



STATE OF NEW YORK  
**DEPARTMENT OF STATE**  
41 STATE STREET  
ALBANY, NY 12231-0001

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ELIOT SPITZER  
GOVERNOR

LORRAINE A. CORTÉS-VÁZQUEZ  
SECRETARY OF STATE

June 5, 2007

Shoreline Bulkheading, Inc.  
c/o Michael Trovich  
323 Edelweiss Road  
West Islip, NY 11795

Re: F-2006-1097  
U.S. Army Corps of Engineers/New York District Permit  
Application - DEC # 1-4734-01257/00008  
Brian Jusas- install 280' new bulkhead and (2) 30' returns,  
backfill with 175 cu. yds. of clean fill; install 280' rip-rap  
consisting of 400-700lb. stones; install a 15' beach access stair  
case and a 150' bluff access staircase with a 10' x 10' deck at foot  
of access stairs; install 70' retaining wall at the 60' elevation on  
bluff.  
Smithtown Bay/Long Island Sound, Village of Nissequogue,  
Suffolk County  
**Objection To Consistency Certification**

Dear Mr. Trovich:

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

Pursuant to 15 CFR Part 930.63, the Department of State objects to the consistency certification for this proposed activity. As a result of this objection, the consistency provisions of the federal Coastal Zone Management Act prohibit the U.S. Army Corps of Engineers from authorizing this activity unless this objection is overridden on appeal to the U.S. Secretary of Commerce.

**Subject of the review**

Your client has requested authorization from the U.S. Army Corps of Engineers/New York District to install 280 linear feet of new bulkhead with two 30 linear foot returns, and 280 feet of rip-rap consisting of 400-700lb. stones immediately in front of the proposed bulkhead, at 5 Fox Point Drive, on the Smithtown Bay, Long Island Sound shoreline in the Village of Nissequogue, Suffolk County, New York. Your client also proposes the construction of a 15-foot beach access staircase, and a 150-foot bluff access staircase with a 10-foot by 10-foot deck at the foot of access stairs. A retaining wall of 70 linear feet at the 60-foot elevation on bluff, and backfilling behind the newly constructed bulkhead with approximately 175 cubic yards of material is also proposed.

**Project Purpose:**

The stated purpose for the activity in the completed Federal Consistency Assessment Form (FCAF) is for “private use” and the submitted information also indicates that the proposed project would provide “slope stabilization” and access stairs “for use by the neighborhood association.”

**Factors Relevant to this 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 would be conducted within the area covered by the State and federally approved Village of Head-of-the-Harbor and Village of Nissequogue Local Waterfront Revitalization Program (LWRP), which contains the enforceable policies of the New York State Coastal Management Program (CMP) for this area. This proposal is to be evaluated for its consistency with the policies and purposes of the LWRP as an element of the CMP.

The proposed activity would be undertaken in a Coastal Erosion Hazard Area (CEHA), designated in accordance with Article 34 of the State Environmental Conservation Law and its implementing regulations in 6 NYCRR Part 505. Specifically, the beach, bluff, and nearshore area where the activity is proposed are natural protective features, and the area is a designated “Natural Protective Feature Area” delineated on the official New York State Department of Environmental Conservation Coastal Erosion Hazard Area Map Photo Number 70-981-83, sheet 2 of 5 and shown on Map 5B of the LWRP. 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 purposes of the designation and the regulation of activities within the designated area are to minimize or prevent damage or destruction to property, natural resources, natural protective features, and protect human life and property from flooding and erosion hazards by limiting structures in these areas, and requiring setbacks from them.

**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. PRIMARY DUNES WILL BE PROTECTED FROM ALL ENCROACHMENTS THAT COULD IMPAIR THEIR NATURAL PROTECTIVE CAPACITY.**

**POLICY 13A: EXISTING OR NEW EROSION PROTECTION STRUCTURES WITHIN AND ADJACENT TO THE NISSEQUOGUE RIVER, STONY BROOK HARBOR, AND SMITHTOWN BAY SHALL BE RECONSTRUCTED, MODIFIED, OR CONSTRUCTED ONLY IF: 1) THEY HAVE A REASONABLE PROBABILITY OF CONTROLLING EROSION FOR AT LEAST THIRTY (30) YEARS AS DEMONSTRATED IN DESIGN AND CONSTRUCTION STANDARDS AND/OR ASSURED MAINTENANCE OR REPLACEMENT PROGRAMS; AND 2) THEY ARE DEMONSTRATED TO BE NECESSARY.**

