STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 15 of the New York State Environmental Conservation Law (ECL) and Part 608 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

- by -

RICHARD J. WALLENHORST, II,

Respondent.

ORDER
DEC Case No.
R6-20180827-28

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation (Department or DEC) alleges violations of Article 15, Title 5 of the ECL (Protection of Water) and 6 NYCRR part 608 by respondent Richard J. Wallenhorst, II at property he owns at 19363 Pregent Road, Wellesley Island, Town of Orleans, Jefferson County, New York (site). The site is located on the shoreline of a water body that is part of the St. Lawrence River, a navigable water which is classified as a Class A stream of the State of New York.

On June 19, 2018, in response to a complaint concerning a seawall on respondent's property, Environmental Conservation Officer (ECO) Benjamin Tabor[1] visited the site and observed a "large dock with a seawall on the water below the mean . . . high water[]mark" (Hearing Transcript [Tr] at 19-21). He took photographs (see DEC Exhibit [Exh] 1) and issued a notice of violation (NOV) to respondent based upon his observation of the wall and his assessment that it would likely require a permit (see Tr at 24-25, 41-42; DEC Exh 2).

Department staff inspected the site again on July 2, 2018 (see Tr at 56). Christopher Balk, Regional Manager of the Department's Bureau of Ecosystem Health in Region 6, observed "a sheet steel wall that had been constructed in the St. Lawrence River" at the site (Tr at 57). Department records indicated that respondent had not applied for or obtained a permit for the dock and seawall (see Tr at 67, 81-82).

[1] ECO Tabor's last name is misspelled as "Taber" in the hearing transcript. His name in the transcript is hereby corrected to "Tabor" for purposes of the record of this proceeding.

Staff commenced this proceeding by serving respondent with a notice of hearing and complaint, dated March 3, 2021 (Original Complaint). The complaint alleged that respondent:

(1) violated ECL 15-0501 and 6 NYCRR 608.2(a) by disturbing the bed and banks of the St. Lawrence River, a protected stream of the State, without a DEC-issued permit (First Cause of Action); and

(2) violated ECL 15-0505 (1) and 6 NYCRR 608.5 by placing fill into the St. Lawrence River, a navigable water of the State, without a DEC-issued permit (Second Cause of Action).[2]

Respondent served an answer to the complaint with 21 affirmative defenses (see Answer ¶¶ 12-32). Administrative Law Judge (ALJ) Michael S. Caruso granted staff's unopposed motion for leave to amend the complaint, and staff thereafter served an amended complaint, dated January 19, 2022, which corrected minor drafting errors and clarified the relief requested (Amended Complaint) (see Hearing Report at 3). Respondent adopted his original answer as his amended answer in response to the amended complaint (see Hearing Transcript [Tr] at 9).

ALJ Timothy M. MacPherson held a hearing in this matter on August 24, 2022. Following the hearing, the ALJ prepared the attached hearing report, dated March 27, 2023, in which he recommends that I issue an order: (1) finding respondent liable for violating ECL 15-0501, ECL 15-0505, 6 NYCRR 608.2 (a) and 6 NYCRR 608.5; (2) imposing upon respondent a civil penalty of five thousand dollars ($5,000); and (3) directing respondent to remediate the site and allow Department staff full access to the property to allow staff to determine compliance (see Hearing Report at 13-14).

Upon review, I adopt the ALJ's hearing report as my decision in this matter, subject to my comments below.

Liability

First Cause of Action (ECL 15-0501 and 6 NYCRR 608.2)

In relevant part, ECL 15-0501 (1) provides that, with certain exceptions not applicable here, "no person . . . shall change, modify or disturb the course, channel or bed of any stream as defined in [ECL 15-0501(2)], or remove any sand, gravel or other material from the bed or banks

[2] Staff did not specifically allege in the Second Cause of Action that the fill was placed below the mean high water level (see Original Complaint ¶ 26 and Amended Complaint ¶ 26), as required to plead a violation of ECL 15-0505 (1) and 6 NYCRR 608.5. However, both the Original Complaint and the Amended Complaint set forth the applicable statutory provisions at issue (see both Original Complaint and Amended Complaint ¶¶ 24-25) and provided respondent with adequate notice that he was being charged with placing fill below the mean high water level and with adequate notice of the facts intended to be proven with respect to this cause of action. I note also that the NOV provided to respondent in this matter made clear what charge was encompassed by the Second Cause of Action (see DEC Exh 2 [NOV dated July 16, 2018, referencing respondent's placement of fill in navigable waters]; see also respondent's answer dated April 9, 2021, ¶ 27 [noting DEC claims and causes of action relating to placing fill below the mean high water level]). In drafting complaints in the future, staff should provide more specific pleadings in the causes of action, as appropriate.

of such stream without a permit" issued by the Department (ECL 15-0501 [1]). Streams subject to this provision include Class A streams such as the St. Lawrence River (see ECL 15-0501 [2]; see also 6 NYCRR 910.6 [Table 1, Item No. 1a]). The Department's regulations likewise provide, in relevant part: "no person . . . may change, modify or disturb any protected stream, its bed or banks, nor remove from its bed or banks sand, gravel or other material, without a permit issued pursuant to this Part" (6 NYCRR 608.2 [a]). Class A streams are included in the regulation's definition of protected stream (see 6 NYCRR 608.1 [aa]). The Department's regulations define the term "banks" as: "that land area immediately adjacent to, and which slopes toward, the bed of a watercourse, and which is necessary to maintain the integrity of a watercourse" (6 NYCRR 608.1 [a]). The term "bed" is defined as: "that land area of a watercourse covered by water at mean high water" (6 NYCRR 608.1 [a]).

Here, there is no dispute that respondent's property is located on the shoreline of a Class A stream subject to ECL 15-0501 and 6 NYCRR 608.2 (see Hearing Report at 4-5 [Finding of Fact Nos. 1 and 6]; Tr at 62-64). There also is no dispute, and respondent acknowledged, that respondent did not, at any time, obtain a DEC permit with respect to the dock and seawall that is present at the site (see Hearing Report at 5 [Finding of Fact No. 12], 6; Tr at 119).

