State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION

DEPARTMENT OF ENVIRONMENTAL, PROTECTION/ COASTAL AND LAND USE COMPLIANCE & ENFORCEMENT,
Petitioner,
v.
JOSEPH DONOFRIO, INDIVIDUALLY, PATRICK DONOFRIO, INDIVIDUALLY, ESTATE OF PATRICK DONOFRIO, AND ESTATE OF JOSEPH DONOFRIO,
Respondent.

OAL DKT. NO. ECE 03062-14
AGENCY DKT. NO. PEA070001-1434-04-0004.1

DEPARTMENT OF ENVIRONMENTAL, PROTECTION/ COASTAL AND LAND USE COMPLIANCE & ENFORCEMENT,
Petitioner,
v.
OWL CONTRACTING COMPANY AND DOUGLAS KELLY, INDIVIDUALLY,
Respondent.

OAL DKT. NO. ECE 03063-14
AGENCY DKT. NO. PEA070001-1434-04-0004.1

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Patrick J. Donofrio, Co-executor for the Estate of Patrick A. Donofrio

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Record Closed: February 23, 2018 Decided: August 23, 2018

BEFORE **LELAND S. McGEE**, ALJ (Ret. on recall):

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The case arises from alleged environmental damage to real property located on the tax map of the Borough of Rockaway Block 21, Lots 1 and 2, as well as certain contiguous property located in the Township of Denville, namely Block 61601, Lot 11 and Block 62002, Lot 3. (Kinsella Cert., Ex. A, T6:16-22.) With respect to the property that is subject of this action, the Donofrio family owned Block 62002, Lot 3 ("Donofrio lands or Donofrio parcels"). (T7:9-12.) The other parcel subject to this action, in the Township of Denville, Block 61601, Lot 11 is owned by the Jersey City Municipal Utilities Authority (JCMUA). (T7:13-15.) Joseph Donofrio, Sr. originally acquired the Donofrio lands in the areas of Rockaway Borough and Denville in the late 1950's, which was originally owned by Lakeland Holding. (T8:1-5.) Thomas Donofrio is the grandson of Mr. Joseph Donofrio, Sr. and the son of Patrick Donofrio, Mr. Joseph Donofrio, Sr.'s

son. (T7:20-24.) The site had been used essentially as a yard for the paving company that Mr. Joseph Donofrio, Sr. operated with his three sons. (T8:1-4.) Joseph Donofrio, Sr. conveyed this land in 1982 to his three sons, Joseph Donofrio Jr., Donald Donofrio, and Patrick Donofrio. (T8:15-19.) Each of the sons in turn operated a business and used the land for various purposes: storage, office space, parking service vehicles, and equipment. (Ibid.) Joseph Jr. managed the property on a day-to-day basis. He managed tenant issues and negotiated leases on behalf of himself and his two brothers. (T15:1-7.) Patrick Donofrio passed away in August of 2007, leaving a one-third interest as Tenant in Common to Thomas Donofrio by conveyance in January of 2012. (T8:20-25.) Additionally, Thomas Donofrio acquired Joseph Donofrio Jr.'s one-third interest in the land in March of 2007. (T9:8-12.) As such, the ownership of the property now consists of Thomas Donofrio owning two-thirds that came to him by virtue of inheritance by his father and a settlement of litigation that he entered into with Joseph, Jr., and the other one-third interest in the land is still owned by Donald Donofrio. (T9:14-21.)

Kelly Excavating & Paving, Inc. trading as OWL Contracting (OWL) first came upon the Donofrio land in 1989, with Mr. Douglas Kelly, Sr. as its principal. (T18:13-15.) He entered into an oral lease of the land with Joseph Donofrio, in which Kelly would be able to access the Donofrio Land east of the Gill Avenue bridge to park equipment and trucks. (T19:9-15.) This consisted of access to Lots 6, 1, and 2 in Rockaway and Block 62002, Lot 3 in Denville. (T18:21-25.) During its operations, OWL dumped asphalt millings east of the Gill Avenue Bridge. (T26:1-5.) In approximately 2003 or early 2004, neighbors began to complain about a large pile of top soil adjacent to Beaver Brook and just north of the Rockaway River. They complained about a large pile of top soil that accumulated as a result of the type of paving jobs that Respondents engaged in. (T29:1-5.) As a result, The New Jersey Department of Environmental Protection (NJDEP), issued a notice of violation (NOV) to Mr. Joseph Donofrio. (T29:5-10.) The Department cited violations of the Freshwater Wetland Protection Act, N.J.S.A. 13:B-1 et seq., as well as its implementing regulations at N.J.A.C. 7:7A-1 et seq., the Flood Hazard Area Control Act, N.J.S.A. 58:16A-52, et seq., and Rules N.J.A.C. 7:13-1 et seq. (T29:17-22.) The NJDEP noted placement and grading of fill material within the floodway and flood fringe of the Rockaway River and Beaver Brook, and placement and grading of fill material within wetlands and wetland transition areas. (T29:1-5-T30:1-2.)

