

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 15 of the New York State Environmental Conservation Law (ECL) and Part 608 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

- by -

**KELLY’S CUSTOM DOCKS LLC,
KEVIN BECK, AND
ALLISAN AQUILINA-BECK,**

Respondents.

ORDER

DEC Case No.
R8-2017-0309-31

This administrative enforcement proceeding concerns alleged violations of Article 15, Title 5 of the ECL (Protection of Water) by respondents Kelly’s Custom Docks LLC (Kelly’s Custom Docks), Kevin Beck and Allisan Aquilina-Beck (the Becks) (collectively, respondents) at property owned by the Becks located at 5127 Elm Road, Dundee, Yates County, New York (site). The site is located on the shoreline of Seneca Lake, a navigable water of the State of New York which is classified as a Class AA (TS) surface water (see Hearing Transcript [Tr] at 55-56).

Factual Background

In 2012, the Becks submitted a joint permit application to the New York State Department of Environmental Conservation (Department or DEC) seeking authorization to construct a combination retaining wall/riprap along the shoreline at the site (see Department Exhibit [Exh] 5; Hearing Report at 3 [Finding of Fact No. 7]; Tr at 42). In 2014, Kelly’s Custom Docks and the Becks submitted a joint permit application to the Department seeking authorization to construct a breakwall along the shoreline at the site (see Department Exh 6; Hearing Report at 3 [Findings of Fact No. 7]; Tr at 43-44).¹ Department staff issued three Notices of Incomplete Application (NOIAs) to respondents, dated October 25, 2012, November 27, 2012 and October 8, 2014 (see Department Exhs 22-24). Of note, in the October 2014 NOIA, Department staff advised, among other things, that a site visit was done on October 7, 2014 to stake the location of the mean high water level, and “[i]t was confirmed that the proposal includes a new vertical wall well below [the mean high water level] of Seneca Lake” (Department Exh 23, at 1).

In July 2016, after receiving no response to a follow-up NOIA sent in May 2016, the Department deemed the application withdrawn as “chronically incomplete” (Department Exh 25). The Withdrawal of Incomplete Application stated that if applicant Kevin Beck “wish[ed] to pursue a permit for the project in the future, [applicant] must reapply providing a new application

¹ The Department considered the second application to be a supplement to the first application (see Tr at 44).

form, reports, plans, and any other supporting materials requested by the [D]epartment” (Department Exh 25).

In September 2016, Department staff visited the site and discovered that a breakwall had been constructed on the site along the shoreline and that lake water had inundated up to the wall (see Tr at 145-146, 153). Respondents did not file a new permit application or otherwise contact Department staff after the Department’s mean high water level determination and before respondents constructed the breakwall (see Tr at 211). Nor did respondents advise Department staff that a land surveying company, T. Merrill & Associates,² had been retained to establish the location of the mean high water line at the site.

Proceedings and Commissioner Determination

Department staff commenced this proceeding by serving respondents with a notice of hearing and complaint, dated March 16, 2018 (Complaint). The complaint alleged that respondents, jointly and severally, violated ECL 15-0505(1) and 6 NYCRR 608.5 by placing fill, and/or authorizing the placement of fill, into Seneca Lake, navigable waters of the State, below the mean high water level without a DEC-issued permit (see Complaint ¶¶ 16-20).³ The Becks, proceeding pro se, and Kelly’s Custom Docks, proceeding pro se through its principal, Nicholas Kelly (Mr. Kelly), served separate answers to the complaint, both dated August 20, 2019. The answers were substantially similar and raised several affirmative defenses.

The matter was assigned to Administrative Law Judge (ALJ) Maria E. Villa. A hearing was held on March 4, 2020 and March 5, 2020.⁴ Following the hearing, the ALJ prepared the attached hearing report in which she recommended that I issue an order dismissing this enforcement proceeding on the ground that Department staff failed to meet its burden to establish by a preponderance of the evidence that respondents violated ECL 15-0505(1) and 6 NYCRR 608.5 (see Hearing Report at 15).

² Also referred to in the record as Thomas Merrill Associates.

³ At the hearing, prior to the introduction of evidence, Department staff requested that the complaint, specifically paragraphs 16, 17, 18 and 20, be corrected to refer to the mean high water level -- rather than the mean high water elevation -- to conform with the language used in ECL 15-0505(1) and 6 NYCRR 608.5 (see Tr at 10-11). Respondents had no objection to the amendment, and the Administrative Law Judge granted the request (see Tr at 11-12).

⁴ Prior to the hearing, Department staff moved to dismiss respondents’ affirmative defenses and to dismiss a section of their answers entitled “Mitigating Circumstances.” By Memorandum dated January 17, 2020, the ALJ granted the motion in part, denied it in part and dismissed the sections in the answers entitled “Mitigating Circumstances” (ALJ Memorandum, dated January 17, 2020, at 1-3; see also Hearing Report at 2). The ALJ denied the motion to dismiss each respondent’s second affirmative defense -- alleging that no permit was required because the breakwall was constructed above the mean high water level of Seneca Lake -- on the ground that the defense went to the issue to be determined at the hearing (see id. at 2; Answers ¶¶ 23-25).

For the reasons that follow, I decline to accept the ALJ's recommendation, as discussed below, and hold that the hearing evidence demonstrated that respondents violated ECL 15-0505(1) and 6 NYCRR 608.5 by constructing a breakwall in Seneca Lake below the mean high water level without a DEC-issued permit. By this order, respondents shall be required to (1) pay a civil penalty of five thousand dollars (\$5,000), payment of which shall be suspended contingent upon respondents' compliance with the terms and conditions of the order, and (2) remediate the site.

I adopt the ALJ's findings of fact (see Hearing Report at 3-5) with certain modifications. These modifications include the following:⁵

Finding of Fact No. 7. This finding of fact is revised as follows: "On October 10, 2012, Department Staff received a permit application from Mr. and Mrs. Beck to build a combination retention wall/riprap at the site. Department Staff Exhibit (hereinafter "Exh. S ____") 5. On September 24, 2014, Department Staff received an application from respondent Kelly's Custom Docks to excavate and fill to place a breakwall at the site. Exh. S6. After issuing notices of incomplete application, the applications were deemed withdrawn by Department Staff on the ground of their being chronically incomplete. Exhs. S22, S23, S24 and S25. Department staff instructed that, if applicant Beck wished to pursue a permit for the project in the future, "[he] must reapply providing a new application form, reports, plans, and any other supporting materials required by the department." Exh. S25.

Finding of Fact No. 16. This finding of fact is revised as follows: "Respondents constructed a breakwall at some point between October 2014 and August 2015. Tr. at 84; Respondents' Exhibit (hereinafter "Exh. R ____") 11. Respondents did not contact Department staff after the Department's mean high water level determination and before Respondents constructed the breakwall. Tr. at 211.

Finding of Fact No. 17. The first sentence of this finding of fact is revised as follows: "On February 5, 2015, employees of T. Merrill & Associates, which had been retained by respondent Becks, went to the site to determine the mean high water level." The remaining portion of this finding of fact is not revised.

Finding of Fact No. 21. This finding of fact is modified by adding the following sentence at the end of the finding: "The presence of the breakwall and the backfill on the site compromised the ability of Department Staff to recreate the mean high water level that Department Staff had established in October 2014. Tr. at 162."

Finding of Fact No. 22. This finding of fact is revised as follows: "Respondents did not obtain a permit to construct the breakwall at the site. Answers, ¶ 19. Although both the Becks and Kelly's Custom Docks submitted permit applications prior to 2014, those permit applications were ultimately deemed withdrawn by Department Staff. Exhs. S5, 6, 22, 23, 24 and 25.

⁵ The abbreviations and exhibit references in these modifications to the findings of fact follow the style of the abbreviations and exhibit references used by the ALJ in her hearing report.

Liability

ECL 15-0505(1) prohibits any person from “excavat[ing] or plac[ing] fill below the mean high water level in any of the navigable waters of the state . . . without a permit issued” by the Department. Section 608.5 of 6 NYCRR similarly establishes a permit requirement in such circumstances. The statute defines “fill” as including “earth, clay, silt, sand, gravel, stone, rock, shale, concrete (whole or fragmentary), ashes, cinders, slag, metal, or any other similar material whether or not enclosed or contained” (ECL 15-0505[1]). In addition, DEC’s regulations provide:

“ ‘Mean low water’ ” or ‘mean high water’ means, respectively, the approximate average low water level or high water level for a given body of water at a given location, that distinguishes between predominantly aquatic and predominantly terrestrial habitat as determined, in order of use by the following:

- (1) available hydrologic data, calculations, and other relevant information concerning water levels (e.g., discharge, storage, tidal, and other recurrent water elevation data); (mean high water elevations are established, using this method, for certain waterbodies as presented in section 608.11 of this Part);
- (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” (6 NYCRR 608.1 [r]).

Here, there is no dispute that Seneca Lake is a navigable water to which ECL 15-0505(1) applies, that the breakwall constructed at the site meets the definition of “fill” set forth in the statute or that respondents did not obtain a permit for the placement of the fill. Furthermore, it is not disputed that the Becks own the site and that the breakwall was constructed by Kelly’s Custom Docks.

