

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1550

In the Matter

- of -

the Application for a Use and Protection of Waters Permit pursuant to Article 15 of the Environmental Conservation Law (ECL) and Part 608 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR)

-by-

GARY HOOVER,
Applicant.

DEC ID No. R6-2228-00675/00001 (Excavation and Fill in Navigable Waters)
DEC ID No. R6-2228-00675/00002 (Water Quality Certification)
DEC ID No. R6-2228-00675/00003 (Stream Disturbance)

DECISION OF THE COMMISSIONER

March 31, 2020

DECISION OF THE COMMISSIONER

Gary Hoover (applicant or Mr. Hoover) applied to the New York State Department of Environmental Conservation (DEC or Department) for permits pursuant to title 5 of article 15 of the New York State Environmental Conservation Law (application) for the construction of a new 85-foot long seawall and the extension of an existing dock (projects). The projects would be undertaken at property that applicant owns at 33633 Poplar Tree Bay Road, Cape Vincent, Jefferson County, New York, on the shore of the St. Lawrence River (site). In conjunction with the projects, Mr. Hoover also applied for a water quality certification pursuant to section 401 of the federal Water Pollution Control Act (33 USC § 1341).

Department staff denied the application for the 85-foot long seawall. Applicant requested an administrative hearing on Department staff's denial. Administrative Law Judge (ALJ) Maria E. Villa presided over the administrative hearing and prepared the attached hearing report in which she concluded that Department staff properly denied the application on the ground that the proposed seawall failed to meet the applicable legal standards.

Based upon my review of the record, I hereby adopt the ALJ's hearing report affirming staff's denial of the permit application, subject to my comments below.

Background

By application dated February 5, 2018 that the Department received on March 14, 2018, applicant applied to the Department's Region 6 office for permits to (a) construct a seawall and (b) add a 6-foot x 6-foot crib to extend a dock at the site by sixteen (16) feet. The seawall would be "in front of an already existing stone wall" (Hearing Transcript [Tr] at 6) and the walkway¹ would be on top of the seawall (see Tr at 9-10). The application describes the need for the seawall "to prevent saltation and home from high water" (Hearing Exhibit 5 [Joint Application Form, at page 2, item # 6.a.]). The seawall would be constructed of wood, with vertical wooden slats (see id., item # 6.d.). Pipes would be placed to support the seawall, and rock added to stabilize the structure (see Hearing Report at 2 [Finding of Fact No. 4]).

Department staff issued a notice of incomplete application on April 19, 2018 (see Hearing Exhibit 5). Applicant submitted additional information that the Department received on May 11, 2018, together with a letter in which he stated that his property had lost a considerable amount of sand and topsoil due to storms and high water (see id.).²

By letter dated July 20, 2018 (denial letter), Department Staff identified various regulatory provisions in 6 NYCRR part 608 that the proposed seawall failed to satisfy and denied

¹ Department staff concluded that the seawall project included a walkway. Applicant however disputed that conclusion, indicating that he was just planning to "cap" the seawall (Tr at 17-18). Whether the feature of the seawall is described as a walkway or simply a cap, it is part of the proposed seawall project (see Hearing Exhibit 5 [Federal Consistency Assessment Form, at 1 – "build 85' wood seawall with top"]).

² Applicant forwarded by e-mail dated May 24, 2019 four additional photographs of his waterfront property. These photographs were submitted following the closure of the record and, accordingly, are not being admitted for purposes of this proceeding.

the application for the seawall (see Hearing Exhibit 3, at 1-2). Among the issues that staff referenced as a basis for its denial were the following:

--adding a vertical wall constructed water-ward of an existing stone wall would increase scour and erosion of the sandy river bottom due to the redirection of wave energy that occurs when waves crash into a hard vertical surface;

--creating a walkway on top of the wall is not a water dependent use and reasonable water access already exists from the existing deck, stairs and dock;

--installing rip rap in front of the existing wall would be preferable to stop saltation and prevent damage to existing structures than constructing an additional seawall; and

--Department guidance dealing with shoreline erosion indicate that retaining walls are not encouraged and generally not approved because these structures are of little use to aquatic organisms and other wildlife and often result in erosion problems.³

Department staff concluded that “the addition of a new vertical wall and cap would not be reasonable or necessary as there are more environmentally friendly methods for preventing shoreline erosion. This vertical wall would also cause unnecessary damage to the aquatic environment through the reduction in aquatic habitat and increased erosion” (see Hearing Exhibit 3, at 2). Staff however advised applicant that “[t]he department does not have any objections to the proposal to extend the existing crib dock in order to reach deeper water. If you would like to apply for a permit for just a dock extension, we would consider the application without prejudice” (see id.).

