



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

BOB MARTIN
Commissioner

KIM GUADAGNO
Lt. Governor

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, COASTAL AND LAND USE COMPLIANCE AND ENFORCEMENT,
Petitioner,
v.
ENZO MARRANO,
Respondent.

ADMINISTRATIVE ACTION
FINAL DECISION

OAL DKT NO.: ECE 12015-14
AGENCY REF. NO.: PEA 120001-1507-11-0039.1

This Order addresses the appeal of an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) issued by the Department of Environmental Protection (Department) on December 19, 2012, assessing penalties of \$4,000 against Enzo Marrano (Respondent) for violations of the Waterfront Development Act (WDA), N.J.S.A. 12:5-3 et seq., and the Coastal Permit Program (CPP) rules—namely, construction of a structure at or waterward of the mean high water line in violation of N.J.A.C. 7:7-2.3(c). The Department transmitted Marrano’s ensuing hearing request to the Office of Administrative Law (OAL) where it was assigned to Administrative Law Judge (ALJ) Lisa James-Beavers. A hearing was held on September 11, 2015. Following the hearing, the ALJ issued an initial decision on October 26, 2015, finding that Respondent violated the WDA and the CPP rules, upholding the penalty assessment of \$4,000, and

ordering Respondent to remove the structures. I ADOPT the ALJ's Initial Decision affirming the Department's AONOCAPA and penalty assessment but REJECT the ALJ's reliance on the Water Pollution Control Act (WPCA), N.J.S.A. 58:10A-1 et seq., as the source of authority for the penalty and MODIFY the decision accordingly.

### FACTUAL AND PROCEDURAL BACKGROUND

Respondent is the owner of Block 1500.01, Lot 1 at 1359 Bay Avenue, in Toms River, Ocean County (the site or property). The back of the property abuts a man-made lagoon which tapers to a point with Respondent's backyard on one side of the point and a neighbor's property on the other. Manmade structures sit on or in the lagoon at the point--a 12 foot by 12.4 foot boat lift with associated pilings, a 6 foot by 6 foot dock, a 6 foot by 5 foot dock, and a 6 foot by 2 foot dock (the structures). Respondent's neighbors complained to the Department about the structures and the Department conducted an inspection of the property.

John Hanf, Jr., is a principal environmental specialist with the Department's Bureau of Coastal Land Use Compliance and Enforcement. Mr. Hanf testified that any waterfront structure located waterward of the mean high water line must be regulated by a Waterfront Development (WD) permit. Mr. Hanf testified that Department records indicate the property was first inspected in June 2011 by another Department inspector, who observed a boatlift, associated pilings, and three irregularly shaped docks that did not have the required permits.

Based on that initial inspection, the Department issued a first Notice of Violation (NOV) on July 19, 2011, to Respondent for the unauthorized structures. The NOV notified

Respondent that he could either obtain a WD permit for the structures or remove them.

Respondent applied to the Department for a WD permit on January 24, 2012, to legalize the structures, and the Department deemed the application administratively complete for review on February 21, 2012. On March 20, 2012, the Department denied the permit because the size of the existing structures did not comply with general permit requirements in the CPP rules, N.J.A.C. 7:7-7.19, or the Coastal Zone Management rules for recreational docks and piers, N.J.A.C. 7:7E-4.5. Namely, the boat lift extended beyond 20 percent of the width of the lagoon at its narrowest point, and, due to the tapered nature of the lagoon, the structures also hindered navigation and access to adjacent docks, moorings, and water areas. Two neighbors submitted public comment letters opposing the structures. Respondent did not appeal the permit denial.

Mr. Hanf testified that the Department inspected the site at least six times over a period of four years and took photographs from the adjacent neighbor's property in June and September 2012 as well as May 2015. Mr. Hanf inspected the site on June 11, 2012 and found that all the structures remained as depicted in the photographs. On June 15, 2012, the Department issued a Second/Final NOV to Respondent informing him that failure to comply by July 31, 2012, could result in a civil administrative penalty and requesting that he submit in writing an explanation of the corrective measures he would take to achieve compliance. Respondent did not reply to the Second/Final NOV. Mr. Hanf conducted additional site inspections on September 12 and November 16, 2012 during which he observed that the noncomplying structures still remained. Photographs taken on September 12, 2012 depicted the boat lift, pilings, and docks.

On December 19, 2012, the Department issued an AONOCAPA to Respondent citing him for noncompliance with the WDA, N.J.S.A. 12:5-1 et seq., and the CPP rules, N.J.A.C. 7:7-1.1 et seq. The AONOCAPA provided thirty days for Respondent to remove the structures. Thereafter, Mr. Hanf returned twice, on May 14 and September 1, 2015, and observed that all structures remained.

Respondent, appearing in the OAL pro se, did not dispute Mr. Hanf's testimony. Respondent testified that he constructed the boat lift about ten years ago to keep the boat clean from the debris in the water, and that part of the original walkway had to be removed to install the boat lift. He stated that he was under the impression that the structures had all the proper permits at that time. He testified that after he received the first letter from the Department in 2011, he spoke with someone at the Department. Later, someone came to his home to look at his deed. He then obtained a survey of the site and brought the survey to Trenton as part of his permit application. He stated that he explained to someone at the Department the need for the boatlift, provided the survey, and was told that everything was fine. He did not recall with whom he spoke at the Department. Respondent felt it was unfair to be cited for structures that had been in place for ten years.