The sole contested issue in this matter was whether the fill -- the breakwall constructed along the shoreline of Seneca Lake -- was placed below the mean high water level. Department staff bore the burden of proof with respect to this issue and was required to “sustain that burden by a preponderance of the evidence” (6 NYCRR 622.11 [c]). Upon her review, ALJ Villa determined that Department staff had failed to meet its burden in this regard (see Hearing Report at 12-15). The ALJ concluded that Department staff had “failed to establish the location of the toe of the bulkhead in relation to the mean high water level of Seneca Lake” (*id.* at 13), and that respondents had mounted a “credible challenge to Department Staff’s determination of mean high water at the site” which had not been rebutted by staff (*id.* at 12-15). Upon due consideration and my review of the entire record, I disagree and do not adopt the ALJ’s recommendation that respondents should not be held liable.

At the hearing, Department staff presented evidence that, on October 7, 2014, Kathleen Kirsch, then a Biologist 1 with the Bureau of Habitat, DEC Region 8,⁶ along with other DEC

⁶ Ms. Kirsch had retired from the Department as of the time of her testimony at the hearing.

staff, visited the site and made an on-site mean high water level determination (see Tr at 69). Ms. Kirsch testified that she called the New York State Canal Corporation (Canal Corp) that morning and obtained the day's water level for Seneca Lake (445.6 Barge Canal datum [BCD]), which was approximately 1.2 feet below the mean high water level for Seneca Lake as listed in 6 NYCRR 608.11 (446.8 BCD) (see Tr at 69, 73-74).⁷ Ms. Kirsch testified that, although the regulations reference a United States Geological Survey (USGS) gage⁸ located at Watkins Glen for lake level readings, she used the gage located at Geneva because the Watkins Glen gage "was discontinued" and the Geneva gage is "the current ga[ge] used by" the Canal Corp for Seneca Lake (Tr at 71; see also Tr at 81; 6 NYCRR 608.11). At the site, she used an engineer's ruler placed vertically at the edge of the water and a laser level placed at the 1.2-foot-mark on the ruler to locate where the red laser dot -- representing the mean high water level -- hit the shoreline at the site (see Tr at 90-94). Department staff assisted her by placing a stake in the ground at the location of the red dot (see Tr at 95). Ms. Kirsch testified that they worked their way along the shoreline and placed six stakes at the site (see Tr at 95-96).

Ms. Kirsch testified that, after the initial placement of the stakes, she made adjustments to the location of the stakes based upon physical and vegetative characteristics present at the site, including the location of (1) what appeared to be a scour line or "scoured-out area (Tr at 106);" (2) leaves that were "either stained or . . . ha[d] an impression of being inundated with water (Tr at 107);" (3) a "debris line" with "finer" material on the landward side that was "not as wave washed," suggesting that the water did not inundate beyond that line (Tr at 110); (4) terrestrial vegetation; (5) algae and water staining on a rock; (6) a dock on the site; and (7) a return wall on adjacent property (see Tr at 96, 111, 114, 119-120, 124, 129-130, 132). Ms. Kirsch and Department staff measured the general distance from each stake to a fixed point on the site and made a "rough sketch" memorializing the location of the stakes and the measurements made (Tr at 96-97; see Tr at 135-139; Department Exh 14). Staff also took photographs of the stakes as placed at the site (see Tr at 100; Department Exh 15). Ms. Kirsch testified that Mr. Kelly was present at the time of the October 7, 2014 site visit and "made it clear that he was unhappy with the way [DEC] determined the mean high" because it was "significantly landward of where his . . . proposal for the concrete wall was to be placed" (Tr at 143). Although she advised him that she would be willing to come out again" to the site," respondents never asked DEC to reconsider the Department's mean high water level measurements (Tr at 143-144).

Department staff also presented evidence that Ms. Kirsch, along with other DEC staff, returned to the site on September 7, 2016 (see Tr at 146). Ms. Kirsch testified that she observed that the breakwall had been built; she also observed fill "along the dock on the land" on the water side of the wall and fill behind the wall (Tr at 146-147). She testified that the breakwall was built "well lakeward" of the mean high water level determination made by DEC (Tr at 153; see

⁷ Ms. Kirsch testified that she determined the mean high water level for Seneca Lake by locating the mean high water level listed in 6 NYCRR 608.11 for Seneca Lake (449.90 1929 National Geodetic Vertical Datum [NGVD]) and then converting it to BCD using a conversion factor of .935 (see Tr at 70; see also 6 NYCRR 608.11). Ms. Kirsch's finding in this regard is not in dispute; respondents' expert also used this figure (446.8 BCD) in plotting the mean high water level at the site (see Tr at 606-607).

⁸ Although the hearing record and papers submitted with respect to this matter use the spelling "gauge," this order uses the spelling "gage" as used by the USGS.

also Tr at 159). She testified that she made this determination based upon the photographs taken in October 2014 and her observations at the site on September 7, 2016, including her observations that lake water had “inundated up to” the wall and that there was staining along the length of the breakwall (Tr at 151; see also Tr at 146, 152-153, 156-160). She testified that the level of the lake that day was approximately 1.5 feet below the mean high water level, which contributed to her determination that the wall was placed lakeward of the mean high water level (see Tr at 146, 151, 157-160). Ms. Kirsch testified that the presence of the wall -- which had covered up the physical and vegetative characteristics that she had used to determine the mean high water level -- compromised her ability to recreate her high water level determination on September 7, 2016 (see Tr at 162). DEC staff took photographs of the site as it appeared on September 7, 2016 (Tr at 149; see Department Exhs 26, 43).

I find that the evidence presented by DEC staff, including Ms. Kirsch’s testimony and the photographs offered in support, established by a preponderance of the evidence that respondents violated ECL 15-0505(1) and 6 NYCRR 608.5 by placing fill, and/or authorizing the placement of fill, into Seneca Lake below the mean high water level without a DEC-issued permit. Initially, I do not accept the determination of ALJ Villa that Department staff failed to adequately demonstrate the relationship between DEC’s mean high water level determination and the breakwall as constructed (see Hearing Report at 13). Ms. Kirsch testified as to her personal observation that the wall was built lakeward of her mean high water level determination (see Tr at 153, 159). Moreover, Department staff offered photographs taken in October 2014 depicting the stakes placed at the site by DEC staff and photographs taken at the site in September 2016 after the breakwall was constructed (see Department Exhs 15, 26, 43). When the photographs are compared, it is clear that the breakwall, in considering the position of the willow tree, was located lakeward of the mean high water level as determined by Ms. Kirsch on October 7, 2014 (see Department Exhs 15C, 26D, 43). Department Exhibit 15C, a photograph taken at the October 2014 site visit which depicts the location of two DEC stakes, and Department Exhibit 26D, a photograph taken at the September 2016 site visit, both show a large willow tree at the site. The DEC stake is located behind the willow tree in Department Exhibit 15C, and the wall that respondents constructed is located in front of the willow tree in Department Exhibit 26D, confirming that the wall was constructed lakeward of DEC’s mean high water level determination.

Respondents challenged the mean high water level determination made by DEC in October 2014, arguing that: (1) the surface of the lake on October 7, 2014 was not completely calm (see Tr at 238; see also Department Exh 15); and (2) the laser level used by Ms. Kirsch had not been calibrated by her before she used it and, when calibrated by DEC staff in February 2020, was found to be “slightly off” (Tr at 446; see also Tr at 296, 447).⁹ Respondents also offered their own expert calculation of the mean high water line, which located the mean high water line between 1.2 feet and 3.4 feet lakeward of the toe of the breakwall and lakeward of the Department’s measurement (see Tr at 636; see also Respondents’ Exh 11).¹⁰

⁹ Respondents’ expert acknowledged that the equipment that he used was not calibrated on the day of the survey (see Tr at 604).

¹⁰ The mean high water line determination of respondents’ expert is depicted on a survey map as a straight line roughly parallel to -- and appearing very close to -- the breakwall (see Respondents Exh 11). Respondents’ expert

Nevertheless, based upon my review of the record, I do not adopt the ALJ's determination crediting the conclusions of respondents' expert as to the mean high water level at the site over the determination made by DEC staff.¹¹ The evidence presented at the hearing clearly established that, on September 7, 2016, water had inundated up to the breakwall -- and in fact was touching the breakwall at some points -- and staining and discoloration was manifestly present along the bottom of the breakwall (see Department Exhs 26A, 26E, and 26F). These photographs depict significant staining and discoloration along much of the length of the breakwall, indicative of regular inundation (see *id.*). Respondents' expert did not offer any testimony addressing the inundation and staining depicted in the photographs (see Tr at 146, 151, 157-160).¹² This photographic evidence of significant staining and discoloration demonstrates that the breakwall was constructed below the mean high water level and its construction is a violation of ECL 15-0505(1) and 6 NYCRR 608.5 (see Matter of Richard Steinberg and Barbara Steinberg, Decision and Order of the Commissioner, August 16, 2010, at 5).

Finally, respondents were aware of the staking done by DEC staff. They were so advised in the October 2014 NOIA and, in addition, Mr. Kelly was present during the site visit when the staking was undertaken. The DEC was never asked to return to the site to make a new determination as offered by Ms. Kirsch (see Tr 143-144; see Department Exh 23). Instead, respondents ignored the stakes placed by DEC staff and the Department's statements in the October 2014 NOIA, hired their own surveyor to make a determination and then unilaterally proceeded to construct the breakwall based upon their surveyor's measurement. Respondents were aware that the two measurements were in conflict, but simply proceeded to undertake the construction based on the measurement most favorable to them with no notice to the Department and no effort to discuss and reconcile the measurements made by respondents' surveyor and those made by Department staff at an earlier site visit. Furthermore, respondents' construction of the breakwall compromised the ability of Department staff to recreate the Department's earlier determination of the mean high water level (see Tr at 162).