By letter dated July 28, 2018 (see Hearing Exhibit 4), applicant requested a hearing on the denial and an administrative hearing was scheduled on the application for the proposed seawall subject to 6 NYCRR part 624. A legislative (public comment) hearing took place on October 17, 2018. No members of the public appeared or spoke, although an e-mail was received from a neighboring landowner in support of applicant’s proposal (see Hearing Report at 1). An issues conference immediately followed the legislative hearing, and the adjudicatory hearing commenced upon the close of the issues conference. Because the ALJ received no petitions for party status, the parties to the proceeding consisted solely of Department staff and applicant.

Standard of Review

Pursuant to 6 NYCRR 624.9(b), applicant has the burden of proof to demonstrate that its proposed project will be in compliance with all applicable laws and regulations administered by the Department. Whenever factual matters are involved, applicant must sustain the burden of proof by a preponderance of the evidence (see 6 NYCRR 624.9[c]).

³ Department staff cited the following regulatory provisions in its denial letter: 6 NYCRR 608.7(b)(1)(iv), (b)(5), (b)(6), and (b)(7) and 608.8.

Discussion

In contesting the Department's denial of his application for a seawall, applicant raised a number of arguments relating to the Department's jurisdictional authority and the permit issuance standards. The ALJ addressed applicant's objections in detail in the hearing report (see Hearing Report at 3-9).

The location of the mean high water level with respect to the site was one of the points of contention. Section 608.5 of 6 NYCRR provides that "[n]o person . . . may excavate from or place fill, either directly or indirectly, in any of the navigable waters of the State . . . that are inundated at mean high water⁴ level or tide, without a permit issued pursuant to [part 608]" (see also ECL 15-0505 [1]). Staff presented evidence demonstrating that the proposed project would involve placing fill below mean high water (see Tr at 31, 35-36, 66-70, 92, 94). Although applicant disputed the location of the mean high water level on his property, and asserted that the mean high water level referenced by Department staff was too far landward, applicant did not offer expert testimony or other competent evidence that rebutted Department staff's mean high water determination (see Hearing Report at 3-4).

In addition, 6 NYCRR 608.2 provides that "no person . . . may change, modify or disturb any protected stream, its bed or banks, nor remove from its bed or banks sand, gravel or other material, without a permit issued pursuant to [part 608]." The ALJ noted that one of the bases for the Department's jurisdiction over the project is that the St. Lawrence River is a protected stream (see Hearing Report at 5). The record supports the determination that applicant's proposal would involve modification of the bed or banks of the St. Lawrence River.

Accordingly, applicant would be required to obtain a permit to comply with 6 NYCRR 608.2 and 608.5. Where, as here, a permit is required, the Department is required to determine if the proposed alterations to water resources of the State are consistent with the standards set forth in 6 NYCRR 608.8. Specifically, 6 NYCRR 608.8 reads as follows:

"[t]he basis for the issuance or modification of a permit will be a determination that the proposal is in the public interest, in that:

- (a) the proposal is reasonable and necessary;
- (b) the proposal will not endanger the health, safety or welfare of the people of the State of New York; and
- (c) the proposal will not cause unreasonable, uncontrolled or unnecessary damage to the natural resources of the State, including soil, forests, water,

⁴ "Mean high water" is defined to mean "the approximate average . . . high water level for a given body of water at a given location, that distinguishes between predominantly aquatic and predominantly terrestrial habitat" (6 NYCRR 608.1 [r]).

fish, shellfish, crustaceans and aquatic and land-related environment.”

As noted, Department staff, in its denial letter dated July 20, 2018, addressed the environmental impacts of the proposed project including, in part, a resulting increase in scour and erosion of the sandy river bottom due to the redirection of wave energy, and unnecessary damage to the aquatic environment through the reduction in aquatic habitat and increased erosion (see Hearing Exhibit 3, at 1-2). Staff also concluded that the proposed project is not reasonable or necessary as applicant’s goals could be achieved in a more environmentally friendly manner, such as installing rip rap in front of an existing wall (see id. at 2).

