summary decision, both as to liability under the FHACA and the penalty assessed. Respondents are ordered to pay the penalty amount of $16,000 within 35 days of the date of this Final Decision, as set forth in Paragraphs 15 and 16 of the AONOCAPA. Respondents are further ordered to restore the violation area as set forth in Paragraph 8 of the AONOCAPA.

IT IS SO ORDERED

Date: July 20, 2016

Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

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