

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Division of Environmental Permits, Region 7
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Certified Mail Return Receipt Requested

February 8, 2022

Supervisor Timothy Ridgeway
Town of Sandy Creek
1992 Harwood Drive
Sandy Creek, NY 13145

Supervisor Daniel Krupke
Town of Richland
1 Bridge Street
Pulaski, NY 13142

RE: Permit Application Denial-Sandy Creek-Richland Joint Water Service Area
DEC ID# 7-3599-00040/00003 Coastal Erosion Management Permit

Dear Supervisors Ridgeway and Krupke:

The New York State Department of Environmental Conservation (DEC) has concluded its review of the application for a Coastal Erosion Management Permit (7-3559-00040/00003) to install a water main through the South Sandy Pond Coastal Barrier Dune, within the mapped Coastal Erosion Hazard Area (CEHA), specifically a Natural Protective Feature Area (NPFA). Construction of a new water main within a NPFA is prohibited per 6 NYCRR Part 505.8(d)(5). The Town's application requested a variance from this restriction. DEC determined that the Towns have not met the variance requirements in 6 NYCRR Part 505.13 of DEC's Coastal Erosion Management regulations, as detailed below. Therefore, the application for a Coastal Erosion Management Permit is denied.

Background and Permit Application Details

2019 Applications

The Towns of Richland and Sandy Creek submitted a Joint Application to DEC on 4/30/19 for construction work associated with expanding a combined water service area. The proposal included installation of approximately 35 miles of new water mains, and 645 service laterals to residential and commercial properties. The Towns applied for 401 Water Quality Certification, Freshwater Wetlands, and Coastal Erosion Management (CEM) (DEC Application Nos. 7-3599-00040/00001, 2, and 3) permits. On



Permit Application Denial (7-3599-00040/00003)

the same date, the Town of Richland also submitted an application for a Water Withdrawal permit for upgrades to its three existing water wells in Richland (DEC Application No. 7-3550-00257/00001).

The CEM permit would have been required for a portion of the project that included installing the new water main through a CEHA primary dune that separates Lake Ontario from South Sandy Pond, hereafter referred to as the “Barrier Dune.” The water main in this section would have served approximately 47 properties located on the Barrier Dune. The Barrier Dune is in a NPFA regulated under Article 34 of the NYS Environmental Conservation Law (ECL) with implementing regulations under Title 6 of New York Codes, Rules and Regulations, Part 505 CEM (*6 NYCRR Part 505*).

On 6/28/19, DEC sent a Notice of Incomplete Application (NOIA) to the Town’s engineering firm Barton and Loguidice (B&L) stating, in part, that the application materials did not establish that the project would be safe from flooding and erosion. Additionally, the NOIA requested that the Town evaluate alternatives to running the water main through the sensitive coastal Barrier Dune. On 7/13/19 a meeting was held between region 7 DEC Permits, Bureau of Ecosystem Health, Division of Water-Western Flood Hub, and B&L to discuss the NOIA and DEC’s concerns with the project. Following this meeting, on 9/10/19, DEC received a response to the NOIA. The response included additional information specific to the five variance criteria that are listed in the coastal erosion management regulations at 6 NYCRR Part 505.13(a). On 10/25/2019, a site visit and meeting, per the applicant’s request, were conducted at the Barrier Dune to walk the water main route and discuss the project. In attendance were DEC Permits staff, DEC Division of Water Flood Hub staff, Town of Richland Supervisor, Town of Sandy Creek Deputy Supervisor, a Representative from Assemblyman William Barclay’s office, various staff from both Towns, and B&L staff.

On 01/14/2020 DEC sent a letter to the Towns that stated, “Based on our assessment of the application and supporting documentation, and subsequent meetings and site visits with you and others, we have determined that the project fails to overcome the regulatory prohibition against development on primary dunes, found in 6 NYCRR Part 505.8(d)(5), and the variance criteria found at 6 NYCRR Part 505.13 have not been met.”

On 01/21/2020 a meeting was held in the Region 7 DEC office including: R7 Regional Director, Division of Environmental Permits, Division of Water-Western Flood Hub, Town of Sandy Creek Supervisor, Town of Richland Supervisor, and B&L staff. At the meeting Regional Director Matthew Marko discussed DEC’s concerns, reasoning behind potential denial, and the hearing process which the Towns could request if the permit was denied.

