

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Application for a Freshwater Wetlands Permit Pursuant to Article 24 of the Environmental Conservation Law of the State of New York (ECL) and Part 663 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) and a Use and Protection of Waters Permit Pursuant to Article 15 of the ECL and 6 NYCRR 608,

- by -

JOSEPH P. SERTH,

Applicant.

DEC Application Nos.
R4-4220-00193/00005 and R4-4220-00193/00006

DECISION OF THE COMMISSIONER

December 19, 2012

DECISION OF THE COMMISSIONER

Applicant Joseph P. Serth ("applicant") applied to the New York State Department of Environmental Conservation ("DEC" or "Department") for permits pursuant to Environmental Conservation Law ("ECL") article 15 (protection of waters) and article 24 (freshwater wetlands) to construct a concrete retaining wall at his property located at 8496 Mariaville Road, Pattersonville, Town of Duanesburg, Schenectady County, New York. The property is located adjacent to Mariaville Lake, which is a regulated Class II freshwater wetland (RJ-3), and a portion of the project would be located within the wetland itself (see 6 NYCRR 663.2[p]). Mariaville Lake is also a navigable water of the State under ECL article 15, and a portion of the project would be located below the lake's mean high water mark (see 6 NYCRR 608.1[u]).

Previously, in October 2010, applicant applied for a permit to construct a 12' x 8' x 3' concrete retaining wall and pier, and floating dock along the shoreline of and into Mariaville Lake. After several revisions to the application, Department staff issued applicant a permit on July 7, 2011, authorizing him to construct a 14' x 8' x 6" concrete slab along the shoreline and above the mean high water elevation (see Hearing Report, at 2; Hearing Exhibit [Exh] 3).

Shortly after issuance of the July 2011 permit, applicant requested a hearing on his previous proposal to build a 12' x 8' x 3' concrete retaining wall and pier (see Hearing Report, at 2). The matter was referred to the Department's Office of Hearings and Mediation Services and assigned to Administrative Law Judge ("ALJ") P. Nicholas Garlick. ALJ Garlick determined that the hearing request was not ripe for adjudication. Applicant did not appeal this decision.

Applicant then submitted additional permit applications for projects at the site,¹ one of which was to

¹ Applicant also sought a federal Clean Water Act § 401 water quality certification in connection with his application for a federal license or permit from the U.S. Army Corps of Engineers ("USACOE") to place fill below the ordinary high water marks of Mariaville Lake. Department staff indicated that it could not act on the application for the 401 water quality certification because the application before the USACOE was incomplete (see Exh 2, at 3-4). Staff's decision on the water quality certification is not ripe for review and is not before me in this proceeding. Applicant's final application, which was for a freshwater wetlands permit for a roof structure

construct a concrete retaining wall at the shoreline 12 feet wide and 3 feet into Mariaville Lake for the stated purposes of erosion control, bank stabilization, and the protection of existing structures. The application was received by Department staff on February 14, 2012. On May 1, 2012, Department staff denied the application for both the ECL article 15 (protection of waters) and ECL article 24 (freshwater wetlands) permits necessary for the concrete retaining wall. Applicant requested a hearing on the denial on May 3, 2012. A legislative hearing, issues conference, and adjudicatory hearing were held on May 30, 2012, before ALJ Garlick.

In the attached hearing report, ALJ Garlick concludes that the proposed concrete retaining wall fails to meet the regulatory criteria for issuance of a freshwater wetlands permit pursuant to 6 NYCRR 663.5(e) or a use and protection of waters permit pursuant to 6 NYCRR 608.8. He recommends that I uphold the permit denial (see Hearing Report, at 20).

I adopt the hearing report as my decision in this matter, subject to my comments below.

FINDINGS OF FACT

Based upon the Department's regulations, jurisdictional documents on file at the Department, other public documents of the Department, and the public record, I make the following additional findings of fact. These findings of fact are in addition to the findings in the hearing report.

5. Mariaville Lake is the headwater of the South Chuctanunda Creek (see 6 NYCRR 876.4, Table I, Item No. 165; 6 NYCRR 876.7, Map 5).² The lake is a class B fresh surface water body (see 6 NYCRR 876.4, Table I, Item No. 165). The best uses of class B

over the permitted concrete slab, was granted and is not relevant to this proceeding (see id. at 1).

² For reference, attached to this decision is a copy of the original jurisdictional Map 5 reproduced at 6 NYCRR 876.7. The original is on file at the Department's Central Office in Albany, New York.

To the extent necessary, I take official notice of the facts concerning Mariaville Lake contained in the Department's regulations and the jurisdictional maps upon which they are based (see 6 NYCRR 624.9[a][6]; CPLR 4511[a] [judicial notice may be taken of the State's regulations]).

fresh surface water bodies are for primary and secondary contact recreation and fishing, including swimming and boating, and the waters are suitable for fish, shellfish, and wildlife propagation and survival (see 6 NYCRR 701.7; 6 NYCRR 700.1[a][49] [primary contact recreation]; 6 NYCRR 700.1[a][56] [secondary contact recreation]). The South Chuctanunda Creek is, in turn, a tributary of the Mohawk River (see 6 NYCRR 876.4, Table I, Item Nos. 159 to 161; 6 NYCRR 876.7, Map 5). The creek is designated as a class C and class C(T) fresh surface water body at points along its course from Mariaville Lake to the Mohawk River (see 6 NYCRR 876.4, Table I, Item Nos. 159 to 161). The best uses of class C fresh surface water bodies is for fishing, and the waters are suitable for fish, shellfish, and wildlife propagation and survival (see 6 NYCRR 701.8). Depending on the circumstances, class C waters may also be suitable for swimming and boating, among other primary and secondary contact recreational activities (see id.). The T designation indicates that the waters provide habitat for trout (see 6 NYCRR 701.25; 6 NYCRR 700.1[a][67]).

6. Mariaville Lake is available for fishing and ice fishing (see Department of Environmental Conservation, Places to Fish, East-Central NY Fishing, Mariaville Lake, available at <http://www.dec.ny.gov/outdoor/83847.html>). The lake contains a variety of fish species, including chain pickerel, bluegill, brown bullhead, black crappie, largemouth and smallmouth bass, pumpkinseed, rock bass, and yellow perch (see id.; DEC Lake Map Series, Region 4, Mariaville Lake, accessed at http://www.dec.ny.gov/docs/fish_marine_pdf/marlmap.pdf). Public access to Mariaville Lake may be obtained from NYS Route 159, which crosses Mariaville Lake over a causeway. Public access may also be obtained by permission from the general store on Route 159 (see id.). In addition, the State (Department of Transportation) owns a parcel of land on the north-east corner of the intersection of Route 159 and Spring Road that is adjacent to the lake.

DISCUSSION

I. Standard of Review

Where, as in this proceeding, an administrative adjudicatory hearing is held on an application, the applicant must "demonstrate that [his] proposal will be in compliance with

all applicable laws and regulations" (6 NYCRR 624.9[b][1]; see Matter of Department of Sanitation of City of New York [Spring Creek Yard Waste Composting Facility], Decision of the Commissioner, July 2, 2012, at 9). Whenever factual matters are involved, the applicant must sustain his or her burden by a preponderance of the record evidence (see 6 NYCRR 624.9[c]; see Spring Creek, at 9).

Prior to the hearing, ALJ Garlick proposed the following issue for adjudication: whether the permit applications "meet the regulatory criteria for permit issuance under [ECL] Article 24, 6 NYCRR 663, and ECL Article 15, 6 NYCRR 608.8(a)" (Hearing Report, at 6). Department staff did not object to the proposed issue. Applicant sought to add issues concerning the intent of the applicable laws and staff's past practices regarding issuing permits to properties on Mariaville Lake (see Hearing Report, at 6-7). The ALJ rejected these proposed issues, but ruled that applicant would be able to introduce evidence regarding the laws' intent and staff's past practices during the hearing (see id. at 7).

The proposed project requires a protection of waters permit pursuant to ECL article 15, specifically, an excavation and fill permit pursuant to ECL 15-0505 and 6 NYCRR 608.5. The project also requires a freshwater wetlands permit pursuant to ECL article 24, specifically ECL 24-0701 and 6 NYCRR 663.4.