Staff testimony at the administrative hearing provided further support for the denial of Mr. Hoover’s application for a seawall (see e.g., Tr at 43-45 [proposed vertical seawall resulting in more erosion and having negative effects on aquatic organisms and animals], 74-76 [vertical structures as least preferred method of erosion control], and 94-104 [vertical structures as most environmentally damaging forms of shoreline protection]).

Applicant failed to show that his project’s proposed alteration to the shoreline would be consistent with the applicable permit issuance standards. In that regard, applicant failed to show that the seawall was necessary to safeguard his property, or that the proposed seawall would be consistent with the State’s natural resource management and objectives (see Hearing Report at 6-9).⁵

Based on the record before me, applicant’s proposed seawall fails to meet applicable permit issuance criteria, and I hereby affirm Department staff’s denial of the application. I would however encourage applicant to discuss with Department staff possible alternative approaches that would satisfy applicable permit issuance standards.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By: _____/s/_____
Basil Seggos
Commissioner

Dated: March 31, 2020
Albany, New York

⁵ As noted, Mr. Hoover also applied to the Department for a water quality certification issued pursuant to section 401 of the federal Water Pollution Control Act and section 608.9 of 6 NYCRR. Department’s denial letter did not address the water quality certification. At the hearing, Department staff stated that because staff had determined that the project did not satisfy permit issuance standards under ECL article 15 and 6 NYCRR part 608, it was not necessary to consider the application for a water quality certification (see Tr at 76-77).

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Hearing Report

_____/s/_____
Maria E. Villa
Administrative Law Judge

January 28, 2019

SUMMARY

An administrative hearing was held at the request of applicant, Gary Hoover, to review the determination of Staff of the New York State Department of Environmental Conservation (“DEC” or “Department”) to deny his application for use and protection of waters permits and a water quality certification pursuant to ECL Article 15 and Part 608 of 6 NYCRR. The permits would have allowed applicant to construct a seawall and extend a dock at property he owns at 33633 Poplar Tree Bay Road, Cape Vincent, Jefferson County, New York, on the shore of the St. Lawrence River (the “Site”). Based on the record of this proceeding, the Commissioner should conclude that the application was properly denied because applicant failed to demonstrate that his proposed project meets permit issuance standards.

PROCEEDINGS

On March 14, 2018, applicant applied to the Department’s Region 6 office for a permit to construct a seawall and add a 6-foot x 6-foot crib to extend a dock¹ at his property along the shoreline of the St. Lawrence River. The permit application numbers are DEC ID No. R6-2228-00675/00001 (Excavation and Fill in Navigable Waters); DEC ID No. R6-2228-00675/00002 (Water Quality Certification); and DEC ID No. R6-2228-000675/00003 (Stream Disturbance).

Department Staff issued a notice of incomplete application (NOIA) on April 19, 2018. Exhibit 5. Applicant submitted additional handwritten drawings on May 11, 2018, and a letter stating that his property had lost up to 24” of sand and topsoil due to storms and high water. *Id.* Department Staff denied the application by letter dated July 20, 2018, and by letter dated July 28, 2018, applicant requested a hearing on the denial. Exhibits 3 and 4.

The notice of hearing was published in the Department’s electronic *Environmental Notice Bulletin* on September 12, 2018, and in the *Watertown Times* on September 19, 2018. Exhibits 1 and 2. The hearing took place as scheduled at 10:00 a.m. on October 17, 2018, at the Cape Vincent Village Library in Cape Vincent, New York, beginning with a legislative public hearing pursuant to Section 624.4(a) of 6 NYCRR. No members of the public appeared or spoke, but an e-mail from a neighboring landowner was received into the legislative hearing record. In the e-mail, the landowner expressed support for applicant’s proposal.

An issues conference immediately followed the legislative public hearing. The parties agreed that the issue for adjudication was whether the permit applications met the regulatory criteria for permit issuance under ECL Article 15 and Part 608 of 6 NYCRR; specifically, the denial grounds set forth in Department Staff’s letter of July 20, 2018. Issues Conference Transcript at 5-6; Exhibit 3. The hearing notice set a deadline of October 12, 2018 for receipt of petitions for party status. No petitions for party status were received.