#### DISCUSSION

N.J.A.C. 7:7-2.3(c)<sup>1</sup> requires that a permit be obtained for certain development activities at or waterward of the mean high water line, including the construction of a boat lift, dock, or pilings. The lagoon abutting Respondent's property lies waterward of the

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<sup>1</sup> The CPP rules were amended and combined with the Coastal Zone Management rules effective July 6, 2015. The provisions governing waterfront development that were set forth in N.J.A.C. 7:7-2.3(c) are now found in N.J.A.C. 7:7-2.4(c). See 47 N.J.R. 1392(a).

mean high water line; thus, there is no dispute that the boatlift, associated pilings, and the three docks were built without a WD permit and that Respondent failed to secure a permit after the fact to legalize the structures. The Department inspected the site multiple times since the summer of 2011 and sent Respondent two NOVs and the AONOCAPA directing him to either obtain a permit or remove the structures. Respondent was given ample time to remove the structures following the permit denial but he did not do so. As the ALJ found, Respondent has been able to use the noncomplying structures “for much longer than he should have and it is past time for them to be removed.” Initial Decision, p. 5.

The Department explained its penalty assessment in the WDA Penalty Rationale accompanying the AONOCAPA. The Environmental Enforcement Enhancement Act of 2007 (EEEE), effective January 4, 2008, modified the WDA at N.J.S.A. 12:5-6(e) to allow the Department “to assess a civil administrative penalty of not more than \$25,000 for each violation of [the WDA], or any rule or regulation adopted, or permit or order issued pursuant thereto.” The EEEA provides that each day during which a violation continues shall constitute an additional, separate and distinct offense. N.J.S.A. 12:5-6(e). Concerning criteria for determining the penalty, the EEEA provides that “[a]ny amount assessed . . . shall fall within a range established by regulation by the commissioner for violations of similar type, seriousness, duration, and conduct; provided, however, that prior to the adoption of the regulation, the commissioner may, on a case-by-case basis, assess civil administrative penalties up to a maximum of \$25,000 per day for each violation, utilizing the criteria set forth herein.” N.J.S.A. 12:5-6(e). The Department exercised its authority to assess penalties based on type of violation, conduct, seriousness, and duration—the criteria set forth in N.J.S.A. 12:5-6(e).

Using the WDA Penalty Rationale,<sup>2</sup> the Department determined a base penalty by reviewing the type of violation, conduct, seriousness of the violation, and duration. The Department characterized Respondent's conduct as major because it was intentional and knowing and assessed five points. The Department reviewed the seriousness of the violation by assessing the size and category of the violation. Here, the size of the structures totaled approximately 222 square feet, which carried two points. The combined seven points resulted in a penalty of \$2,000 for each violation. As to the final criterion, duration of the violation, the Department used its discretion to assess a penalty for two days of violation for a total penalty of \$4,000. The ALJ found the Department's penalty assessment to be within its broad discretion and fair under the circumstances presented. See In re Scioscia, 216 N.J. Super. 644, 660 (App. Div.), certif. denied, 107 N.J. 652 (1987).

I concur with the ALJ's findings and conclusions as to the WDA violation and ADOPT them in this Final Decision. However, I note that, under the Conclusions of Law in the Initial Decision, the ALJ cited N.J.S.A. 58:10A-10 as the relevant penalty authority and relied on the penalty matrix in N.J.A.C. 7:14-8.5. N.J.S.A. 58:10A-10 is part of the WPCA, N.J.S.A. 58:10A-1 et seq., and N.J.A.C. 7:14-8.5 was promulgated under the WPCA. The AONOCAPA was issued for violations of the WDA, N.J.S.A. 12:5-3 et seq., not the WPCA. I therefore REJECT the ALJ's conclusion of law that N.J.S.A. 58:10A-10 and N.J.A.C. 7:14-8.5(i) authorize the penalty here and MODIFY the decision to make clear that, as set forth in the AONOCAPA, the statutory basis for the penalties is the WDA as amended by the EEEA at N.J.S.A. 12:5-6.

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<sup>2</sup> The penalty rationale conformed to the requirements of the EEEA, N.J.S.A. 12:5-6(e), and formed the basis for the July 2015 amendments to the penalty rules. See N.J.A.C. 7:7-29.5, which provides for civil administrative penalties for violations of N.J.A.C. 7:7-2.2, 2.3, or 2.4.

CONCLUSION

For the reasons set forth therein and above, I ADOPT the Initial Decision affirming the Department's AONOCAPA and penalty assessment but MODIFY the decision to make clear that the WDA is the source of penalty authority in this matter. I CONCLUDE that Respondent violated the WDA as set forth in the Department's AONOCAPA and that the penalty of \$4,000 was appropriate. Accordingly, Respondent is hereby ORDERED to submit payment of the penalty by check payable to the Treasurer, State of New Jersey, in the amount of \$4,000 as set forth in paragraphs 12, 14 and 15 of the AONOCAPA, within twenty (20) days of this decision. Respondent is further ORDERED to remove the boatlift, associated pilings, and three docks as set forth in paragraphs 10 and 11 of the AONOCAPA.

IT IS SO ORDERED.

DATE: December 10, 2015



Bob Martin, Commissioner  
New Jersey Department of  
Environmental Protection

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ENVIRONMENTAL PROTECTION  
COASTAL AND LAND USE COMPLIANCE AND ENFORCEMENT

v.  
ENZO MARRANO

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