II. ECL 15-0505 Jurisdiction

Both ECL 15-0505 and its implementing regulation at 6 NYCRR 608.5 require an applicant to obtain a Departmental permit prior to excavating from or placing fill "below the mean high water level in any of the navigable waters of the state" (ECL 15-0505[1]; see also 6 NYCRR 608.5). The Appellate Division has recently held that under the Navigation Law and the common law, Mariaville Lake, which is an artificial lake, is not a navigable water of the State, notwithstanding the fact that boats are operated on the lake (see Mohawk Valley Ski Club, Inc. v Town of Duanesburg, 304 AD2d 881, 883-884 [3d Dept 2003] [citing Navigation Law § 2(4)³], overruled in part on other grounds by

³ Navigation Law § 2(4) defines "navigable waters of the state" as "all lakes, rivers, streams and waters within the boundaries of the state and not privately owned, which are navigable in fact or upon which vessels are

Town of North Elba v Grimditch, 98 AD3d 183, 187 [3d Dept 2012]). The court reached its conclusion based upon a lack of evidence in that case demonstrating public access to the lake, the public's historical use of the lake, and the lake's navigability in its natural state (see id.). The parties to this proceeding do not address the point. Nevertheless, due to the Appellate Division's holding directly addressing the navigability of Mariaville Lake under the Navigation Law and the common law, I take this opportunity to clarify the scope of the Department's jurisdiction over navigable waters under ECL 15-0505.⁴

The court's holding in Mohawk Valley Ski Club reflects the view that the common law and Navigation Law definition of navigable waters is limited to waters that are navigable in fact, that is, in the classical sense of being useful as a public highway for travel, whether for commerce or recreation (see id. at 882-884). Given the Navigation Law's focus on use of vessels and their safe maintenance and operation, among other things,⁵ that law is clearly concerned with the protection of navigability in its traditional sense. Thus, the limitation to waters used for public transport is consistent with the Navigation Law's intent.

Waters that are navigable in fact are clearly subject to the Department's jurisdiction under ECL 15-0505. Navigation Law § 31 expressly provides that waters that are navigable under the Navigation Law are subject to ECL 15-0505. However, the Department's jurisdiction over the waters of the State under ECL article 15 is not limited only to waters used as public highways. ECL 15-0505 is a broad environmental protection statute concerned with uses of the State's waters for a variety of water quality and ecological purposes beyond public navigation, and include waters such as tributaries and

operated, except all tidewaters bordering on and lying within the boundaries of Nassau and Suffolk counties."

⁴ The Department was not a party to the Mohawk Valley Ski Club litigation.

⁵ A notable exception to the Navigation Law's focus on the operation of vessels is article 12 of that law, which addresses oil spill prevention, control, and compensation. Article 12 prohibits discharges of petroleum onto land or into the State's waters, and does not limit its prohibition to "navigable" waters of the State (see Navigation Law §§ 172[8], 173). Thus, the definition of navigability at Navigation Law § 2(4) does not apply to article 12.

headwaters that impact the navigable waters of the State, whether those tributaries and headwaters themselves are navigable in the traditional sense or not (see People v System Props., Inc., 281 AD 433, 442 [3d Dept 1953] [State has power to regulate tributaries of navigable waters even though the tributaries are themselves non-navigable], mod on other grounds 2 NY2d 330, 343 [1957] [the State's power to regulate navigable waters and their tributaries are not affected by and do not depend on navigability or non-navigability]).

The broad scope of ECL article 15 is evident from its structure and legislative purposes. Although article 15 does not provide a definition of the term "navigable," the article's definition of "waters" broadly encompasses all of the State's waters, including surface and underground waters, whether natural or artificial, public or private (see ECL 15-0107[4]). The definition of waters is sufficiently broad so as to include not only waters that are navigable in fact, but tributaries and other surface waters that are hydrologically connected to waters navigable in fact.

Review of the legislative findings and purposes underlying article 15 reveals a legislative intent to protect the State's waters not only for public navigation, but for a full range of uses relating to public health, safety and welfare, and environmental protection. These include uses of the State's waters not only for public navigation, but all forms of navigation, whether public or private, for boating, fishing, swimming, water sports, and other forms of recreation (see ECL 15-0103 [legislative findings]; ECL 15-0105 [declaration of policy]). They also include uses of waters unrelated to navigation, including for water supply for domestic, municipal, agricultural, industrial and other uses; for maintenance of fish and wildlife populations and the habitat upon which they rely; for water quality and purity; for flood control; and for a host of other ecological concerns (see id.).

With respect to the specific impacts associated with excavation and filling in the State's water, the legislative findings for article 15 reveal the Legislature's concerns not only with impacts on navigation, but also water pollution; turbidity; deposition of silt and debris; water velocity, temperature and levels; erosion; flooding; fish, wildlife, habitat destruction; and other ecological impacts (see ECL 15-0103[9], [10]). Nothing in the legislative findings indicates

that the Legislature's concerns about the non-navigation related environmental impacts from filling and excavation were limited solely to waters used as public highways. Those impacts can also occur in waters that are only navigated for recreational boating, fishing, and other non-travel related activities, or in waters that are hydrologically connected to navigable in fact waters.

Finally, nothing in the legislative findings supports the conclusion that the public intended to be protected by article 15 is limited to the general public using the State's waters for transportation. Given the uses sought to be protected, and the broad range of environmental impacts sought to be avoided, under article 15, the "public" protected by article is broad enough to encompass private property owners using a privately-owned lake for boating and other recreational, non-transportation related activities.

The structure of ECL 15-0505 also reveals the broad scope of the statute's intended reach. ECL 15-0505 expressly includes marshes, estuaries, and other surface waters hydrologically connected to navigable waters that are not necessarily themselves navigable in the traditional sense (see ECL 15-0505[1]). Moreover, when reviewing an application for a ECL 15-0505 excavation and fill permit, the Department is directed to ascertain the probable effects of the proposed project not only on navigation, but also on "the health, safety and welfare of the people of the state and the effect on the natural resources of the state, including soil, forests, water, fish and aquatic resources therein, likely to result from the proposed project or work" (ECL 15-0505[3]). The Department is further authorized to issue excavation and fill permits "with such conditions as will safeguard life or property against danger or destruction and as will make the navigable waters safe for use by the public" (ECL 15-0505[4]). Thus, under ECL 15-0505, the Department is directed to consider and protect more than just the navigability of waters as public highways. Moreover, the Department is directed to protect not only the general public, but also members of the "public," such as private property owners that use the waters of the State for private recreation and other non-navigation related uses.

Thus, given the broad public health and safety, and environmental protection purposes of ECL article 15, and the lack of a specific definition of the term "navigable" in article

15, a broad interpretation of the term "navigable waters of the state" under ECL 15-0505 is necessary to accomplish the statute's purpose (see ECL 15-0103 ["[a]rticle 15 shall be construed and administered in light of" its legislative findings]). Navigation under ECL 15-0505 encompasses not only use of vessels for transportation, but also for boating, fishing, swimming, water sports, and other recreational purposes protected by article 15 (see, e.g., ECL 15-0103[5], [8]). And the public that is protected by ECL 15-0505 includes not only the general public using a water for transportation, but all members of the public, including private property owners surrounding a lake not otherwise open to the general public.

The system for classifying the quality and purity of the State's waters, which has been legislatively approved and adopted (see ECL 17-0301[7]), similarly reflects the broad understanding of navigability as used in ECL article 15. The classification system for the protection of the State's waters is based upon the "best usage in the interest of the public," and includes not only use of waters for transportation, but fishing, swimming, consumption, and other uses (see ECL 17-0301[2], [3]). Waters classified as AA-Special to B include "secondary contact recreation" among those waters' best usages (see 6 NYCRR 701.3 to 701.7). Secondary contact recreation includes boating and fishing generally (see 6 NYCRR 700.1[a][56]). Boating is not limited in the State's classification system only to boating by the general public for travel.

Thus, notwithstanding the court's conclusion that Mariaville Lake is not a navigable water under Navigation Law § 2(4) or the common law, the lake is nevertheless a navigable water of the State under ECL 15-0505. Mariaville Lake is the headwater of the South Chuctanunda Creek, a tributary to the Mohawk River, and is hydrologically connected to the Mohawk River, which is navigable in fact (see Danes v State of New York, 219 NY 67, 70 [1916]). Moreover, Mariaville Lake is classified by the State as a class B water body,⁶ suitable for boating, fishing, ice fishing, swimming, and other recreational uses.

⁶ As with the State's classification system, the Legislature has approved and adopted the classifications assigned to specific waterbodies, including Mariaville Lake (see ECL 17-0301[8]).

As was the case in Mohawk Valley Ski Club, the record in this proceeding does not indicate the extent to which the general public uses Mariaville Lake. However, the record reveals that the private property owners surrounding Mariaville Lake operate vessels, including motorized vessels, on the lake for a variety of recreational purposes (see Hearing Transcript [Tr] at 188 [jet skis]; see also Mohawk Valley Ski Club, 304 AD2d at 884 [noting the presence of motorized vessels on the lake]). Applicant himself operates a 45 foot sailboat on the lake, and would operate a 60 foot sailboat if his application were granted (see Tr at 154). At least 13 boat launches are maintained on the lake, including a boat launch operated by the Mariaville Civic Association, a private association that operates and maintains the dam that impounds the lake (see, e.g., Tr at 151, 156). Thus, Mariaville Lake is used by members of the public, albeit the private property owners surrounding the lake, for the operation of vessels for purposes protected by ECL article 15. Thus, the lake is a navigable water of the State under ECL 15-0505.