¹ The Department’s denial letter stated that “[t]he department does not have any objections to the proposal to extend the existing crib dock in order to reach deeper water. If you would like to apply for a permit for just a dock extension, we would consider the application without prejudice.” Exhibit 3, at 2. Consequently, this hearing report addresses only applicant’s proposal to construct a seawall.

The adjudicatory hearing began immediately following the close of the issues conference. Applicant put on his case first. Pursuant to Section 624.9(b) of 6 NYCRR, applicant has the burden of proof to demonstrate that the proposed project would comply with all applicable laws and regulations administered by the Department. Whenever factual matters are involved, applicant must sustain the burden of proof by the preponderance of the evidence (see Section 624.9(c)).

At the hearing, applicant appeared *pro se*, and testified on his own behalf. Department Staff was represented by Assistant Regional Attorney Barbara A. McGinn, Esq., and called the following witnesses, all from the Department's Region 6 office: Jessica Hart, Environmental Analyst II and Deputy Regional Permit Administrator; Thomas Voss, Division of Environmental Permits, Regional Permit Administrator; and Stephanie Larkin, Biologist, Bureau of Habitat.

The transcript was received on November 13, 2018, and on that date the parties were notified by letter that the record had closed.

FINDINGS OF FACT

1. Gary Hoover owns property located at 33633 Poplar Tree Bay Road, Cape Vincent, Jefferson County, New York.
2. On March 14, 2018, applicant applied for permits, pursuant to ECL Article 15 and Part 608 of 6 NYCRR, to construct a seawall along the shore of the St. Lawrence River. These permit applications included: (1) DEC ID No. R6-2228-00675/00001 (Excavation and Fill in Navigable Waters); (2) DEC ID No. R6-2228-00675/00002 (Water Quality Certification); and (3) DEC ID No. R6-2228-00675/00003 (Stream Disturbance). Exhibit 5.
3. The St. Lawrence River is a navigable water of the State as defined in Section 608.1(u) of 6 NYCRR. Transcript (hereinafter "Tr.") at 31, 66 and 92. The St. Lawrence River is also a Class A protected stream, as defined at Section 608.1(aa). Tr. at 30, 66, and 91.
4. Applicant proposes to construct a seawall consisting of wood vertical slats, approximately 32 inches high. Exhibit 8. The proposed structure would be 85 feet in length. Exhibit 5. Pipes would be placed to support the seawall, and rock added to stabilize the structure. Id.
5. The proposed structure would be below the mean high water level of the St. Lawrence River at the site.

DISCUSSION

Applicant proposed to construct a wooden seawall along the shoreline of the St. Lawrence River at his property at 33633 Poplar Tree Bay Road, Cape Vincent, New York. The application describes the project as a "seawall – to prevent saltation² and home from high water .

² "Saltation" is defined in the online English Oxford Living Dictionaries as "the transport of hard particles over an uneven surface in a turbulent flow of air or water." <https://en.oxforddictionaries.com/definition/saltation>.

. . build 85' staving wall and cap.” Exhibit 5 (application). The seawall would be constructed of wood, approximately three feet high, with wooden slats running vertically. Exhibit 8. Pipes would be placed to support the seawall, and rock added to stabilize the structure.

As an initial matter, applicant argued that the Department did not have jurisdiction over the proposed project. Nevertheless, as discussed below, the record supports a finding that the Department has jurisdiction pursuant to its authority over the St. Lawrence River, as a navigable water of the State. The Department also has jurisdiction pursuant to Section 608.2 over the bed and banks of the River, which is a protected stream.

The Department’s Jurisdiction – Navigable Waters

Section 608.5 of 6 NYCRR provides that “[n]o person . . . may excavate from or place fill, either directly or indirectly, in any of the navigable waters of the State . . . that are inundated at mean high water level or tide, without a permit issued pursuant to this Part.” The St. Lawrence River is a navigable water as defined at 6 NYCRR 608.1(u). Tr. at 31, 66. “Mean high water” is defined as the approximate average high water level “for a given body of water at a given location, that distinguishes between predominantly aquatic and predominantly terrestrial habitat.” Section 608.1(r). The definition provides a hierarchy, in order of use, by which a determination as to the high water level may be made.