Upon this record, I find that respondents violated ECL 15-0505(1) and 6 NYCRR 608.5.

testified that the mean high water level line as determined by his company has a "slight curve" but, given the scale of the map, "you can't see it" (Tr at 627).

¹¹ Respondents' expert, Thomas Merrill, a professional surveyor, testified that his company was only tasked to perform a survey of the property, identify the mean high water line at a certain elevation (446.8 BCD) on the site and produce a survey map (see Tr at 599, 624-626, 634, 660-661; Respondents Exh 11). Mr. Merrill and his crew were not asked to, and did not, determine the mean high water level with reference to 6 NYCRR 608.1, which provides for the consideration of several criteria with respect to mean high water level (see Tr at 660-661; 6 NYCRR 608.1 [r]; see also Matter of Anna Romer, Order of the Commissioner, July 2, 2003, at Hearing Report at 15 [stating that vegetative and physical characteristics are to be considered in determining the mean high water level at a location]).

¹² Respondents asserted, in their post-hearing brief, that "[e]rosive forces acting on the face of the breakwall changed the site conditions between 2015, when the wall was constructed, and the State's site visit in 2016" such that the photographs taken on September 7, 2016 "are not accurate measures of the relationship between *mean high water* and the toe of the breakwall at the time of construction" (Respondents' Closing Brief at 5 [emphasis in original]). Respondents, however, did not offer any testimony in support of this assertion, and the photographs referenced by respondents in support do not, without more, establish this point (see Department Exh 26A; Respondents Exh 14E).

Penalty and Remedial Relief

Here, Department staff sought in its complaint, at the hearing and in its post-hearing brief the imposition of a civil penalty of \$5,000, payable by respondents jointly and severally (see Complaint, Wherefore Clause at 4 ¶¶ 1-2; Tr at 212-218). Staff asserted that, pursuant to ECL 71-1107 (1), \$5,000 was the maximum civil penalty allowed for respondents' violation (see Tr at 212-213). Because she recommended finding no liability, ALJ Villa did not make a recommendation with respect to the requested penalty and remediation.

I disagree with staff's calculation of what staff refers to as the maximum penalty for respondents' violation of ECL 15-0505(1) and 6 NYCRR 608.5. I note that ECL 71-1127, which is appropriate to apply here provides:

“[a]ny person who violates any of the provisions of, or who fails to perform any duty imposed by article 15 . . . or who violates or who fails to comply with any rule, regulation, determination or order of the department heretofore or hereafter promulgated pursuant to article 15 . . . shall be liable for a civil penalty of not more than two thousand five hundred dollars for such violation and an additional civil penalty of not more than five hundred dollars for each day during which such violation continues, and, in addition thereto, such person may be enjoined from continuing such violation as otherwise provided in article 15” (ECL 71-1127 [1]).

Under ECL 71-1127, the maximum civil penalty far exceeds \$5,000 for this violation, which has been continuing since at least September 2016, if not earlier.¹³

Nevertheless, I adopt the civil penalty amount proposed by Department staff but am suspending that amount for the reasons discussed below.

Department staff has also requested that respondents be ordered to remove all fill placed in Seneca Lake in constructing the breakwall at the site and to take all actions necessary to return the area impacted by the placement of fill into Seneca Lake in constructing the breakwall at the site to its original condition (see Complaint, Wherefore Clause at 4 ¶¶ 3-4).

In the circumstances of this case, the immediate need is for the removal of the breakwall and for the restoration of the impacted area in as expeditious and environmentally protective manner as possible, and it is to that effort which financial resources should be applied. Accordingly, I direct that the full amount of the civil penalty shall be suspended contingent upon

¹³ ECL 71-1107, upon which Department staff relied in calculating the penalty in this matter, provides, in relevant part, that “[a] violation of section 15-0501, . . . shall constitute a misdemeanor, punishable by a fine of not to exceed ten thousand dollars, or by imprisonment not to exceed one year or by both such fine and imprisonment and, in addition thereto, by a civil penalty of not more than five thousand dollars” (ECL 71-1107 [1]). However, ECL 71-1127 authorizes civil penalties for violations of ECL 15-0501 in addition to the criminal sanctions and accompanying civil penalties authorized by ECL 71-1107 (see ECL 71-1107; ECL 71-1127; Matter of William Stasack and Stephen Stasack, Ruling of the Chief Administrative Law Judge, April 25, 2013, at 10).

respondents' compliance with the terms and conditions of this order including, but not limited to, the removal of the breakwall and restoring the impacted area.

I also find that the remedial relief requested by Department staff is appropriate and authorized. The testimony offered by Department staff clearly demonstrated the negative environmental impact of the breakwall on the lake ecosystem (see Tr at 53-54, 58, 211). Respondent is hereby directed to submit an approvable remediation plan to Department staff that addresses the removal of the breakwall and associated fill and the restoration of the impacted area to its original condition. An approvable plan is one that can be approved by the Department with only minimal revision. The remediation plan must be submitted to Department staff within sixty (60) days of the service of this order upon respondents.

Based upon my review and to ensure appropriate completion of the remediation, the remediation plan must contain, among other things:

- a timetable for respondents' removal of the breakwall and associated fill, the restoration of the impacted area and the completion of any other activities proposed by the plan;
- a description of the method by which respondents shall remove the breakwall and associated fill (including the protections to be followed to minimize any further negative impacts to Seneca Lake or its banks);
- the names of the facility(ies) where any removed material will be disposed and the requirement that respondents shall submit receipts for any such disposal; and
- the manner by which respondents shall furnish photographs that show the appearance of the area before and after removal/restoration.

I encourage respondents to discuss the preparation of the work plan with Department staff prior to its submission to ensure that the work plan incorporates all components that staff would require for this type of remedial relief.

Respondents may, upon good cause shown, request an extension of the remediation plan submission date and milestone dates contained in the plan. Any such request must be in writing, setting forth the reasons for the request, and submitted to Department staff in DEC Region 8. The granting of any extension shall be within the discretion of Department staff.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

- I. Based on the record of this proceeding, respondents Kelly's Custom Docks, LLC, Kevin Beck and Allisan Aquilina-Beck violated ECL 15-0505(1) and 6 NYCRR 608.5 by placing, and/or authorizing the placement of, fill into Seneca Lake below the mean high-water level without a permit from the Department.

- II. Respondents Kelly's Custom Docks, LLC, Kevin Beck and Allisan Aquilina-Beck, individually, are hereby assessed a civil penalty in the amount of five thousand dollars (\$5,000), jointly and severally, for the violation identified in paragraph I of this order. This penalty is suspended contingent upon respondents' implementation of the required remediation plan to Department staff's satisfaction and compliance with all other terms and conditions of this order.

In the event that respondents fail to comply with any term or condition of this order, including but not limited to the implementation of the required remediation plan to Department staff's satisfaction, the suspended civil penalty (five thousand dollars [\$5,000]) shall be immediately due and payable and shall be paid by certified check, cashier's check, or money order made payable to the New York State Department of Environmental Conservation and submitted to:

Dusty Renee Tinsley, Esq.
Assistant Regional Attorney
NYS Department of Environmental Conservation
Region 8
6274 East Avon-Lima Road
Avon, New York 14414-9516.

- III. Within sixty (60) days of the date of the service of this order upon respondents, respondents Kelly's Custom Docks, LLC, Kevin Beck and Allisan Aquilina-Beck are to submit an approvable remediation plan to Department staff that addresses the removal of the breakwall and associated fill and the restoration of the impacted area to its original condition. An approvable plan is one that can be approved by the Department with only minimal revision.

The remediation plan, which is to be submitted to Department staff must contain, among other things:

- A. a timetable for respondents' removal of the breakwall and associated fill, the restoration of the impacted area and the completion of any other activities proposed by the plan;
- B. a description of the method by which respondents shall remove the breakwall and associated fill (including the protections to be followed to minimize any further negative impacts to Seneca Lake or its banks);
- C. the names of the facility(ies) where any removed material will be disposed and the requirement that respondents shall submit receipts for any such disposal; and
- D. the manner by which respondents shall furnish photographs that show the appearance of the area before and after removal/restoration.

IV. Respondents shall submit the remediation plan referenced in Paragraph III of this order to:

Dusty Renee Tinsley, Esq.
Assistant Regional Attorney
NYS Department of Environmental Conservation
Region 8
6274 East Avon-Lima Road
Avon, New York 14414-9516.

V. Respondents may, upon good cause shown, request an extension of the remediation plan submission date and milestone dates contained in the plan. Any such request must be in writing, setting forth the reasons for the request, and submitted to Department staff in DEC Region 8. The granting of any extension shall be within the discretion of Department staff.

VI. Any questions or other correspondence regarding this order shall be addressed to Dusty Renee Tinsley, Esq., at the address referenced in Paragraph II of this order.

VII. The provisions, terms and conditions of this order shall bind respondents Kelly's Custom Docks, LLC, Kevin Beck and Allisan Aquilina-Beck and their agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____

Basil Seggos
Commissioner

Dated: January 12, 2023
Albany, New York

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

- of -

Alleged Violations of Article 15 of the Environmental Conservation Law
of the State of New York, and Title 6 of the Official Compilation of Codes,
Rules, and Regulations of the State of New York Part 608

by

Kevin Beck, Allisan Aquilina-Beck, and Kelly's Custom Docks, LLC,
Respondents.