**POLICY 17: WHEREVER POSSIBLE, USE NON-STRUCTURAL MEASURES TO MINIMIZE DAMAGE TO NATURAL RESOURCES AND PROPERTY FROM FLOODING AND EROSION. SUCH STRUCTURES SHALL INCLUDE: (I) THE SET-BACK OF BUILDINGS AND STRUCTURES; (II) THE PLANTING OF VEGETATION AND THE INSTALLATION OF SAND FENCING AND DRAINING; (III) THE RESHAPING OF BLUFFS; AND (IV) THE FLOOD-PROOFING OF BUILDINGS ON THEIR ELEVATION ABOVE THE BASE FLOOD LEVEL.**

The explanation of Policy 12 of the LWRP states that the bluffs along the shoreline of Smithtown Bay in the Village of Nissequogue (as shown on LWRP Map 5B) are specifically designated as important natural protective features to be protected from disturbances or encroachments by development or other incompatible land use activities. This designation is intended in order to minimize or prevent damage or destruction to property, natural resources, natural protective features, and protect human life and property from flooding and erosion hazards. The alteration of natural protective features may 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. The policy requires the siting of structures a minimum distance of 100 feet from the landward edge of the bluff. This distance is to be determined by the erosional rate of the bluff and the amount of land needed for the structure to remain unaffected for a period of fifty years. In addition, there shall be no land disturbance of the natural protective feature and of the area within 100 feet from the landward edge of the bluff. Land disturbance includes the alteration of surface soils or grade, the removal of vegetation, and the placement of structures. A bulkhead and returns, stone rip-rap, and a retaining wall are structures and their installation would constitute a land disturbance of the bluff within the 100-foot minimum required set-back zone.

LWRP Policy 17 requires the use of non-structural measures to minimize damage to natural resources and property from flooding and erosion hazards wherever possible. The explanation for this policy indicates that it applies to measures to protect existing development. To ascertain consistency with the policy, it must be determined if any one, or a combination of, non-structural measures would afford the degree of protection appropriate both to the character and purpose of the activity or development and to the hazard. If non-structural measures are determined to offer sufficient protection, then consistency with this policy requires the use of such measures. Such measures include the siting of development outside of hazard areas, the planting of vegetation, and ensuring overland drainage is directed away from the bluff face, rather than toward it.

According to the information submitted, the applicant's residence is setback a minimum of approximately 155' from the top of the bluff. The applicant's residence is not in the hazard area and is not in imminent jeopardy. Non-structural measures to reduce the erosion of the bluff face on the applicant's property could include the planting of vegetation. Planting and maintaining vegetation along the bluff face and at the top of the bluff is an available non-structural alternative that would provide an increased level of protection to both the bluff and the existing upland structures and would be consistent with the CMP as expressed in the LWRP.

Policy 13A requires that new erosion protection structures adjacent to Smithtown Bay be constructed only if they are demonstrated to be necessary, and this is also reflected in section 505.6(a) of the CEHA regulations. The submitted drawing (dated November 2006) indicates that the residence currently situated on the upland property is set back 155 feet from the top edge of the bluff. Given this setback and the average erosion rate of the bluff, the residence is not in imminent danger from flood or erosion hazards. Additionally, given the availability of vegetative planting as a non-structural alternative to minimize damage to natural resources and property from flooding and erosion, an erosion control structure is not necessary.

### **Conclusion**

Given the foregoing information, this proposal would not be consistent with the CMP as it is expressed in Policies 12, 13A, or 17 of the Head-of-the-Harbor and Nissequogue LWRP.

### **Alternatives**

Pursuant to 15 CFR Part 930.63, the Department of State may identify alternatives, if they exist, which, if adopted by an applicant, may permit the proposed activity to be conducted in a manner consistent with the New York State Coastal Management Program.

The proposed access staircase and deck for use by the neighborhood association would provide for public access along the publicly owned foreshore, and would not be inconsistent with the policies and purposes of the LWRP. Construction of the proposed staircase, without the proposed bulkhead, rip-rap, retaining wall, and fill is an available alternative that would provide access and would be consistent with the CMP as expressed in the LWRP.

Planting vegetation along the bluff and maintaining a vegetated buffer between the upland residence and the top of the bluff is a non-structural measure which would minimize damage to natural resources and property from erosion hazards and would be consistent with the CMP as expressed in the LWRP.

The preceding alternatives 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 Department of State and to the federal permitting or licensing agency. 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 call Mr. Steven C. Resler at (518) 474-5290. If you or your client are represented by counsel, kindly have your attorney contact Mr. Resler for referral to our Legal Division.

Sincerely,

George R. Stafford  
Deputy Secretary of State  
for Coastal Resources

GRS/RM

c: OCRM - John King  
COE/NY District - Michael Vissichelli  
DEC/Region 1 - Laura Scovazzo  
HOH/Nissequoque LWRP - Kaylee Engellenner