As to staff's allegation that respondent disturbed the bed and banks of the St. Lawrence River, I concur with the ALJ that Department staff met its burden of proof to establish this element of the charge by a preponderance of the evidence (see 6 NYCRR 622.11 [c]; see also 6 NYCRR 622.11 [b][1] ["Department staff bears the burden of proof on all violations alleged and matters affirmatively asserted in the document that commenced the proceeding"]). The documents and testimony presented at the hearing established that, sometime in 2012 or after, respondent modified an existing structure at the site. ECO Tabor testified that, when he visited the site in 2018, he observed construction on the dock that appeared "fresh" and "fairly new" (Tr at 21, 36); he also testified that respondent told him that the dock had been repaired in 2017 (see Tr at 36).[3]

Respondent testified that renovations occurred in 2012 (see Tr at 112). Although respondent maintains that the renovations were done within the original footprint of the structure, that he only did work to the existing structure that was above the water line, and that he did not disturb the banks or bed of the waterway in making the renovations (see Respondent's Closing Brief, at 3-4; see also Tr at 114-115), that position is contradicted by both respondent's own testimony and the photographic evidence. Indeed, respondent testified that ice "took out" the existing structure and "totally turned it into toothpicks," requiring him to renovate the structure in 2012 by installing "something heavier" (Tr at 112). A comparison between a photograph of the original structure taken in 2005 (see Respondent Exh B) and photographs of the renovated structure taken by ECO Tabor on June 19, 2018 (see DEC Exhs 1.2, 1.5, 1.6, 1.7, 1.9, 1.10) demonstrates that the new structure is considerably larger than the former structure, is built out

[3] The ALJ reserved on a hearsay objection raised by respondent's attorney with respect to a statement that ECO Tabor testified respondent made to him about repairs to the structure in 2017 (see Tr at 36-37). The ALJ determined that he would allow the testimony "subject to any . . . submissions that the parties might make in favor of or in opposition to that testimony coming in" (Tr at 38). Based upon my review of the record, I find that nothing was presented that would support the exclusion of ECO Tabor's testimony in this regard. Furthermore, respondent's attorney did not ask respondent about the statement during subsequent testimony.

of different materials and, importantly, includes a new return section that extends to the shoreline and sits on the bed of the river, partially submerged (see DEC Exh 1.5). I agree with the ALJ's determination that "it would be impossible to create the Structure as it exists today without disturbing the bed and banks of the St. Lawrence River," as those terms are defined in the regulation (Hearing Report at 7). Respondent's contentions to the contrary are unsupported and lack credibility.

Based upon the foregoing, I concur with the ALJ's determination that respondent violated ECL 15-0501 and 6 NYCRR 608.2 and adopt it.

Second Cause of Action (ECL 15-0505 [1] and 6 NYCRR 608.5)

ECL 15-0505 (1) prohibits any person from "excavat[ing] or plac[ing] fill below the mean high water level in any of the navigable waters of the state . . . without a permit issued" by the Department. The Department's regulations contain a similar permit requirement (see 6 NYCRR 608.5). ECL 15-0505 (1) defines "fill" as including, but not limited to, "earth, clay, silt, sand, gravel, stone, rock, shale, concrete (whole or fragmentary), ashes, cinders, slag, metal, or any other similar material whether or not enclosed or contained." In addition, DEC's regulations provide:

> " 'Mean low water' " or 'mean high water' means, respectively, the approximate average low water level or high water level for a given body of water at a given location, that distinguishes between predominantly aquatic and predominantly terrestrial habitat as determined, in order of use by the following:
>
> (1) available hydrologic data, calculations, and other relevant information concerning water levels (e.g., discharge, storage, tidal, and other recurrent water elevation data); (mean high water elevations are established, using this method, for certain waterbodies as presented in section 608.11 of this Part);
>
> (2) vegetative characteristics (e.g., location, presence, absence or destruction of terrestrial or aquatic vegetation);
>
> (3) physical characteristics (e.g., clear natural line impressed on a bank, scouring, shelving, or the presence of sediments, litter or debris); and
>
> (4) other appropriate means that consider the characteristics of the surrounding area" (6 NYCRR 608.1 [r]).

Here, there is no dispute that respondent's property is located on the shoreline of a navigable water to which ECL 15-0505 and 6 NYCRR 608.5 apply (see Hearing Report at 4 [Finding of Fact No. 6]; 6 NYCRR 608.1 [u][definition of navigable waters of the State]). There also is no dispute that respondent did not, at any time, obtain a DEC permit with respect to the dock and seawall that is present at the site (see Hearing Report at 5 [Finding of Fact No. 12], 6; Tr at 119).

As to the issue of whether respondent placed fill below the mean high water level in the St. Lawrence River, I concur with the ALJ that Department staff met its burden of proof to establish this element of the charge by a preponderance of the evidence. As discussed above, the documents and testimony presented at the hearing established that, sometime in 2012 or after, respondent renovated an existing structure at the site by enlarging and extending it using new materials; this renovation necessarily required the placement of fill.

The evidence presented at the hearing also demonstrated that the fill – here the dock and the seawall/bulkhead – was placed in the St. Lawrence River below the mean high water level. On this point, ECO Tabor testified that, during his visit to the site on June 19, 2018, he observed "a large dock with a seawall on the water below the mean . . . high water[]mark" and explained that he determined the mean high water level by "looking at the shoreline vegetation" (Tr at 21), which is a "typical reference" for making such a determination (Tr at 31). Similarly, Mr. Balk testified that, when he inspected the site on July 2, 2018, he observed a seawall that "had been constructed in the St. Lawrence River" (Tr at 57; see Tr at 59, 64). He testified that he determined that the structure was built below the mean high water level by looking at: (1) staining present on the front of the wall of the structure, which was located about a foot below the top of the wall; and (2) terrestrial vegetation (see Tr at 65-66).

In addition to this testimony, Department staff offered photographs taken on June 19, 2018 by ECO Tabor which show a structure which is built on the bed of the St. Lawrence River and is partially submerged in the St. Lawrence River (see DEC Exhs 1.2 and 1.5). The structure has a clear line of water staining on the sheet steel wall face (see DEC Exhs 1.1, 1.3, and 1.4). As the ALJ found, these photographs, in and of themselves, establish that the dock and seawall/bulkhead were constructed below the mean high water level of the St. Lawrence River in violation of ECL 15-0505 and 6 NYCRR 608.2 (see Hearing Report at 8; Matter of Kelly's Custom Docks LLC et al., Order of the Commissioner, January 12, 2023 at 7). Notably, although respondent argued that staff's mean high water level determination was not reliable for a variety of reasons (see Respondent's Closing Brief at 7-9),[4] respondent did not offer any evidence refuting staff's evidence as to this element of the charge. I find that respondent's position that he did not construct anything that was below the mean high water level is not credible and is contradicted by the evidence presented at the hearing.

Based upon the foregoing, I concur with the ALJ's finding that respondent violated ECL 15-0505 and 6 NYCRR 608.5 and adopt it.

[4] Respondent argued, among other things, that staff's determination as to the mean high water level was not reliable because the "water levels were historically higher in 2018 when these pictures were taken than it was when the seawall was repaired in 2012" (Respondent's Closing Brief at 7-8). I note that respondent did not offer any proof to support his contention that the water level was unusually high on the date when the photographs were taken. The photographs also contradict his position, as they show that the water level that day was well below the visible high water mark on the front of the wall (see Department Exhs 1.1 and 1.3).