Case No: R8-2017-0309-31

Hearing Report

- by -

/s/

Maria E. Villa
Administrative Law Judge

February 25, 2021

Proceedings

Staff of the New York State Department of Environmental Conservation (Department staff) commenced the captioned enforcement proceeding with service of a notice of hearing and complaint, both dated March 16, 2018, upon respondents, Kevin Beck and Allisan Aquilina-Beck, and Kelly's Custom Docks, LLC (collectively, "respondents"). The complaint alleged that respondents violated Section 15-0501(1) of the New York State Environmental Conservation Law ("ECL"), and implementing regulations at Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York ("6 NYCRR") Section 608.5, when they placed fill by constructing a breakwall below the mean high water level¹ ("MHWL") in a navigable water of the State, without a permit to do so. Complaint, ¶¶ 16-20.

The site of the alleged violations is on property owned by the Becks located at 5127 Elm Road, Dundee, New York (Yates County) (the "Site"). The Site immediately abuts and is adjacent to Seneca Lake. Complaint, ¶ 5. According to the complaint, during a September 7, 2016 site inspection, Department Staff observed that a breakwall and fill had been placed in Seneca Lake at the site. Complaint, ¶ 16. For the alleged violations Department Staff seeks an order of the Commissioner directing respondents to remove the breakwall and fill from Seneca Lake, and to pay a total civil penalty of \$5,000.

The Becks and respondent Kelly's Custom Docks filed separate answers, both dated August 20, 2019 (the "Answers"). Both Answers were essentially identical, although respondent Kelly's Custom Docks' Answer was unsigned. In their Answers, respondents denied the violations alleged in the complaint, and offered three affirmative defenses, as well as three additional statements captioned "Mitigating Circumstances."

In a motion dated August 26, 2019, Department Staff moved to dismiss the affirmative defenses and mitigating circumstances in both Answers. Following a conference call on January 17, 2020, a ruling was issued that day (the "January 2020 Ruling") granting the motion in part, and denying it in part, and dismissing respondents' mitigating circumstances. The January 2020 Ruling also addressed respondents' motion to compel disclosure, to depose Department Staff, and for relief from certain of Department Staff's discovery demands.

The parties engaged in settlement discussions, but failed to resolve the matter. Pursuant to a January 17, 2020 notice of hearing, the hearing took place as scheduled on March 4, 2020 and continued to the following day at the Department's Region 8 sub-office at 100 North Main Street, Elmira, New York. The hearing was held in Elmira in order to accommodate Mr. Beck, who was on active military service in the United States Coast Guard. Dusty Renee Tinsley, Esq., Assistant Regional Attorney, represented Department Staff. Department Staff called three witnesses: Kathleen Kirsch, a retired Biologist 1 (Habitat Ecologist) in the Department's Region 8 office; Peggy Norry, a Region 8 Environmental Analyst (now retired); and Zachary T. Kowasz, a licensed land surveyor in the Department's Region 8 office. Respondents appeared *pro se* and called Thomas Merrill, a professional surveyor licensed by the State of New York. A number of

¹ The complaint originally used the phrase "mean high water elevation." Complaint, ¶¶ 16, 17, 18 and 20. On the first day of hearing, Department Staff moved to amend the complaint to refer instead to "mean high water level." Respondents did not object, and the motion was granted. Transcript, at 12.

exhibits were received into evidence, and those exhibits are listed in the exhibit chart attached to this report.

The parties filed closing briefs and reply briefs. Reply briefs were received on May 15, 2020, and at that point the record of the proceeding closed.

Findings of Fact

1. Kevin Beck and Allisan Aquilina-Beck own property at 5127 Elm Road, Dundee, Yates County, New York. Transcript (hereinafter “Tr.”) at 28-29. The Becks’ property abuts and is immediately adjacent to Seneca Lake. Answers, ¶ 5.
2. Kelly’s Custom Docks, LLC is an active domestic limited liability company with a business address of P.O. Box 189, Watkins Glen, New York. Tr. at 31.
3. Seneca Lake is a navigable water of New York State. It is a Class AA(TS) surface water. Tr. at 55. Class AA surface waters may be used as a potable water source and for primary and secondary contact recreation and fishing, and Class AA surface waters must be suitable for fish, shellfish and wildlife propagation and survival. Section 701.5(a) of 6 NYCRR. Water bodies classified as TS pursuant to Section 701.25(b) of 6 NYCRR are trout spawning waters, and therefore any water quality standard, guidance value, or thermal criterion that specifically refers to trout spawning applies.
4. The littoral zone of Seneca Lake is the near shore shallow area where sunlight hits the bottom. Tr. at 58. This area supports plant life and provides food and habitat for invertebrates, insects, crustaceans, fish and wildlife, and is a nesting area for fish where small fish can hide from predators. Id.
5. Placement of a wall can exacerbate erosion on neighboring shorelines and in front of the wall. Tr. at 211.
6. Pursuant to Section 608.11 of 6 NYCRR, the mean high water elevation for Seneca Lake is 449.5 National Geodetic Vertical Datum of 1929 (“NGVD29”). The gaging station is identified as 04232400 (Watkins Glen).
7. On October 10, 2012, Department Staff received a permit application from Mr. and Mrs. Beck to build a combination retention wall/riprap at the site. Department Staff Exhibit (hereinafter “Exh. S__”) 5. On September 24, 2014, Department Staff received an application from respondent Kelly to excavate and fill to place a break wall at the site. Exh. S6. After issuing notices of incomplete application, the applications were withdrawn by Department Staff. Exhs. S22, S23, S24 and S25.
8. On October 7, 2014, representatives of the Department visited the site in order to determine the mean high water level. Kathleen Kirsch, Peggy Norry, and Thomas Haley from the Region 8 permit office were present, as was Nick Kelly. Tr. at 89. Ms. Kirsch obtained the day’s water level for Seneca Lake from the New York State Canal

Corporation. Tr. at 69. On that day, the mean high water level was 445.6 BCD (“Barge Canal Datum”). Id. A datum is a reference point (a level surface) to measure vertical data. Tr. at 71, 444; Exh. S62 at 74.

9. Ms. Kirsch added the conversion factor for the Geneva station on Seneca Lake to the mean high water elevation provided in Section 608.11 of 6 NYCRR to arrive at a mean high water level of 446.84 BCD. Tr. at 70-74. Although the regulation lists Watkins Glen as the station to be used, rather than the Geneva station, the Watkins Glen gauge was discontinued in 2013 and had not provided current water elevations since that time. Tr. at 71-73. The Geneva gauge is the gauge used by the New York State Canal Corporation. Tr. at 71 and 81.
10. Mean high water level determinations are not conducted during windy conditions, because the water must be relatively calm in order to obtain an accurate measurement. Tr. at 89.
11. At the October 7, 2014 site visit, Ms. Kirsch used a folding ruler and laser level to determine the mean high water level. Tr. at 90-91. She placed the ruler at the edge of the water, holding the ruler vertically, and determined the difference between the BCD mean high water level and the current water level in BCD. Tr. at 91 and 92-93. On that day, the difference was approximately 1.2 feet. Tr. at 91. Ms. Kirsch aimed the laser level at the shoreline and instructed Ms. Norry to put a stake at the location where the red dot of the laser level hit the ground on shore. Tr. at 91-95. Department Staff placed six stakes at the site. Tr. at 95-96, 99.
12. Ms. Kirsch then considered the physical and vegetative characteristics of the site to make any changes to the placement of the stakes. Tr. at 96.
13. Ms. Norry drew a sketch of the placement of the stakes at the site. Tr. at 97, 303; Exh. S14. The sketch depicted the mean high water level as a curved line. Tr. at 99; Exh. S14. The sketch was not drawn to scale. Tr. at 407.
14. Department Staff did not provide a copy of the sketch to respondents, or notify respondents of the location of the mean high water level as determined during the October 7, 2014 site visit, but did place stakes at the site, and respondent Kelly was present during the site visit. Tr. at 89, 95-96, 99, 305-308, 411-412, 428; Exh. S23.
15. Photographs of the site taken on October 7, 2014 show waves on the water, and that the water was not completely calm. Tr. at 236-238; Exh. S15K.
16. Respondents constructed a breakwall at the site at some point between October 2014 and August 2015. Tr. at 84; Respondents’ Exhibit (hereinafter “Exh. R ___”) 11.
17. On February 5, 2015, employees of Thomas Merrill Associates went to the site to determine the mean high water level. The water was choppy that day and so they returned on the following day, February 6, 2015. The lake was “basically flat” on that

day. Tr. at 628. During the month of February 2015, the elevation of Seneca Lake was approximately just below the elevation of 445 BCD. Tr. at 85.

18. The elevation used by the surveying team for mean high water was 446.8 BCD. Exh. R12. This location was established by using a lake elevation of 445.15 BCD for a reference elevation, as provided by the Navy Barge in Seneca Lake on the morning of February 6, 2015. *Id.* The team set four stakes and returned in approximately one week to locate the staked points to boundary points on the property. Tr. at 611-612.
19. After the breakwall was constructed, Thomas Merrill Associates was asked to return to the site to locate the existing breakwall and to update the survey showing the relationship of the breakwall to the property lines and to the mean high water elevation that had been staked in February 2015. Tr. at 622. In order to do so, the team used an electronic theodolite, which the witness stated was advanced survey equipment, compared to a transit. Tr. at 623. The device records data which can then be downloaded and used to prepare a survey. Tr. at 623.
20. Thomas Merrill Associates prepared a survey dated August 6, 2015 showing the location of the breakwall in relation to the mean high water level on February 6, 2015. Exh. R11.
21. During a September 7, 2016 site inspection, Department Staff observed a breakwall that had been constructed at the site. Ms. Kirsch was present on that day, as well as Environmental Conservation Officer Paul Blanton and Ashley Reed, a Region 8 seasonal compliance inspector. Tr. at 145-146. Department Staff observed staining on the breakwall at the site. Tr. at 152; Exh. S26. Department Staff took some measurements, but did not place stakes or determine the mean high water level. Tr. at 160-161. Department Staff does not have any documentation that shows the relationship between the mean high water level as determined in October 2014 and the breakwall. Tr. at 352-353.
22. Respondents did not obtain a permit to construct the breakwall at the site. Answers, ¶ 19. Although both the Becks and Mr. Kelly submitted permit applications prior to 2014, those permit applications were ultimately withdrawn by Department Staff. Exhs. S5, 6, 22, 23, 24 and 25.