The NJDEP required the submission of a restoration plan that was to provide for removal of all fill from the regulated areas within forty-five days. (T29:3-5.) The restoration plan included Block 21, Lots 1 and 2 in Rockaway Borough, Block 61601, Lot 11 and Block 62002, Lot 3 in Denville Township. (T35:1-3.) A second NOV was sent to Mr. Joseph Donofrio and OWL contracting dated April 29, 2004, referencing a field violation on April 16, 2004. (T31:8-14.) The DEP assessed penalties to the Donofrio interests and the OWL interests, in the total amount of $167,500.00. (T33:14-17.) They assessed penalties because even after removal of the top soil pile that was the subject of the sanctions, the site was left with non-native fill in the areas of the wetlands, the wetland transition areas, and the flood plain (eventually measuring 5,250-cubic yards of fill material). (T33:19-22.)

Under Docket No. MRS-L-2339-08, the Estate of Patrick Donofrio and Thomas Donofrio brought a lawsuit against Owl Contracting, Inc., et. al., alleging inter alia, violations of the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, et seq., and the New Jersey Environmental Rights Act, N.J.S.A. 2A:35A-1, et seq. In that proceeding, Judge Brennan ruled that both sides, the Plaintiffs as landlords or owners to the property, and Defendant as OWL Contracting as the tenant, are responsible for the filling and dumping that occurred. (Brennan Order; T38:16-21.) Because filling and dumping on the property occurred during the time it was owned by the Donofrio's interests as well as during the tenancy of Owl Contracting, both parties had the duty to investigate and properly care for the property, and failed to do so. (T44:13-23.) Judge Brennan ruled that Thomas Donofrio, who is now the successor in ownership to his father and his Uncle Joseph Donofrio's ownership, "fell heir" to at least one-third of the property and his successor by way of the settlement to his Uncle Joseph's share. (T47:23-48:2.) Judge Brennan concluded that an equitable allocation of liability would be two-thirds to the Landlord (The Donofrios) and one/third to Owl and Kelly, Sr. (T55:5-9.)

In the present case, on October 14, 2016, the NJDEP filed a Cross-Motion for Summary Decision for a determination that all Respondents are liable for compliance, and for penalties for violations of the Flood Hazard Area Control Act (FHACA) and the Freshwater Wetlands Protection Act (FWPA) on both the Donofrio and JCMUA parcels.

Subsequently, Respondent Thomas Donofrio filed a Cross-Motion for Partial Summary Decision to dismiss the claims for violations of the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50, et seq., and the New Jersey Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1, et. seq., and for civil administrative penalties brought against him by Petitioner as to the land owned and/or managed by Intervenor New Jersey Municipal Utilities Authority (JCMUA) identified as Block 61601, Lot 11. On October 14, 2016, Intervenor JCMUA filed a letter brief in support of JCMUA's Cross-Motion for Summary Decision and in opposition to the cross-motions for Partial Summary Decision by the Donofrio Respondents as to the liability for the JCMUA parcel. On September 29, 2016, Respondent Donald Donofrio submitted a letter in lieu of a more formal brief in opposition to the cross-motion for summary decision, filed by the NJDEP as to liability for the parcels.

The parties have been engaged in settlement discussions and on February 23, 2018, Petitioner advised the undersigned that "the parties have reached an impasse in their settlement discussions" and the record closed.

