STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 15 and 25 of the New York State Environmental Conservation Law and Parts 608 and 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York

RULING ON MOTION TO DISMISS AND MOTION TO COMPEL

-- by --

ROCCO MANNIELLO, GELSOMINA MANNIELLO, ARGYRIS TSENESIDIS, POLYTIMI TSENESIDIS, MALBA ASSOCIATION, AND JOHN DOE,

Respondents.

Case Nos. R2-20060516-220 and R2-20060410-164

BACKGROUND

In a complaint dated October 6, 2006, staff of the New York State Department of Environmental Conservation ("Department Staff") alleged that respondents, Rocco Manniello, Gelsomina Manniello, Argyris Tsenesidis, Polytimi Tsenesidis, Malba Association, and John Doe (collectively, "Respondents") violated Articles 15 and 25 of the New York State Environmental Conservation Law ("ECL") and Parts 608 and 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

Specifically, Department Staff alleged that, on or before April 27, 2006, Respondents Rocco and Gelsomina Manniello (the "Manniello Respondents") cleared vegetation, constructed and backfilled a seawall, and constructed a pile-supported deck on property in Queens County, New York, within a regulated tidal wetland as well as in the wetland adjacent area, without the requisite permit from the Department. Complaint, at ¶¶ 18-19. According to the complaint, the seawall was constructed at least in part on property owned by Respondent Malba Association, which the Complaint asserted allowed the removal of vegetation as well as the construction of the seawall and the deck. Complaint, at ¶¶ 21-22.

Department Staff went on to allege that on or before April 27, 2006, Respondents Argyris Tsenesidis and Polytimi Tsenesidis (the "Tsenesidis Respondents") hired "John

Doe,"[1] an unidentified contractor, to conduct earthmoving activities on their property. Complaint, at ¶ 23. According to the complaint, the contractor, acting on behalf of the Manniello Respondents and the Tsenesidis Respondents, operated equipment at the site in such a way that the seawall collapsed, and concrete blocks, backfill and other fill were released into the regulated wetland and adjacent area. Complaint, at ¶ 24. Department Staff alleged that Respondents violated Section 15-0505 and 25-0401 of the ECL, and 6 NYCRR Part 661, by clearing vegetation, constructing a concrete block seawall and placing fill, all within a regulated tidal wetland and/or the tidal wetland adjacent area without a permit.

The Manniello Respondents each served an answer, both dated November 3, 2006.[2] Both the Rocco Manniello and the Gelsomina Manniello answers included eleven affirmative defenses that were essentially identical,[3] and interposed a cross-claim against the Tsenesidis Respondents and Malba Association.

In their first affirmative defense, the Manniello Respondents contended that the Department lacked subject matter jurisdiction. Subsequently, on October 10, 2008, the Manniello Respondents moved to dismiss the complaint on that basis.[4] In support of the motion, the Manniello Respondents submitted a Notice of Motion, the supporting affirmation of J. James Carriero, Esq., dated October 10, 2008 (the "Carriero Affirmation"); the Affidavit of Stephen M. Gross, sworn to September 4, 2008; and the Affidavit of Edward M. Weinstein, sworn to September 16, 2008. According to the Manniello Respondents, the Department's jurisdiction "ends at a rip rap seawall that is seaward of the allegedly violative concrete block wall." Carriero Affirmation, at ¶ 5. The Manniello Respondents disputed Department Staff's characterization of the concrete block wall as a "seawall," and asserted that the concrete block wall is a retaining wall that is landward of the riprap seawall.

Department Staff opposed the motion in a memorandum of law, and moved to compel discovery. The memorandum of law in opposition and motion to compel were dated October 24, 2008, and included the affirmation of Udo M. Drescher, Esq., Assistant Regional Attorney in Region 2 ("Drescher Affirmation"). Specifically, Department Staff sought to compel the Manniello Respondents to respond to Department Staff's Expert and Lay Witness List Production Demand, which was served on September 24, 2008, according to the Drescher Affirmation.

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[1] The "John Doe" respondent has yet to be identified or served.