On 02/21/2020 the Towns sent DEC a revised design plan which officially removed the section of water main which passed through the CEHA Barrier Dune along S. Sandy Pond Inlet Road and N. Rainbow Shores Road. The decision to remove the section of water main along the Barrier Dune was made by the Towns after meeting

Permit Application Denial (7-3599-00040/00003)

with DEC. Based on the revised application, the project no longer involved construction within the mapped CEHA and did not require a Coastal Erosion Management permit. The permit applications for the remaining work were deemed complete by DEC on 3/12/2020 and the necessary permits were issued on 5/6/2020 for the combined water district project. The issued permits and their effective and expiration dates include the following:

| Permittee | DEC No. | Permit Type | Effective Date | Expiration Date |
|-----------------------------------|--------------------|-----------------------------|----------------|-----------------|
| Towns of Richland and Sandy Creek | 7-3599-00040/00001 | Freshwater Wetlands | 5/6/2020 | 5/6/2023 |
| Towns of Richland and Sandy Creek | 7-3599-00040/00002 | Water Quality Certification | 5/6/2020 | 5/6/2023 |
| Town of Richland | 7-3350-00257/00001 | Water Withdrawal | 5/6/2020 | 7/1/2024 |

2021 Application

On 2/19/2021 the Towns of Richland and Sandy Creek applied for a Coastal Erosion Management permit to modify the project to include the areas along the Barrier Dune that were previously proposed in 2019. The permit application for the modified project included a variance to the prohibition contained in 6 NYCRR 505.8 (d)(5); *all development is prohibited on primary dunes unless specifically allowed by this subdivision 505.8(d) of this Part*. No other DEC permits, or modification of the already-issued permits referenced above, are required for the additional work.

On 3/19/2021 DEC sent a NOIA requesting additional information, and a comprehensive analysis of potable water alternatives to serve the residents on the Barrier Dune. On 5/18/2021 DEC received a response from the Towns' consultant, B&L. The application was deemed complete on 6/2/2021, and a notice of complete application was sent to the Towns. In addition to indicating DEC's tentative determination to deny the application, the notice was transmitted with a letter to the Towns that stated:

Please be advised that DEC has determined the application materials submitted to date do not support the issuance of a variance from the restriction found at 6 NYCRR 505.8 (d)(5); all development is prohibited on primary dunes unless specifically allowed by this subdivision. DEC has made a tentative determination to deny the application. Before making a final decision on the application, DEC will review and consider all public comments and any additional information the Town wishes to provide in support of its application. If the Town wishes to provide additional information in support of its application, DEC requests that it be provided by 06/30/2021.

Permit Application Denial (7-3599-00040/00003)

A 15-day public comment period began after the notification of complete application was published in the Palladium Times newspaper on 06/10/2021, the Watertown Daily Times on 06/08/2021, and the Environmental Notice Bulletin (ENB) on 06/09/2021. DEC received 20 comments. A response to comments document has been prepared and is included with this denial.

Reasons Supporting Permit Application Denial

Installing the proposed water main on the Barrier Dune within a CEHA NPFA is a prohibited activity per 6 NYCRR Part 508.8(d)(5); *all development is prohibited on primary dunes unless specifically allowed by this subdivision 505.8(d) of this Part.* NPFAs are regulated to protect and preserve natural protective features such as nearshore areas, beaches, dunes, and bluffs and to protect human life and property by ensuring new development is placed at a safe distance from areas of active erosion and coastal storms.

The prohibition cited above is derived directly from the clearly stated purposes of the regulation contained in 6 NYCRR Part 505.1, which provide, among others, that:

“(b) Land use, development and other activities are regulated in coastal areas subject to coastal flooding and erosion to minimize or prevent damage or destruction to man-made property, natural protective features and to protect human life.”

“(c) New construction or placement of structures is regulated to place them a safe distance from areas of active erosion and the impacts of coastal storms to ensure that these structures are not prematurely destroyed or damaged due to improper siting, as well as to prevent damage to natural protective features and other natural resources.”

“(d) Public investments in services, facilities, or activities which are likely to encourage new permanent development in erosion hazard areas is restricted.”