Affirmative Defenses

As noted above, respondent raised 21 affirmative defenses in his answer. In his hearing report, ALJ MacPherson addressed each affirmative defense that was addressed by respondent at the hearing or in his closing brief and determined that respondent had not met his burden of proving any of those affirmative defenses (see Hearing Report at 9-11). The ALJ also concluded that respondent had not met his burden with respect to any of the affirmative defenses not specifically addressed by respondent (see id. at 12). Based upon my review of the record, I concur with the ALJ's conclusions in this regard and adopt the same as part of this Order.[5]

Penalty and Remedial Relief

Pursuant to ECL 71-1127, "[a]ny person who violates any of the provisions of, or who fails to perform any duty imposed by article 15 . . . or who violates or who fails to comply with any rule, regulation, determination or order of the department heretofore or hereafter promulgated pursuant to article 15 . . . shall be liable for a civil penalty of not more than two thousand five hundred dollars for such violation and an additional civil penalty of not more than five hundred dollars for each day during which such violation continues, and, in addition thereto, such person may be enjoined from continuing such violation as otherwise provided in article 15" (ECL 71-1127 [1]).

Here, Department staff sought in its amended complaint the imposition of a total civil penalty "up to the maximum allowed by law, but not less than $5,000.00" (Amended Complaint, Wherefore Clause, par B). Staff also sought an order directing respondent, within thirty days of the effective date of the order, to:

(1) remove the vertical sheet pile wall that is along the shoreline in its entirety, and reinstall a 10-foot wide bulkhead with returns sited entirely above mean high water elevation;

(2) after the vertical sheet pile is removed, restore the shoreline with 12-18-inch riprap on a slope of 1:2 or flatter, the base of which shall start at the same elevation as the river bottom on the outside of the vertical sheet pile wall that is immediately adjacent;

(3) install a turbidity curtain around the work area to maintain water quality; and

(4) seed any exposed soil not covered by riprap with a DEC-approved Northeast conservation seed mix and mulch (see id., par C).

[5] Several of the affirmative defenses raised by respondent have also been addressed in earlier DEC administrative proceedings (see e.g.. Matter of McCashion, Ruling on Motion to Dismiss Affirmative Defenses, January 10, 2018, at 3 [statute of limitations in administrative proceedings]; Matter of Bartell, ALJ Ruling, June 11, 2009, at 12 [generally a governmental entity may not be estopped from the proper discharge of its statutory duties]; Matter of Cobleskill Stone Prods, Inc., Rulings of the Chief ALJ on Motions, January 18, 2012 at 12 [laches]; and Matter of Giambrone, Decision and Order of the Commissioner, March 17, 2010 at 11-12 [applicability of Cortlandt factors]).

In addition, staff sought an order directing respondent to allow Department staff full access to the site and to cease and desist from any and all future violations of ECL 15-0501 and 15-0505 and 6 NYCRR 608.2 (a) and 608.5 (see id., pars D and E).

ALJ MacPherson found staff's requests to be reasonable and supported by the evidence presented at the hearing and recommended, with one exception,[6] that the remedial relief be ordered and a civil penalty of $5,000 be imposed (see Hearing Report at 12-13). Based upon this record, I find that the imposition of a civil penalty of $5,000 is appropriate and authorized. I also find that the remedial relief requested by Department staff is appropriate and authorized, as the hearing record established the negative environmental impact of the dock and seawall at the site, including that its presence exacerbates erosion of the shoreline and "usurps" aquatic habitat and that the presence of the fill "is placed at the expense of the resource" (Tr at 68-69).

However, to ensure that the remediation work is done properly and in accordance with any applicable and statutory requirements, I am directing that respondent first submit an approvable remediation plan to Department staff which describes the manner by which the remediation will be conducted.

Based upon my review and to ensure appropriate completion of the remediation, the remediation plan must contain:

- a timetable for respondent's removal of all illegal structures, the restoration of the impacted area and of any other activities proposed by the plan;

- a description of the method by which respondent shall remove illegal structures (including the protections to be followed to minimize any further negative impacts to the St. Lawrence River);

- the names of the facility(ies) where any removed material will be disposed and the requirement that respondent shall submit receipts for any such disposal; and

- the manner by which respondent shall furnish photographs to Department staff that show the appearance of the area before and after removal/restoration.

An approvable plan is one that can be approved by the Department with only minimal revision.

I encourage respondent to discuss the preparation of the remediation plan with Department staff prior to its submission to ensure that the remediation plan incorporates all components that staff would require for this type of remediation.

[6] The ALJ recommended that staff's request for a "cease and desist" order be denied, as respondent is already required to comply with the ECL and title 6 of the NYCRR (see Hearing Report at 13 n 1). Further language to that effect is not needed (see Matter of Adonai Realty L.P., Order of the Commissioner, February 19, 2016 at 2; Matter of the Miguel Sosa Estates, L.P., Order of the Commissioner, January 28, 2016 at 2).

With respect to the timeframes for payment of the civil penalty and for the submission of an approvable remediation plan to Department staff, staff did not request a specific timeframe for the payment of the penalty but did request that the remedial work be completed within 30 days of the effective date of this order. Upon due consideration, I am directing that respondent submit the civil penalty and the remediation plan (in approvable form) to Department staff within thirty (30) days of the service of this order upon respondent.

Respondent may, upon good cause shown, request an extension of the milestone dates contained in the remediation plan. Any such request must be in writing, setting forth the reasons for the request, and submitted to Department staff in DEC Region 6. The granting of any extension shall be within the sole discretion of Department staff.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

I. Based on the record of this proceeding, respondent Richard J. Wallenhorst, II violated ECL 15-0501 and 6 NYCRR 608.2(a) by disturbing the bed and banks of the St. Lawrence River without a permit issued by the Department, and violated ECL 15-0505 (1) and 6 NYCRR 608.5 by placing fill below the mean high-water level of the St. Lawrence River without a permit issued by the Department.

II. Respondent Richard J. Wallenhorst, II is hereby assessed a civil penalty in the amount of five thousand dollars ($5,000) for the violations identified in paragraph I of this order. This penalty shall be paid within thirty (30) days of the service of this order upon respondent and shall be paid by certified check, cashier's check, or money order made payable to the New York State Department of Environmental Conservation and submitted to:

Shannon C. McGlew, Esq.
Assistant Regional Attorney
NYS Department of Environmental Conservation
Office of General Counsel, Region 6
317 Washington Street
Watertown, New York 13601

III. Within thirty (30) days of the date of the service of this order upon respondent, respondent Richard J. Wallenhorst, II is to submit an approvable remediation plan to Department staff that addresses the removal of all illegal structures and the restoration of the impacted area as set forth herein. An approvable plan is one that can be approved by the Department with only minimal revision.