[2] According to Department Staff, the Tsenesidis and Malba Association respondents have also served answers. Department Staff's Memorandum of Law, at ¶ 5.

[3] The Rocco Manniello answer included a twelfth affirmative defense stating that "[t]his answering respondent is not the owner of premises known as 3 Point Crescent, Malba, NY." Rocco Manniello Answer, at ¶ 38.

[4] The motion seeks dismissal of the First, Third, Fifth and Tenth causes of action. The Manniello Respondents conceded that the Seventh and Eighth causes of action were not the subject of this motion, and stated that they would "vigorously defend" with respect to the allegations that they were liable for the collapse of the retaining wall which caused rubble or fill to fall beyond the riprap wall and into the tidal wetland. Carriero Reply Affirmation, at 2, fn. 1.

Department Staff agreed to accept reply papers, and the Manniello Respondents submitted the Reply Affirmation of J. James Carriero, Esq. dated November 10, 2008 ("Carriero Reply Affirmation"). Attached as Exhibit 2 to the Carriero Reply Affirmation was Respondents' Witness List.

DISCUSSION AND RULING

Section 661.4(b)(1) of 6 NYCRR defines the term "adjacent area" to mean

> any land immediately adjacent to a tidal wetland within whichever of the following limits is closest to the most landward tidal wetland boundary, as such most landward tidal wetlands boundary is shown on an inventory map . . .
>
> (i) 300 feet landward of said most landward boundary of a tidal wetland, provided, however, that within the boundaries of the City of New York this distance shall be 150 feet . . . ; or
>
> (ii) to the seaward edge of the closest lawfully and presently existing (i.e., as of August 20, 1977), functional and substantial fabricated structure (including, but not limited to, paved streets and highways, railroads, bulkheads and sea walls, and rip-rap walls) which lies generally parallel to said most tidal wetland landward boundary and which is a minimum of 100 feet in length as measured generally parallel to such most landward boundary, but not including individual buildings . . .; or
>
> (iii) to the elevation contour of 10 feet above mean sea level, except when such contour crosses the seaward face of a bluff or cliff, or crosses a hill on which the slope equals or exceeds the natural angle of repose of the soil, then to the topographic crest of such bluff, cliff or hill . . .. Pending the determination by the commissioner in a particular case, the most recent, as of the effective date of this Part, topographical maps published by the United States geological survey, Department of the Interior, having a scale of 1:24,000, shall be rebuttable presumptive evidence of such 10 foot elevation.

The Manniello Respondents maintained that a pre-existing riprap wall to the seaward side of the concrete retaining wall limits the Department's jurisdiction with respect to the Manniello Respondents' property. According to the Manniello Respondents, "the rip rap wall is 'substantial and functional' because it has functioned to prevent erosion along Powell's[5] Cove for many, many years." Carriero Reply Affirmation, at ¶ 10.

[5] Although the parties' submissions refer to this water body as "Powell's" or "Powells" Cove, the United States Geological Service topographic map (Flushing, NY; Q-25-SE (1966)) indicates that the correct name is "Powell Cove."

In their motion, the Manniello Respondents stated that Rocco and Gelsomina Manniello acquired title to the real property located at 3 Point Crescent, Malba, New York in December 1994. At some point in 1995, the Manniello Respondents began construction of the retaining wall, and in June 1997, Respondent Gelsomina Manniello became the sole owner of the property by deed from Respondent Rocco Manniello. The Manniello Respondents maintained that "[i]n April 2006, the adjacent property owners, Respondents Argyris Tsenesidis and Polytimi Tsenesidis caused the collapse of Manniello's retaining wall during the course of construction and renovation work on the adjacent property." Carriero Affirmation, at ¶ 10.

In support of their motion, the Manniello Respondents submitted the Gross Affidavit and the Weinstein Affidavit. Stephen M. Gross is a professional environmental consultant, and a principal of Hudson Highlands Environmental Consulting. Mr. Gross stated that he has 27 years of experience in the field of land use and environmental assessment, including more than twenty years of experience in delineating and assessing freshwater and tidal wetlands in New York State. Mr. Gross indicated that he had investigated the property "on multiple occasions," and concluded that the subject property is adjacent to, but does not contain tidal wetlands. Gross Affidavit, at ¶ 4.