ARGUMENTS

I. Respondent Thomas Donofrio's Opposition To the Motion For Summary Decision of Petitioner and Intervenor

Respondent Thomas Donofrio argues that there are disputed facts which are "material to the case" and consequently support the denial of the joint motion of the NJDEP and the JCMUA for summary decision. Respondent asserts that the NJDEP never issued a Notice of Violation to Thomas Donofrio. Instead, Respondent asserts that on April 29, 2004, the NJDEP issued a Field Notice of Violation (2004 Field NOV) to Joseph Donofrio Jr., along with a notice of violation based on the same violations set forth in the 2004 Field NOV to Joseph Donofrio, Jr. and OWL. Additionally, Respondent Thomas Donofrio asserts that the First Restoration Plan for the subject parcel was served on the JCMUA, and the NJDEP issued a notice of violation to the JCMUA for the JCMUA Land. The violations and penalties claimed in this matter were based on those NOV's and the Restoration plan. Additionally, Respondent Thomas Donofrio asserts

that despite efforts to remove the fill and restore the Donofrio Land to be within the parameters of Judge Brennan's 2012 decision, the NJDEP and the JCMUA prevented the work from being performed. Respondent Thomas Donofrio has denied responsibility for the JCMUA Land, and he argues that no evidence has been presented by any party as to who placed fill on the JCMUA Land or when. Respondent argues that "the mere existence of these facts precludes the Court from granting the Motion for Summary Decision" as to the liability of Thomas Donofrio for violations of the New Jersey Freshwater Wetlands Act and the Flood Hazard Area Control Act.

Respondent Thomas Donofrio argues that there are no facts to support a finding that he violated the New Jersey Freshwater Wetlands Act and Flood Hazard Area Control Act, which would result in his individual liability. Respondent asserts that the FHACA refers to notice to the "property owner" or the "person committing the violation." See N.J.S.A. 58:16A-63(d); N.J.A.C. 7:7A-16.6(a) (citing penalty notice to the "violator"). Respondent Thomas Donofrio asserts that the parties do not dispute that the 2004 Notices of Violation are the basis for the 2008 AONOCAPA and 2016 AONOCAPA. Respondent Thomas Donofrio asserts that he was not an owner and did not have any control over the Donofrio land at that time. Respondent Thomas Donofrio argues that since he was not listed as a violator at the time of the NOV's, he is not liable under the FWPA and FHACA. As a result, he argues that the 2016 AONOCAPA is defective because it lacks "fair support in the evidence." See In re Freshwater Wetlands Gen. Permit No. 16, 379 N.J. Super. 331, 341 (App. Div. 2005) (quoting Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963).

Respondent Thomas Donofrio argues that even if the Court finds the 2016 ANOCAPA as to Thomas Donofrio is enforceable, a detailed factual analysis is required as to (1) whether any of the respondents had a connection with the property at the time of the violations; and (2) the nature of any conduct—or lack thereof—of the Respondents resulting in a violation. Respondent Thomas Donofrio argues that the NJDEP relied on the decision in New Jersey Department of Environmental Protection v. Huber, 213 N.J. 338, 371 (2013) in adding Thomas Donofrio as a party. However, Respondent Thomas Donofrio distinguishes this case from Huber, because he did not own or control the Donofrio Land at the time of the violations. Most importantly, he did

not admit to performing any prohibited activities or filling on the Donofrio Land or the JCMUA land, and the NJDEP has never alleged or presented any evidence to substantiate that he did. Respondent argues that the record is devoid of any evidence as to whether he violated the FWPA or FHACA by performing "prohibited activities" or placing "fill within restricted areas." Additionally, Respondent argues that once he became the owner in entirety, there have been several steps taken to sort out the liability, and he has actively participated in efforts to resolve the 2004 notices of violation and the 2008 AONOCAPA for the past ten years. Respondent argues that there has been no finding of liability on the part of Joseph Donofrio, Donald Donofrio, or Patrick Donofrio.

Respondent also argues that he cannot be held individually liable for remediation of the JCMUA land simply because he is now the owner of the Donofrio land. He argues that since the JCMUA has controlled the land since 1935, the JCMUA is responsible to monitor that piece of land at all times relevant to this matter. Respondent argues that this is evidenced by the Notice of Violation issued to JCMUA in 2007, which advised the JCMUA that the NJDEP considered the JCMUA a "responsible entity" for the unauthorized fill material on the subject JCMUA land. Respondent argues that there is no legal basis for extending the Respondent's monitoring obligation beyond property owned by a party to which the Respondent has no control. He suggests that it is "unreasonable and has no legal basis." Respondent argues that the NJDEP should have named the JCMUA a party in this matter.