Interpretation of the term "navigable waters of the State" under ECL 15-0505 to include waters such as Mariaville Lake is further justified when the other statutory provisions enacted by the Legislature for water pollution control are considered. ECL 15-0501, which governs streams, including ponds and lakes 10 acres or smaller, with classifications of C(T) or higher, prohibits the unpermitted excavation in such streams, ponds, and lakes irrespective of their navigability (see ECL 15-0501[1], [2]). Similarly, ECL article 17, which governs the discharge of pollutants into the State's waters, prohibits unpermitted discharges without regard to the navigability of the receiving waters (see ECL 17-0501; ECL 17-0701; ECL 17-0801). Thus, discharges of pollutants into Mariaville Lake would be prohibited without a permit. Moreover, if Mariaville Lake was only 10 acres or under in size, excavation in the lake would be prohibited without a permit (see ECL 15-0501[2]). To conclude that a permit is not required for excavation in a lake over 10 acres in area, such as Mariaville Lake, simply because the lake is not used by the general public as a public highway leaves a gap the Legislature could not have intended, given the broad purposes of ECL article 15 and the uses of the State's waters it seeks to protect.

Although Navigation Law § 2(4) provides a definition of "navigable waters of the state," that definition is not

applicable to ECL 15-0505. As the courts have held, the Navigation Law definition is limited to use in that statute, and does not otherwise define the State's power (see Town of North Elba v Grimditch, 98 AD3d 183, 190 [3d Dept 2012]). Moreover, limiting the definition of navigability under ECL 15-0505 to the definition found at Navigation Law § 2(4) would be inconsistent with ECL 15-0505's legislative history. As originally enacted, ECL 15-0505 expressly adopted the Navigation Law § 2(4) definition as its definition of navigability (see former Conservation Law § 429-b[1], as added by L 1965, ch 955, § 7). The express reference to Navigation Law § 2(4) was removed in 1975, when ECL 15-0505 was amended to apply to "any of the navigable waters of the state" (see L 1975, ch 349, § 1). One reason for the amendment was to remove the Navigation Law's exceptions for Nassau and Suffolk County from section 15-0505's application (see Assembly Introducer Mem in Support, Bill Jacket, L 1975, ch 349). In addition, the law's sponsors were concerned with the impact that dredging and filling had on recreation and ecology, further supporting an expansion of jurisdiction beyond traditional navigation (see id.). In any event, limiting ECL 15-0505's scope to navigation in its traditional sense is contrary to the Legislature's express attempt to decouple ECL 15-0505 from the Navigation Law's narrow limitations.

In sum, based upon the legislative history and policies underlying ECL article 15, the use of the term "navigable" as used in section 15-0505 encompasses waters that would not be deemed navigable under the common law (see United States v Riverside Bayview Homes, Inc., 474 US 121, 131-133 [1985] [reaching a similar conclusion with respect to the term "navigable waters of the United States" under the federal Clean Water Act]). The term "navigable waters" under ECL 15-0505 is sufficiently broad so as to encompass waters, such as Mariaville Lake, in order to protect its navigation for boating, fishing, and other recreational uses by the private owners of properties surrounding the lake. Nothing in ECL 15-0505, or in ECL article 15 generally, requires a showing that Mariaville Lake is used by the general public for purposes of use as a public highway to be navigable under that section.

Finally, an alternative basis for the Department's jurisdiction exists in this case. As noted above in finding of fact no. 6, the general public has access to Mariaville Lake, either by permission from the general store on NYS Route 159,

from Route 159 itself, or from the State-owned parcel located at the corner of Route 159 and Spring Road, for boating, fishing, ice fishing, and other recreational purposes. Under Navigation Law § 37, the provisions of the Navigation Law apply "to privately owned navigable waters to which the public has or is granted access, for compensation or otherwise, for boating, bathing, swimming, or other recreational uses or purposes" (see Town of North Elba, 98 AD3d at 193 n 7). Thus, because the public has recreational access to Mariaville Lake, the lake is subject to the Navigation Law under section 37. Accordingly, an ECL 15-0505 permit is required under Navigation Law § 31.

III. Permit Issuance Standards

To be granted an excavation and fill permit, an applicant must demonstrate that the proposed activity: (1) "is reasonable and necessary"; (2) "will not endanger the health, safety, and welfare of the people of the State"; and (3) "will not cause unreasonable, uncontrolled or unnecessary damage to the natural resources of the state, including soil, forests, water, fish, shellfish, crustaceans and aquatic and land-related environment" (6 NYCRR 608.8). Department staff determined that two practicable alternatives existed and, therefore, the proposed project was not reasonable and necessary (see Hearing Report, at 10). The alternatives include: (1) constructing the concrete retaining wall further landward, but not beyond the crest of the bank; or (2) placing rip-rap along the existing contours of the bank for stabilization purposes (see id.; Tr at 95-96).

With respect to the freshwater wetlands permit, Mariaville Lake is a Class II freshwater wetland. Class II freshwater wetlands "provide important wetland benefits, the loss of which is acceptable only in very limited circumstances" (6 NYCRR 663.5[e]). Department staff determined that a portion of the proposed concrete retaining wall would be constructed within Mariaville Lake and result in filling approximately 36 square feet of the lake (see Hearing Report, at 9). The activities associated with the proposed project require a permit and, when conducted in the freshwater wetland itself, are considered incompatible with the wetland and its functions and benefits (6 NYCRR 663.4[d][20], [33]).⁷

⁷ In its notice of permit denial, Department staff cited the regulations governing local government implementation of the Freshwater Wetlands Act when stating the proposed activities' incompatibility (see 6 NYCRR 665.7[g]). At

For activities identified as incompatible under section 633.4(d), a permit for a class II wetland may be issued only if the following three tests are met: (1) the proposed activity must be compatible with the public health and welfare, be the only practicable alternative to accomplish the applicant's objectives, and have no practicable alternative on a site that is not a freshwater wetland or adjacent area; (2) the proposed activity must minimize degradation to or loss of the wetland or its adjacent area; and (3) the proposed activity must satisfy a pressing social or economic need that clearly outweighs the loss of or detriment to the Class II wetland's benefits (see 6 NYCRR 663.5[e][2]). Staff again determined that, because two practicable alternatives exist, the proposed project does not meet the regulatory requirements for a freshwater wetland permit (see Hearing Report, at 11). Furthermore, staff concluded that applicant's project serves no pressing economic or social need (see Exh 2, at 3).

Applicant contends that staff's proposed alternatives will not protect the existing structures at the site. Two Department staff members testified, however, concerning the alternatives and their effectiveness at erosion control, bank stabilization, and protection of existing structures landward of staff's proposed retaining wall (see Testimony of James J. Eldred, Environmental Analyst 2, Tr at 95-96; Testimony of Michael T. Higgins, Deputy Regional Permit Administrator, Tr at 136-139). In response, applicant offered no evidence challenging the effectiveness of the alternatives for the application's stated purposes of erosion control and bank stabilization. Nor did applicant offer any evidence showing that his proposal was the only practicable alternative to accomplish the application's stated purposes. Thus, applicant failed to carry his burden of proving that his proposed project satisfies the "reasonable and necessary" requirement for an Article 15 excavation and fill permit, or the "only practicable alternative" requirement for an Article 24 freshwater wetlands permit.

the hearing, however, Department staff cited the correct regulation at 6 NYCRR 663.4 (Tr at 96). Under both sections 665.7(g) and 663.4(d), filling and constructing shoreline stabilization structures in a wetland are activities incompatible with the wetland (see 6 NYCRR 663.4[d][20], [33]; 6 NYCRR 665.7[g][20], [33]). Moreover, staff correctly applied the weighing standards in Part 663. Thus, any citation error in staff's denial letter was harmless.

Applicant puts forth several additional arguments in support of his permit application (see Hearing Report, at 11-12). Applicant argues that: (1) Department staff miscalculated the amount of concrete to be placed in Mariaville Lake; (2) staff failed to consider the recreational benefits of the proposed project; (3) staff has permitted similar structures on Mariaville Lake; and (4) the proposed project would be constructed at the water line of Mariaville Lake (Hearing Report, at 12).

The ALJ thoroughly analyzed each of applicant's arguments and I agree with his analyses. First, although applicant claims that only about four square feet of fill would be placed in Mariaville Lake, it is undisputed that the proposed project would result in the placement of fill in freshwater wetland RJ-3, an activity that is, at best, usually incompatible with the benefits and functions of the wetland (see 6 NYCRR 663.4[d]). It would also result in the placement of fill in the navigable waters of the State. I agree that a determination of the exact amount of fill is not necessary to this permit application decision.

As to considerations of recreational benefits of the project, applicant did not cite recreation as a basis for his project in his application. Rather, the purpose stated in the application for the proposed project is erosion control and bank stabilization (see Exh 1). Staff correctly evaluated the application in light of its stated objectives.

With respect to the allegedly comparable structures on Mariaville Lake, the projects applicant used as examples during the hearing are distinguishable from his present proposal. Applicant presented five examples of structures around Lake Mariaville in an attempt to show that these structures were permitted by the Department and are similar to the proposed project (see Hearing Report, at 15-18). He failed, however, to provide any proof that some of these structures were actually permitted by the Department. Further, the record demonstrates that the proposed activity is new construction that would result in the placement of fill in a Class II freshwater wetland and below the mean high water mark in a navigable water. The allegedly comparable projects were either located above the mean high water mark, involved rehabilitation of an existing structure, to which different standards apply, or were

constructed prior to the adoption of the Freshwater Wetlands Act and at a time when different standards applied.