Discussion

Standard of Review

Where a hearing is held in a Department administrative enforcement proceeding, Department Staff bears the burden of proof on all charges and matters affirmatively asserted in the complaint, pursuant to Section 622.11(b)(1) of 6 NYCRR. Respondents bear the burden of proof with respect to any affirmative defenses (*see* Section 622.11(b)(2) of 6 NYCRR). The standard of proof in Department enforcement proceedings is a preponderance of the evidence (*see* Section 622.11(b) of 6 NYCRR; *see also Matter of Steck*, Order of the Commissioner, at 4 (March 29, 1993)).

Applicable Statutory and Regulatory Provisions

The complaint alleged that respondents violated provisions of ECL Article 15, Title 5 (Protection of Water), and the statute's implementing regulations at Part 608 of 6 NYCRR (Use and Protection of Waters) when they constructed a breakwall below the mean high water level in Seneca Lake at the site without a permit from the Department. The January 2020 Ruling stated that "the issue to be addressed at the hearing is the location of the toe of the bulkhead in relation to the MHWL of Seneca Lake. Department Staff bears the burden of proof with respect to this issue."

Section 15-0505(1) of the ECL provides that "[n]o person . . . shall excavate or place fill below the mean high water level in any of the navigable waters of the State . . . without a permit issued pursuant to subdivision 3 of this section." Section 608.5 states that "[n]o person . . . may excavate from or place fill, either directly or indirectly in any of the navigable waters of the State or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the State, and that are inundated at mean high water level or tide, without a permit issued pursuant to this Part."

Pursuant to Section 608.1(u) of 6 NYCRR, the navigable waters of New York State are those lakes and other bodies of water that are navigable in fact notwithstanding interruptions to navigation by seasonal variations in capacity. This definition does not apply to waters that are surrounded by land held in single private ownership at every point in their total area. It is undisputed that the waters of Seneca Lake are navigable in fact.

"Fill" is defined as "any solid or semi-solid, organic or inorganic material including, but not limited to, earth, clay, silt, sand, gravel, stone, rock, shale, concrete, ashes, cinder, slag, metal, stumps, solid waste as defined in Part 360 of this Title, or any other similar material, whether or not enclosed or contained by a structure."

The terms *mean low water*, and *mean high water* are defined in the regulations at Section 608.1(r) of 6 NYCRR. These terms mean, respectively,

the approximate average low water level or high water level for a given body of water at a given location, that distinguishes between predominantly aquatic and predominantly terrestrial habitat...

The definition further identifies four methods for making the distinction between predominantly aquatic and predominantly terrestrial habitat, "as determined, in order of use by the following:

1. available hydrologic data, calculations, and other relevant information concerning water levels (*e.g.*, discharge, storage, tidal, and other recurrent water elevation data); (mean high water elevations are established, using this method, for certain waterbodies as presented in section 608.11 of this Part);

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)(1)-(4) of 6 NYCRR).”

A table of mean high water elevations is presented at Section 608.11(a) of 6 NYCRR for various waterbodies in New York State. The waterbodies are grouped by their respective drainage basins in the State, and their respective index numbers are provided.² For each body of water, the relevant US Geological Service (USGS) gaging station number is provided, and the mean high water elevation at the gaging station is expressed in feet above mean sea level based on various elevation data sets (*see* Section 608.11(a), notes a, b, and c).

Seneca Lake is listed in the table provided at Section 608.11(a). The gaging station is identified as 04232400 (Watkins Glen), and the mean high water elevation, expressed in 1929 National Geodetic Vertical Datum³ (“NGVD”) is 445.90.

In 1994, the Department amended Part 608, including the definition of “mean high water.” *New York State Register*, at 15 (December 7, 1994). According to the State Register, the definition was amended “to more clearly define the criteria to be utilized to make determinations for these respective elevations. Mean high water elevations for certain water bodies around the State are established by the department and presented in the regulations.” *Id.*

On January 13, 1995, William Adriance, the Department’s Deputy Chief Permit Administrator, issued guidance regarding the implementation of the amended Part 608 (the “Guidance”). Exh. R2. The Guidance states that the definition of “mean high water” was revised “to place criteria for making these determinations in an order of use from the most reliable methodology, calculation based on hydrologic data, to more judgmental methodologies based on vegetative and physical characteristics. In the future we hope to rely upon established elevations as much as possible.” *Id.*, at 9. The Guidance noted that in establishing mean high water elevations for 45 water bodies around the State using hydrologic data, “care was taken to ensure that they are consistent with the elevations utilized by other regulatory agencies such as the Army Corps of Engineers and the Adirondack Park Agency.” *Id.* The Guidance concluded that “[w]here no elevations are established, or data is not available to make calculations, the physical characteristics relied upon in the past should be utilized.” *Id.*

² For the meaning of “index numbers” *see* Part 865 of 6 NYCRR *et seq.*

³ A “datum” is defined as “any numerical or geometrical quantity of set of such quantities which may serve as a reference or base for other quantities . . . A level surface to which elevations are referenced, *e.g.*, “mean sea level.” Exh. S62 at 74.; Tr. at 444.

Positions of the Parties

Department Staff's complaint alleged that respondents violated Section 15-0501(1) of the ECL, and implementing regulations at Section 608.5 of 6 NYCRR, when they placed fill by constructing a breakwall below the mean high water level in a navigable water of the State, without a permit to do so. Department Staff contended that, while the regulations identify a specific mean high water elevation for Seneca Lake, Department Staff also considers the additional factors, including physical and vegetative characteristics, set forth in Section 608.1(r) of 6 NYCRR.

Seneca Lake is listed in the table provided at Section 608.11(a). of 6 NYCRR. Therefore, the first methodology applies in determining the mean high water level of Seneca Lake. At the hearing, Department Staff's witness, Kathleen Kirsch, testified that she located the mean high water level by first locating the mean high water level for Seneca Lake at the site, and then went on to rely upon the second and third methods set forth in the regulations, for determining the mean high water level of Seneca Lake in the vicinity of the project site. Based upon that evaluation, Department Staff maintained that the breakwall was lakeward of the mean high water level.

Respondents argued that the mean high water level determined by Department Staff was too far landward, and that it was impossible to verify Department Staff's determination of that level, given the documentation prepared during the site visit, specifically, a rough hand drawn sketch, which was not provided to respondents. Respondents took the position that the specific mean high water elevation set forth in the regulations controlled, and that Department Staff's reliance on physical and vegetative characteristics was misplaced. To rebut Department Staff's case, respondents provided the testimony of a licensed surveyor, with a survey (Exh. R11) showing that the breakwall was landward of the mean high water level.

In addition, respondents argued that the tools used by Department Staff's witness to determine the mean high water level (a folding ruler and a laser level) were unreliable, particularly in light of site conditions on the day of the site visit. According to respondents, Department Staff's determination was subjective and impossible to verify, such that respondents' ability to mount a defense to the allegations in the complaint was compromised.

October 7, 2014 Site Visit

On October 7, 2014, representatives of the Department visited the Site. Department Staff's witness Kathleen Kirsch testified that before visiting the Site, she obtained the day's water level for Seneca Lake from the New York State Canal Corporation. That day, the level was 445.6 BCD ("Barge Canal Datum"). At the time the visit took place, Ms. Kirsch, Peggy Norry, and Tom Haley from the Department's permit office were present, as well as Nicholas Kelly, of respondent Kelly's Custom Docks, LLC.

Section 608.11 indicates that in determining mean high water level, the gauge to be used for Seneca Lake is Watkins Glen. Ms. Kirsch testified that the Watkins Glen gauge was discontinued in 2013, and had not provided current water elevations since that time. Tr. at 71-73.

Ms. Kirsch testified that she used the Geneva gauge because “it was the current gauge used by the New York State Canal Corporation.” Tr. at 16-18, 71. Ms. Kirsch then added the conversion factor of .935 for the Geneva Station to the mean high water elevation provided in Section 608.11 (445.90 NGVD), to arrive at an elevation of 446.84 BCD. Tr. at 70-74.

At the site, Ms. Kirsch stood at the edge of the water, and placed a folding ruler at the water’s edge. Tr. at 90-94. She then measured up the ruler approximately 1.2 feet, to account for the difference between the mean high water level in BCD and the water level that day. Id. The witness placed the laser level at the 1.2 foot mark, and aimed the laser level at the shore. Id.

Ms. Norry testified that she was present at the site visit on October 7, 2014. Tr. at 386. She stated that she did not have any expertise in making mean high water elevation determinations, and that she was at the site to assist Ms. Kirsch by holding the “dead” end of the measuring tape while Ms. Kirsch was determining the mean high water level. Tr. at 386. Ms. Norry testified that Ms. Kirsch would point the laser level at the shore, and Ms. Norry would find the location of the red dot from the laser level on the ground, and place a stake at that point. Tr. at 388-39. They would then measure from the stake to a benchmark on shore. Tr. at 524.