Respondent Thomas Donofrio also argues that the 2012 judgement is not undisputable evidence of liability under the FWPA or FHACA or the penalties assessed by the NJDEP. He emphasizes that Justice Brennan concluded that "none of these parties to this lawsuit unlawfully placed contaminants on the Donofrio Land . . . ." Respondent argues that the NJDEP's claims were not before Judge Brennan in the former case, and the NJDEP failed to participate in the proceedings before Judge Brennan regarding that case. Additionally, Respondent argues that the broad application of "in any way responsible" as used in the Spill Act is not applicable to violations of the FWPA and FHACA, and this immediate action requires the NJDEP to establish a separate legal basis for liability under the FWCPA and FHACA and the

resulting penalties. Respondent argues that these "disputed facts" preclude the granting of the NJDEP's motion.

Respondent argues that the NJDEP is not entitled to enforce liability on Thomas Donofrio as a result of a potential contractual obligation not before this court or as an heir. Because the Donofrio Settlement Agreements assign no rights to third parties, the NJDEP cannot require this Court on a Motion for Summary Decision to find that he is liable to NJDEP on that basis. Petitioner argues that the interpretation of the Donofrio Settlement Agreements are not before this court. As a result, in the absence of a legal determination of responsibility to defend and indemnify the AONOCAPAS and as to the JCMUA land (without reference to them in the agreements) there is no obligation. See Mantilla v. NC Mall Assocs., 167 N.J. 262, 272 (2001) (finding that indemnity provisions differ from provisions in a typical contract in one important aspect. If the meaning of an indemnity provision is ambiguous, the provision is "strictly construed against the indemnitee"). Since the 2012 judgment is not "automatic," questions of fact still exist with regard to whether Joseph Donofrio, Jr., Donald Donofrio and Patrick Donofrio ("DD&D") is liable for the violations alleged by the NJDEP and then, the extent to which, if at all, the parties intended Thomas Donofrio to be liable for DD&D.

Respondent argues that there is no connection between him and the JCMUA Land which would result in liability for violations at that property and therefore, the respondent's Cross-Motion for Partial Summary Decision should be granted. Respondent argues that Judge Brennan clearly concluded that the basis of any liability for the Donofrios was due to their status as landlord of the Donofrio Land and made no determinations as to the JCMUA Land because the JCMUA land was not part of that case. So, unless NJDEP can establish that Thomas Donofrio engaged in prohibited activities on JCMUA land, Thomas Donofrio is in no way liable for JCMUA land.

Finally, Respondent argues that the NJDEP is not entitled to Summary Decision as to the penalties assessed as the amount is excessive. The 2004 Field NOV and 2004 NOV were issued in 2004, but the AONOCAPA was not issued until August 2008. Eight years later, the AONOCAPA was amended to add additional parties and revise the penalty assessment. After the enactment of the Environmental Enforcement Act

(EEA), N.J.S.A. 58:16A-63(a), the NJDEP was granted direct authority to impose assessments without having to resort to filing an action in Superior Court. The EEA also enhanced penalties for violations of the FHACA from $2,500 to $25,000 per day. Respondent argues that it is undisputed that the penalties are based on the 2004 violations, and the NJDEP penalty assessment should be rejected as the EEA may not be applied to pre-existing violations. See N.J. Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 498 (1983) (holding that when considering whether a statute should be applied prospectively or retroactively, in the absence of an express declaration to the contrary, it may lead to the conclusion that a statute should be given only prospective effect). Respondent argues that similar to Asdal Builders v. New Jersey Department of Environmental Protection, 426 N.J. Super. 564 (App. Div. 2012), the EEA cannot be applied to violations that pre-existed the EEEA's adoption.

II. NJDEP

NJDEP argues that Summary Decision should be entered against the Estates of both Patrick and Joseph Donofrio as neither Estate has submitted opposition raising any material factual dispute to NJDEP's cross-motion. Joseph's Estate submitted a one-page letter that generically denies liability, with no certification or affidavit. Although Patrick's Estate joins in Thomas's opposition and cross-motion, Thomas's certification is limited to facts relating to his own personal involvement in the case, and Patrick's Estate has submitted no affidavit or certification raising any factual dispute concerning Patrick's liability. Therefore, Summary Decision should be granted finding both of the Estates jointly and severally liable for compliance and penalties for violations of the FHACA and FWPA on the Donofrio and JCMUA parcels. Additionally, OWL and Kelly do not oppose summary decision on liability for violations on the Donofrio parcels. Since apportionment is not before the OAL because all parties are jointly and severally liable for all compliance costs and penalties in Judge Brennan's Administrative Order, there is no need to apportion the remediation costs between the parties. See, e.g. Dep't. of Envtl. Protection v. Ench, ECE 2360-08, Final Decision at 12-14 (February 21, 2011), http://njlaw.rutgers.edu/collections/oal/ (holding that apportionment of liability is not DEP's responsibility).