New development and alteration of the Barrier Dunes may reduce or destroy the natural erosion and flood protection afforded by the natural features or lower the reserves of sand or other natural materials available to replenish storm losses through coastal processes. The two primary functions of dunes are prevention of wave overtopping and storage of sand for coastal processes. New development and increased investment in coastal areas often result in extensive shoreline protection structures that can harm adjacent properties and natural protective features. Hard shoreline erosion protection structures, such as rock revetments, can cause an increase in erosion at the ends of the structure and can decrease the amount of sand available to replenish the coastal system's nearshore areas, beaches, and dunes. In addition, shore protection structures are expensive and often only partially effective over time. The number of permits issued for the repair and replacement of existing erosion protection

structures along the Barrier Dune illustrates the vulnerability of these structures. For these reasons, existing or proposed private shore protection structures should not be used to justify additional development within CEHAs.

Furthermore, new developments on Primary Dunes, such as the proposed water main, are contrary to the purpose of Part 505 because they can cause adverse effects to the Barrier Dune and encourage more development in a high-risk coastal area that has demonstrated vulnerabilities to coastal storms and surge.

New roads, rock revetments, year-round homes, and other development often occur following installing a municipally maintained and operated water line. The flooding of 2017 and 2019 caused significant erosion and flooding impacts on the entire Lake Ontario shoreline, with the more devastating impacts in the highly developed areas.¹ Installing a water main on the Barrier Dune puts more investment in areas that are vulnerable and subject to flooding and erosion and thus decreases lakeshore resiliency. Currently, most of the residences on the Barrier Dune are seasonal and a new water line would increase the potential that existing structures could eventually be replaced with larger, year-round homes putting increased investment into the highly vulnerable area.

Variance Criteria

6 NYCRR 505.13(a) states: *when an applicant can demonstrate that the strict application of the restrictions or requirements of sections 505.7-505.9 of this Part will cause practical difficulty or unnecessary hardship, any such restriction or requirement may be varied or modified, provided that the following criteria are met:*

- (1) no reasonable, prudent, alternative site is available;
- (2) all responsible means and measures to mitigate adverse impacts on natural systems and the functions and protective values described in section 505.3 of this Part have been incorporated into the project design and will be implemented at the developer's expense;
- (3) the development will be reasonably safe from flood and erosion damage;
- (4) the variance requested is the minimum necessary to overcome the practical difficulty or hardship which was the basis for requesting it; and
- (5) where public funds are utilized, the public benefits clearly outweigh the long-term adverse effects for any proposed activities and development.

¹ Edgemere Drive, Town of Greece, Monroe County; Lake Road, Town of Webster, Monroe County

The following is DEC's determination on the applicant's variance request, numbered according to the applicant's variance request, dated 2/19/2021, and the variance resubmission, dated 5/18/2021.

(1-1) practical difficulty or unnecessary hardship

DEC Response: A practical difficulty or unnecessary hardship has not been established. As stated in the application material, the residences within this CEHA utilize private wells as a source of water. Upgrading existing wells, constructing water filling stations, utilizing the pond or lake for fire protection, and/or utilizing bottled water were described as alternatives to the new water main in the application material. However, the Towns never conducted a comprehensive analysis to determine if these options would, or would not, provide a reasonable solution while avoiding impacting the resource.

(2-1) no reasonable, prudent, alternative site is available;

DEC Response: The entire Barrier Dune is located within the CEHA. Although an alternative site is not available on the Barrier Dune for the water main, there are other reasonable sources of water that have less impacts on the natural resource. Real property records, maintained by the Oswego County Department of Real Property Tax Services, show that residential house construction in this area began in 1928 (Tax # 027.17-02-05) and continued through 1996 (Tax # 037.05-01-01). The application material states these houses use private wells, and the continued use or improvement of existing water sources is a reasonable alternative to the proposed water line. On 02/21/2020, the Towns submitted plans to DEC which included two water filling stations that will provide water to the residents on the Barrier Dune. These stations, which are proposed on the northern and southern end of the Barrier Dune, will supplement existing water sources, and will avoid an impact to the coastal resource from installing the new water main through the CEHA area.

