



STATE OF NEW YORK
DEPARTMENT OF STATE
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ALBANY, NY 12231-0001

GEORGE E. PATAKI
GOVERNOR

CHRISTOPHER L. JACOBS
SECRETARY OF STATE

September 15, 2006

David William Dengler
11 Leiffel Lane
Boyertown, PA 19512

Re: F-2006-0258
U.S. Army Corps of Engineers/ Buffalo District Permit
Application # 2006-00712 - DEC Application # 7-3550-
00198 - Install 250' long rip-rap wall, approx. 40' high
Lake Ontario, Town of Richland, Oswego County
Objection To Consistency Certification

Dear Mr. Dengler:

The Department of State has completed its review of the above-referenced proposal and the consistency certification that you provided for it.

Pursuant to 15 CFR Part 930.63 and based on the information you submitted for this proposal, the Department of State objects to the consistency certification for this proposed activity because the proposed activity is not consistent with Policies 12, 14, and 17 of the New York State Coastal Management Program (CMP). As a result of this objection the consistency provisions of the federal Coastal Zone Management Act (CZMA) prohibit the U.S. Army Corps of Engineers (Corps) from authorizing this activity unless this objection is overridden on appeal to the U.S. Secretary of Commerce.

Subject of the review

You have requested authorization from the U.S. Army Corps of Engineers/ Buffalo District to construct a rip-rap revetment 250 feet in length and 40 feet high along the base of a bluff at 132 Rainbow Shore Road, on the shoreline of Lake Ontario, in the Town of Richland, Oswego County.

Project Purpose: The stated purpose for the activity in the completed Federal Consistency Assessment Form (FCAF) is to "control the erosion," and the permit application to the Corps states it is to "control erosion from Lake Ontario and groundwater from Deer Creek Wildlife Management Unit wetland."

Factors Relevant to the Review:

Pursuant to the consistency provisions of the CZMA, certain activities requiring federal agency authorizations are required to be consistent with the policies of the New York CMP. The proposed activity, which requires authorization from the U.S. Army Corps of Engineers, is subject to the consistency provisions of the CZMA, and is required to be consistent with the enforceable policies of the CMP.

The proposed activity involves the excavation and construction of a rip-rap revetment in a State-designated Coastal Erosion Hazard Area. The beach and bluff area where the revetment would be constructed are natural protective features and the natural protective features in it are designated pursuant to Article 34 of the Environmental Conservation Law (ECL) and its implementing regulations in 6 NYCRR Section 505 (see 6 NYCRR Section 505.2(o) for a definition of a Coastal Erosion Hazard Area). The designated erosion hazard area is a "Natural Protective Feature Area" delineated on the official New York State Department of Environmental Conservation Coastal Erosion Hazard Area Map Photo Number 402-828-79, sheet 6. A natural protective feature area is a land and/or water area containing natural protective features, the alteration of which might reduce or destroy the protection afforded other lands against erosion or high water, or lower the reserves of sand or other natural materials available to replenish storm losses through natural processes (see 6 NYCRR Section 505.2(z) for the definition of a natural protective feature area). The designation and the regulation of activities within the designated area minimize or prevent damage or destruction to property, natural resources, natural protective features, other natural resources, and to protect human life and property from flooding and erosion hazards.

According to the information submitted with your consistency certification, there are no residential or other structures on the property that are or would be in jeopardy from flooding and erosion hazards. Drawings submitted with your consistency certification show where a house might be constructed, and indicate it could be constructed landward of the designated coastal erosion hazard area. There is considerable depth to the lot, which the submitted drawings show is approximately 193 feet deep from the eastern property line to the landward limit of the designated Natural Protective Feature area. These drawings also show that a proposed residence could be located approximately 99 feet from the southern side yard property line and 80 feet from the northern side yard property line. In a conversation on September 5, 2006 between staff of the Department's Division of Coastal Resources and the zoning official for the Town of Richland, the zoning official indicated that the Town of Richland zoning code requires a 20 foot minimum setback from the edge of the right of way for residences and other structures, but a variance could be requested to construct a residence within the setback in order to site the proposed structure as far away from coastal hazards as possible. The zoning official also indicated that the total of all side yard setbacks must be 30 feet, with a minimum of 7 feet on one side.

Applicable Policies:

POLICY 12: ACTIVITIES OR DEVELOPMENT IN THE COASTAL AREA WILL BE UNDERTAKEN SO AS TO MINIMIZE DAMAGE TO NATURAL RESOURCES AND PROPERTY FROM FLOODING AND EROSION BY PROTECTING NATURAL PROTECTIVE FEATURES INCLUDING BEACHES, DUNES, BARRIER ISLANDS, AND BLUFFS.