Finally, I agree with the ALJ that the record demonstrates that applicant's proposed project would be constructed in the freshwater wetland and below the mean high water mark in a navigable water (see Hearing Report, at 19). As to applicant's multiple allegations of wrong-doing by staff, as noted by the ALJ, the allegations are unsupported by record evidence, and I reject them in their entirety.

In sum, applicant failed to carry his burden of proving that the proposed construction of the concrete retaining wall, which would result in the placement of fill in both freshwater wetland RJ-3 and the navigable portion of Mariaville Lake, is both reasonable and necessary, and the only practicable existing alternative. Accordingly, as detailed in the ALJ's hearing report, applicant failed to establish by a preponderance of the evidence that the proposed project would satisfy the standards for permit issuance set forth in 6 NYCRR parts 608 and 663.

CONCLUSION

Based on the record before me, applicant failed to carry his burden of establishing that the proposed project would comply with all applicable laws and regulations administered by the Department. Accordingly, the application of Joseph P. Serth for a freshwater wetlands and protection of waters permit for the proposed project is denied.

New York State Department of
Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: December 19, 2012
Albany, New York

Attachment

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by

Joseph P. Serth,

Applicant.

DEC # R4-4220-00193/00005
and
DEC # R4-4220-00193/00006

Hearing Report

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

SUMMARY

An administrative hearing was held at the request of the applicant, Joseph P. Serth, to review the decision of the Staff of the New York State Department of Environmental Conservation (DEC Staff) to deny his application for a freshwater wetland permit (pursuant to ECL Article 24, 6 NYCRR 663) and a use and protection of waters permit (pursuant to ECL Article 15, 6 NYCRR 608). The requested permits would have allowed Mr. Serth to construct a retaining wall on Mariaville Lake adjacent to property he owns at 8496 Mariaville Road, Pattersonville (Town of Duanesburg), Schenectady County, New York (site). Based on the record of this proceeding, the Commissioner should conclude that Mr. Serth has failed to demonstrate that his proposed project meets permit issuance standards and that DEC Staff acted properly in denying his application.

PROCEEDINGS

Mr. Serth has made at least three applications to DEC Staff involving proposed construction at the site in the last three years. The first application (Exh. 23) resulted in the issuance of a permit (Exh. 3) for the installation of a concrete slab at the site. This application is not the subject of this hearing, but is relevant as background. The second application (Exh. 1) is for a concrete retaining wall which is the subject of the hearing. The third application was for the construction of a roof structure above the concrete slab, and is not at issue in this proceeding. Each of these applications is discussed below.

The First Application

With an application dated October 25, 2010, Mr. Serth sought permission to construct a 12' x 8' x 3' concrete retaining wall/pier and floating dock along the shoreline of and into Mariaville Lake (Freshwater Wetland RJ-3)(DEC #4-4220-00193/00002). This application was for a freshwater wetlands permit, a use and protection of waters permit, and a water quality certification (Exh. 23).

DEC Staff issued a notice of incomplete application (NOIA) on December 14, 2010. After discussions with DEC Staff, Mr. Serth modified his proposal and on March 3, 2011, amended the application to request a permit to construct a 14' x 8' x 6" concrete slab along the shoreline of Mariaville Lake, in the adjacent area of freshwater wetland RJ-3. A second NOIA was issued on April 4, 2011 and during a telephone call on April 6,

2011, this NOIA was addressed. A notice of complete application was issued on April 8, 2011 and subsequently published in the *Schenectady Gazette* on April 13, 2011.

In early May 2011, Mr. Serth contacted DEC Staff by phone and stated that he no longer wished to proceed with the concrete slab, but rather wished to pursue his original application for a concrete retaining wall/pier. Mr. Serth did not notify DEC Staff in writing of his desire to modify the application.

On July 7, 2011, DEC Staff issued a permit which authorized the construction of the concrete slab along the shoreline and above the mean high water elevation (Exh. 3).

By letter dated July 14, 2011, Mr. Serth requested a hearing. DEC Staff referenced Mr. Serth's request for a hearing in an email which was received by the DEC Office of Hearings and Mediation Services (OHMS) on July 18, 2011. On July 20, 2011, I was assigned to this matter. On July 26, 2011, I contacted DEC Staff in Region 4 about the status of this matter and the next day DEC Staff emailed that the matter was not ready to proceed.

By letter dated August 12, 2011, DEC Staff suggested that the matter could be resolved through mediation and on August 14, 2011, DEC Administrative Law Judge (ALJ) Richard Wissler was assigned to attempt to mediate the dispute. After discussions and a site visit, by letter dated December 19, 2011, ALJ Wissler informed the parties that because mediation efforts had failed, he was returning the matter to me for an administrative hearing.

By papers dated January 19, 2012, DEC Staff made a motion for clarification requesting a ruling requiring the applicant to clarify what condition of the permit he wished to adjudicate.

A formal referral for a hearing was received in OHMS on January 23, 2012 from DEC Staff.

A conference call was held with the parties on January 27, 2012. On this call, DEC's administrative permit hearing process was reviewed and the parties explained their positions. Mr. Serth explained that he wanted a hearing on his original proposal (to construct a 12'x 8'x 3' concrete retaining wall/pier along the shoreline). He stated that DEC Staff was acting improperly by issuing notices of incomplete application on this proposal, when he had provided all the information requested. He stated that DEC Staff was denying him a hearing on the project he wanted to construct. DEC Staff took the

position that a hearing could only be held on the project for which the permit was issued (the concrete slab). On the call, Mr. Serth made a number of references to previous disputes he had had with DEC Staff over projects at other sites on Mariaville Lake.

A second conference call was held with the parties on February 1, 2012. During this call I explained that a hearing could only be held to review a decision by DEC Staff and that if Mr. Serth wanted a hearing on his original application, he would need to submit a complete application to DEC Staff. Only after DEC Staff had made a determination on the original permit application could a hearing be held. DEC Staff argued that before it would review any new permit application Mr. Serth would have to surrender his existing permit for the slab. During this call it became obvious that the parties were in possession of relevant documents that had not been shared with me and I asked that copies of these documents be provided. These materials were provided by the parties via email on February 8, 9, and 10, 2012.

A third conference call was held with the parties on February 10, 2012. During this call Mr. Serth disclosed that he had installed a large part of the concrete slab pursuant to his permit. Mr. Serth contended that he had not finished the work authorized in the permit and still wanted an administrative hearing. At the conclusion of the call, it was agreed that he would submit a new application for further work at the site.

DEC Staff visited the site after the call and verified that the slab was installed in accordance with the permit. At this point, DEC Staff concluded that this permit was closed out. Mr. Serth contended in an email dated February 19, 2012, that the permit was still active and that he still wanted a hearing. By email dated February 28, 2012, I informed the parties that the dispute was not ripe for an administrative hearing and that a hearing could only be held after DEC Staff had reviewed a complete application for the project that Mr. Serth wanted to construct. In an effort to prevent any disputes arising during the permit review process, I requested to be copied on all correspondence regarding the new application.

The Second and Third Applications

On February 14, 2012, DEC Staff received the second and third applications from Mr. Serth for projects at the site. The second application requested the following permits to construct

a concrete retaining wall at the shoreline and in the water on the site: (1) a freshwater wetland permit (application #4-4220-00193/00005); (2) a use and protection of waters permit (DEC #4-4220-00193/00006); and (3) a water quality certificate (DEC #4-4220-00193/00009) (Exh. 1). The third application (DEC #4-4220-00193/00007) requested a freshwater wetlands permit to construct a roof structure over the concrete slab in the freshwater wetland adjacent area at the site.

On February 28, 2012, DEC Staff issued two notices of incomplete application for the two projects and requested additional information.

A fourth conference call was held with the parties on March 13, 2012 and a fifth on March 26, 2012. On these calls the status of the second and third applications was discussed.

DEC Staff then sent a written proposal to Mr. Serth on March 29, 2012 that included acceptable alternatives to the project proposed by Mr. Serth in his second application (Exh. 13, p. 1). Later that day, Mr. Serth informed DEC Staff that the alternatives would not meet his needs (Exh. 13, p. 4).

A sixth conference call was held with the parties on April 4, 2012 and a seventh on April 18, 2012. During these calls DEC Staff indicated that it would deny the permit application for the concrete retaining wall and approve the application for the roof structure. Discussions also occurred about the logistics of the administrative hearing.

On May 1, 2012, DEC Staff issued a combined notice of permit issuance and permit denial for the two proposed projects. DEC Staff denied the second application (DEC #4-4220-00193/00005 and #4-4220-00193/00006) for permits to construct a concrete retaining wall at the shoreline on the site and approved the third application (DEC #4-4220-00193/00007) for a permit to construct a roof structure over the concrete pad at the site¹ (Exh. 2).