During the site visit, Ms. Norry drew a sketch and “attempted to draw the benchmarks that we took . . . [and] the measurements from the stake to the benchmark.” Tr. at 390; Staff Exh. 14. The witness characterized the sketch as “just a rudimentary drawing,” and that the line labeled “M.H.W.L.” was “just a general sort of arch where it – the shoreline curved in a one point, but it’s not reflective of the actual curve.” Tr. at 391, 394. The drawing was not to scale. Tr. at 407.

Ms. Kirsch was shown a photograph of the lakeshore (Exhibit S15K). Tr. at 236. The photograph was taken on the day of the Site visit on October 7, 2014. Ms. Kirsch acknowledged that there was “some kind of wave. It is not a totally calm glass – water.” Tr. at 238. She went on to testify that determining where the mean high water level “is an approximate . . . So basically, what you’re trying to find is a moving target . . . you try your best to try to get that approximate location of where that elevation is . . . and then you narrow down where the mean high-water elevation is by using the – the next information, which is vegetative and physical, and other characteristics to try to get that mean high water elevation – or level location.” Tr. at 241. She stated that she was approximating the lake level that day because of the moving water. Tr. at 264. On redirect, the witness stated that “calm waters” is subjective, and that even if there are waves, the evaluation of physical and biological characteristics would compensate for any wave action. Tr. at 359.

Ms. Kirsch took the position that for water bodies that do have a mean high water level established in the regulations, “you’re allowed to use all the characteristics listed in the regulation.” Tr. at 258. She acknowledged that this approach was “subjective,” and that if someone else went to the site and evaluated the physical and vegetative characteristics, “there might be a variation” in the location of the mean high water level. Tr. at 258-259. In her opinion, the stated hydrologic elevation for Seneca Lake would not take precedence over these other characteristics. Tr. at 260.

As part of their cross-examination, respondents questioned Ms. Kirsch about the laser level that she used to determine the mean high water level. She acknowledged that the label on the packaging for the laser level did not indicate that the instrument was intended for outdoor use, and that although the instruction manual stated that the calibration of the laser level should be verified before each use, she had not done so before using the level at the site, and in fact had never verified the calibration. Tr. at 294-296; Staff Exh. 16; Respondents' Exhs. 9A, B and C.

Department Staff called Zachary Kowasz, a licensed land surveyor in the Department's Region 8 office. Mr. Kowasz testified that shortly before the hearing, on or about February 25, 2020, he calibrated the laser level. Tr. at 445. According to Mr. Kowasz, the level was "slightly off," "about three-eighths of an inch at the distance of fifteen feet away." Tr. at 446. He stated that it did not appear that the laser level had been calibrated previously, and that "the bubble was off . . . if the laser pointer is pointing out, it would have pointed the laser lower three-eighths of an inch than where it should have been had it been calibrated." Tr. at 446, 451. As a result, the witness stated that "if you had an error of three-eighths of an inch vertically," it would hit the shoreline landward thirteen inches. Tr. at 450-451. Mr. Kowasz was not at the site on October 7, 2014. He testified that it did not appear that the laser level had ever been calibrated before he did so.

Mr. Kowasz reviewed several documents that provided historical data as to the level of Seneca Lake on October 7, 2014, and concluded that, based upon that data, Ms. Kirsch's methodology of determining the mean high water level would be "a more conservative approach" resulting in a mean high water level closer to the lake. Tr. at 472-473, 553; Staff Exhs. 64, 67A-C.

February 6, 2015 Survey

In February of 2015, the Becks retained Thomas Merrill, who testified at the hearing. Mr. Merrill is a licensed surveyor, and obtained his license in 1984. Tr. at 596-597; Exh. R16. He has performed various surveys on Seneca Lake, including elevation certificates. Tr. at 599.

Mr. Merrill testified that the initial scope of work was "to have a field crew out – to go out to the site and stake the line of – the mean high water line at a certain elevation." Tr. at 599. Subsequently, the crew returned to the site "a couple of weeks after we staked the line and actually physically located the points that we had put in the ground so that we had the location of record relative to the property lines." *Id.* The work took place before the breakwall was constructed at the site. Tr. at 622. Thereafter, the crew "went back in the summer to locate the line that we had originally staked, as far as to relocate those pins, whatever was left of them, as well as to locate the seawall and do an updated boundary survey for the property." *Id.*

The witness stated that "we decided to use the Dresden benchmark on the Naval station for our benchmark because it was in Barge Canal datum already and I was asked to stake a line of elevation that was already in Barge Canal datum. So there was no conversion involved in it." Tr. at 606, 612. Mr. Merrill stated that he was provided with the elevation of 446.8 by Mr. Kelly as the elevation to use for mean high water. *Id.* Mr. Merrill went on to state that 446.8 is "the

mean high water line of elevation for Seneca Lake published” in BCD. Id. He testified further that 446.8 feet is “the standard mean high water elevation for Seneca Lake.” Tr. at 607.

Mr. Beck questioned the witness further regarding the 446.8 BCD:

Q. . . . that converts to four four five point nine zero N.G.V.D. 29, is that correct? . . . So the law states that the mean high water level is four four five point nine zero N.G.V.D and you used four four six point eight feet in B.C.D. Are those two numbers the same? . . . [i]s the conversion factor that you would use is point nine three?

A. Point nine three five typically, yes.

Tr. at 607-608.

Mr. Merrill testified that initially, the crew planned to go to the site on February 5, 2015, but because the day was windy, the visit was postponed until the following day, February 6, 2015. Tr. at 609. On February 6, 2015, the lake was “basically flat.” Tr. at 628. The witness stated that before the team went out, they called the Navy barge at Dresden for the lake elevation, which was 445.15 BCD on that day. Tr. at 609-610; Exhibit R18. Mr. Merrill testified that

[w]e used to call the Geneva Water Treatment Plant, but we ended up doing more and more work further away from Geneva and knowing that the elevation of the lake changed as you went north to south, we were trying to find a closer location and I called various surveyors in the area who had been doing work in the area for years and they gave me the reference for the Navy barge.

Tr. at 613. The witness stated that Dresden is a more accurate location to use than Geneva, because “[i]t’s half the distance—again, closer to the site than Geneva.” Tr. at 613-14. He stated further that it was “definitely” best to use the surface water elevation closest to the site, and that the difference between the Navy barge and Geneva on any given day would typically be about three to four inches. Tr. at 614. Department Staff did not establish that there was any difference in the conversion factor from BCD to NGVD29 between the Geneva gauge and the Navy barge at Dresden. Tr. at 549.

Mr. Merrill’s team used a Sokkia automatic level, which he testified was “very accurate” and “very stable.” Tr. at 601-602, 605. The level requires the use of a tripod. Tr. at 602. The witness stated that calibration of equipment such as the automatic level is required, and that the level was calibrated before the crew went to the site. Tr. at 604. The crew measured elevations and set stakes, and returned a week later to “set some survey control points, horizontal points, that tied into the boundary points on the . . . property.” Tr. at 610-612; Exhs. R13A-D.

Some months later, after the breakwall had been constructed, the crew returned to the site, and located the mean high water level of 446.8 BCD, as located on February 6, 2015, in

relation to the breakwall. Tr. at 622-623. A survey map was prepared based upon the data collected during the subsequent site visit. Exh. R11.

Mr. Merrill was asked to look at a photograph of the water at the site on October 7, 2014. Tr. at 628-630. The witness stated that in his opinion, based upon the photograph, the water was not calm enough to get an accurate reading, and testified that “we wouldn’t have done the work if it had been choppy like that.” Tr. at 630. The witness was also asked if he would use the equipment Department Staff used to determine the mean high water elevation, and he replied that he “definitely would not . . . I would not have used that instrument for determining that high water elevation.” Tr. at 634, 635.

According to the Mr. Merrill, the breakwall was landward of the mean high water line, approximately three and one-half feet at the south end. Tr. at 635. He was shown the sketch drawn by Ms. Norry during the October 2014 site visit, and stated that he would not be able to reproduce “the locations of these points in the field from these notes.” Tr. at 640. He stated that the team did not consider biological characteristics of the site as part of the work that was performed. Tr. at 661.

September 7, 2016 Site Visit

Department Staff, including Ms. Kirsch, returned to the site on September 7, 2016. During that visit, Department Staff “determined or looked at what the [water] level was in relation to the wall in the adjacent shorelines and took photographs.” Tr. at 146. Ms. Kirsch testified that she observed fill “along the dock on the land – on the water side of the wall, as well as the fill that was behind the wall.” Tr. at 146-147. According to the witness, the wall was below the mean high water level and that there was water staining on the breakwall “all the way across.” Tr. at 152; Exh. S43. The witness testified that based upon the photos and the benchmarks used in October of 2014, there was “fill and a wall lakeward of our mean high water elevation stakes.” Tr. at 157; Exh. S26D.

Nevertheless, Department Staff did not undertake a mean high water determination during the September 2016 site visit, and the stakes that Department Staff placed were no longer present at the site. Department Staff took some measurements, but did not place stakes or determine the mean high water level. Tr. at 160-161. Department Staff does not have any documentation that shows the relationship between the mean high water level as determined in October 2014 and the breakwall. Tr. at 352-353.