The first method of determining the high water mark refers to hydrologic information and high water elevations established for certain waterbodies, as set forth in Section 608.11 of 6 NYCRR. This method does not apply in this case, because the project location is not one of those listed in Section 608.11, and the record does not include any hydrologic data for the site. The definition goes on to describe other means of determining the high water mark, including “(2) vegetative characteristics (*e.g.* location, presence, absence or destruction of terrestrial or aquatic vegetation); (3) physical characteristics (*e.g.* clear natural line impressed on a bank, scouring, shelving, or the presence of sediments, litter or debris); and (4) other appropriate means that consider the characteristics of the surrounding area.” Section 608.1(r)(2)-(4).

Department Staff contended that the proposed project would be below the mean high water mark, and thus subject to the Department’s jurisdiction under Article 15. Jessica Hart, the Region 6 Deputy Permit Administrator, testified that “generally we determine the mean high water level on the river because there’s no set elevation in regulation. We determine it based on drift lines, vegetation lines, stain lines on docks, that type of thing.” Tr. at 35. Ms. Hart referred to a full-size photograph of the site, noting that “in this photograph you can see a stain on the – on the staining for the deck. And there’s a line where the sandy beach and rocky beach kind of turns to vegetation, green vegetation. And there’s also staining on the rocks as well.” Exhibit 5 (full size photograph); Tr. at 36. Based upon these characteristics, Ms. Hart concluded that the project would involve placing fill below mean high water. Tr. at 31, 35-36.

Department Staff also offered the testimony of Stephanie Larkin, a biologist in the Region 6 Bureau of Habitat. Ms. Larkin testified that the staining on the slats on the existing structure along the deck, as well as the stone in front of the structure, showed the location of the mean high water mark. Tr. at 94; Exhibit 5 (photographs). Ms. Larkin stated that she observed

the vegetation growing along the shoreline, which provided an indication of mean high water. Id. According to Ms. Larkin, the proposed seawall, including the vertical slats and piping, as well as the stone and cap, would constitute fill below mean high water. Tr. at 92.

Thomas Voss, the Regional Permit Administrator, testified that high water reached a wood wall along a deck at the site “for a sustained period of time to result in physical changes.” Tr. at 68. Mr. Voss referred to the staining and changes in vegetation that he observed at the site. Tr. at 68-69; Exhibit 5. He concluded that the proposed project would be below the mean high water mark, and would constitute filling within the navigable waters of the St. Lawrence. Tr. at 66-67, 70.

Applicant disputes the location of the high water mark on his property, and asserts that the mean high water level referenced by Department Staff is too far landward. Based on his estimation, Mr. Hoover argued that his proposed project would be above the mean high water mark. There are no surveyed or engineered drawings in the record, and the plans and drawings provided with the application do not indicate the mean high water level. Applicant did not offer expert testimony or other competent evidence to rebut Department Staff’s determination.

Although Department Staff’s witness, Jessica Hart, acknowledged on cross-examination that it was possible that the staining observed resulted from flooding during storm events, she stated further that “generally, when we see staining like that, it’s usually from repeated high water events.” Tr. at 47, 54; Exhibit 5. Mr. Voss also conceded that it was a possibility, but went on to testify that based upon his visit to the property, and the photographs offered at the hearing, the markings observed were an accurate representation “of the average location or elevation that the water reaches on a yearly basis.” Tr. at 81. The testimony from Department Staff’s witnesses regarding the staining on the existing structure, as well as the vegetation line, is sufficient to support Department Staff’s position regarding the location of the mean high water mark, and applicant’s argument on this point amounts to speculation.

The Department has jurisdiction over the placement of fill in navigable waters; in this case, the placement of a seawall at applicant’s property below the mean high water level. Applicant must therefore demonstrate that the proposed project would meet the standards for issuance of a use and protection of waters permit pursuant to ECL Article 15 to place fill (specifically, his proposed seawall) in the navigable waters of the St. Lawrence River. As discussed below, the record supports Department Staff’s position that the proposed seawall was not reasonable or necessary, would not safeguard life or property and instead would increase scour and erosion, and would cause unnecessary damage to the aquatic environment.