On May 3, 2012, an eighth conference call was held with the parties during which Mr. Serth requested a hearing on the permit denial. The parties also discussed plans for the hearing. A

¹ DEC Staff also stated in this notice that it could not act on the application for a water quality certificate (DEC #4-4220-00193/00009) because Mr. Serth had not provided all necessary information to the US Army Corps of Engineers (Exh. 2, p. 2).

draft notice of hearing was circulated among the parties and agreed upon.

The notice of hearing was published in the *Schenectady Gazette* on May 7, 2012 and in DEC's electronic Environmental Notice Bulletin on May 9, 2012.

By email dated May 25, 2012, I contacted the parties regarding the upcoming hearing and proposed a draft issue for the issues conference. A ninth and tenth conference call were held with the parties on May 29, 2012 in preparation for the hearing.

An administrative permit hearing was convened on May 30, 2012, in the conference room of DEC's Region 4 Headquarters, 1130 North Westcott Road, Schenectady, New York, at 10:00 a.m. The hearing concluded that afternoon at 3:45 p.m.

The transcript was received electronically on June 28, 2012 and the original hard copy on July 20, 2012.

An eleventh conference call was held with the parties on July 28, 2012 to discuss establishing a briefing schedule and closing of the record.

Closing briefs were received from the parties on August 3, 2012. DEC Staff submitted a reply brief on August 16, 2012. Mr. Serth did not submit a reply brief and on August 22, 2012 confirmed his decision not to reply. The record closed on August 23, 2012.

APPEARANCES

At the hearing, the respondent, Joseph P. Serth appeared *pro se*. Mr. Serth called three members of DEC Staff as witnesses and testified himself. The members of DEC Staff who testified were: James J. Eldred, Environmental Analyst 2; Michael T. Higgins, Deputy Regional Permit Administrator; and Steven Swenson, Biologist 1.

DEC Staff was represented by Assistant Regional Attorney Jill Phillips, Esq. DEC Staff also called Mr. Eldred as its sole witness.

FINDINGS OF FACT

1. Joseph P. Serth owns property located at 8496 Mariaville Road, Pattersonville (Town of Duaneburg), Schenectady County, New York.
2. With papers dated February 13, 2012, Mr. Serth applied for permits to construct a concrete retaining wall along the shoreline of Mariaville Lake. These permit applications included: (1) a freshwater wetland permit pursuant to ECL article 24 (application #4-4220-00193/00005); and (2) a use and protection of waters permit pursuant to ECL Article 15 (DEC #4-4220-00193/00006) (Exh. 1).
3. Mariaville Lake is a navigable water of the state as defined at 6 NYCRR 608.1(u). It is also a regulated freshwater wetland (RJ-3) as defined at 6 NYCRR 663.2(p).
4. Mr. Serth's proposed project involves the filling of a portion of Mariaville Lake. The fill will be placed in wetland RJ-3 and below the mean high water level of Mariaville Lake. The exact area of fill is unclear from this record, however, the evidence in the record shows that the area of filling would be between four and thirty-six square feet (the depth of the fill also cannot be determined from this record).

DISCUSSION

The hearing commenced at 10:00 a.m. on May 30, 2012 with the opening of the legislative hearing pursuant to 6 NYCRR 624.4(a). No members of the public appeared or spoke, but one letter was received into the legislative hearing record (t. 5). It was a letter from Terry Bieniek, President of the Mariaville Civic Association, Inc. which was written in support of DEC Staff's denial of the permit (legislative hearing Exh. 1).

After the closure of the legislative hearing, an issues conference was held pursuant to 6 NYCRR 624.4(b). In order to facilitate the issues conference, I had emailed the parties on May 25, 2012 a proposed issue for adjudication which was: "Do the applications 4-4220-00193/000005 and 4-4220-00193/000006 meet the regulatory criteria for permit issuance under ECL article 24 (and 6 NYCRR part 663), and ECL article 15 (6 NYCRR 608.6(a))?" DEC Staff indicated that the proposed issue was acceptable (t. 7). Mr. Serth wanted to include language in the proposed issue relating to: (1) the intent of laws cited; and (2) DEC Staff's past practices in issuing permits on Mariaville

Lake (t. 8-9). After discussion, I ruled that Mr. Serth's suggested changes to the proposed issue were not appropriate; however, I did state that I would allow Mr. Serth to introduce evidence regarding DEC Staff's past practices regarding permit issuance on Mariaville Lake (t. 9-10).

The adjudicatory hearing began immediately following the close of the issues conference. No petitions for party status were received and the hearing proceeded with just two parties, Mr. Serth and DEC Staff. Mr. Serth put his case on first and bore the burden of proof to demonstrate that his proposed project would be in compliance with all applicable laws and regulations administered by DEC (6 NYCRR 624.9(b)).

The proposed project

In his February 13, 2012 application, Mr. Serth proposed to construct a retaining wall along the shoreline and in Mariaville Lake across State Route 159 from Mr. Serth's property at 8496 Mariaville Road, Pattersonville (Town of Duanesburg), New York. The February 13, 2012 application describes the project as "erosion control" and states Mr. Serth's intention to "build a retaining wall made of concrete, gravel and existing stone. This will protect the tree and bank from erosion. This proposed structure of a retaining wall is for the purpose of bank stabilization, control erosion, protect my property and existing structure. This is to replace the telephone pole in the area which is failing to retain the earth" (Exh. 1, p. 2). The dimensions of the proposed retaining wall would be 12 feet by 3 feet with a total square footage of 36 feet (no information on the depth of the structure is provided). The drawing accompanying the application shows a portion of the proposed structure below the water level of Mariaville Lake (Exh. 1, p. 4). Mr. Serth testified that in this application he was trying to keep the concrete on the edge of the water, but because his shoreline does not go straight for twelve feet, he does need to fill an area about six feet long and, at its widest, eighteen inches wide (approximately four square feet) to complete his proposed project (t. 167). He stated that this was the least intrusive way he could achieve his aims (t. 169).

Mariaville Lake

Mariaville Lake is a navigable water as defined at 6 NYCRR 608.1(u) and a freshwater wetland as defined at 6 NYCRR 663.2(p). The wetland is identified as RJ-3, a class II wetland.

Does the proposed project meet permit issuance standards?

The proposed project requires three approvals from DEC Staff: (1) a use and protection of waters permit issued pursuant to ECL Article 15 and 6 NYCRR 608; (2) a freshwater wetlands permit issued pursuant to ECL Article 24 permit and 6 NYCRR 663; and (3) a water quality certification issued pursuant to § 401 of the Federal Clean Water Act. In its May 1, 2012 notice of permit denial (Exh. 2), DEC Staff determined that Mr. Serth's application (Exh. 1) for the Article 15 permit (DEC #4-4220-00193/0006) and the freshwater wetland permit (DEC #4-4220-00193/0005) failed to meet regulatory criteria for permit issuance and denied the application. In this notice DEC Staff noted that because Mr. Serth had failed to respond to an April 5, 2012 letter from the U.S. Army Corps of Engineers requesting additional information about the proposed project, DEC Staff could not act on the application for a water quality certification (DEC #4-4220-00193/0008). The adjudicatory hearing was held regarding DEC Staff's denial of the Article 15 permit and the freshwater wetland permit.

The Article 15 permit. The applicant requires an Article 15 permit in order to place fill, his proposed retaining wall, in the navigable waters below the mean high water mark of Mariaville Lake (6 NYCRR 608.5). DEC Staff member Swenson testified that the mean high water mark on Mr. Serth's property was the vegetation line (t. 143). DEC Staff member Higgins testified that the vegetation line occurs at the crest of the bank at the site (t. 119). Mr. Swenson stated that the mean high water mark can change along a bank of a water body even if the surface elevation of the water stays the same (t. 143).

The applicant disputes the location of the high water mark on his property and whether any fill would be placed below the mean high water mark. Mr. Serth argues that DEC Staff has determined that the mean high water mark on his property is too far landward, compared to other properties on the lake. However, Mr. Serth offers no expert testimony or other competent evidence to challenge DEC Staff's determination of the location of the mean high water mark. Mr. Serth did take numerous photos the day before the hearing of other areas of the lake where structures had been constructed (Exhs. 4, 7, 11, 17, 18, 19, 20 and 21). These photos, he claims, show projects closer to the shoreline than he would be allowed to construct his project. He also makes note of the fact that the water level on the lake can be adjusted by opening a valve on the dam or by the use of a

kicker board on the dam which can be used to raise the level of the lake by 12 inches (t. 152-3). Based on his estimation of the mean high water mark, Mr. Serth argues that his entire proposed project would be above the mean high water level on Mariaville Lake. In his brief, Mr. Serth claims that based on photos he provided, the entire proposed structure would be at the water line (Serth brief, p. 2).