(2-2) all responsible means and measures to mitigate adverse impacts on natural systems and the functions and protective values described in section 505.3 of this Part have been incorporated into the project design and will be implemented at the developer's expense;

DEC response: The application does not meet Part 505.13(a)(2). The proposed water main and increased investment will cause adverse impacts on the natural system and the function and protective values of the Barrier Dune, as described in 6 NYCRR Part 505.3(c)(3). The new water main would result in dune disturbances and could ultimately result in the need for new erosion protection structures, that would be necessary to protect the new development. Furthermore, individual private connections to the new water main and further repairs and maintenance would cause adverse effects and disturbances to the dune. The placement of structures is regulated to ensure they are a safe distance from areas of active erosion, and to prevent damage to NPFAs and other natural resources. In addition, except for the State Park, the remaining developed private parcels are primarily seasonal, and installing the water line could potentially

result in conversion to year-round and larger structures, installation of additional utilities, and additional development. Upgrading wells, constructing a water filling station, utilizing the pond or lake for fire protection, and utilizing bottled water were described in the application as alternatives to the new water main. However, no analysis was ever conducted to determine if the other alternatives could work at the site.

(2-3) the development will be reasonably safe from flood and erosion damage

DEC Response: The application does not meet Part 505.13(a)(3). Multiple areas on the Barrier Dune experienced flooding and erosion in 2017 and 2019. Since 2017, DEC issued 27 permits and one emergency authorization to properties on the Barrier Dune for construction of shoreline protection structures and for repairs to existing shoreline protection structures, due to damages caused by high waters (see Attachment C for corresponding DEC ID numbers). On 5/27/2017, Region 7 DEC Permits issued an emergency authorization to the NYS Office of Parks and Recreation (OPRHP) for the emergency repairs to an eroding dune at the Sandy Island Beach State Park (located on the northern portion of the Barrier Dune). In their emergency declaration, OPRHP stated, "extreme high water in Lake Ontario has caused extensive erosion and loss of land along shoreline, jeopardizing public facilities, including access road to private homes. Existing natural sand dunes which form the basis of the park are rapidly eroding into Lake Ontario." As seen in Attachment A, the eroding bluff threatened S. Sandy Pond Inlet Road, the road where the new water main is proposed. OPRHP complete the emergency work 2017, and on 6/21/2019, Region 7 DEC Permits issued an Emergency General Permit to OPRHP for additional work to the previously repaired dune. [See Attachment B.] In their permit application OPRHP stated, "This project is designed to address an eroding dune at Sandy Island Beach State Park. Once again, the high-water levels and waves on Lake Ontario have created significant erosion problems, threatening an existing road (South Sandy Pond Inlet Rd) to the east of the dune."

The number of permits and the repeated issues experienced at Sandy Island Beach State Park clearly illustrate the Barrier Dune's susceptibility to erosion and damage during flooding and coastal storms. The regulation is intended to keep the structures a safe distance from areas of active erosion and the impacts of coastal storms to ensure that these structures are not prematurely destroyed or damaged due to improper siting. A new water main and the associated service laterals will not be safe from erosion or flooding in an area with demonstrated vulnerabilities to coastal storms and surge.

Although portions of the Barrier Dune have been previously hardened with erosion protection structures, these are often only partially effective over time and should not be used as justification for additional development. Part 505 restricts new public infrastructure within vulnerable areas and new development that will ultimately lead to further development and erosion protection structures.

(2-4) the variance requested is the minimum necessary to overcome the practical difficulty or hardship which was the basis for requesting it

DEC Response: The application does not meet Part 505.13(a)(4). DEC requested an analysis of alternative water sources, including upgrading wells, constructing water filling stations, utilizing the pond or lake for fire protection, and utilizing bottled water. However, the Towns' response to this request did not include an adequate technical analysis of potential alternative water sources which would work at this site. Residential structures have occupied this area since 1928 without the aid of a municipal water source. Occupants have utilized private wells in this area for more than 94 years. Maintaining wells and filtration systems are standard requirements for all residential well users, regardless of the geographical location. Maintaining and upgrading existing wells will likely have a significantly smaller impact on the resource than installing, operating, and maintaining a municipal water main. Without a full analysis of the other alternatives, it has not been shown that the water main is the minimum necessary to overcome the hardship the Town claims. Therefore, based on the information supplied, the applicant has failed to demonstrate that their request is the minimum necessary to overcome the practical difficulty or hardship.