The Department’s Jurisdiction – Protected Stream

In addition to its authority with respect to the State’s navigable waters, the Department has jurisdiction over the proposed project pursuant to Section 608.2 of 6 NYCRR, which provides that “no person . . . may change, modify or disturb any protected stream, its bed or banks nor remove from its bed or banks sand, gravel or other material, without a permit issued

pursuant to this Part.”³ At the hearing, Ms. Hart testified that the work to be done at the site would be within the bed and banks of the St. Lawrence River, a Class A protected stream. Tr. at 30, 35. Ms. Larkin and Mr. Voss confirmed Ms. Hart’s testimony. Tr. at 66-67; 91-92, 94.

Applicant did not rebut Department Staff’s proof. The record supports Department Staff’s assertion that applicant’s proposal would involve modification of the bed or banks of the St. Lawrence River at the site. Applicant is therefore required to show that the proposal would satisfy the permitting requirements of Part 608 of 6 NYCRR. Based upon the evidence and testimony in the record, applicant failed to meet that burden.

Permit Issuance Standards

In its notice of permit denial, Department Staff referred to Section 608.8 of 6 NYCRR, which sets forth the permit issuance standards for Article 15 permits. Section 608.8 states that

[t]he basis for the issuance or modification of a permit will be a determination that the proposal is in the public interest, in that: (a) the proposal is reasonable and necessary; (b) the proposal will not endanger the health, safety or welfare of the people of the State of New York; and (c) the proposal will not cause unreasonable, uncontrolled or unnecessary damage to the natural resources of the State, including soil, forests, water, fish, shellfish, crustaceans and aquatic and land-related environment.

Exhibit 3, at 2. According to Department Staff’s denial, the addition of a vertical wall and cap would not be reasonable or necessary, because more environmentally friendly methods to prevent shoreline erosion exist. *Id.* In addition, Department Staff asserted that the vertical wall “would cause unnecessary damage to the aquatic environment through the reduction in aquatic habitat and increased erosion.” *Id.*

At the hearing, Ms. Hart, who signed the denial letter, reiterated that the proposal was not reasonable or necessary, and would cause unreasonable, uncontrolled, or unnecessary damage to the natural resources of the State, based upon the criteria set forth in Section 608.7(b) of 6 NYCRR. Tr. at 45. Mr. Voss and Ms. Larkin’s statements at the hearing were consistent with Ms. Hart’s. Tr. at 76, 95-96.

Department Staff’s denial letter also cited Section 608.7(b), which addresses the requirements for the review of permit applications, and provides, in pertinent part, that

³ Applicant also applied for a water quality certification issued pursuant to Section 401 of the federal Clean Water Act and Section 608.9 of 6 NYCRR. The Department’s denial letter did not address the water quality certification. At the hearing, Mr. Voss testified that because Department Staff determined that the application did not satisfy permit issuance standards under Article 15, it was not necessary for Department Staff to consider the impacts of a federal action to be reviewed by the U.S. Army Corps of Engineers, and did not evaluate the application in that regard. TR at 76-77. Because the applicant’s proposal fails to satisfy the requirements for Article 15 permits, this report recommends that the water quality certification not be issued.

[t]he department’s review will determine if proposed alterations to water resources of the State are consistent with standards contained in section 608.8 of this Part, considering issues such as: (1) the environmental impacts of a proposal, including . . . (iv) water course and water body integrity, including such criteria as erosion, turbidity, and sedimentation; . . . (5) the water dependent nature of a use; (6) the safeguarding of life and property; and (7) natural resource management objectives and values.

Exhibit 3. As discussed below, applicant failed to show that the proposed alteration to the shoreline would be consistent with the permit issuance standards articulated in Section 608.8, and referenced in Section 608.7(b) of 6 NYCRR.

Water Course and Water Body Integrity

The denial letter stated that “the department contends that the addition of a vertical wall constructed waterward of an existing stone wall would increase scour and erosion of the sandy river bottom due to the redirection of wave energy that occurs when waves crash into a hard vertical surface.” Exhibit 3, at 1. Ms. Hart testified that the wall would increase erosion, stating that “[a]ny time that a vertical wall is put into the water, instead of allowing wave action to dissipate as like on a sloped shoreline, the wave energy just smashes against that vertical structure and is reflected and either will continue to undermine or erode in front of the wall or tunnel along the wall and erode around the sides of the structure.” Tr. at 42.