Additionally, NJDEP argues that Donald Donofrio does not raise any material factual dispute to defeat Summary Decision, and the indemnity agreement is not enforceable against NJDEP. First, the uncontested facts show that Donald Donofrio was joint owner of the Donofrio parcels at the time of the alleged violations occurred, Donald Donofrio and his brothers were landlords; and that along with Owl and Kelly, the parties failed to adequately protect the property from illegal dumping. Both the OAL and the Commissioner have held that in this case the NJDEP can enforce the FHACA and FWPA against those "responsible for the regulated activity" and those who "own or control property" on which a violation occurs. N.J.A.C. 7:13-2.1(a); N.J.A.C. 7:7A-2.1(e). Donald Donofrio does not dispute that, as part-owner, he had legal control with his brothers as landlords over the activities occurring on the parcels. Thomas Donofrio's agreement to indemnify Donald Donofrio is not enforceable and cannot be asserted as a defense to this action, as NJDEP was not a party to the agreement and did not agree to dismiss any of its claims against Donald Donofrio. NJDEP argues that Donald Donofrio may enforce the indemnity agreement against Thomas Donofrio (although not in the OAL because that agreement is not the subject of this contested case, see N.J.A.C. 1:1-3.2(a)), but the agreement cannot relieve Donald Donofrio of liability to NJDEP.

NJDEP argues that Thomas Donofrio is liable for compliance and penalties as an owner and person having control of the Donofrio Parcels, because he became legally responsible for the Administrative Order when he purchased the Donofrio parcels. NJDEP is authorized to enforce the FHACA and FWPA against "those responsible for the regulated activity" as well as those who "own or control property" on which a violation occurs. N.J.A.C. 7:13-2.1(a); N.J.A.C. 7:7A-2.1(e). NJDEP also relies on Department of Environmental Protection v. Huber, A-5874-07 (App. Div. Jan. 20, 2010) (slip op. at 35), http://njlaw.rutgers.edu/collections/courts/, to assert that it can enforce a violation of the FWPA against the purchaser of a property whereon violations have occurred, especially where the purchaser has constructive or actual notice of the alleged violations and NJDEP's enforcement action. This same logic applies to violations of the FHACA. NJDEP also argues that it is immaterial that the NJDEP did not issue NOVs to Thomas Donofrio, as NJDEP does not allege and need not prove that Thomas Donofrio caused the violations, only that he now "owns and controls" the

Donofrio parcels, and that he purchased the parcels with actual knowledge of the compliance obligations that come with ownership.

NJDEP also asserts that Respondents are estopped from re-litigating their responsibility for fill placed on the JCMUA property. NJDEP argues that the Judgment itself is explicit that it applies to "the injured land that is the subject matter of Plaintiffs' claims and related violation notices issued by the New Jersey Department of Environmental Protection," not simply the "Donofrio Land." (Brennan Judgement.) "Injured land" includes the JCMUA lot at issue. Additionally, NJDEP asserts that its NOV to JCMUA does not relieve any of the Respondents from liability for fill on the JCMUA property. It relies on Moss v. Shinn, 341 N.J. Super. 327, 339 (App. Div. 2000) in concluding that it cannot be ordered to pursue enforcement against JCMUA. Additionally, NJDEP asserts the OAL does not have jurisdiction to enter an order against JCMUA as Thomas Donofrio requests, because the OAL cannot initiate claims in its courts. N.J.A.C. 1:1-3.1.