(2-5) where public funds are utilized, the public benefits clearly outweigh the long-term adverse effects for any proposed activities and development.

DEC Response: The application does not meet Part 505.13(a)(5). Public investments in services, facilities, or activities that are likely to encourage new permanent development in erosion hazard areas are restricted. The total project includes approximately 35 miles of new water main; however, only approximately 0.8 miles (Station AAA27+00 to AAA68+50) is proposed within the NPFA. Within the 0.8 miles, there are 47 properties that would be served by the water main with the vast majority being seasonal residences, and 1 State Park. The public benefits to the 47 properties do not outweigh the long-term adverse effects of installing the new water main on the Barrier Dune. As discussed previously, the new water main, increased investment, and resulting potential development will cause adverse effects on the Barrier Dune and inevitably put more structures at risk from flooding and erosion, including any publicly owned and maintained infrastructure.

Permit Denial

For the reasons explained in this letter, DEC has determined that the variance request for the proposed water main within the CEHA NPFA on the South Sandy Pond Barrier Dune, which is required due to the restriction in 6 NYCRR Part 505.8(d)(5), does not meet the variance criteria in 6 NYCRR 505.13. Therefore, the application by the Town of Richland and Town of Sandy Creek for an Article 34 Coastal Erosion Management permit is denied.

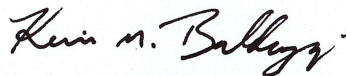
Permit Application Denial (7-3599-00040/00003)

Please be advised, the Uniform Procedures Regulations (6 NYCRR Part 621) provide that an applicant may request an adjudicatory hearing if a permit is denied or contains conditions that are unacceptable to them. Any such request must be made in writing within 30 calendar days of the date of this denial and must be addressed to the Regional Permit Administrator, Elizabeth Tracy, at the address below. A copy should also be sent to the Chief Administrative Law Judge at the address below.

Elizabeth Tracy
NYSDEC Regional Permit Administrator, Region 7
615 Erie Blvd. W.
Syracuse, NY 13204

Chief Administrative Law Judge
NYSDEC Office of Hearing and Mediation Services
625 Broadway, 1st Floor
Albany, NY 12233-1550

Respectfully,



Kevin M. Balduzzi
Deputy Regional Permit Administrator
Division of Environmental Permits

Ecc. Matt Marko, P.E., DEC Regional Director, Region 7
Scott Sheeley, DEC Chief Permit Administrator, Albany
Elizabeth Tracy, DEC Regional Permit Administrator, Region 7
Margaret Sheen, DEC General Counsel, Region 7
Tim Eidle, DEC General Counsel, Albany
Larry Weintraub, DEC General Counsel, Albany
Karis Manning, P.E., DEC Western Flood Hub Chief
Beth Geldard, P.E., DEC Western Flood Hub
Matt Chlebus, P.E., DEC Division of Water
Interested Parties
Barton and Loguidice

Permit Application Denial (7-3599-00040/00003)

Attachment A-DEC drone flight 5/19/2017



Attachment B-Town of Sandy Creek Flight 6/19/2019



Permit Application Denial (7-3599-00040/00003)

Attachment C-DEC Permit ID Numbers

| | | | |
|--------------------|--------------------|--------------------|--------------------|
| 7-3552-00039/00011 | 7-3552-00114/00004 | 7-3552-00145/00022 | 7-3552-00145/00030 |
| 7-3552-00157/00007 | 7-3552-00167/00009 | 7-3552-00167/00013 | 7-3552-00175/00008 |
| 7-3552-00201/00005 | 7-3552-00201/00011 | 7-3552-00209/00003 | 7-3552-00209/00006 |
| 7-3552-00209/00009 | 7-3552-00213/00007 | 7-3552-00213/00010 | 7-3552-00241/00009 |
| 7-3552-00292/00004 | 7-3552-00295/00002 | 7-3552-00330/00004 | 7-3552-00330/00006 |
| 7-3552-00331/00006 | 7-3552-00426/00005 | 7-3552-00491/00001 | 7-3552-549/00001 |
| 7-3552-550/00001 | 7-3552-00554/00003 | 7-3552-00559/00001 | 7-3552-565/00004 |