The remediation plan, which is to be submitted to Department staff, must provide for:

(A) removal of the vertical sheet pile wall that is along the shoreline in its entirety, and reinstallation of a 10-foot wide bulkhead with returns sited entirely above mean high water elevation;

(B) after the vertical sheet pile is removed, restoration of the shoreline with 12--18-inch riprap on a slope of 1:2 or flatter, the base of which shall start at the same elevation as the river bottom on the outside of the vertical sheet pile wall that is immediately adjacent;

(C) installation of a turbidity curtain around the work area to maintain water quality; and

(D) seeding of any exposed soil not covered by riprap with a DEC-approved Northeast conservation seed mix and mulch;

(E) a timetable for respondent's removal of all illegal structures, the restoration of the impacted area and of any other activities proposed by the plan;

(F) a description of the method by which respondent shall remove illegal structures (including the protections to be followed to minimize any further negative impacts to the St. Lawrence River);

(G) the names of the facility(ies) where any removed material will be disposed and the requirement that respondent shall submit receipts for any such disposal; and

(H) the manner by which respondent shall furnish photographs to Department staff that show the appearance of the area before and after removal/restoration.

IV. Respondent shall submit the remediation plan referenced in Paragraph III of this order to:

Shannon C. McGlew, Esq.
Assistant Regional Attorney
NYS Department of Environmental Conservation
Office of General Counsel, Region 6
317 Washington Street
Watertown, New York 13601

V. Respondent may, upon good cause shown, request an extension of the milestone dates contained in the remediation plan. Any such request must be in writing, setting forth the reasons for the request, and submitted to Department attorney Shannon C. McGlew at the address referenced in Paragraph II of this order. The granting of any extension shall be within the sole discretion of Department staff.

VI. Any questions or other correspondence regarding this order shall be addressed to Shannon C. McGlew, Esq., at the address referenced in Paragraph II of this order.

VII. The provisions, terms and conditions of this order shall bind respondent Richard J. Wallenhorst, II and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /S/
Basil Seggos
Commissioner

Dated: May 8, 2023
Albany, New York

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

- of -

Alleged Violation of Article 15 of the Environmental Conservation Law of the State of New York, and Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York Part 608

by

Richard J. Wallenhorst II,
Respondent.

Case No: R6-20180827-28

Hearing Report

- by -

/s/
_____
Timothy M. MacPherson
Administrative Law Judge

March 27, 2023

Proceedings

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced the above captioned enforcement proceeding by service of a notice of hearing and complaint dated March 3, 2021 (complaint), upon Richard J. Wallenhorst II (respondent). The complaint alleges violations of Environmental Conservation Law (ECL) article 15 and part 608 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) at property owned by respondent located at 19363 Pregent Road, Wellesley Island, Town of Orleans, Jefferson County, New York (the Site). According to the complaint, the alleged violations were first observed on June 19, 2018, and have continued to this date.

Respondent filed an answer to the complaint dated April 9, 2021, by his attorney, Michael Pattison, Esq. The answer denied the alleged violations and requested a dismissal of the complaint in its entirety, together with such other and further relief as may be deemed just and proper. In his answer, respondent also asserted twenty-one (21) affirmative defenses, which are addressed below.

Department staff submitted a motion to amend the complaint dated January 19, 2022, which was granted by Administrative Law Judge Michael S. Caruso. The amendments to the complaint included updated language regarding settlement and revisions to the remedial relief that staff was requesting. Staff served the amended complaint on February 15, 2022. In the amended complaint, staff alleges that Mr. Wallenhorst violated ECL 15-0501 and 6 NYCRR 608.2(a) by disturbing the bed and banks of the St. Lawrence River, a protected stream of the State, without having a permit issued by the DEC. Staff further alleges that Mr. Wallenhorst violated ECL 15-0505 and 6 NYCRR 608.5 by placing fill into the St. Lawrence River, a navigable water of the State, without a permit issued by the DEC. For the alleged violations, staff seeks an order from the Commissioner:

A. Finding respondent violated ECL 15-1501, ECL 15-1505, 6 NYCRR 608.2(a), and 6 NYCRR 608.5;

B. Directing respondent to pay a civil penalty up to the maximum allowed by law, but not less than five thousand dollars ($5,000.00) for the violations of the ECL and 6 NYCRR, pursuant to ECL 71-1127;

C. Within 30 days of the effective date of this order, directing respondent to;

    i. Remove the vertical sheet pile wall that is along the shoreline in its entirety, and reinstall a 10-foot-wide bulkhead with returns sited entirely above the mean high water elevation;

    ii. After the vertical sheet pile is removed, restore the shoreline with 12-18 inch riprap on a slope of 1:2 or flatter, the base of which shall start at the same

elevation as the river bottom on the outside of the vertical sheet pile wall that is immediately adjacent;

iii. Install a turbidity curtain around the work area to maintain water quality; and

iv. Seed any exposed soil not covered by riprap with a DEC-approved Northeast conservation seed mix and mulch;

D. Directing respondent to allow full access to the Site to the DEC, or areas in the vicinity of the Site which may be under respondent's control and as to which respondent has the authority to provide access to others, and any areas under respondent's control that are necessary to gain access thereto, in order to determine compliance;

E. Directing respondent to cease and desist from any and all future violations of ECL section 15-1501, ECL section 15-1505, 6 NYCRR section 608.2(a), and 6 NYCRR section 608.5; and

F. Orders such further relief as may be just and proper.

Because the amended complaint served only to correct minor drafting errors and to clarify upon the relief requested, respondent opted not to answer the same. Staff filed a statement of readiness dated April 4, 2022.

I issued a notice of hearing dated July 27, 2022, which scheduled a hearing for August 24, 2022, at 10:00 a.m. at the offices of the New York State DEC Region 6 office located at 317 Washington Street, Watertown, New York. The administrative enforcement hearing convened, as scheduled on August 24, 2022, and concluded on that same day.

Shannon C. McGlew, Esq., Assistant Regional Attorney (Region 6), represented Department staff. Benjamin Taber, Environmental Conservation Officer (ECO), and Christopher Balk, Regional Manager from the Bureau of Ecosystem Health, testified for the Department. Both ECO Taber and Mr. Balk operate out of the DEC Region 6 office. Michael T. Pattison, Esq., (Rochester, New York), appeared for respondent, Richard J. Wallenhorst II. Mr. Wallenhorst served as respondent's only witness.

Associated Reporters International, Inc. provided stenographic services and prepared a transcript of the hearing. The transcript was circulated to the parties' counsel on September 26, 2022. I provided respondent with the opportunity to file a written closing brief as discussed during the hearing (Transcript [Tr.] at 127-130). On October 13, 2022, I received an electronic copy of respondent's closing brief. Subsequently, on October 20, 2022, I received an electronic copy of Department staff's reply brief. By email dated October 20, 2022, I advised the parties that the record of the proceeding closed (*see* 6 NYCRR 622.17[d]).

Prior to the hearing, Department staff circulated electronic copies of its' four (4) exhibits labeled DEC-1.1 through 1.12, DEC-2, DEC-3 and DEC-4. Respondent provided two (2) exhibits prior to the hearing labeled Exhibit A and Exhibit B. During the hearing, I received

DEC Exhibits 1.1 through 1.12, as well as DEC Exhibits 2, 3 and 4, which were entered into the record (Tr. at 50-51, 73). I also received and entered into the record respondent's Exhibit B (Tr. at 105). An exhibit chart is attached to this hearing report.