In her testimony, Ms. Larkin referred to the notification of availability for review. Exhibit 5A. On that document, Ms. Larkin’s handwritten notes stated

Not Reasonable or Necessary don’t see much erosional issues that would require a wall out in the water. Could do some work on the [incomplete]. His proposal will stop the movement of sediment along the shoreline. The rest of the shoreline extends to the bottom.

Exhibit 5A. Applicant argued that the statement “will stop the movement of sediment along the shoreline” supported his argument that his proposal would address erosion at the site. Tr. at 84-86.

At the hearing, Ms. Larkin clarified that sediment movement along a shoreline is a natural and desirable process. Tr. at 88-89. She stated that the project as proposed would interfere with sediment movement, and exacerbate erosion. Ms. Larkin recommended that applicant construct a stone sill to establish a stable slope, backfill the area with soil, and plant vegetation with a strong root system that would tolerate being inundated during high water events. Tr. at 88, 97-98. Ms. Larkin stated that this would provide additional stabilization to the slope, and reduce wave energy. Tr. at 88. The witness testified that erosion would increase if

the proposed seawall were built, because the movement of water through the slatted structure “may actually cause an increase in turbidity as well as movement of sediment in front of it” and increase wave energy. Tr. at 102.

Applicant did not offer expert testimony or evidence in response to the testimony of Department Staff’s witnesses with respect to this requirement for review of a permit application. As a result, the record supports the conclusion that the proposal would increase erosion, and halt sediment movement, to the detriment of the water body’s integrity (see Section 608.7(b)(1)(iv)).

Water Dependent Use

Department Staff’s denial letter indicated that “[c]reating a walkway on top of the wall is not a water dependent use and there is already reasonable water access from the existing deck, stairs, and dock” at the Site. Exhibit 3, at 1. Ms. Hart testified that “there was no water dependent use that was elucidated” in the application. Tr. at 43. The witness noted that applicant has other access to the river by the existing dock and deck. Id. Ms. Larkin testified that applicant has reasonable access by the existing deck out to the dock by way of stairs. Tr. at 87. She explained that a water dependent use “is something that . . . is absolutely necessary for access to the water for a landowner, and is dependent upon the water resource. A walkway parallel to the shoreline is not a water dependent use.” Tr. at 102. Applicant did not rebut this testimony, and failed to establish that the proposed project is a water dependent use.

Safeguarding of Life and Property

In his application, Mr. Hoover stated that the addition of the seawall would stop saltation and prevent damage to the existing structures. In response, Department Staff’s denial letter stated that “this goal could be achieved in a more environmentally friendly manner, such as by installing rip rap (loose angular rock) in front of the existing wall.” Exhibit 3, at 1. The denial letter went on to indicate that “[p]roperly installed rip rap would allow waves to run up the rocks and allow wave energy to dissipate before reaching the existing wall, thus reducing erosional forces.” Id.

Ms. Hart pointed out that Department Staff had offered alternatives to protect the shoreline from erosion. Tr. at 43. The witness confirmed that the addition of a vertical wall would in fact cause increased erosion, even if the wall consisted of wooden slats. Ms. Hart observed that the structure would still “cause an impediment to the wave energy naturally dissipating on a sloped surface.” Tr. at 44. Mr. Voss testified that a vertical wall is the least preferred method of erosion control, and that the Department prefers natural shorelines, “[o]r those protection measures that provide the elements of what a natural shoreline would provide.” Tr. at 76.

Mr. Voss noted that during the site visit, he was able to look behind a door in the existing decking, and observed areas of native bedrock that slope down to the shore underneath the deck. Mr. Voss testified that the rock already provides the property with some erosion protection. Tr. at 73. Mr. Voss indicated that during the site visit, Department Staff attempted to engage applicant in a discussion of the impacts of the proposal, and “encouraged the consideration of

alternatives that would not have as significant an environmental impact.” Tr. at 71. The witness stated that Department Staff was unable to discuss the matter with applicant, noting that it is typical to discuss changes to a project with an applicant, and “look for alternatives that have less of an environmental impact that are more likely to meet our permitting standards.” Id. According to Mr. Voss, “[t]hat did not happen in this case.” Id. Ms. Larkin testified that the proposal was not necessary to safeguard the site, and pointed out that there were other alternatives that could be considered. Tr. at 103.