Based on the foregoing, this hearing report recommends that the Commissioner dismiss this enforcement proceeding, because Department Staff failed to demonstrate that the breakwall constructed at the site is located below the mean high water level of Seneca Lake. Department Staff has the burden to show, by a preponderance of the evidence, that respondents committed the violation alleged. Once respondents offered a credible challenge to Department Staff’s determination of mean high water at the site, Department Staff was obliged to rebut that challenge by a preponderance of the evidence.

The deficiencies in Department Staff's case result in a lack of evidence necessary to make the factual findings that would establish the violations alleged in Department Staff's complaint. Department Staff failed to establish the location of the toe of the bulkhead in relation to the mean high water level of Seneca Lake. Although Ms. Kirsch visited the site on September 7, 2016, after the breakwall had been constructed, she did not make a determination of the mean high water level as was done on October 7, 2014. Rather, Ms. Kirsch took some measurements, but relied primarily on the staining on the breakwall and the presence of fill lakeward of the wall. When questioned, Ms. Kirsch acknowledged that Department Staff did not have any documentation to show the relationship between the mean high water level and the breakwall. Tr. at 353.

In its closing brief, Department Staff argued that the mean high water elevation delineated by Department Staff did not have to be "reproducible." This argument overlooks the fact that Department Staff has the burden to show that respondents violated the statute and regulations by constructing a breakwall and placing fill below the mean high water level set forth in Section 608.11 for Seneca Lake. In that regard, Department Staff's determination must be capable of verification.

Department Staff's assertion that "a licensed surveyor cannot determine the MHWL" is not supported by any citation or evidence. Department Staff's Reply Brief, at 5. Department Staff did not rebut respondents' expert's testimony, and Department Staff's contention that Mr. Merrill's team never determined the mean high water level at the site is flatly contradicted by his testimony. Department Staff's statement that Mr. Merrill "was given a number by Nick Kelly," overlooks the fact that the number Mr. Merrill was given was the same number used by Department Staff: 446.8, which Department Staff arrived at by applying a conversion factor of .935 to the 445.90 NGVD elevation set forth in the regulation. Moreover, Department Staff does not quote Mr. Merrill's other testimony, in which he states that the team went to the site to determine a mean high water level, nor does Department Staff explain why the number (446.8) was incorrect, particularly since this was the mean high water level used by Department Staff.

Department Staff did not offer a witness to rebut Mr. Merrill's testimony, and that testimony is accorded significant weight, in light of its credibility as observed during the hearing, and his years of expertise. Department Staff's argument that Mr. Merrill's testimony should be disregarded because he was not present at the site himself is unpersuasive. His employees, as his agents, were present at the site and documented their findings in the survey.

According to Department Staff, because the Watkins Glen gauging station was no longer available, Department Staff relied upon physical and vegetative characteristics, which Department Staff's witness acknowledged was subjective. The fact that respondents' expert elected to use the Navy Barge at Dresden, rather than the Geneva station, does not make his testimony less reliable, particularly since the Dresden location is closer to the site than Geneva. Department Staff has not cited to any authority that would require the use of the Geneva station.

Department Staff argued that the determination made by the Merrill Associates team was flawed because they did not take physical and vegetative characteristics into account. Although Department Staff maintained that the regulation allows consideration of those factors, the

language of the regulation does not establish that those factors must be considered when a specific mean high water level is provided for a particular body of water. The regulation sets forth a hierarchy, with “the most reliable” methodology to be used when a mean high water level is established, followed by more “judgmental” methodologies, such as physical and vegetative characteristics. Guidance, at 9.

The Guidance is not a regulation, but the statements in the Guidance are consistent with the idea that, absent circumstances to the contrary, hydrologic data is the most reliable methodology to be used in determining mean high water levels when such data is available. Moreover, the Guidance shows that the Department took care to ensure consistency with other regulatory agencies, such as the Army Corps of Engineers and the Adirondack Park Agency, in establishing mean high water levels. While the regulation does not specifically state that physical and vegetative characteristics are not to be used when a mean high water level has been established for a particular body of water, the circumstances of this case do not suggest that those characteristics should take precedence over hydrologic data, or a determination by a qualified expert, in this instance, a licensed surveyor.

This is particularly so where, as here, the determination that Department Staff made on October 7, 2014 must be evaluated in light of the evidence, including the sketch prepared at the time. The sketch is not drawn to scale, and in some cases does not provide clear references or identification as to some of the benchmarks used. According to Department Staff, the sketch was not intended to be 100% accurate, and was only depicting general information. Tr. at 99. Respondents’ expert testified that he would not be able to reproduce the locations of the points depicted on Department Staff’s sketch in the field. Tr. at 640. Under the circumstances, the sketch does not provide a persuasive graphic representation of the mean high water level determination Department Staff made in October of 2014.

Although Department Staff maintained that because the Watkins Glen station was unavailable, it was necessary to rely more heavily on physical and vegetative characteristics, the record reflects that this was argument by counsel, not testimony by a witness. Tr. at 80. This argument appears to be internally inconsistent, because if the hydrologic data from Geneva were unreliable, presumably Department Staff would not have used it. Instead, Department Staff’s use of a different station, in this case, Geneva, supports the regulatory hierarchy’s recognition that in the first instance, hydrologic data is more reliable than physical and vegetative characteristics. While the regulation may not foreclose the use of physical and vegetative characteristics, it does not require that those characteristics be taken into consideration.

In support of their argument that hydrologic data should control, respondents cited to other enforcement proceedings, noting that in those cases, Department Staff relied upon physical and vegetative characteristics because the water bodies at issue did not have mean high water levels established by regulation, as is the case here. See *Matter of Joseph P. Serth*, Commissioner’s Decision (Dec. 19, 2012) (Mariaville Lake); *Matter of Gary Hoover*, Commissioner’s Decision (March 31, 2020) (St. Lawrence River). Respondents also pointed out that although the respondents in *Serth* and *Hoover* were found to be liable for the violations alleged, those respondents did not offer expert testimony to rebut Department Staff’s proof.

Moreover, the photographs taken on October 7, 2014 show that the water is not completely calm, and Department Staff's witness acknowledged that the laser level was not calibrated before it was used to determine the mean high water level. On this record, it is not possible to find that the laser level was correctly calibrated on October 7, 2014, the date of the site visit. Department Staff's evidence must be evaluated in light of the persuasive proof offered by respondents in rebuttal, including a survey provided by a professional surveyor, using superior instruments under more favorable site conditions. Under the circumstances, Department Staff did not satisfy its burden of proof.

Department Staff relied upon the discussion in the hearing report in *Matter of Anna Romer*, in which the ALJ concluded that Department Staff's evidence showed that respondent placed a breakwall below the mean high water level in Lake Ontario. *Matter of Anna Romer*, Hearing Report, at 15, *adopted by* Order of the Commissioner (July 2, 2003). In that proceeding, the ALJ noted that "the seawall . . . is inundated at the mean high water level of Lake Ontario and, in fact, the base of the lakeward front of the seawall is inundated at all times of the year." Hearing Report, at 9, Finding of Fact No. 4.

The Hearing Report went on to note that photographs taken during a site visit by Department Staff showed "by use of a yardstick, that on that day, the level of the lake was approximately 2.7 feet below the top of the band of discoloration on the seawall, consistent with the levels observed at the ISLRBC reference station at Oswego, New York, the same day." Hearing Report, at 16. The Hearing Report took into account the mean high water level, but went on to consider the second and third criteria in Section 608.1(i) of 6 NYCRR, specifically, vegetative and physical characteristics, including green filamentous algae and discoloration of the seawall. Nevertheless, unlike the present proceeding, respondents in *Matter of Romer* did not offer expert testimony to rebut Department Staff's proof. Respondents here have made a credible showing that calls into question the validity of Department Staff's conclusions.

Conclusion

Department Staff failed to meet its burden to show by a preponderance of the evidence that respondents violated ECL 15-0505(1) and Section 608.5 of 6 NYCRR.

Recommendation

The Commissioner should dismiss this enforcement proceeding.

Attached: Exhibit Chart

Matter of Kelly's Custom Docks LLC et al.
R8-2017-0309-31
March 4-5, 2020

EXHIBIT CHART

Exhibit No.	Bates	Description	Rec'd?	Notes
Staff 1	D441	Map of Seneca Lake	✓	
Staff 2	D488-490	Call for Service		
Staff 3	D483-484	Request for Investigation		
Staff 4	D501-502	Photocopy of Notes with attached page "T. Merrill & Associates"		
Staff 5	D407-414	Joint Permit Application Form	✓	
Staff 6	D398-406	Joint Application Form	✓	
Staff 7	D645-646	E-mail trail (10/31/2016)		
Staff 8	D558-559	DFWMR Policy Memorandum FW 15-01		
Staff 9	D553-557	Policy Memorandum 87-1 (August 19, 1987)		
Staff 10	D560-616	Freshwater Wetlands Delineation Manual (July 1995)		
Staff 11	D652-657	DFWMR Interpretive Guidance to Staff – Shoreline Protection		
Staff 12		Graph: Seneca Lake Level at Geneva – 2015	✓	
Staff 13		Aerial Photos: 5127 Elm Road, Dundee, NY (7 sheets)		
Staff 14	D740	Sketch: "Site Visit 10/7/14"	✓	
Staff 15A	D510-525	Photograph – three individuals standing near stake (circled in red on photo)	✓	
Staff 15B		Photograph – two wooden stakes circled in red	✓	
Staff 15C		Photograph – three persons; two stakes circled in red; markings on area near shoreline	✓	
Staff 15D		Photograph – two wooden stakes circled in red	✓	