Findings of Fact

1. Richard J. Wallenhorst owns property at 19363 Pregent Road, Wellesley Island in the Town of Orleans (Jefferson County), New York. Mr. Wallenhorst's property is adjacent to Lake of the Isles, a bay-like water body located along the St. Lawrence River. (*See* Tr. at 94, 111; DEC Exhibit 2, 4.)

2. Mr. Wallenhorst has owned the property on Pregent Road since 1988. He has performed renovations since as early as 2012 on a pre-existing dock located at the Site and adjacent to the Saint Lawrence River (the Structure) to remediate damage caused by seasonal ice flows. Over the years, renovations to the structure have included, among other things, replacement of old materials with heavier materials more suited to resisting damage from seasonal ice flows and the placement of a three-to-four-inch layer of crushed stone and pavers on top of the Structure. (Tr. at 111-114; DEC Exhibit 4.)

3. The structure consists of a large dock platform, approximately 40 to 41 feet in length, which extends from the shoreline outward into the portion of the St. Lawrence River that is the subject of this report (the River). The Dock platform is supported by a corrugated sheet steel seawall or bulkhead consisting of a one-inch-thick outer steel face with solid fill behind it. (*See* Tr. at 40-41, 57-59, 66; DEC Exhibit 1.1-1.12.)

4. Benjamin Paul Tabor is an Environmental Conservation Officer (ECO) employed by the New York State DEC out of the Region 6 office located in Watertown, New York. ECO Tabor enforces the environmental conservation laws, along with other state laws, and has served as a DEC ECO since February of 2016. ECO Tabor received six months of training related to, among other things, ECL Article 15, water body recognition, shore and stream setbacks and methods used to determine the mean high water level of water bodies throughout New York State. (Tr. at 18-19, 30-31.)

5. Christopher Balk has served as the DEC Region 6 Regional Habitat Manager with the Bureau of Ecosystem Health since 2015. Mr. Balk's job duties include reviewing permit applications for potential development projects along the state's productive waterways and administering the protection of waters and freshwater wetland protection programs in New York State. Mr. Balk has worked for the DEC in varying capacities for over thirty years. (Tr. at 55-56)

6. The St. Lawrence River is a Class A stream and navigable water of New York State located on the United States border with Canada. In accordance with this classification, the St. Lawrence River may be used as a potable water source as well as for primary and secondary contact recreation and fishing. In addition, Class A surface waters like the St.

Lawrence River must be suitable for fish and wildlife propagation and survival. (*See* Tr. at 15, 62-63; 6 NYCRR 701.6[a]; 6 NYCRR 910.6.)

7. The mean high water level of the River varies both seasonally within any given year and annually from year to year, but does not ebb and flow with the ocean tides. The water level of the River may also fluctuate, albeit slowly, depending upon the extent of the downstream release of water at the Moses-Saunders Dam. (Tr. at 21, 34, 35, 65, 88, 95, 99-101.)

8. Department staff uses a variety of methods to determine the mean high water level of water bodies in New York State including reference to the established elevation in a particular year and other tabulated hydrologic data. Mean high water level can also be accurately ascertained by visualizing the level where shoreline vegetation ends or by observing water staining on structures emersed into a given waterbody. (Tr. at 31, 34, 43; 6 NYCRR 608.1[r])

9. On June 19, 2018, ECO Tabor conducted an inspection at the Site after the DEC Habitat Office received a complaint regarding the potential presence of an unpermitted dock and seawall. (Tr. at 19-20; DEC Exhibit 4).

10. During the June 19, 2018, inspection, ECO Tabor observed and photographed a large dock and seawall with fresh construction protruding below the mean high water level of the River. Because a permit had not been issued for the Structure, ECO Tabor issued a Notice of Violation (NOV) to respondent which instructed respondent to appear or contact DEC staff at the Region 6 office in Watertown, New York on July 16, 2018. (Tr. at 21-25; DEC Exhibit 1.1 – 1.12, 2, 4).

11. Department staff, including Mr. Balk, conducted a second inspection at the Site on July 2, 2018. During this inspection Mr. Balk observed water staining on the sheet piling which comprises the outer wall of the Structure. Accordingly, Mr. Balk determined that the structure was built on the bed of the River and that it contained fill placed below the mean high water level. (Tr. at 41-42, 59, 63-66)

12. A search of DEC records indicate that respondent never applied for a permit to perform the work that was done on the Structure. (Tr. at 67).

13. Vertical structures placed below the mean high water level of a given water body have negative environmental impacts. These structures cause an increase in wave energy as they reflect and synergize with naturally occurring waves. The resulting turbulence is greater in front of the vertical walls, impacts erosion and prohibits the growth of aquatic vegetation, usurping habitat for fish and wildlife that would otherwise be available. (Tr. at 61-62, 68.)

Discussion

I. Liability

ECL 15-0501 and 6 NYCRR 608.2(a)
Disturbing the Bed and Banks of the St. Lawrence River:

In the February 15, 2022, amended complaint, Department staff alleges that respondent violated ECL 15-0501 and 6 NYCRR 608.2(a) by disturbing the bed and banks of the St. Lawrence River, a protected stream of the State of New York, without having a permit issued by DEC.

First, it is clear from the record that respondent never obtained a permit from the DEC. At the August 24, 2022, hearing Mr. Balk offered testimony that respondent never applied for a permit from the DEC to perform work on the Structure. Mr. Balk reached this conclusion after performing a review of DEC records prior to the inspection that occurred at the Site on July 2, 2018. Furthermore, Mr. Balk is qualified to make this determination as reviewing permit applications is one of his job duties. (Tr. at 67; Finding of Fact Nos. 5, 12.)

Respondent does not dispute that a permit was never obtained. In fact, respondent testified that he inquired about the need for a permit with both the Army Corps of Engineers as well as the contractor who performed the work on the Structure in 2012. In both instances, respondent testified that he was told no permit was required (Tr. at 120).

However, respondent is not absolved from the requirement to obtain a DEC-mandated permit simply because the Army Corps of Engineers does not require one on their end. Furthermore, the contractor was plainly incorrect when he or she informed respondent that a permit was not required. ECL 15-0501 clearly states that "no person… shall change, modify or disturb the course, channel or bed of any stream… without a permit…" (*see* ECL 15-0501[1]). Likewise, 6 NYCRR 608.2(a) states that "no person… may change, modify or disturb any protected stream, its bed or banks… without a permit…" (*see* 6 NYCRR 608.2[a]). Because the St. Lawrence River is a Class A protected stream (Finding of Fact No. 6) the permit requirement would apply for any activity that disturbs its bed or banks and, again, in the instant case respondent did not apply for the required permit.