As noted above, Mr. Serth's application shows that a portion of the proposed retaining wall would be constructed in the waters of Mariaville Lake (Exh. 1, p. 4). There is a dispute as to the amount of filling that would occur. In its closing brief, DEC Staff asserts that the construction of a retaining wall would result in the filling of approximately 36 square feet of the lake (DEC Staff brief, p. 1). DEC Staff states that this measurement was taken from an analysis of the information contained in the application (DEC Staff reply brief, p. 1). Mr. Serth challenges this and claims that the United States Army Corps of Engineers (ACOE) reviewed the same permit application and concluded that less than six square feet would be below the mean high water mark (Applicant's brief, p. 1). He also cites a section of an April 5, 2012 letter from the ACOE (Exh. 2, pp, 8-9).² DEC Staff does not dispute this claim, but states that it has a separate and distinct jurisdiction from the ACOE and ACOE's determinations do not bind DEC Staff (DEC Staff reply brief, p.1). The applicant testified that he does need to partially fill an area of the lake about six feet long and eighteen inches wide (approximately four square feet) to complete his proposed project (t. 167). Regardless of the extent of the filling, the application clearly shows Mr. Serth's intention to fill a portion of Mariaville Lake to construct the retaining wall.

In its notice of permit denial, DEC Staff cites 6 NYCRR 608.8, the permit issuance standards for Article 15 permits.

"The basis for the issuance or modification of a permit will be a determination that the proposal is in the public interest, in that:

(a) the proposal is reasonable and necessary;

² This letter, attached to DEC Staff's notice of permit denial, does not state that six square feet of the lake would be filled, rather it states that "approximately six (6) feet of the proposed retaining wall would be constructed a maximum of sixteen inches waterward of the OHWM [ordinary high water mark]" (Exh. 2, p. 9, ¶ 2).

- (b) the proposal will not endanger the health, safety or welfare of the people of the State of New York; and
- (c) the proposal will not cause unreasonable, uncontrolled, or unnecessary damage to the natural resources of the State, including soil, forests, water, fish, shellfish, crustaceans and aquatic and land-related environment."

In its notice, DEC Staff states that it had identified two less intrusive alternative bank stabilization methods that would effectively stabilize the bank without filling a portion of the lake. The alternatives identified by DEC Staff are: (1) construction of the retaining wall further landward, above the crest of the bank, with the possible placement of stone rip-rap in front of the retaining wall to stabilize the bank; and (2) placing rip-rap where erosion is evident on the bank (Exh. 13, t. 95-6).³

At the hearing, Mr. Eldred testified that DEC Staff had determined that the proposed project was not reasonable and necessary because two alternatives were available to stabilize the bank on Mr. Serth's property (t. 94). Mr. Eldred stated that DEC Staff viewed the proposed project as essentially a fill project that would just extend the applicant's property (t. 96).

Mr. Serth's contention that DEC Staff incorrectly determined the location of the mean high water mark on his property is not supported by this record. DEC Staff has identified the vegetation line, which occurs at the crest of the hill, as the extent of mean high water. Mr. Serth offers no competent evidence to challenge DEC Staff's determination. Based on the evidence in the record from DEC Staff regarding the location of the mean high water mark, the Commissioner should conclude that (1) Mr. Serth has failed to meet his burden of showing that his proposed concrete retaining wall meets the permit issuance standards in 6 NYCRR 608.8(a); and (2) DEC Staff acted properly when it denied the permit application.

The freshwater wetland permit. Mariaville Lake has been determined to be a class II freshwater wetland and identified as RJ-3. The proposed project requires a freshwater wetland permit pursuant to 6 NYCRR 663.4(a). The exact location of the

³ These alternatives were shared with Mr. Serth on March 29, 2012, two months prior to the hearing and rejected (Exh. 13).

freshwater wetland boundary is not precisely identified in this record. It is possible to surmise that, because the construction of the slab above the crest of the bank was determined to be in the adjacent area of the freshwater wetland (Exh. 3) and this proposed activity in the waters of Mariaville Lake requires a freshwater wetland permit, the edge of the wetland is between the shore of the lake and the crest of the bank. It may be the shore of the lake or the high water mark, but this is not established on this record.

In its notice of permit denial, DEC Staff notes that the activity proposed, construction of a retaining wall, has been identified as incompatible under items 20 and 33 of 6 NYCRR 665.7(g) (see Exh. 2, p.3).⁴ Item 20 refers to filling and item 33 refers to construction of groins, bulkheads and other shoreline stabilization structures. Both items are classified as requiring a permit and as being incompatible with the functions and benefits of a wetland (P(X)) when conducted in a freshwater wetland. In order for a permit to be issued for this activity, it must meet the weighing standards listed in 6 NYCRR 663.5(e)(2). These standards require, among other things, that the proposed activity: (1) be the only practicable alternative that could accomplish the applicant's objective; (2) minimize any adverse impacts on the functions and benefits that the wetland provides; and (3) satisfy a pressing economic or social need that clearly outweighs the loss of or detriment to the benefits of the Class II wetland. DEC Staff concluded that the existence of two approvable practicable alternatives demonstrated that the proposed project did not meet permit issuance standards.

At the hearing, DEC Staff member Eldred testified that there were two alternatives which would control erosion and, therefore, DEC Staff concluded that the proposed project did not meet permit issuance standards (t. 98). Based on this, DEC Staff denied the permit application.

Mr. Serth argues that the alternatives suggested by DEC Staff will not protect the existing structures at the site (as discussed in greater detail, below), but provides no support for his argument. He does claims that DEC Staff's proposed alternative of moving the retaining wall landward would result in it being only two inches thick (Applicant brief, p. 1). However, Mr. Serth offers no evidence such as surveyed or

⁴ The citation is incorrect and should refer to 6 NYCRR 663.4(d) (t. 96).

engineered drawings of the site to substantiate his claim. Therefore, it is impossible to evaluate Mr. Serth's claim that moving the retaining wall landward would result in it being two inches thick, or otherwise incapable of protecting the structures at the site. Mr. Serth has failed to meet his burden of demonstrating that his proposed project is the only practicable alternative.

Based on the evidence in the record, the Commissioner should conclude that Mr. Serth has failed to show that his proposed concrete retaining wall meets the permit issuance standards in 6 NYCRR 663.5(e) and that DEC Staff acted properly when it denied the permit application.

Applicant's arguments

The applicant makes five arguments in his closing brief regarding DEC Staff's permit denial and argues that a permit should be issued. Mr. Serth does not argue that his application meets permit issuance standards for either a freshwater wetlands permit or an Article 15 permit. Mr. Serth's arguments are: (1) DEC Staff incorrectly calculated the amount of concrete to be placed in Mariaville Lake; (2) DEC Staff failed to account for the recreational benefits of his proposed project; (3) DEC Staff failed to evaluate the permit application with respect to protecting existing structures at the site; (4) DEC Staff has permitted other similar structures on Mariaville Lake; and (5) the proposed project would be constructed at the water line of Mariaville Lake. Each of these arguments is discussed below.

(1) DEC Staff incorrectly calculated the amount of concrete to be placed in Mariaville Lake. At the hearing, DEC Staff member Eldred testified that the notice of permit denial (Exh. 2) indicated that the proposed project would result in the filling of a thirty-six square foot area (t. 31). Mr. Serth challenges DEC Staff's conclusion and testified that only about four square feet of Mariaville Lake would be filled (t. 167). DEC Staff notes that the drawings attached to the application are not drawn to scale (DEC Staff reply brief, p. 1).

There are no surveyed or engineered drawings in the record and it is impossible to determine exactly how much filling of the lake would occur. The only conclusion that can be drawn is that the amount of filling would be between four and thirty-six square feet. However, the amount of fill is not relevant to the discussion of whether or not the proposed project meets permit issuance standards. It is uncontested that some filling of

wetland RJ-3 and the navigable waters of the state would occur; therefore, the permit issuance standards cited above apply. The Commissioner should conclude that Mr. Serth's first argument is not relevant to the question of whether or not the proposed project meets permit issuance standards.

(2) DEC Staff failed to account for the recreational benefits of his proposed project. At the hearing, DEC Staff member Eldred testified that the stated purpose of the proposed project was for erosion control and bank stabilization (t. 20). Mr. Serth claims that although the permit application does not mention it, DEC Staff knew it was his intention to attach a dock to the proposed retaining wall, and therefore, the proposed project has recreational benefits. These benefits were not considered in DEC Staff's denial of the permit application. Mr. Serth contends that DEC Staff made a similar mistake on an earlier permit application he made during 2007 to rehabilitate an existing concrete pier and construct a new concrete boat ramp on Mariaville Lake at property located at 216 Batter Street. As discussed later, DEC Staff reversed its initial decision to deny this permit, and Mr. Serth claims that the reversal was due to DEC Staff's failure to consider recreational benefits in its initial review. DEC Staff disputes this and notes that the standard for permit issuance for the rehabilitation of an existing pier is different than that for new construction.