Applicant contended that the alternatives suggested by Department Staff would not protect the existing structures at the site, but did not provide evidence at the hearing to support his assertion. Applicant did not offer expert testimony, or any other evidence to substantiate his claim. Moreover, applicant did not dispute Department Staff’s contention that a rip rap wall would stop saltation and prevent further erosion. On this record, applicant has failed to meet his burden to demonstrate that his proposed project was necessary to safeguard the property.

Natural Resource Management and Objectives

Department Staff’s denial letter referred to and attached the Department’s guide entitled “Shoreline Stabilization – Ecological Importance of Natural Shorelines and Proper Shoreline Stabilization” (the “Guide”). The Guide noted that

[r]etaining walls are not encouraged and generally are not approved. These structures (typically sheet steel, concrete, wood or large armor stone) produce a sterile, vertical, flat-faced object which is of little use to aquatic organisms and other wildlife. They also tend to reflect wave energy rather than dissipate it, usually resulting in erosion problems in front of the “fix” and elsewhere.

Exhibit 3, at 2; Guide, at 5. At the hearing, Ms. Hart testified that the proposal would be inconsistent with natural resource management and objectives, noting that “we have multiple guidances on our website available to the public that state that vertical walls are generally not allowed.” Tr. at 44. Ms. Hart stated that vertical walls exacerbate erosion. Id.

The witness discussed the effect of vertical structures on aquatic organisms and other wildlife, noting that “vertical walls in the water cover any habitat that was there in the littoral zone, the shoreline zone.” Id. Ms. Hart characterized a vertical structure as “a very sterile environment” that would not provide ingress and egress for aquatic organisms, and indicated that the structure “pretty much – it eliminates any habitat that would be there.” Tr. at 44-45. She referred to the information included in the notice of denial, including suggestions for shoreline stabilization, which would involve placing rock riprap in front of the existing stone wall at the property, and placing a sill structure, backfilling, and planting vegetation. Tr. at 45.

On cross-examination, Mr. Hoover questioned Ms. Hart as to the presence of any wildlife at the site. Tr. at 49. On redirect, she testified that “I would guarantee that there are aquatic organisms in there that we can’t see” that are “extremely valuable to the ecosystem.” Tr. at 55. Ms. Hart said that even though the proposed wall was not solid, it would still be considered a

vertical structure, and stated that “[v]ertical structures have zero value for habitat.” Id. Ms. Larkin testified that that the proposal would be inconsistent with natural resource management objectives and values, because it would remove habitat for invertebrates and shore birds, as well as fish and aquatic species, and would result in increased erosion. Tr. at 103.

Applicant did not show that his proposal would be consistent with natural resource management and objectives, or, as discussed above, that any of the other regulatory standards would be satisfied. As a result, applicant has not established that the permits applied for should be issued.

CONCLUSIONS OF LAW

Applicant’s proposal does not meet the regulatory criteria for issuance of use and protection of waters permits pursuant to ECL Article 15 and Part 608 of 6NYCRR.

RECOMMENDATION

On this record, the Commissioner should conclude that the project proposed by applicant, a wood seawall, does not meet applicable permit issuance criteria, and that Department Staff’s denial of the application was proper.

Matter of Gary Hoover
 October 17, 2018
 Exhibit Chart

Exhibit No.	Description	Rec'd?	Notes
1	September 12, 2018 Notice (<i>Environmental Notice Bulletin</i>)	✓	
2	Notice (<i>Watertown Daily Times</i>) – September 19, 2018	✓	
3	July 20, 2018 letter denying permit application	✓	
4	July 28, 2018 request for hearing	✓	
5	Permit Application	✓	
5A	Notification of Availability for Review	✓	More legible copy of document included in Exhibit 5
6	NYS DEC: Shoreline Protection (Interpretive Guidance to Department Staff)	✓	
7A	Photograph	✓	
7B	Photograph	✓	
7C	Photograph	✓	
8	Photograph of wooden structure	✓	