Second, respondent did, in fact, disturb the bed and banks of the River when he modified the Structure in 2012 or at some point thereafter. This conclusion is supported by the record because Mr. Balk provided credible testimony that "the wall [of the Structure] itself is built on the bed of the St. Lawrence River" (Tr. at 59; Finding of Fact No. 11). In addition to Mr. Balk's testimony, the photographs taken by ECO Tabor clearly show that the Structure rests, in part, on the bed and banks of the river (*see* DEC Exhibits 1.1-1.10). Finally, comparing the pictures of the Structure taken by ECO Tabor in 2018 with a picture of the dock as it existed in 2005 (Exhibit B), it is clear that the footprint of the Structure is different today from the footprint that existed prior to the 2012 renovations (*compare* DEC Exhibit 1.1-1.10 *with* Exhibit B; Tr. at 106).

Although it is impossible to determine what material the dock was made of in the 2005 photograph, the sheet metal comprising the wall of the structure in the 2018 photographs is clearly of a different character (Tr. at 106; Department staff's Reply Brief at 1-2). In fact, respondent admitted that the material comprising the Structure today is different than it was in 2005. Explaining why the renovation was made to the Structure, respondent stated that "[t]he ice took out… what was the existing structure that was there" and "turned it into toothpicks" at which point he "decided to try to get something heavier to stop the ice flow…" (Tr. at 112). Naturally, ice flows would not affect the Structure either before or after the 2012 renovation if the Structure wasn't resting on the bed and banks of the river exposing it to the ice in the first place.

Based on this record, I find (1) that it would be impossible to create the Structure as it exists today without disturbing the bed and banks of the St. Lawrence River and (2) that respondent never applied for or obtained a DEC permit. Accordingly, I conclude that respondent violated ECL 15-0501 and 6 NYCRR 608.2(a) by disturbing the bed and banks of the St. Lawrence River, a protected stream of the State of New York, without having a permit issued by DEC.

ECL 15-0505 and 6 NYCRR 608.5
Placing Fill below the Mean High Water Level:

In the February 15, 2022, amended complaint, Department staff alleges that respondent violated ECL 15-0505 and 6 NYCRR 608.5 by placing fill into the St. Lawrence River, a navigable water of the State of New York, without a permit issued by DEC.

ECL 15-0505(1) prohibits any person from either excavating or placing fill below the mean high water level of any navigable water of the State without first obtaining a permit from the Department under the provisions of ECL 15-0505[3] (*see also* 6 NYCRR 608.5). Pursuant to 6 NYCRR 608.1(m), fill may be "any solid or semi-solid, organic or inorganic material including, but not limited to, earth, clay, silt, sand, gravel, stone, …, concrete, …, [and] metal…." (*see also* ECL 15-0505[1] containing a substantially similar list of materials that may be considered *fill*).

The navigable waters of New York State are those lakes and other bodies of water that are navigable in fact notwithstanding interruptions to navigation by seasonal variations in capacity. This definition does not apply to waters that are surrounded by land held in single private ownership at every point in their total area. (*See* 6 NYCRR 608.1[u].)

The terms mean low water, and mean high water are defined in the regulations at 6 NYCRR 608.1(r) as "the approximate average low water level or high water level for a given body of water at a given location, that distinguishes between predominantly aquatic and predominantly terrestrial habitat as determined in order of use by the following:

> (1) available hydrologic data, calculations, and other relevant information concerning water levels (*e.g.*, discharge, storage, tidal, and other recurrent water elevation data);

(mean high water elevations are established, using this method, for certain waterbodies as presented in section 608.11 of this Part);

(2) vegetative characteristics (*e.g.*, location, presence, absence or destruction of terrestrial or aquatic vegetation);

(3) physical characteristics (*e.g.*, clear natural line impressed on a bank, scouring, shelving, or the presence of sediments, litter or debris); and

(4) other appropriate means that consider the characteristics of the surrounding area." (6 NYCRR 608.1[r][1] - [4]).

Although some testimony was provided during the cross examination of ECO Tabor and Mr. Balk regarding the possibility of establishing the mean high water level of the River by reference to hydrologic data (*see* Tr. at 31-35, 99-101), ECO Tabor and Mr. Balk relied on the second, third and fourth methods in the regulations, to determine the mean high water level in the vicinity of the Structure. Specifically, ECO Tabor testified that he determined the mean high water level by visualizing where shoreline vegetation ends (Tr. at 21, 31). Mr. Balk testified that he determined the mean high water level by both observing where terrestrial vegetation ends on the banks of the river and by observing water staining on the face of the sheet metal wall of the Structure (Tr. at 59, 65-67).

On cross examination, counsel for respondent challenged the reliability of using vegetative characteristics to determine the mean high water level. During the cross examination of Mr. Balk, respondent's counsel questioned whether the photographs in DEC Exhibits 1.1-1.12 show where the vegetation line ends in relation to the Structure (Tr. at 90-91). The photographs show that a sandy beach lies to the left of the Structure as it is viewed from the river (*see* DEC Exhibit 1.1, 1.2, 1.4-1.7, 1.9-1.12) and riprap lies to the right of the Structure as it is viewed from the river (*see* DEC Exhibit 1.1. 1.3, 1.8). The photographs, however, do not adequately demonstrate the location of the vegetative line.

However, both ECO Tabor and Mr. Balk provided credible testimony that they used the vegetative characteristics of the bank of the river to determine the mean high water level in relation to the Structure beyond what was captured in any one of the photographs in DEC Exhibits 1.1-1.12. Furthermore, their testimony is not less credible simply because the photographs are too narrow in scope to corroborate that testimony. No evidence was presented by respondent to rebut ECO Tabor or Mr. Balk's testimony regarding the use of vegetative characteristics for determining the mean high water level. Moreover, staff's testimony is further supported by the photographs that demonstrate that the structure is built below the mean high water level based upon the water staining on the Structure's walls (Tr. at 59; DEC Exhibit 1.1, 1.3-1.4). Finally, a plain viewing of the photographs in DEC Exhibit 1.1-1.10 leaves no doubt that the Structure was, in fact, built into the waters of the River (DEC Exhibits 1.1-1.10).

As discussed above, Department staff's testimony along with the photographs introduced at the hearing show that respondent installed the Structure below the mean high water level of the River. The record also clearly establishes that, by performing this installation, fill was placed

below the mean high water level as early as 2012 when the renovation of the Structure took place. On direct examination Mr. Balk credibly testified that "the sheet steel wall [of the Structure]… sits in the water" and that "[t]here's solid fill behind the sheet steel, hence there's fill in the river." (Tr. at 66; Finding of Fact No. 11). In fact, no showing that fill was placed behind the sheet steel is even required because fill includes, among other things, metal, thus making the sheet steel wall itself a form of fill (*see* 6 NYCRR 608.1(m); ECL 15-0505[1]).

Furthermore, respondent offered testimony that crushed stone was put down underneath the pavers which make up the walking surface of the Structure (Tr. at 114). Crushed stone would also qualify as *fill* based upon the above referenced definitions found in 6 NYCRR 608.1(m) and ECL 15-0505(1). Although respondent testified that only a few inches of crushed stone fill were placed and that this crushed stone fill was all placed above the mean high water level (*see* Tr. at 114-115), I do not find that testimony credible when viewing the profile of the Structure before and after the renovations that took place in 2012.

