



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

May 22, 2007

Mr. Thomas Radomski, PE  
Absolute Contracting & Engineering  
456 Barton Drive  
Lewiston, NY 14092

Re: F- 2007-0172  
U.S. Army Corps of Engineers/ Buffalo District Permit  
Application 2006-2061-2 / DEC # 9-2934-00075  
Donald Williams - install approximately 51 LF of rip-rap  
Lake Ontario, Town of Porter, Niagara County  
**Objection To Consistency Certification**

Dear Mr. Radomski:

The Department of State (DOS) 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**

Your client, Donald Williams, has requested authorization from the U.S. Army Corps of Engineers/ Buffalo District to construct a rip-rap revetment 51 feet in length along the base of a bluff at 2511 Lake Road, on the shoreline of Lake Ontario, in the Town of Porter, Niagara County.

**Project Purpose:**

The stated purpose for the activity in the permit application to the Corps states it is to “stop bank erosion.”

**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 undertaken in a State designated 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. 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 (DEC) Coastal Erosion Hazard Area Map Photo Number 180-800, sheet 8 of 8. 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 purpose of the designation and the regulation of activities within the designated area is to minimize or prevent damage or destruction to property, natural resources, natural protective features, other natural resources, and protect human life and property from flooding and erosion hazards by limiting structures in these areas and requiring setbacks from them.

The applicant has applied for a Coastal Erosion Management Permit from DEC, but has not yet received a permit. In a letter dated August 14, 2006, the Region 9 office of DEC indicated that moving the house landward would be the favored alternative and option for the proposed activity. Erosion of the bluff at this site may be accelerated in part due to the proximity of the septic system and associated residential structures which causes seepage, a reduction in infiltration rates from overly saturated soil conditions. According to the information submitted with the consistency certification for this proposal, there is considerable depth to the lot which is approximately 498 feet deep along the southern property line, providing considerable distance between the landward-most portion of the lot and Lake Ontario and its associated hazard area. In a conversation on May 11, 2007 between staff of the Department's Division of Coastal Resources and the zoning official for the Town of Porter, the zoning official indicated that the Town of Porter zoning code requires a 60 foot minimum setback from the edge of the right of way for residences and other structures. Given this setback, the applicant has 400 feet of depth within which the residence could be relocated.

**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.**

Policy #12 of the New York State Coastal Management Program (CMP) requires that activities in the coastal area be undertaken in a manner so as to minimize damage to natural resources and property from flooding and erosion by protecting natural protective features. The explanation of policy for Policy #12 indicates that natural protective features include bluffs. The installation of the proposed rip-rap at the toe and on the face of a bluff would require the excavation and physical removal of portions of the 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. Excavation and construction of the rip-rap revetment would damage the benefits provided by the bluff as a natural protective feature by replacing the naturally dynamic toe and face of the bluff with a stationary rip-rap revetment. This could result in increased 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 and impair the ability of the bluff to provide protection during storm events. This would not be consistent with CMP Policy #12, the purpose of which is to minimize damage to the bluff, nor would it be consistent with CMP Policy # 14, one of the purposes of which is to avoid measurable increases in erosion of adjacent areas.

CMP 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.

Siting a residence as far as possible from hazards and erosion hazard areas is a non-structural measure which provides a high degree of protection to a residence by moving it away from hazards. Based on the information submitted, there is approximately 463 feet of depth to the lot from the top of the bluff, providing ample upland space to move the applicant's house landward. Staff from the DEC Division of Water have indicated that the existing residence is a cottage on blocks with no foundation walls or basement. The residence could be moved upland far from the erosion hazard area, or a new residence could be constructed with considerable distance remaining between a residence and the front yard property and setback lines. These options are non-structural alternatives previously recommended by the Department of Environmental Conservation (letter from DEC to applicant dated August 14, 2006) that would protect both the bluff, its protective capabilities, and the applicant's residence using highly effective non-structural measures, and would be consistent with CMP Policies 12, 14, and 17, and the State's Coastal Erosion Hazard Area regulations.

### **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 by an applicant, may permit the proposed activity to be conducted in a manner consistent with the New York State Coastal Management Program.

The stated purpose of the activity is to "stop bank" erosion. The photographs submitted with the file record show that much of the bluff is 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 the consistency certification show that there is some relatively minor erosion where some of the vegetation has been lost. Replanting appropriate vegetation on this portion of the bluff would provide a higher degree of protection to the bluff, and as it is a non-structural measure identified in CMP Policy # 17, it would be consistent with this policy.

The lot is approximately 498 feet deep on the western side with approximately 463' from the southern property line to the top of the bluff. The existing residence could be moved landward from the bluff and hazards outside

of the erosion hazard area, or a new residence could be constructed with considerable distance remaining for front yard property and other setbacks. In a conversation on March 6, 2007, staff from the DOS and staff from the DEC Division of Water agreed that moving the house and all associated structures (including septic system) landward at least 85 feet from the top of the bluff would provide a high degree of protection to the residence and the bluff by moving the house farther away from hazards and avoiding interference with the protective capabilities of the bluff. Additionally, moving the septic system landward would reduce seepage to the bluff face, thus increasing upland infiltration rates and potentially reducing erosion of the bluff face and the current rate of overall erosion resulting in part from overly saturated soil.

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/SCR/rm

c: OCRM - John King  
COE/Buffalo - Steven Metivier, Diane Kozlowski  
NYSDEC/Region 9 - David Denk, Rebecca Anderson, Steve Doleski