POLICY 14: ACTIVITIES AND DEVELOPMENT, INCLUDING THE CONSTRUCTION OR RECONSTRUCTION OF EROSION PROTECTION STRUCTURES, SHALL BE UNDERTAKEN SO THAT THERE IS NO MEASURABLE INCREASE IN EROSION OR FLOODING AT THE SITE OF SUCH ACTIVITIES OR DEVELOPMENT, OR AT OTHER LOCATIONS.

POLICY 17: NON-STRUCTURAL MEASURES TO MINIMIZE DAMAGE TO NATURAL RESOURCES AND PROPERTY FROM FLOODING AND EROSION SHALL BE USED WHENEVER POSSIBLE.

The explanation of policy for Policy #12 indicates that natural protective features include bluffs.

The proposed revetment would be constructed at the toe and on the face of a bluff. Bluffs protect coastal lands and properties, as well as human lives from wind and water erosion by absorbing the often destructive energy of open water, and are of greatest value during times of storm-induced high water. Construction of the revetment would damage the benefits of the bluff as a natural protective feature by replacing the toe and face of the bluff with a rip-rap revetment. This could result in scour and erosion of the nearshore area waterward of the proposed revetment during certain storms, leading to further loss and erosion of the adjacent unarmored shoreline impairing the ability of the bluff to provide protection during storm events. This would not be consistent with Policy #12, the purpose of which is to minimize damage to the bluff, nor would it be consistent with Policy # 14, one of the purposes of which is to avoid measurable increases in erosion of adjacent areas.

Policy # 17 requires the use of non-structural measures rather than structural measures to minimize damage to natural resources and property from flooding and erosion, whenever possible, where such structures are determined to offer sufficient protection. Construction of the revetment is a structural measure, not a non-structural measure. Non-structural measures include the siting of new and existing development away from natural protective features and flood and erosion hazards.

The stated purpose of the activity is to control erosion. The photographs submitted with the file record show that much of the bluff is highly vegetated and the beach area between the toe of the bluff and the lake is comprised of stones and small cobbles. The beach area is not highly susceptible to erosion. The photographs submitted with your consistency certification show that there is some relatively minor erosion where some of the vegetation has been lost. Replanting vegetation on this portion of the bluff would provide a higher degree of protection to the bluff, and is a non-structural measure identified in CMP Policy # 17.

Siting a residence as far as possible from erosion hazards involves a non-structural measure which provides a high degree of protection to a residence by moving it away from hazards. The drawings submitted with the consistency certification indicate there is approximately 193 feet of depth to the lot from the top of the bluff. Drawings submitted with the consistency certification indicate a residence could be sited upland and outside of the erosion hazard area with considerable distance remaining between a residence and the front yard property and setback lines.

Conclusion

Given the foregoing, and since the non-structural measures of planting native vegetation and siting an upland residence and other structures away from the bluff and coastal erosion hazards could be used and construction of the revetment would result in increased erosion of adjacent lands and impairments to the functions of natural protective features, the proposed revetment and the excavation necessary to construct the revetment would not be consistent with CMP policies #12, #14, and #17.

Alternatives

Pursuant to 15 CFR Part 930.63, the Department of State may identify alternatives, if they exist, which, if adopted, may permit the proposed activity to be conducted in a manner consistent with the CMP.

According to the submitted information, there are no upland structures situated on the property. The drawings submitted (dated May 21, 2006) include a depiction of where a residence is proposed to be constructed. The drawing indicates the lot is approximately 265 deep on the southern property line, and 214 feet deep at the northern end of the property. The drawing also shows that there is significant room to the east of where the residence is drawn which would allow a residence to be constructed even further landward of the designated erosion hazard area. Local zoning would

permit siting of the residence within 20 feet of the right-of-way, and the town zoning official indicated that a variance could be requested which would allow the construction of a residence within the setback in order to construct a residence as far away from coastal hazards as possible. This is an available alternative that would protect both the bluff and structures using non-structural measures and would be consistent with the New York Coastal Management Program.

Pursuant to 15 CFR Part 930, Subpart H, and within 30 days from receipt of this letter, you may request that the U.S. Secretary of Commerce (Secretary) override this objection. In order to grant an override request, the Secretary must find that the activity is consistent with the objectives or purposes of the Coastal Zone Management Act, or is necessary in the interest of national security. A copy of the request and supporting information must be sent to the New York State Department of State and to the federal permitting or licensing agency (in this case the Corps). The Secretary may collect fees from you for administering and processing your request.

The appeal process can be a lengthy one, therefore, if you would like to continue discussions with this office while pursuing an appeal, please contact Mr. Steven C. Resler at (518) 474-5290 (email: sresler@dos.state.ny.us). If you are represented by counsel, kindly have your attorney contact Mr. Resler for referral to our Legal Division.

Sincerely,

Matthew L. Andrus
First Deputy Secretary of State

GRS/SCR

c: OCRM - John King
COE/Buffalo - Daniel Decker; Diane Kozlowski
NYSDEC/Region 7 - Joseph Dlugolenski; John Feltman