Finally, NJDEP argues that it properly assessed penalties for continuing violations under the FHACA and FWPA. These violations are viewed as "continuing" until the areas of disturbance are restored. NJDEP amended the penalty rationale to delete FHACA penalties assessed before January 2008, when amendments to the FHACA took effect that first permitted NJDEP to assess administrative penalties for continuing violations. NJDEP argues that because the penalty rationales are not contested, there is no need for a hearing on the penalty factors if the OAL agrees NJDEP has legal authority to assess penalties under both the FHACA and FWPA. Under both the FHACA and the FWPA, penalties may be assessed up to $25,000 per day. N.J.S.A. 58:16A-63(d). NJDEP relies on Department of Environmental Protection v. Ench, A-3259-13 (App. Div. July 3, 2013), http://njlaw.rutgers.edu/collections/courts/, in which the Appellate Division upheld NJDEP's assessment of daily penalties for fill placed in wetlands.

III. JCMUA

JCMUA opposes the Cross-Motions for Summary Decision filed by Respondents Thomas and Donald Donofrio. JCMUA argues that DEP never served the JCMUA with any formal, appealable, enforcement document alleging that the JCMUA ever violated the FHACA or the FWPA at the JCMUA's watershed property. In fact, the JCMUA asserts that the correspondence sent to it was to prompt the JCMUA to respond to the pending requests by Dykstra Walker, the consultant retained by the owner(s) of the Donofrio property, to address the illegal filling on that property, and to access the JCMUA property to conduct restoration activities. Additionally, regardless of how the letter is read, NJDEP never issued any enforcement action against JCMUA, therefore it is not liable for illegal fill at the watershed property. N.J.S.A. 52:14B-2; N.J.S.A. 52:14B-9.

JCMUA also argued that its property is specifically part of the "injured parcel" that Judge Brennan addressed in his decision, and the Donofrio's are liable for the damage to that land. Additionally, JCMUA argues that liability was based upon a finding that the Donofrios were "in any way responsible" under the Spill Act because they failed to monitor and control the activities on their property; not that they physically placed contaminated fill on that property.

IV. Donald Donofrio

Donald Donofrio submitted a letter in lieu of a more formal brief in opposition to the Cross-Motion for Summary Decision filed by the NJDEP. Donald Donofrio asserts that this case was dismissed with prejudice by the Estate of Patrick Donofrio and Thomas Donofrio, and that dismissal was filed with the court prior to Judge Brennan's May 16, 2012, Decision.

LEGAL DISCUSSION

A. The Estates of Patrick, Joseph, and Donald Donofrio do not raise any material, factual dispute to defeat Summary Decision.

N.J.A.C. 1:1-12.5(b) provides: "[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." It further provides: "[t]he decision sought may be rendered 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." Joseph's Estate submitted a one-page letter generically denying liability, but no responding certification or affidavit. Patrick's Estate has not submitted an affidavit or certification raising any material factual dispute concerning Patrick's liability. Accordingly, since these parties have not submitted any materials that show a genuine dispute of material fact, Summary Decision should be granted as to their liability for the JCMUA parcel.

As for Donald Donofrio, he has not submitted an affidavit or certification to contest the fact that he was 1/3 owner of the premises. Donald Donofrio's share was not conveyed to Thomas Donofrio until October 2012, five months after Judge Brennan's May 2012 decision. (Donald Donofrio Opposition, Ex. B.) His letter does not dispute that as part owner, he had legal control with his brothers as landlords over the activities occurring on the Donofrio parcels. Additionally, Donald Donofrio may not enforce the indemnity agreement against the NJDEP, but rather he may enforce the indemnity agreement against Thomas Donofrio. N.J.A.C. 1:1-3.2(a).

B. Thomas Donofrio is liable for penalties on the JCMUA property, as he is the owner of the Donofrio Parcels.

Respondent Thomas Donofrio is liable as a purchaser of the Donofrio parcels who was on notice of the alleged violations. In Huber, A-5874-07, the Hubers purchased a home with a conservation easement on the property. Id. at 9. The ALJ pointed out that the Hubers were "specifically alerted to the facts"; there was a conservation easement affecting the property they were seeking to purchase. Id. at 15. The ALJ found that the conservation easement was properly recorded, making the Hubers "bona fide purchasers with notice," thereby making the easement applicable. Id.

at 16. Accordingly, the Appellate Division held that the NJDEP was authorized to enforce the FWPA against the Huber's for the prior owner's violations of the statute, which were ongoing after they purchased the land. Ibid. The Appellate Division went on to emphasize that "it would defeat the purpose of the FWPA, which is to protect freshwater wetlands, if, as the Commissioner stated, violations were legalized by the transfer and sale of property. This is especially true because the Huber's had notice of the conservation easement." Id. at 35.