Mr. Gross went on to contend that the subject property is not within a regulated wetland adjacent area, because the boundary of the regulated tidal wetlands is defined by a riprap wall. Mr. Gross relied upon Section 661.4(b)(1)(ii), which provides that, for purposes of determining a tidal wetlands adjacent area, the land immediately adjacent to a tidal wetland is limited to the seaward edge of the closest lawfully and presently existing (as of August 20, 1977) functional and substantial man-made structure, including riprap walls. According to Mr. Gross, the existing riprap wall functions as a seawall, was in existence prior to August 20, 1977, and defines the boundary of the regulated tidal wetland area. Mr. Gross went on to state that the riprap wall is both functional and substantial, and "exceeds 100 feet just within the immediate vicinity of the subject property, and continues much further in either direction away from the subject property, but especially to the east." Gross Affidavit, at ¶ 13.

Mr. Gross referred to a 1966 United States Geological Survey ("USGS") topographic map of the Flushing Quadrangle, attached to the Gross Affidavit as Exhibit 1. According to Mr. Gross, the riprap seawall is clearly indicated as a manmade seawall on the map, and the contour lines on the map indicate that "the land edge bounding the tidal water/wetland is at least 10 feet above mean sea level, rather than being *at* sea level. Further, the presence of the 20-foot contour line immediately behind the 10-foot contour line indicates that the land edge facing the tidal water/wetland is actually 20 feet or more above mean sea level." Gross Affidavit, at ¶ 18 (emphasis in original).

Mr. Gross stated the staining on the seaward face of the wall indicates that the top of the riprap seawall is approximately 2.5 feet, or thirty inches, above the high water mark. Id., at ¶ 19. Mr. Gross concluded that the seawall met the Part 661 definition of a "lawfully and

presently existing functional and substantial man-made structure," and that as a result, "regulated areas are limited to its seaward edge, and no regulated adjacent area exists beyond the seaward edge." Id., at ¶ 20. Mr. Gross concluded that, as a result, none of the work being done in connection with the reconstruction of the concrete retaining wall required a permit from the Department.

Mr. Gross went on to state that the boulders along the shoreline constitute a riprap seawall, citing to the glossary of the Department's *Owners Guidance Manual for the Inspection and Maintenance of Dams in New York State*, (June, 1987) where that term is defined to mean "[a] layer of uncoursed stones, broken rock, or precast blocks placed in random fashion on the upstream slope of an embankment dam, on a reservoir shore, or on the sides of a channel as a protection against wave and ice action. Very large riprap is sometimes referred to as armoring." Appendix C (Glossary), at p. 108 (see http://www.dec.ny.gov/docs/water_pdf/damguideman5.pdf). In addition, Mr. Gross referred to the definition of riprap contained in the Department's Glossary of Terms on its Environmental Remediation webpage ("Glossary of Environmental Cleanup Terms Q Through Z"), at http://www.dec.ny.gov/regulations/4630.html. That document indicates that "[t]his glossary lists common terms related to New York State Department of Environmental Conservation's voluntary cleanup, brownfield, and inactive hazardous waste disposal site programs." Id. "Rip rap" is defined to mean

> [l]arge fragments of broken rock, thrown together irregularly, or fitted together (as on the down stream face of a dam). Its purpose is to prevent erosion by waves or currents and thereby preserve a surface, slope or underlying structure. It is used for irrigation channels, river-improvement works, spillway at dams, and seawalls for shore protection.

Id. Mr. Gross pointed out that the USGS defines riprap as "[a] general term for large, blocky stones that are artificially placed to stabilize and prevent erosion along a riverbank or shoreline." See *Status and Trends of the Nation's Biological Resources*, Volume 2, p. 907 (1998) (http://www.nwrc.usgs.gov/sandt/Glossary.pdf). Mr. Gross went on to note that the National Oceanic and Atmospheric Administration ("NOAA") defines riprap as "[r]ock, concrete, or other material used as a hard, artificial shoreline facing to reduce erosion." See *Calcasieu Estuary Watershed Database Mapping Project* http://mapping2.orr.noaa.gov/website/portal/calcasieu/calc_html/resources/glossary.html#r.