Exhibit No.	Bates	Description	Rec'd?	Notes
Staff 15E		Photograph – one person; two wooden stakes circled in red	✓	
Staff 15F		Photograph – one person; two wooden stakes circled in red	✓	
Staff 15G		Photograph – three persons; two wooden stakes circled in red	✓	
Staff 15H		Photograph – three persons; two wooden stakes circled in red	✓	
Staff 15I		Photograph – four photos on sheet, three blocked out; wooden stake shown in photo in lower left corner	✓	
Staff 15J		Photograph – end of dock; two wooden stakes circled in red	✓	
Staff 15K		Photograph – end of dock; two wooden stakes circled in red	✓	
Staff 15L		Photograph – stones	✓	
Staff 15M		Photograph – wood branch fence; stake circled in red	✓	
Staff 16		Johnson Magnetic Torpedo Laser Level	✓	
Staff 17	D958	May 10, 2018 e-mail from K. Kirsch to D. Tinsley		
Staff 18		NYS DOS Entity Information: Kelly's Custom Docks LLC		Stipulation
Staff 19		2019 Final Assessment Roll		Stipulation
Staff 20		Kelly's Custom Docks – Webpage printout		
Staff 21	D547	Color photograph -- stairway	✓	
Staff 22	D658-659	October 25, 2012 Notice of Incomplete Application	✓	
Staff 23	D660-661	October 8, 2014 Notice of Incomplete Application	✓	
Staff 24	D662-663	November 27, 2012 Notice of Incomplete Application	✓	
Staff 25	D664-665	July 13, 2016 Withdrawal of Incomplete Application with certified mail receipt	✓	

Exhibit No.	Bates	Description	Rec'd?	Notes
Staff 26A	D212, D526, D209, D211, D210	Photograph – (9/7/2016); view of wall; handwritten notation in margin	✓	
Staff 26B		Photograph – (9/7/2016); orange tape; wall at left	✓	
Staff 26C		Photograph – (9/7/2016); two persons in front of shed; wall at right	✓	
Staff 26D		Photograph – (9/7/2016); wall at left; tree in center rear; picnic table at right	✓	
Staff 26E		Photograph – (9/7/2016); view of corner of wall in foreground; water at right	✓	
Staff 26F		Photograph – (9/7/2016); view of wall from dock	✓	
Staff 26G		Photograph – (9/7/2016); front view of wall; two persons near shed	✓	
Staff 27	D551	Color aerial photo		
Staff 28	D162, 163, 541	Black and white photographs (3 sheets)		
Staff 29	D548, 550	Black and white aerial photos (2 sheets)		
Staff 30	D552	Blue aerial photo		
Staff 31	D164	Black and white aerial photo		
Staff 32	D165	Black and white photo		
Staff 33	D167	Black and white aerial photo		
Staff 34	D549	Color aerial photo		
Staff 35	D539	Black and white photo		
Staff 36	D520, 532, 533	Color photographs (3 sheets)		
Staff 37	D516	Color photograph of dock		
Staff 38	D537	Black and white photograph		
Staff 39	D542, 544, 545, 546, 189	Color photographs (5 sheets)		
Staff 40	D669	Color aerial photo	✓	
Staff 41	D673	Two color photographs; 6/7/2012		
Staff 42	D674	Color photo; 7/20/2018		Withdrawn; settlement document

Exhibit No.	Bates	Description	Rec'd?	Notes
Staff 43	D672	Color photo – front view of wall	✓	
Staff 44A	D670	Color aerial photo – 7/15/2015	✓	
Staff 44B	D671	Color aerial photo – 9/24/2013	✓	
Staff 45	D675	Color photo		
Staff 46	D676-681	Color aerial photos (6 sheets)		
Staff 47	D682	Black and white photographs (one sheet)		
Staff 48	D683-684	Color aerial photos (2 sheets)		
Staff 49	D685	Color photo (9/7/2016)		
Staff 50	D686-688	Black and white photographs (3 sheets)		
Staff 51	D961	Black and white photograph (9/7/2016)		
Staff 52	D505,506,507	Hand drawn sketch and cross sections		
Staff 53	D424	Cross section		
Staff 54	D426, 156	Drawings of breakwall		
Staff 55	D155	Breakwall cross section detail		
Staff 56	D423	Plan view: breakwall		
Staff 57	D394-95	Map		
Staff 58	D391	Survey		
Staff 59		Color aerial photos – Central NYS 2015 and Central NYS 2011 (2 sheets)		
Staff 60A		Sketch: Cross section plan (2/8/20)		
Staff 60B		Sketch: Top-view plan (2/8/20)		
Staff 61		Resume: Zachary Kowasz	✓	
Staff 61B		Printout: NYSED Office of the Professions: Land Surveying License (Zachary Kowasz)	✓	
Staff 62		Excerpt: “Definitions of Surveying and Associated Terms”	✓	
Staff 63		Table: “NYS DEC Region 8 Lake Mean High Water Elevations As Recalculated In 1994”	✓	
Staff 64		February 27, 2020 e-mail from Geoffrey Welsh to Zachary Kowasz	✓	

Exhibit No.	Bates	Description	Rec'd?	Notes
Staff 65		NOAA: Seneca Lake at Geneva	✓	
Staff 66		USGS 04232400 Seneca Lake at Watkins Glen	✓	
Staff 67A		Sketch of Seneca Lake and differences between associated datums (reference planes)	✓	
Staff 67B		Sketch of Seneca Lake showing the surface elevation as observed in Geneva on October 7, 2014 by NYS Canal Corp., and its relationship to man high water elevation using -0.94 ft. versus -1.30 ft to convert Barge canal Datum to National Geodetic Vertical Datum of 1929	✓	
Staff 67C		Sketch of Seneca Lake showing the surface elevation as observed in Geneva on October 7, 2014 by NYS Canal Corp., and its relationship to mean high water elevation using -0.94 ft to convert Barge canal Datum to National Geodetic Vertical Datum of 1929	✓	
R 1		Photographs (5)		
R 2		Implementation of Amended 6 NYCRR Part 608 (January 13, 1995)		Guidance; official notice taken
R 3		How to Apply for a Protection of Waters Permit (Region 5)		
R 4	D645-646	October 21, 2016 e-mail trail	✓	Duplicate of Staff 7
R 5	D958	May 10, 2018 e-mail from K. Kirsch to D. Tinsley	✓	Duplicate of Staff 17
R 6	D954-955	March 10, 2017 e-mail trail	✓	Chart is Staff 12
R6A	D955	Unredacted March 10, 2017 e-mail trail	✓	Chart is Staff 12
R 7A		USGS 04232400 Seneca Lake data at Watkins Glen (2006)		
R 7B		USGS 04232400 Seneca Lake data at Watkins Glen (2010)		
R 7C		USGS 04232400 Seneca Lake data at Watkins Glen (2012)		

Exhibit No.	Bates	Description	Rec'd?	Notes
R 7D		USGS 04232400 Seneca Lake data at Watkins Glen (2013)		
R 8		(Excel spreadsheet)		
R 9		Johnson Torpedo Laser Packaging (color photo)	✓	
R 9A		Johnson Torpedo Laser (actual packaging)	✓	
R 9B		Johnson Torpedo Laser (instruction manual)	✓	
R 10		Sketch: "Site Visit 10/7/14"		Duplicate of Staff 14
R 11		Survey	✓	Duplicate of Staff 58
R 12		T. Merrill & Associates – 2/27/2015 letter and invoices	✓	
R 13A		Photograph – orange stakes on shoreline	✓	
R 13B		Photograph – closeup of orange stake	✓	
R 13C		Photograph – two orange stakes; excavator bucket in foreground	✓	
R 13D		Photograph – two orange stakes; excavator in background	✓	
R 14A		Photograph – top view of excavator	✓	
R 14B		Photograph – wall and trees	✓	
R 14C		Photograph – view from staircase; trees on left	✓	
R 14D		Photograph – view from staircase towards water	✓	
R 14E		Photograph – excavator and shed at top center	✓	
R 14F		Photograph – side view of wall return; shed and docks in background	✓	
R 14G		Photograph – front view of wall; excavator in center	✓	
R 14H		Photograph – view of staircase at left, trees in center	✓	
R 14I		Photograph – trees at left; shed at rear	✓	
R 14J		Photograph – top view of wall; trees at left	✓	
R 14K		Photograph – front view of wall	✓	
R 14 L		Photograph – top view of excavator	✓	

Exhibit No.	Bates	Description	Rec'd?	Notes
R 14M		Photograph – excavator, trees at left; shed in center background	✓	
R14N		Photograph – side view of excavator and bucket; tree at right rear	✓	
R 15		Photographs (5)		
R 16		Resume: Thomas G. Merrill	✓	
R 17A		Sketch: “Lake Seneca Average Surface Water Elevation 2013”	✓	
R 17B		Sketch: “Lake Seneca Elevation of Surface Water Oct. 7, 2014”	✓	
R 17C		Sketch: “Illustration of Vertical Measuring Error”	✓	
R 17D		Sketch: “Lake Seneca Elevation of Surface Water Feb. 5, 2015”	✓	
R18		Photograph of Sketch	✓	
R19		Aerial Photo		
R20A		March 2, 2020 e-mail trail	✓	
R20B		Excel Spreadsheet	✓	
R21A		Photograph		
R21B		Photograph		
R21C		Photograph		
R21D		Photograph		
R21E		Photograph		
R22		Spec sheet: Sokkia Automatic Level	✓	
R23		USGS e-mail		
R24		2006 Survey	✓	
R25		Photograph of laser level		
R26		Text of measurements (referred to by witness Merrill)		