Respondent Thomas Donofrio's argument mirrors that of Huber. He argues that he did not control the Donofrio Land at the time of the original violations. However, Thomas Donofrio did have actual notice of the violations alleged by NJDEP. He learned of the alleged violations in 2007 when he became a party to litigation in Superior Court between the Donofrio's to assign responsibility for cleanup of the fill. The Administrative Order is binding on the original respondents, "their successors [and] assigns." (Certification of Thomas Donofrio Exhibit E, at 28.) Accordingly, since Respondent Thomas Donofrio was on notice of the alleged violations, he is liable as to the cost of the cleanup.

C. The JCMUA parcel is considered part of the "injured land" in Judge Brennan's decision, Respondents are responsible for the fines associated with that property.

Thomas Donofrio contends that Judge Brennan's decision in The Estate of Patrick Donofrio and Thomas Donofrio v. Owl Contracting, Inc., Docket No. MRS-L-2239-08 made no determination as to liability against him for the filling of the JCMUA watershed property. However, Judge Brennan emphasized multiple times in his opinion that the JCMUA property was included in his description of the injured land: " . . . as well as certain contiguous property located in the Township of Denville, **namely Block 61601** . . . ." (Brennan Decision, Kinsella Cert., Ex. B (emphasis added)); See Kinsella Cert., Ex. A at T6:16-22 and T7:11-15.) Judge Brennan went further to say that the parties are liable under the Spill Act "for the restoration of the property **as I have described it** . . . ." (Kinsella Cert., Ex. A at T63:9-14 (emphasis added)). Judge Brennan ordered that Thomas A. Donofrio and Owl Contracting were responsible for

two-thirds and one-third respectively for "the injured land that is the subject matter of Plaintiffs' claims and related violation notices issued by the [DEP]." (Brennan Decision, Kinsella Cert., Ex. B.) Accordingly, since the JCMUA property was part of the "injured parcel" specifically defined in Justice Brennan's decision, the Respondents are liable for the damage on this property as well.

D. The NJDEP does not need to pursue claims against JCMUA.

Respondent Thomas Donofrio argues that the NJDEP should have named the JCMUA a party in this matter. Respondent argues that this is evidenced by the Notice of Violation issued to JCMUA in 2007, which advised the JCMUA that the NJDEP considered the JCMUA a "responsible entity" for the unauthorized fill material on the JCMUA land. However, Justice Brennan addresses this in his opinion: "[A]s noted, the statutory authority of the New Jersey Spill Act and its legislative history "make clear that it is the NJDEP which is entrusted initially with the right to determine the primary course of action to be taken against persons who damage or threaten the environment." (Kinsella Cert. Ex. A., T57:8-12.) Additionally, the record is clear that NJDEP did not serve the JCMUA with any formal enforcement documents that the JCMUA ever violated the FHACA, the FWPA, or regulations implementing those statutes at the JCMUA's watershed property. However, the enforcement notice issued to the JCMUA was not of the nature that would put it on alert that they were committing violations. The January 4, 2007, correspondence from NJDEP to JCMUA read:

> In April of 2004, this office-initiated enforcement actions against Joseph Donofrio for the placement of fill materials within the Rockaway River floodway and in the freshwater wetlands. These activities occurred on properties located in Rockaway Borough, and adjacent to the JCMUA property . . . . In the course of their site investigation, Dykstra Walker discovered that the filling activities had extended beyond the boundaries of the Donofrio properties and onto the JCMUA property. DLUR in turn has required that written authorization be obtained from JCMUA for the performance of restoration activities on its property with said written authorization becoming a part of the permit application record . . . .
>
> (T. Donofrio Cert., Ex. D.)

This correspondence does not result in any sort of formal filing against JCMUA. In fact, DEP has never instituted any subsequent formal action against JCMUA for the improper placement of fill material on the watershed property. N.J.S.A. 52:14B-2 provides that a "contested case" means

> a proceeding, including any licensing proceeding, in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing . . . ."

Accordingly, since there is no type of action against the JCMUA, it can have no judgments, orders, or remedies imposed upon it relative to its alleged liability for violating the FHACA or the FWPA at its watershed property.