Mr. Gross maintained that the proposed work is a repair to a pre-existing concrete retaining wall that has existed on the property for some time, and is set back several feet from the seaward face of the riprap seawall. According to Mr. Gross, the bottom of the concrete retaining wall is approximately 2.5 feet, or thirty inches, above the high water mark of tidal waters, and is untouched and unaffected by those waters. Mr. Gross concluded that as a result, the concrete retaining wall provides no protection against the sea, and therefore does not function as a seawall. Rather, according to Mr. Gross, the concrete wall "functions to retain soil for the residential lot located above the riprap seawall. . . . [and] is separate and

apart from the function of the riprap seawall." Gross Affidavit, at ¶¶ 33, 35. Mr. Gross noted that the concrete retaining wall is physically separate from the riprap seawall, asserting that the retaining wall is outside the Department's jurisdiction, and any modifications to the structure would not be subject to the Department's wetland regulations.

Mr. Gross contended that the Department's case is "dependent on the absence of a seawall," and that the records show the continuous presence of a seawall at this location. Gross Affidavit, page 7. Attached as exhibits to the Gross Affidavit were postcard images, circa 1910-1920, showing the seawall "installed by the Malba Estates Corporation in conjunction with the original development of the Malba Community." Gross Affidavit, at ¶ 41; Exhibit 5. Mr. Gross went on to contend that the Department's tidal wetlands map (#598-516) depicts the landward edge of the shoals and mudflats tidal wetland in the area of the subject property as the riprap seawall along the seaward side of all the residential properties between Malba Drive and Powell Cove. Exhibit 6. Mr. Gross concluded that the seawall has been in place since at least 1966, the date the USGS topographic survey map was originally published. According to Mr. Gross, he had a telephone conversation with a member of Department Staff, who acknowledged the presence of a seawall at the subject location. Gross Affidavit, at ¶¶ 44-47.

The Manniello Respondents also offered the Weinstein Affidavit. Mr. Weinstein indicated that he is an architect with more than 35 years of experience in waterfront planning and development, and is president of Weinstein Architecture and Planning, P.C., located in Hastings on Hudson, New York. Mr. Weinstein stated that he had served as Director of Waterfront Development and Assistant Commissioner of Port Planning and Development for the City of New York.

In his Affidavit, Mr. Weinstein asserted that the beach at the subject location is regulated by the Department, as "coastal shoals, bars, and flats" defined at 6 NYCRR Section 661.4(hh)(3). According to Mr. Weinstein, none of the conditions described in that regulatory provision exist within the subject property itself, specifically, it is not covered by water at high tide, is not exposed or covered by water to a maximum depth of approximately one foot at low tide, and is not vegetated by low marsh cordgrass, *Spartina alterniflora*. Mr. Weinstein went on to state that the boundary of the tidal wetland is defined by a riprap wall which serves to function as a seawall and was in place prior to August 20, 1977. According to Mr. Weinstein, "[t]he riprap seawall is both functional and substantial, and exceeds 100 feet just within the immediate vicinity of the subject property, and continues much further in either direction away from the subject property, but especially to the east." Weinstein Affidavit, at ¶ 13. The Weinstein Affidavit went on to reiterate the same information and conclusions contained in the Gross Affidavit with respect to the presence of the riprap seawall and the concrete retaining wall, and noted further that the State of New York granted title to the underwater lands in Powell Cove to William Ziegler in March, 1902. According to Mr. Weinstein, "[o]ne of the expressly stated purposes in the application for this grant was for the construction of a bulkhead to protect the adjacent upland property." Weinstein Affidavit, at ¶ 40.

