

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

## SETTLEMENT AGREEMENT

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

FRED DAIBES, individually  
1000 Portside Drive, Edgewater, NJ

NEA150001 – 0213-02-0003.2

The New Jersey Department of Environmental Protection (the “Department” or “NJDEP”) is authorized to enter into this Settlement Agreement 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, the Coastal Zone Management Rules, N.J.A.C. 7:7, and duly delegated to the Chief of the Bureau of Coastal & Land Use 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 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. 7:7E-3.48, 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. 7:7-1.3.
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 the Site the Site without NJDEP approval, in violation of N.J.A.C. 7:7-2.3(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. 7:7-2.3(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. 7:7-2.3(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 a 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 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 followup 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 incurred two new violations. First, Respondents had cleared vegetation and graded slopes on about 26,660 sf of coastal bluffs on the southern half of the Site without NJDEP approval, in violation of N.J.A.C. 7:7-2.3(d). Second, Respondents had disturbed an acreage of the Hudson River beyond the allowed 1,640 sf, in violation of N.J.A.C. 7:7-2.3(c)(1). NJDEP alleges that 1.23 acres were filled beyond what was authorized by the May 2003 Permit.
14. Respondents' continued occupancy of this 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 of on February 25, 2008 and March 10, 2008. Specifically, NJDEP alleged new violations, including (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. The Honorable Diana Sukovich, ALJ is presiding over the case.
19. NJDEP and Respondents now enter into this Settlement Agreement to resolve the violations alleged in these Findings.

**NOW THEREFORE IT IS HEREBY ORDERED AND AGREED THAT:**

**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 sixteen feet wide, with fourteen feet reserved on the landward side for benches and lighting. The attached Site Plan provides details of the current proposed configuration of the Walkway segment, but the parties acknowledge that this may change during the proposal review process. The Site Plan is attached for conceptual purposes only.
  - 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 approval of the walkway design and restoration plan shall constitute NJDEP approval of a Water Quality Certificate, under section 401 of the federal Clean Water Act 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 the approval of the Bureau of Coastal & Land Use Compliance & Enforcement of the design proposal, Respondents shall submit a complete application to the New Jersey Tidelands Resource Council ("TRC") 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 approvals necessary to construct the project as described in Paragraph 20, above 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. 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. Such conveyance shall be in a standard form provided by NJDEP or in an alternate form specifically approved by NJDEP. 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 paras. 20 and 22, and after all Federal, State and local approvals necessary to construct the project as described in Paragraph 20, above are obtained, then within one year of the final approval necessary to construct the project, Respondents shall complete removal of fill as detailed in para. 20(b) and construction of the Walkway segment.
26. The Department has agreed to credit \$418,941 of the cost of the walkway construction (excluding the cost of fill removal), towards the Penalty Payment detailed in paragraph 34 based on a cost estimate provided by the Respondent.
27. 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 Settlement Agreement and the approvals issued by NJDEP and the Tidelands Resource Council.

#### **SUPPLEMENTAL ENVIRONMENTAL PROJECT**

28. Respondents may propose 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. Any such proposal shall be prior approved by the Department and shall include the following:
  - a. Name and contact information of facility personnel knowledgeable of SEP
  - b. Project description and location(s)
  - c. projected start date
  - d. projected completion date
  - e. description of project deliverables
  - f. project milestones and timeline for reaching milestones
  - g. timeline for submitting interim and final verification of project milestones to DEP for review
  - h. detail of projected costs
  - i. a summary of project benefits
  - j. identification of parties that benefit from the project
  - k. the role of third parties (if applicable)

29. Respondent shall satisfy \$300,000 of the penalty amount by satisfactorily completing the SEP approved by the Department in accordance with paragraph 28 above. By signing this order Respondent certifies that it has not commenced performance of the SEP.
30. By signing this order 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.
31. 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 Order.
32. 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.
33. 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 Agreement relating to the performance of the approved SEP and/or to the extent that the actual expenditures for the SEP do not equal or exceed the cost of the SEP, Respondent shall be liable for stipulated penalties according to the provisions set forth below:
  - i. Except as provided in subparagraph (ii) immediately below, for a SEP which has not been completed in accordance with the proposal approved by the Department in Paragraph 28, above, the Department may assess the greater of either stipulated daily penalties or the remainder of the SEP value plus 25% of the estimated SEP cost.
  - ii. If the SEP is not completed in accordance with the above paragraphs, but the Department determines that the Respondent: a) made good faith and timely efforts to complete the SEP; and b) certifies, with supporting documentation, that at least 95 percent of the amount of money which was required to be spent, or \$285,000, was expended on the SEP, Respondent shall not be liable for any stipulated penalty.
  - iii. If the SEP is completed in accordance with the provisions outlined above, but the Respondent spent less than \$285,000, to complete the SEP, Respondent shall pay the difference between \$300,000 and the amount spent to complete the SEP to the Treasurer, State of New Jersey or propose an additional SEP to expend the remaining funds.