E. The Fines Imposed by the NJDEP Were Not Excessive and Properly Assessed.

Respondent Thomas Donofrio argues that the fines imposed by the NJDEP for the violations of FHACA and FWPA are excessive. Under both the FHACA (as amended in 2008) and the FWPA: "Each day during which each violation continues shall constitute an additional, separate and distinct offense" for which "daily civil administrative penalties may be assessed up to $25,000 per day." N.J.S.A. 58:16A-63(d); N.J.S.A. 13:9B-21(d). The activities challenged in the present case are construed as "separate offenses" for each day the activity continues or the pollutants remain:

> if a violation involves placement of fill in a floodway, each day that the fill remains in the floodway is an additional, separate and distinct offense, because the increased flood hazard caused by the fill continues each day that the fill is present. In such a case, [NJDEP] may seek a separate penalty for each day that the fill remains in the floodway.
>
> [N.J.A.C. 7:12-19.1(b).]

Respondent Thomas Donofrio relies on Asdal, 426 N.J. Super at 581 to argue that fill in a flood hazard area cannot be considered a continuing violation. In Asdal, appellants, a property owner and builders, challenged the final decision of the NJDEP and others, regarding NJDEP's enforcement of various flood hazard and freshwater protection rules and the imposition of penalties against appellants. Id. at 579. In that case, despite obtaining the necessary township approvals, appellants were cited for violations under the FHACA and the FWPA, because of their actions involving renovations to pre-existing buildings on the property. Id. at 581. The court addressed the DEP's authority designated to it by the EEA to impose penalties outside of filing suit and reversed the EEA assessments since they only applied to violations that pre-existed the statute's adoptions. Ibid. The Court found that the violations at issue could not be considered on-going, unlike pollution violations, because the violations claimed in this case were that renovated structures remained on the property as opposed to being removed. Ibid. at 581.

This rationale has been echoed by the Court in Ench, A-3259-13, where the Court agreed with the Commissioner's determination that pollution to freshwater wetlands or transition areas should be considered ongoing:

> [The] failure to restore a disturbed freshwater wetlands or transition areas allows environmental damage to continue and constitutes an ongoing violation, which may be subject to a new statutory remedy such as an enhanced penalty. Here, because disturbances to wetlands were already subject to penalty before the enactment of the EEEA, the maximum daily penalty amount for such ongoing violations can be increased for the time period following the statutory enactment.
>
> [Id. at 31.]

The Court found that assessment of penalties under the FWPA may begin when a violation occurs, and each day the illegal activity continues constitutes "a new, distinct, violation." Ibid.

In the present matter, the pollution on the JCMUA land is exactly what the "additional, separate, and distinct offense" phrasing in the statute is intended to cover,

and the "pollution violations" that are deemed to be "ongoing" as per the Asdal case. Judge Brennan found that the fill placed on the Donofrio and JCMUA properties contained pollutants including "brick, concrete, asphalt, metal, rubber, plastic, tile, tires, etc.," and was contaminated with polynuclear aromatic hydrocarbons above remedial action limits. (Kinsella Cert., Ex. C at T33:23-T34:11; T35:20-25.) The occupation of the flood hazard area by fill on the Donofrio and JCMUA parcels displaces floodwaters as long as it remains in the floodway, and, in so doing, places nearby properties at risk of increased flooding. Accordingly, the NJDEP properly assessed the penalties for this case.

CONCLUSION

For the foregoing reasons I **CONCLUDE** that Summary Decision should be granted to NJDEP for the liability of Thomas Donofrio and Donald Donofrio for the JCMUA parcel. First, The Estates of Patrick, Joseph, and Donald Donofrio do not raise any material, factual dispute to defeat Summary Decision. Second, Thomas Donofrio is liable for penalties imposed on the JCMUA property, as he is the owner of the Donofrio Parcels, and was on notice of the violations occurring on the property when he acquired title. Third, since the JCMUA parcel is considered part of the "injured land" in Judge Brennan's decision, Respondents are responsible for the fines associated with that property. Fourth, since the NJDEP has the "authority to determine the primary course of action to be taken against persons who damage or threaten the environment," the OAL cannot compel the NJDEP to pursue the JCMUA as to liability of its parcel. Finally, the fines posed by the NJDEP were not excessive and were properly assessed.

ORDER

I hereby **ORDER** that Respondent's Motion for Summary Decision is hereby **GRANTED** with respect to all allegations.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, P.O. Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 23, 2018
DATE

LELAND S. McGEE, ALJ (Ret., on recall)

Date Received at Agency: August 23, 2018

Mailed to Parties:

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