In its opposition, Department Staff characterized the Manniello Respondents's submission as a "motion for summary ruling similar to a motion for summary judgment . . . the motion is in substance an unspecified motion for a partial summary ruling." Memorandum in Opposition, at ¶¶ 11, 14. Pointing out that summary judgment is a drastic remedy, Department Staff argued that "the core issue in this motion is whether the movants have succeeded in establishing, as a matter of law, that the NYSDEC has no jurisdiction over the geographic area at issue in the complaint." Id., at ¶ 19. Department Staff went on to note that the motion did not address Department Staff's first cause of action, which alleged that the Manniello Respondents cleared vegetation within the regulated tidal wetland and/or tidal wetland adjacent area, and maintained that for that reason alone, the motion should be denied. With respect to the submissions on the motion, Department Staff argued that the two supporting, "almost identical" affidavits were insufficient to meet the Manniello Respondents' burden of production and the burden of persuasion. Drescher Affirmation, at ¶¶ 20, 21. Department Staff pointed out that although both consultants indicated that they inspected the site, they did not indicate when this took place, and observed further that the documentary evidence proffered, specifically the post cards and aerial photographs, did not depict the subject location.

Department Staff offered a photograph dated April 27, 2006 which depicts tidal wetlands vegetation, specifically, intertidal marsh, at the subject property. Drescher Affirmation, at ¶ 23; Exhibit 1. Department Staff took the position that at the time the concrete block retaining wall was constructed, "there was no lawfully and presently (and continuously thereafter) existing (i.e., as of August 20, 1977), functional and substantial fabricated structure between the tidal wetland and the areas affected by that construction that would have formed the landward terminus of NYSDEC's tidal wetlands jurisdiction." Drescher Affirmation, at ¶ 26. Department Staff pointed out that neither of the affiants claimed to have been present at the subject location before or while the seawall was being constructed, and therefore cannot attest to whether there was a lawfully existing functional and substantial structure seaward of the concrete retaining wall.

Department Staff called into question the consultants' reliance on the 1966 USGS map, observing that the document has no probative value, other than establishing a rebuttable presumption as to the location of the ten foot elevation above mean sea level. Department Staff went on to take issue with the consultants' characterization of the "loosely strewn rip rap material" as a riprap wall. Drescher Affirmation, at ¶ 30. Department Staff noted that a riprap wall is only one example of a functional and substantial fabricated structure provided for in the regulation, which also includes "paved streets and highways, railroads, bulkheads and sea walls." Section 661.4(b)(1)(ii). According to Department Staff,

> [p]aved streets, highways, railroads, bulkheads and seawalls are engineering structures, whose placement requires care and the expenditure of money beyond securing the raw material for the structure. It is apparent from this context that the reason for the exclusion of land landward of these substantial fabricated structure[s] was to avoid hardships that otherwise might arise after

> people spent significant construction effort and, importantly, significant amounts of money on structures in proximity to the to the shore.

Drescher Affirmation, at ¶ 30. Department Staff maintained that "[t]aking rock, rubble or debris and dumping it along the shoreline, essentially by allowing gravity to take its course is not, as a matter of law, enough to create a substantial fabricated structure." Id., at ¶ 31.

Mr. Drescher stated that he had personal knowledge of areas in the vicinity of the subject location with vertical seawalls, noting that the Tsenesidis property has such a seawall, which the Department determined to be a legally existing, functional and substantial seawall that terminates the Department's jurisdiction under the Tidal Wetlands Act landward of the wall. Mr. Drescher went on to note that the seawall does not extend onto the Malba Association's parcel seaward of the Manniello property.

Department Staff offered two surveys of the subject property, one dating from November of 1996, depicting a seawall that does not extend onto the Manniello property. Instead, the survey indicates "slope to water" at that location. Exhibit 2. According to Department Staff, the second survey post-dates the previous survey because it depicts a building and swimming pool constructed by the Manniello Respondents. The date on the second survey is incomplete. The document is dated "Dec. 2, 199__," and depicts a concrete wall in the area where the prior survey indicated "slope to water." Exhibit 3. Department Staff noted that neither survey shows a riprap seawall. An aerial photo submitted by Department Staff shows a structure that terminates just over what appears to be the boundary between the Tsenesidis and Manniello parcels.