The proposed project in the instant application is different than that described in Mr. Serth's October 25, 2010 application, which requested permission to construct a concrete pier to attach a floating dock (Exh. 23). The earlier proposed project would have required placing forms about four feet into the lake and filling them with concrete. While not stated in the instant application, at the hearing (t. 154, 176) and in his closing brief (p. 1), Mr. Serth states that one of the reasons he wants the permit to construct the retaining wall is to attach a dock to it. This is part of his plan to upgrade his sailboat. He states he currently has a 45' sailboat and wants to dock a 60' sailboat at the site (t. 154). This larger boat will provide a large wind load to the dock during storms (Applicant's brief, p. 1).⁵ Attaching his new boat to a smaller structure or the existing slab could result in the slab being displaced and

⁵ At the hearing, Mr. Serth attempted to show that DEC Staff knew that it was his intention to attach a floating dock to the retaining wall. He questioned DEC Staff member Eldred about a conversation that occurred during a site visit in Spring 2012, but Mr. Eldred did not remember the conversation (t. 19).

ending up in the lake (t. 168). When asked at the hearing about why he did not mention his planned dock in Exhibit 1, he stated that he worded his application so as to be similar to other applications that DEC Staff had approved on Mariaville Lake (t. 181). Mr. Serth claims that DEC Staff knew of his intention to attach a dock to the retaining wall, despite his failure to mention it in the application.

DEC Staff noted at the hearing (t. 179-180) and in its brief that while Mr. Serth argues that this application (Exh. 1) is for a similar project to the one he applied for in 2010 (Exh. 23), no mention of a dock is made in the present application (DEC Staff reply brief, p. 1). DEC Staff states that it reviewed the application for the purpose stated, which was to control erosion (DEC Staff reply brief, p. 1).

DEC Staff can only evaluate the application materials presented and in this case no mention of a dock or any other recreational use is made in the application (Exh. 1). Even if the proposed dock were included in the application, there is nothing in the record to suggest that the applicant could not attach a dock to a bulkhead built beyond the high water mark, which is one of the alternatives offered by DEC Staff. Accordingly, the Commissioner should reject this argument of the applicant.

(3) DEC Staff failed to evaluate the permit application with respect to protecting existing structures at the site. Mr. Serth's permit application states that the purpose of the proposed retaining wall is, in part, to "protect my property and existing structures. This is to replace the telephone pole in the area which is failing to retain the earth" (Exh. 1, p. 2). The drawing attached to the application shows a wood deck, concrete pad and telephone pole (Exh. 1, p. 3). In his closing brief, the applicant argues that DEC Staff failed to evaluate the application in regards to protecting these existing structures and his floating dock. Mr. Serth asserts that the alternatives suggested by DEC Staff will not protect these structures, but does not state why. He does claim that DEC Staff's proposed alternative of moving the retaining wall landward would result in it being only two inches thick (Applicant brief, p. 1). DEC Staff counters that the alternatives suggested would be effective in controlling erosion, thus protecting structures existing at the site (see DEC Staff reply brief, p. 1).

Mr. Serth has failed to demonstrate that DEC Staff's suggested alternatives would fail to protect existing structures at the site. Because there are no surveyed or engineered drawings of the site, it is impossible to substantiate Mr. Serth's claim that moving the retaining wall landward would result in it being two inches thick, or otherwise incapable of protecting the structures at the site. For these reasons, the applicant has failed to meet his burden of proof and the Commissioner should reject this argument of the applicant.

(4) DEC Staff has permitted other similar structures on Mariaville Lake. Mr. Serth argues that DEC Staff has treated this permit application differently than other applications, and that DEC Staff's denial should be reversed. Mr. Serth testified that DEC Staff had permitted many other structures to be constructed along and in Mariaville Lake (t. 150-151). At the hearing, Mr. Serth testified that on the day before the hearing, he took a series of pictures of various structures on Mariaville Lake, including Exhibits 4, 7, 11, 17, 18, 19, 20 and 21 (see, e.g., t. 29, 149, 156). These photos, Mr. Serth states, show a series of vertical walls around Mariaville Lake (t. 157) and other concrete structures (t. 163). According to Mr. Serth, DEC Staff is aware that a characteristic of this lake includes many retaining walls built into the water which have been permitted by DEC Staff in the past (t. 164). DEC Staff notes it is impossible for it to respond to Mr. Serth's claims about many of these properties without more information about the addresses or property owner names (DEC Staff brief, p. 4).

In his brief, the applicant makes arguments about three specific projects recently constructed on Mariaville Lake and introduced evidence at the hearing regarding several others. Each is discussed below.

Unidentified property. At the hearing Mr. Serth introduced a photograph of a property on Mariaville Lake where, he said, a concrete fire pit, concrete slab, and gravel boat launch had been constructed in either 2011 or 2012 (Exh. 7). Neither the address of this property nor the name of the property owner is in the record, nor are any other documents relating to this project. When Mr. Eldred was questioned about the site, he testified that he believed the fire pit had been constructed without a permit and that a consent order had been entered into and a fine paid (t. 67). The concrete slab appeared to be away from the shoreline and similar to the slab Mr. Serth had constructed (t. 65). He did not recall any actions about the gravel boat launch (t. 67). Mr. Serth testified that he had

called Mr. Eldred about this project when it was built and then talked to Mr. Higgins about the disposition of the unidentified property (t. 155).⁶ DEC Staff argues that this unidentified project is not similar to that proposed by Mr. Serth because it does not involve a retaining wall and the slab appears to be built off of the shore and not directly in the lake (DEC Staff closing brief, p. 3).

The Morgan project. At the hearing, the applicant introduced a permit issued on August 30, 2004 to Keith Morgan for construction of a 3' x 4' x 18" concrete slab to access a floating dock (Exh. 16). This permit authorized this activity along the shoreline of Mariaville Lake and in the adjacent area of the freshwater wetland. The applicant also introduced a photograph of the completed project that he took the day before the hearing (Exh. 17). Mr. Serth asserts that with the Morgan project DEC Staff allowed construction of the concrete structure at the bottom of the bank (t. 130, 166). In its closing brief, DEC Staff asserts that the placement of the Morgan concrete structure is comparable to the slab that Mr. Serth installed, and not the proposed retaining wall (DEC Staff brief, p. 4).

Yauchler project. Mr. Serth went to great lengths at the hearing to compare his proposed project to that of Gene Yauchler for which a permit was issued in 2005. According to the portion of Mr. Yauchler's application introduced by the applicant at the hearing, the project was to "build a retaining wall made of flagstone, sand and concrete. This will protect the trees from erosion. Fill area around trees with top soil" (Exh. 8, p. 1).⁷ The permit authorized, among other items, the construction of a 3 feet high, 2 feet wide, stone wall approximately 83 feet in length along a portion of the southern shoreline, above mean high water and installation of a seasonal floating dock⁸ (Exh. 9,

⁶ In his closing brief, the applicant claims to have: (1) spoken to Environmental Conservation Officer Chris Valenty about the violations; and (2) made a Freedom of Information Law (FOIL) request for a copy of the consent order executed to resolve the violation, which DEC Staff did not provide. DEC Staff argues that this information does not appear in the record and should not be referred to in briefs (DEC Staff reply brief, p. 2).

⁷ Mr. Eldred testified that Exhibit 8 did not appear to be the complete Yauchler application (t. 70).

⁸ This authorization for a floating dock was apparently in response to a notice from DEC Staff stating that an existing dock was installed in violation of an earlier permit issued in 2003 (Exh. 12). This earlier permit is not in the record.

p. 2). Mr. Yauchler's property is located on an island in Mariaville Lake (t. 78). Following completion of the project, Mr. Yauchler submitted photos, taken in the winter, showing the completed wall (Exh. 10, p. 5, photo #3). Mr. Serth contends that Mr. Yauchler is a member of the Mariaville Civic Association, the organization that owns the dam and controls the level of the lake (t. 108-9, 151). Mr. Serth claims that this photo was taken when the level of the lake was very low.

At the hearing, Mr. Serth introduced a second photograph of the Yauchler wall, which he took the day before the hearing (Exh. 11), which he stated showed that the wall was constructed below mean high water.⁹ Mr. Serth testified that the day before the hearing he viewed the wall on the Yauchler shoreline and it was up to 24 inches in depth from the bed of Mariaville Lake up to the water line on the wall (t. 151). Mr. Eldred could not confirm Mr. Serth's claim that the wall had been built below the mean high water mark because he did not know where DEC Staff biologists had established the mark (t. 81).

At the hearing, DEC Staff member Eldred explained that the wall was authorized for the purpose of stabilizing a steep bank that had experienced considerable erosion resulting in the roots of large trees being undermined (t. 82). Mr. Eldred testified that Mr. Yauchler had originally sought permission for a longer wall, but DEC Staff had requested him to submit possible alternatives (t. 101, Exh. 10) After reviewing the alternatives, DEC Staff approved a shorter wall than originally applied for and authorized the use of rip-rap in areas where the bank was not high (t. 84).

DEC Staff acknowledges that the water level shown in Exhibit 11 is higher than when the wall was constructed (DEC Staff Brief, p. 4). DEC Staff also contends that the Yauchler permit for construction above the mean high water mark is distinguished from Mr. Serth's proposal to construct below the high water mark.