In the 2005 photograph offered as respondent's Exhibit B, the top platform of the dock is cantilevered out over the walls of the base of the dock. On the landward side of the platform that is visible in Exhibit B, there appear to be wooden beams separating the raised grassy portion of the property from the beach area. Finally, in the 2005 photograph there appears to be an area covered in grass and rock between the dock structure and the wooden beams. (*See* Exhibit B.)

Viewing that same profile of the renovated Structure in the June 19, 2018, photographs, the grass and rock area has been paved over and made contiguous with the top platform of the dock. Furthermore, whereas the upper platform of the dock was cantilevered out from the base in 2005, the upper platform of the Structure after the 2012 renovations is now nearly flush with the sheet steel walls of the base demonstrating that the Structure's footprint was enlarged and built further into the waters of the River. (*Compare* Exhibit B *with* DEC Exhibits 1.5, 1.7.)

Based on this record, I find by a preponderance of the evidence that fill was placed below the mean high water level of the River, at least as early as the point in time where the 2012 renovation to the Structure took place, and the Department did not issue a permit to respondent pursuant to ECL 15-0505(3). Accordingly, I conclude that respondent violated ECL 15-0505(1) and 6 NYCRR 608.5.

II. Respondent's Affirmative Defenses

As noted above, respondent asserted twenty one (21) affirmative defenses in the April 9, 2021, answer (*see* Answer p. 2-6). Respondent touched on some of the concepts behind these affirmative defenses at the hearing, but stated in his closing presentation that he would rely mostly on his closing brief to address them (Tr. at 126-127). Each affirmative defense is addressed below.

Respondent's first affirmative defense is that the action is barred by the applicable statute of limitations. This defense can be easily dismissed as there is no statute of limitations for an administrative enforcement proceeding and the parties seem to have agreed on this fact (see Respondent's Closing Brief At 9; Department Staff's Reply Brief at 4).

The second affirmative defense asserts that the claim is barred in whole or in part by administrative delay. In making this affirmative defense respondent cites *Cortlandt Nursing Home v. Axlerod*, 66 NY2d 169, and the four factors the New York Court of Appeals set forth to determine whether a period of delay is reasonable under State Administrative Procedure Act 301(1). Those factors include, "(1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by government regulation" (*see Cortlandt*, 66 NY2d at 178).

Respondent argues that the alleged delay has created a hardship due to both the increased cost of materials and the difficulty in finding contractors to perform the work during the COVID 19 pandemic. First, respondent knew that there was a potential violation on June 19, 2018, when ECO Tabor issued the NOV and instructed respondent to contact Department staff to work towards a resolution (Tr. at 25-27, 41-42). Respondent also knew the exact nature of the remedial work that Department staff sought as early as December of 2020 when he received a proposed order on consent to resolve the matter (Department staff's Reply Brief at 4). Department staff gave respondent ample opportunities to resolve the matter from the date of receipt of that order on consent through January 7, 2022, when respondent failed to meet the final extension deadline to respond to the same (Department staff's Affirmation in Support of Motion to Amend Complaint ¶ 7). Based on the above, even if this series of events can be described as delayed, I find much of that delay has been caused by respondent's failure to work with Department staff after being advised that the Structure was built in violation of the law and regulations. Finally, it should be noted that throughout this period, respondent continued to enjoy the use of the Structure: a dock on the St. Lawrence River which I have determined was illegally constructed.

Staying with the second affirmative defense, respondent also asserts that there is substantial prejudice caused by the delay in enforcement due to the possibility of higher fines. Under the ECL, "[a]ny person who violates any of the provisions of Article 15 of the ECL… shall be liable for a civil penalty of not more than two thousand five hundred dollars [$2,500] for such violation and an additional civil penalty of five hundred dollars [$500] for each day during which such violation continues…" (*see* ECL 71-1127). Here, Department staff's prayer for relief includes the imposition of a civil penalty "up to the maximum allowed by law, but not less than $5,000 for the violations of the ECL… pursuant to ECL 71-1127…" (Amended Complaint at 5).

At the hearing Mr. Balk testified that the maximum penalty that he calculated for this matter was "approximately one point five million dollars" ($1,500,000). Although the amended complaint requests a civil penalty "up to the maximum allowed by law" (see Amended Complaint at 5), Department staff clarified in its closing statement that it is only seeking a civil penalty of five thousand dollars ($5,000), which equals the maximum civil penalty that could be imposed if each of the two violations persisted for only one day. (Tr. at 74, 125.) With that clarification in mind, I find the requested penalty to be reasonable and appropriate under the circumstances.

Overall, I find that respondent has not met the burden of proof in arguing that administrative delay should bar this action. The respondent knew within a reasonable period of time what remedial work Department staff wanted him to perform on the Structure and was given over a year to accept the December 2020 order on consent. Respondent exercised his right to have a hearing and in doing so he took on the inherent risks that come with exercising that right.

Respondent's fourth affirmative defense is that the Department stands to be unjustly enriched because the alleged administrative delay has resulted in higher fines (Respondent's Closing Brief at 11-13). As discussed above, there is no need to discuss this affirmative defense or Department staff's response to it because the Department is only requesting the maximum fine that could be imposed if both violations of the ECL persisted for a single day.

Respondent's eleventh affirmative defense asserts that Department staff's claims and causes of action are barred, in whole or in part, by the doctrine of unclean hands. This argument can be roughly summarized as falling into the category of administrative delay and unjust enrichment. Both of those arguments have already been addressed above.

In respondent's sixteenth affirmative defense, which is more of a general denial than an affirmative defense, respondent asserts that the action is barred in whole or in part, because the alleged actions of respondent did not disturb nor excavate or place fill below the mean high water level. This affirmative defense is discussed in detail above and this court finds that respondent has not met its burden of proof. (*See* pp. 6-9 *supra*.)

In respondent's eighteenth affirmative defense, respondent states that his actions in renovating the Structure were designed to prevent erosional issues. Relatedly, in his twentieth affirmative defense respondent asserts that his actions were necessary to safeguard the property. At the hearing, respondent did offer testimony relating to the damage that was done to the pre-existing dock at the Site. Specifically, he testified that the Structure needed to be renovated because years of prior ice flows destroyed the pre-existing structure. (Tr. at 112, 116.) In fact, DEC has already provided respondent with a road map describing how the Structure can be remodeled to protect his property without violating the ECL or 6 NYCRR (*see* Amended Complaint at 5-6 [Wherefore Clause, C. i.-iv.]).