#### **PENALTY PAYMENT**

34. Respondents shall pay a penalty of \$958,588, subject to reduction by \$718,941 in accordance with paragraphs 26 and 29 above. To that end, \$239,647 of the penalty shall be paid as follows: (1) an initial payment of \$119,823.50 within thirty (30) days after conclusion of the public participation process pursuant to paragraph 42, below; and (2) a second payment of \$119,823.50 within (90) days of the conclusion of the public participation process pursuant to paragraph 42, below. 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.

### RESOLUTION OF AONOCAPA

35. NJDEP and Respondents agree that this Settlement Agreement resolves all issues raised by NJDEP in the AONOCAPA, subject to the public participation process pursuant to paragraph 42, below.

### STIPULATED PENALTIES

36. In the event that Respondents fail to act in accordance with the terms and conditions of this Settlement Agreement, 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 such penalty for failure to comply with this Settlement Agreement 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 Settlement Agreement.
39. The payment of stipulated fees does not alter Respondents' responsibility to complete all the requirements of this Settlement Agreement.

### FORCE MAJEURE

40. If any event occurs which Respondents believe will or may cause delay in the achievement of any provision of this Settlement Agreement, 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, 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 Settlement Agreement shall constitute a violation of the requirements of the Settlement Agreement. The burden of proving that any delay is caused by circumstances beyond the control of Respondents, that all necessary actions were taken to prevent or minimize the delay, and the length of any such delay attributed to those circumstances, shall rest with Respondents. Increase in the cost or expenses incurred in fulfilling the requirements of this Settlement Agreement 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 Settlement Agreement shall be published in the DEP Bulletin and will be subject to a thirty (30) day public comment period. Notice of this settlement will be published following signature by all parties.
- a. 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 Settlement Agreement shall become final upon Respondent's receipt of certified mail notice from NJDEP that there are no changes proposed to the Settlement Agreement.
  - b. If NJDEP proposes to make changes to this Settlement Agreement 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 Settlement Agreement, as modified in writing, shall become final and the public participation process shall conclude upon signature of the modified Settlement Agreement by all parties;
  - c. If NJDEP proposes to make changes to this Settlement Agreement 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 receives notice of the NJDEP's proposed changes by certified mail, this Settlement Agreement 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 Settlement Agreement, 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 obligations and debts under Paragraph 34 shall be treated as administrative and/or priority claims against the Debtor.

### RESERVATION OF RIGHTS

44. NJDEP reserves the right to require any and all necessary additional measures to be taken should NJDEP determine that such measures are necessary to protect human health and/or the environment. Nothing in this Settlement Agreement 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 Settlement Agreement 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 Settlement Agreement.

### GENERAL PROVISIONS

46. This Settlement Agreement represents the complete and integrated agreement of, and shall be binding upon, and/or inure to the benefit of, the State of New Jersey, NJDEP, and their divisions, agencies and respective successors, and 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 Settlement Agreement shall not relieve Respondents from obtaining and complying with all applicable federal, state and local permits as well as all applicable statutes, codes, rule, regulations and orders, including but not limited to the statutes and regulations cited herein.
48. All obligations of this Settlement Agreement 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 Settlement Agreement, 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 Settlement Agreement in any action to enforce its provisions.
50. If any provision of this Settlement Agreement is found to be invalid or unenforceable, the remainder of this ACO shall not be affected thereby and each provision of this Settlement Agreement shall be valid and enforced to the fullest extent permitted by law. NJDEP does however retain the right to terminate the remainder of this Settlement Agreement if after such finding, it determines that the remaining Settlement Agreement does not serve the purpose for it was intended.
51. No modification or waiver of this Settlement Agreement shall be valid except as authorized by NJDEP in writing.



52. This Settlement Agreement shall be governed and interpreted under the laws of the State of New Jersey.
53. This Settlement Agreement may be executed in several 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 Settlement Agreement 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 Settlement Agreement as to the parties and may be used in lieu of the original Settlement Agreement 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 Settlement Agreement and bind themselves, their successors, assignees, and/or trustees to comply with the terms and provisions of this Settlement Agreement. This Settlement Agreement 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: 10/5/15

  
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Ray Bukowski, Assistant Commissioner  
Compliance & Enforcement

FOR RIVER LOOKOUT ASSOCIATES LLC

Dated: \_\_\_\_\_

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Fred Daibes  
Managing Member

FOR 1275 RIVER ROAD ASSOCIATES LLC

Dated: \_\_\_\_\_

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Fred Daibes  
Managing Member

FOR FRED DAIBES

Dated: \_\_\_\_\_

\_\_\_\_\_  
Fred Daibes

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FOR NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Dated: .....

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Ray Bukowski, Assistant Commissioner  
Compliance & Enforcement

FOR RIVER LOOKOUT ASSOCIATES LLC

Dated: *Fred Daibes*, 2/20/15

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Fred Daibes  
Managing Member

FOR 1775 RIVER ROAD ASSOCIATES LLC

Dated: October 5, 2008

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Fred Daibes  
Managing Member

FOR FRED DAIBES

Dated: October 5, 2008

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Fred Daibes