Mr. Serth's 2007 application. At the hearing, Mr. Serth introduced evidence regarding a permit application he made during 2007 to rehabilitate an existing concrete pier and construct a new concrete boat ramp on Mariaville Lake at

⁹ In his closing brief, Mr. Serth claims that DEC Staff found the placement of the wall to be in violation of the permit and a consent order was then executed, but there is no reference to this in the record (Applicant's brief, p. 1-2).

property located at 216 Batter Street. This application was for a freshwater wetland permit, an Article 15 permit, and a water quality certification. DEC Staff initially denied the application because the proposed project did not meet permit issuance standards (Exh. 5). DEC Staff later reversed its decision and upon further review issued the permit (Exh. 6). Mr. Serth questioned DEC Staff member Eldred about DEC Staff's actions in an attempt to show that the precedent set in the 2007 matter should be followed in this case. Mr. Eldred testified that, while the 2007 permit application was not in the record, each review was conducted on a site-specific basis and the standards for permit issuance for the rehabilitation of an existing pier are different than that for new construction (t. 41, 58, & 99). DEC Staff argues that Mr. Serth's earlier permit for rehabilitation of an existing pier is not comparable to the instant application because different permit issuance standards apply for new construction (DEC Staff brief, p. 5).

Abare project. At the hearing, Mr. Serth introduced an Article 15 permit issued to Joseph Abare in 1974 that authorized the construction of log cribbing into Mariaville Lake so long as the crib did not extent more than 3 feet into the lake (Exh. 22). Mr. Serth stated he had six other permits for projects which were built in the 1970's, but did not introduce them into the record (t. 185). DEC Staff notes that this permit was issued before the Freshwater Wetlands Act (ECL Article 24) was enacted and the regulations promulgated (DEC Staff brief, p. 4), and accordingly it is inappropriate to compare this permit to Mr. Serth's application.

Conclusion. Mr. Serth claims that these examples demonstrate that his application has been treated differently than others on the lake and DEC Staff improperly denied his application. DEC Staff responds that each of these examples is different from the instant case and that they do not provide a precedent for the issuance of this permit to Mr. Serth. Based on the discussion above, the Commissioner should conclude that DEC Staff's analysis is correct and reject the applicant's claim that these other cases support the issuance of a permit. The unidentified project and the Morgan project both involve slabs installed above the water level of the lake, the permit for the Yauchler project clearly states it was to be installed above the high water mark, Mr. Serth's 2007 permit was for the rehabilitation of an existing structure (not a new one), and the Abare project was proposed before enactment of New York's freshwater wetlands law.

(5) The proposed project would be constructed at the water line of Mariaville Lake. The final argument made by the applicant in his closing brief is that the proposed project would be at the water line and consistent with previous permits issued by DEC Staff. DEC Staff responds that its jurisdiction begins at the mean high water mark (the vegetation line) on Mr. Serth's property and that the water line on the property is not relevant (DEC Staff reply brief, p. 2). Mr. Serth's own testimony contradicts his claim that the retaining wall would be constructed at the water line. Mr. Serth testified that the wall would be constructed so as to fill about four square feet of Mariaville Lake (t. 167).

The Commissioner should reject this argument of the applicant because the record clearly demonstrates that the proposed project would be constructed below the mean high water mark and in the lake itself. Thus the permit issuance standards cited in DEC Staff's notice of permit denial are applicable, regardless of where the water line falls on the property.

Improper behavior by DEC Staff. The applicant makes several claims regarding the alleged improper conduct of DEC Staff in this matter. Mr. Serth testified that he believed that DEC Staff was selectively enforcing the laws (t. 168). As discussed above, the record of this matter does not support this claim.

Mr. Serth also testified that DEC Staff had contacted the New York State Department of Transportation (NYSDOT) regarding the placement of the slab and permitted proposed roof structure. According to Mr. Serth this was the first time DEC Staff had taken such action (t. 170). Apparently, the slab was constructed in the NYSDOT right of way (see, t. 170, 171). There is not enough evidence in the record to evaluate this claim.

In his closing brief, Mr. Serth accuses DEC Staff member Higgins of perjury with respect to his testimony regarding the Yauchler permit (Applicant's closing brief, p. 2). This is apparently in reference to Mr. Higgins' testimony that he was not involved in the review of the Yauchler application (t. 120). Mr. Serth then produced a letter dated July 13, 2007 to Mr. Yauchler that was signed by Mr. Higgins (Exh. 15). This letter extended the term of Mr. Yauchler's permit, at the request of the applicant. Mr. Higgins then testified that he just signed the letter to extend the permit, and was not involved in the original permit review (t. 122-123). DEC Staff claims that the

applicant wrongfully accused Mr. Higgins of perjury based on a faulty understanding of the difference between permit issuance and permit extension (DEC Staff reply brief, p. 3). Based on the evidence in the record, the Commissioner should conclude that Mr. Serth's claim that Mr. Higgins committed perjury is without merit.

The applicant also accuses DEC Staff in Region 4 of attempting to cover up Mr. Higgins' alleged perjury by purposefully delaying the release of information requested pursuant to FOIL until October 2012 (Applicant's closing brief, p. 2). DEC Staff responds that these documents should be outside the hearing record because Mr. Serth made his FOIL request on June 11, 2012, after the hearing, and Mr. Serth opted not to conduct any discovery before the hearing (DEC Staff reply brief, p. 2). According to DEC Staff, Mr. Serth has requested to view all permits issued in the Town of Duanesburg, approximately 341 records (DEC Staff reply brief, p. 3). Based on this information, the Commissioner should not conclude that DEC Staff has acted improperly with regard to Mr. Serth's latest FOIL request.

CONCLUSIONS OF LAW

1. The proposed concrete retaining wall does not meet the regulatory criteria for permit issuance of a freshwater wetlands permit pursuant to ECL Article 24 and 6 NYCRR 663.5(e).
2. The proposed concrete retaining wall does not meet the regulatory criteria for permit issuance of a use and protection of waters permit pursuant to ECL Article 15 and 6 NYCRR 608.8.

RECOMMENDATION

Based on the information in the record, I recommend that the Commissioner conclude that the project proposed by the applicant, a concrete retaining wall, does not meet applicable permit issuance criteria. The Commissioner also should conclude that: (1) DEC Staff properly denied Mr. Serth's application; (2) Mr. Serth's request for a permit should be denied; and (3) there is no evidence in the record that DEC Staff acted improperly in this matter.

Matter of Serth
DEC #4-4220-00193/00005 & 00006

Final Exhibit List

#	Description	Identification	Evidence
1	Joseph Serth Joint Application Form 2/13/2012	Y	Y
2	Notice of Permit Denial DEC#4-4220-00193/00005 & 00006 5/1/12	Y	Y
3	Permit for Concrete Pad DEC#4-4220-00193/00002 7/7/11	Y	Y
4	Photo Taken 5/29/12	Y	Y
5	Notice of Permit Denial DEC#4-4220-00194/00002 7/25/07	Y	Y
6	Response to Public Written Comments by James Eldred 11/29/07, Letter from Gene Kelly 3/4/08	Y	Y
7	Photo Taken 5/29/12	Y	Y
8	Yauchler Application 6/7/05	Y	Y
9	Yauchler Permit 10/20/05	Y	Y
10	Notice of Incomplete Application for Yauchler Property 6/23/05	Y	Y
11	Photo Taken 5/29/12	Y	Y
12	Eldred Letter to Yauchler 6/23/05	Y	Y
13	Email from Jill Phillips 3/29/12, Email from Joseph Serth 3/29/12	Y	Y
14	Department of the Army (ACOE) Letter to Joseph Serth 5/30/12	Y	Y
15	Permit Extension for Yauchler 7/13/07	Y	Y
16	Morgan Permit 8/30/04	Y	Y
17	Photo Taken 5/29/12	Y	Y
18	Photo Series Taken 5/29/12	Y	Y
19	Photo Series Taken 5/29/12	Y	Y
20	Photo Series Taken 5/29/12	Y	Y
21	Photo Series Taken 5/29/12	Y	Y
22	1974 Abare Permit 12/31/74	Y	Y
23	Joseph Serth's Prior Application 10/25/10	Y	Y

AMSTERDAM

STATE OF NEW YORK
DEPARTMENT OF PUBLIC WORKS
FREDK STUART GREENE, SUPERINTENDENT
WILLIAM M. ACHESON, CHIEF ENGINEER

DEPARTMENT OF THE INTERIOR
U.S. GEOLOGICAL SURVEY



SCALE IN MILES



MAP 5

Topography by D.H. Watson, K.W. Trimble, W.K. McKinley, W.F. Chenault, and H.R. Kilmer. Culture and drainage in part compiled from aerial photographs taken by Air Corps, U.S. Army Control by U.S. Geological Survey, U.S. Coast and Geodetic Survey, and New York State Survey. Surveyed in 1928.

APPROXIMATE MEAN DECLINATION, 1928

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