In respondent's nineteenth affirmative defense, respondent asserts that his actions are necessary to assist respondent with his water dependent use and accessibility. Respondent did testify that the reason he built the Structure was mostly "because of problems with [his] legs being able to get to [his] boats." He also acknowledged that the structure was designed to be handicap accessible. (Tr. at 113.) As with the eighteenth and twentieth affirmative defenses discussed in the preceding paragraph, here too there is a way to construct the Structure that will maintain its current accessibility features without violating the ECL and 6 NYCRR (*see* Amended Complaint at 5-6.)

It is for the above reasons that I find Respondent has not met the burden of proving any of the above affirmative defenses asserted.

Respondent's other affirmative defenses were not specifically addressed either at the hearing or in respondent's closing brief and, therefore, respondent has not met his burden of on proof on the remaining affirmative defenses.

III. Relief

Department staff seeks an order from the Commissioner that would direct respondent to remove the vertical sheet pile wall along the shoreline in its entirety, and reinstall a 10-foot wide bulkhead with returns sited entirely above the mean high water level of the St. Lawrence River. Additionally, respondent must restore the shoreline with 12-18 inch riprap on a slope 1:2 or flatter, install a turbidity curtain around the work area to maintain water quality and seed any exposed soil not covered by riprap with a DEC-approved Northeast conservation seed mix and mulch. Staff also seeks a total civil penalty of $5,000 pursuant to ECL 71-1127. (*See* Amended Complaint at 5-6.)

For violations of ECL article 15, its implementing regulations, as well as permits and orders issued pursuant thereto, ECL 71-1127 authorizes a civil penalty of not more than $2,500 per violation and an additional civil penalty of not more than $500 for each day that the violation continues.

Mr. Balk testified about the need to remediate the site and how Department staff calculated the requested civil penalty. According to Mr. Balk, leaving the Structure in place will cause adverse environmental impacts (Tr. at 61-62). Among them would be increased wave energy due to reflection of incoming waves off the walls of the Structure. This increased wave energy impacts erosion around the ends of the walls usurping habitat that would otherwise be available. (Tr. at 68.)

With respect to the civil penalty calculation, Department staff referred to DEE-1, which is the Commissioner's Civil Penalty Policy (issued June 20, 1990). Mr. Balk explained that the civil penalty can include a component related to the continuous nature of the violation. As of the hearing date (*i.e.*, August 24, 2022), Mr. Balk testified that the potential maximum civil penalty would be "approximately one point five million dollars". (Tr. at 70, 74.)

In terms of the gravity of the violation, Mr. Balk said that the "whole intent of article 15 is to avoid impacts to our waterways." He further specified that the purpose of assigning a Class A designation to a protected stream like the St. Lawrence River is to provide a source of drinking water, protect water bodies for fish and wildlife propagation and survival, and to provide recreational resources for the public (Tr. at 61-63). Mr. Balk, again, cautioned about potential adverse effects associated with filling the St. Lawrence River with respect to wave action, erosion, and loss of habitat. (Tr. at 61-62, 68.) With those environmental impacts in mind, I have already found that respondent has disturbed the bed and banks of the River and that he placed fill below the mean high water level without a Department issued permit in violation of ECL Article 15 and 6 NYCRR part 608.

Respondent argued that the footprint of the Structure at the Site has been the same since 1988 (*see* Respondent's Closing Brief at 3). I disagree. Based upon the testimony offered by

ECO Tabor and Mr. Balk along with DEC Exhibits 1.1-1.10, respondent's Exhibit B, and respondent's own testimony, I conclude that the structure as it stands today is substantially different from the one that existed in 2005. (*See* pp. 6-7, 9 *supra*.)

Respondent also argued that the dock at the Site required renovation for several compelling reasons which include the remediation of perpetual damage to the Structure caused by annual ice flows and his need for handicap accessibility to his boats (Tr. at 112-113, 116). Although respondent's concerns in this regard are valid, these goals could have been achieved in a manner consistent with the ECL and the pertinent regulations that does not have a negative impact on the St. Lawrence River. In fact, Department staff has effectively provided respondent with a roadmap to achieving those goals. (*See* Amended Complaint at 5-6.)

With respect to relief, Department staff's requests are reasonable and supported by the evidence presented during the administrative hearing. Accordingly, I conclude that the remediation and civil penalty of $5,000 requested by Department staff are supported and appropriate.[1]

Conclusion

Respondent violated ECL 15-0501 and 6 NYCRR 608.2(a) by disturbing the bed and banks of the St. Lawrence River, a protected stream of the State, without having a permit issued by the DEC. Respondent also violated ECL 15-0505 and 6 NYCRR 608.5 by placing fill into the St. Lawrence River, a navigable water of the State, without a permit issued by the DEC.

Recommendations

Based on the foregoing, I recommend that the Commissioner issue an order:

1. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent Richard J. Wallenhorst II violated the following:

    a. ECL 15-0501 and 6 NYCRR 608.2(a) by disturbing the bed and banks of the St. Lawrence River, a protected stream of the State, without a permit; and

    b. ECL 15-0505 and 6 NYCRR 608.5 by placing fill into the St. Lawrence River, a navigable water of the State, without a permit

2. Directing respondent Richard J. Wallenhorst II to pay a civil penalty of $5,000.

[1] The prayer for relief in Department staff's amended complaint requested that the Commissioner's order include a provision directing respondent to "cease and desist from any and all future violations of ECL Section 15-0501, 6 NYCRR Section 608.2(a) and 6 NYCRR Section 608.5" (*see* Amended Complaint at 6 [Wherefore Clause, E.]). The Commissioner's order should not include this provision because all legal persons and entities are required to adhere to the ECL and title 6 of the NYCRR.

3. Directing respondent Richard J. Wallenhorst II to:

   (a) remove the vertical sheet pile wall that is along the shoreline in is entirety, and reinstall a 10-foot wide bulkhead with returns sited entirely above the mean high water elevation;

   (b) after the vertical sheet pile is removed, restore the shoreline with 10 to 18 inch riprap on a slope of 1:2 or flatter, the base of which shall start at the same elevation as the river bottom on the outside of the vertical sheet pile wall that is immediately adjacent;

   (c) install a turbidity curtain around the work area to maintain water quality; and

   (d) seed any exposed soil not covered by riprap with a DEC-approved Northeast conservation mix and mulch.

4. Directing respondent Richard J. Wallenhorst II to allow full access to the Site to Department staff, or areas in the vicinity of the Site which may be under respondent's control and as to which respondent has the authority to provide access to others, and any areas under respondent's control that are necessary to gain access thereto, in order to determine compliance.

5. Order such further relief as the Commissioner may deem just and proper.

Exhibit Chart
Matter of Richard J. Wallenhorst II
DEC Case No. R6-20180827-28
Hearing Date: August 24, 2022

DEC Exhibits	**Description**
1.1 – 1.12	Set of twelve photographs, taken June 19, 2018.
2	Notice of Violation
3	DEE-1 Civil Penalty Policy
4	DLE Complaint Summary
Respondent Exhibit	
B	Jefferson County Property Database readout for tax map parcel no.: 6.138-1-29 with photograph dated 2005.