In response, the Manniello Respondents argued that Department Staff cited no authority for its restrictive reading of the regulation to apply only to "vertical" walls or walls that cost a substantial amount of money. In contrast to Department Staff's contention that the material in question was merely "rock, rubble or debris" that was dumped along the shoreline, the Manniello Respondents pointed to the Department's definitions stating that riprap can be "placed in random fashion" or "thrown together irregularly."

The Manniello Respondents contended that the purpose of riprap is to prevent shoreline erosion, and argued that the riprap wall is substantial and functional because it has served to prevent erosion along the shoreline of Powell Cove for many years. The Manniello Respondents pointed out that the Department had not shown that there had been any such erosion, or that the tidal wetland has extended beyond, or landward, of the riprap wall. According to the Manniello Respondents, the Department's tidal wetlands map (#598-516) depicts the landward edge of the shoals and mudflats tidal wetland in the area of the subject property as the riprap seawall lining the seaward side of all the residential properties between Malba Drive and Powell Cove.

The Manniello Respondents disputed Department Staff's assertion that the consultants' affidavits did not establish the existence of the riprap seawall in 1995 or 1996,

arguing that the exhibits attached to the affidavits "establish a sea wall that pre-dates 8/20/77 and that is still in existence today." Carriero Affirmation, at ¶ 11. In addition, the Manniello Respondents contended that Department Staff failed to explain why the surveys "whose purpose is to establish land boundaries and not topography," would be more probative that the USGS map, "whose purpose is to map the features of the shoreline." Id., at ¶ 12. The Manniello Respondents provided copies of photographs included in a Malba Association brochure dated approximately 1972 that, according to the Manniello Respondents, "depict the existence of a substantial and functional rip rap wall as noted in the USGS map." Id., at ¶ 13.

As noted above, Department Staff argued that the motion to dismiss was more properly considered a motion for partial summary judgment. In response, the Manniello Respondents asserted that "'[t]his motion does not question this tribunal's jurisdiction to render a decision, but is addressed to DEC's 'standing' to issue a violation, or questions whether there is 'subject matter jurisdiction' in a case where DEC has exceeded the scope of its statutory authority." Carriero Affirmation, at ¶ 3. According to the Manniello Respondents, "the motion is one to dismiss under either CPLR [New York Civil Practice and Rules] § 3211(a)(3) – lack of capacity to sue – or (7) – lack of subject matter jurisdiction." Id. This citation appears to be an error. Section 3211(a)(7) permits a court to dismiss a complaint where the pleading fails to state a cause of action. The lack of subject matter jurisdiction is a different, separate basis for a motion to dismiss, set forth in Section 3211(a)(2). With respect to the Manniello Respondents' reliance on Section 3211(a)(3) ("the party asserting the cause of action has not legal capacity to sue"), "[t]he concept of capacity is a separate legal doctrine from the concept of standing." I & T Petroleum Inc. v. LaScalia, 22 Misc.3d 1118(A), 2009 WL 264129, *3 (Sup. Ct. Nassau Cty. 2009), citing Community Bd. 7 of Borough of Manhattan v. Schaffer, 84 N.Y.2d 148, 154 (1994). Accordingly, this basis for the motion to dismiss is not viable.

Assuming that the Manniello Respondents' submission is a motion to dismiss pursuant to CPLR Section 3211(a)(2) ("the court has not jurisdiction of the subject matter of the cause of action"), the allegations in Department Staff's complaint must be deemed to be true, and Department Staff is entitled to the benefit of all reasonable inferences with respect to those allegations. See Lee v. City of Rochester, 195 A.D.2d 1000, 1000 (4th Dept. 1993) (articulating the standard on a 3211(a)(2) motion to dismiss).

On a motion for partial summary judgment, the Manniello Respondents "must make a prima facie showing of an entitlement to judgment as a matter of law sufficient to demonstrate the absence of any material issue of fact." Flacke v. NL Indus, 228 A.D.2d 888, 890 (3rd Dept. 1996); see Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). The burden then shifts to Department Staff "to demonstrate, through evidence in admissible form, the existence of material questions of fact requiring a trial." State v. Williamson, 8 A.D.3d 925, 928 (3rd Dept. 2004), citing Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003); Zuckerman, supra, at 562. That evidence is viewed in the light most favorable to the non-moving party. Williamson, supra, at 927-28: citing Trionfero v. Vanderhorn, 6 A.D.3d 903, 903 (3rd Dept. 2004).

However the motion is denominated,[6] the parties' submissions raise issues of fact that preclude summary relief. The Manniello Respondents have not demonstrated their entitlement to judgment as a matter of law. The affidavits and accompanying documents submitted by the Manniello Respondents are insufficient to establish the presence of a functional and substantial fabricated structure in the form of a riprap seawall that was pre-existing as of August 20, 1977.

Although the USGS topographic map dated 1966 appears to indicate the presence of a seawall, the photographs that accompanied the Gross Affidavit are insufficient to establish the condition of the seawall as it exists today at the subject location. Some of the photographs, including the photographs that accompanied the Carriero Affirmation, depict locations other than the Manniello property. Gross Affidavit, Exhibit 5; Carriero Affirmation, Exhibit 1. Exhibit 7 to the Gross Affidavit consists of two photographs entitled "Riprap Seawall in Front of Subject Property." The photographs are indistinct and some of the material depicted appears to be debris or unconsolidated material. Whether this material amounts to a "functional and substantial fabricated structure" cannot be determined as a matter of law based on the photographs, or on the affidavits, which do not indicate when Mr. Gross and Mr. Weinstein visited the site, who took the photographs, or when those photographs were taken. There is vegetation visible in the photographs but the nature of that vegetation cannot be discerned. It is also unclear what the condition of the site might have been in August, 1977.

Moreover, although the Manniello Respondents cite to several definitions of "riprap," both on the Department's website as well as in USGS and NOAA publications, it appears that there is at least one other potentially applicable definition that should be considered. The *New York State Standards and Specifications for Erosion and Sediment Control* (August 2005) of the Department's Division of Water contains detailed standards and specifications for riprap slope protection, and defines "riprap" to mean

> [a] facing layer or protective mound of stones placed to prevent streambank erosion or sloughing of a structure or embankment due to flow of surface and stormwater runoff. A combination of large stone, cobbles and boulders used to line channels, stabilize stream banks, reduce runoff velocities.

Glossary, at p. 164. The rock and stone in the photographs submitted by the Manniello Respondents appears to be unconsolidated material mixed with debris. Under the circumstances, it cannot be said, as a matter of law, that this amounts to a functional structure that was in existence on August 20, 1977.

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[6] Regardless of what the CPLR may provide, or how the parties in this proceeding may characterize these submissions, Part 622 of 6 NYCRR expressly provides for motion practice where the movant has the burden of proof. See § 622.6(c); § 622.11(b)(3).

Department Staff relies only upon an attorney affirmation, and did not submit an affidavit from an individual with personal knowledge of the subject property, or the requisite education and experience to assess the site conditions or reach conclusions with respect to those conditions. The surveys and photographs attached to Department Staff's submission in opposition are not authenticated (although the same is true of the photographs offered by the Manniello Respondents). Nevertheless, as discussed above, these omissions are of no consequence because the Manniello Respondents failed to set forth a prima facie case that would entitle them to summary relief. Moreover, it is noteworthy that the photographs provided by Department Staff differ significantly from the photographs submitted by the Manniello Respondents, particularly with respect to the images of the rock, stone, and debris located on the subject property. The material depicted in the photographs submitted by Department Staff calls into question the Manniello Respondents' statements that a functional and substantial man-made structure is present on the subject property.

CONCLUSION

Respondents' motion is denied. Department Staff's motion to compel discovery is moot, inasmuch as the Manniello Respondents served their responses to Department Staff's Expert and Lay Witness List Production Demand as part of the submissions on this motion. On or before Friday, July 10, 2009, the parties are to advise the administrative law judge as to their availability for a conference call to discuss scheduling.

_____/s/_____

Maria E. Villa
Administrative Law Judge

Dated: July 3, 2009