OFFICE OF ADJUDICATIONS
VIA FACSIMILE

IN THE MATTER OF ***: ORDER NO. LIS-2006-060-V***

CARL SHANAHAN ***: APRIL 30, 2008***

RULING:
FINAL DECISION ON JURISDICTION AND ADDITIONAL ISSUES

I
SUMMARY

An order was issued to the Respondent on January 29, 2007, alleging a violation of General Statutes §22a-361 through the erection and maintenance of a stone retaining wall waterward of the HTL in tidal, coastal, and navigable waters of the State without a certificate or permit from the Commissioner. The Commissioner ordered the Respondent to submit for review and written approval a plan to restore the filled area; this plan must include provisions for removal of the wall and restoration of the site.

The hearing on the Respondent's appeal began on September 12, 2007, and was recessed on December 4, 2007 for the parties to brief the issues outlined herein. These briefs were filed on March 10, 2008; replies were filed on April 4, 2008. Evidentiary motions and requests were submitted during the recess; however, no additional evidence has been entered into the record.

The issues being addressed are whether the DEP has jurisdiction, the method by which the DEP determined its jurisdiction, and how it applied that jurisdiction. If the DEP has jurisdiction, there is the question as to whether the Respondent has properly alleged any grounds beyond jurisdiction for contesting this order and, if so, whether I should conduct further proceedings to find facts on additional issues.

The DEP properly determined that it has statutory jurisdiction in this matter and properly applied its jurisdiction. §22a-359(c). No further proceedings are necessary to address additional issues raised by the Respondent. Therefore, this Ruling is my final decision in this matter. The Order that is the subject of this appeal is affirmed.

II

JURISDICTION

A
Location of the Wall

The parties dispute the meaning of "location" of the wall and its impact on jurisdiction. According to the Respondent, "location" is a question of the wall's physical position in relation to the high tide line (HTL) of 5.8'[1] NGVD[2]. The DEP counters that the "location" of the wall is relevant only as it relates to the statutory definition of HTL set out in §22a-359(c).

1
Respondent: Physical Location of the Wall

The Respondent claims his wall (seawall) was constructed and remains located at or near elevation 6.8', well landward of 5.8', the HTL he identified, and therefore outside the jurisdiction of the DEP. The primary witness supporting this argument was Leonard D'Andrea, who prepared various surveys before and after the wall was built and who staked a line at a 6.8' elevation to guide the construction to keep the wall out of the jurisdiction of the DEP, believed to start at a 5.8' HTL. Other witnesses included Thomas Kennedy, the builder of the wall, and Robert DeSanto, a consultant who prepared an assessment of the site from an ecological perspective, including an analysis of the pattern of phragmites growth on the property.

Mr. Kennedy's testimony did not convince me that the wall was constructed at elevation 6.8'. He did testify that he did not see any water touching the wall while he was building the wall, but noted that during initial construction, water (i.e., the tide) interfered with his work. In addition, he admitted that after construction, water was touching the base of the wall. He explained that this was due to removal of the riprap, which caused water to hit the wall and "scourge" its bottom, dropping the elevation. In the extensive array of photographs introduced by DEP staff and the Respondent showing the wall from many angles and directions, I saw no evidence of significant impacts to the wall from removal of riprap, particularly changes that would cause a "drop in elevation" of the shorefront or the wall of as much as one foot.

[1] The HTL is noted as 5.7' and 5.8'; given the slight variance, I will refer to the HTL here as 5.8'.
[2] National Geodetic Vertical Datum, a fixed datum adopted as a national standard geodetic reference for sea level. Hereafter, all references to HTL elevation should be considered as NGVD, even if not included.

Although Mr DeSanto gave a thorough presentation, nothing in his testimony or report convinced me that the wall was constructed as planned. DeSanto assessed phragmites growth on the site, shown to be above the existing (i.e., old) seawall and above the location of the new wall. Mr. DeSanto concluded that the wall was located as planned, but that the elevation of the beach has been lowered following the construction of the wall. This conclusion, however, is based on his assumptions that: first, "the elevations staked by the surveyor were the controls Mr. Kennedy used for his excavation of a foundation trench"; and second, that "'beach veneer'" to a depth of 1 to not more than 2 feet from the toe of the completed sea wall was removed or redistributed."[3] There was no convincing proof that either of these assumptions supports Mr. DeSanto's conclusions.

I have reviewed the evidence and documents presented and/or prepared by Mr. D'Andrea, including his July 2006, September 2006 and October 2007 site surveys and his testimony about the process of staking a line at elevation 6.8' for the wall's construction. The July 2006 survey was prepared while the wall was under construction and shows the wall at or behind this line of stakes at elevation 6.8'.[4] His September 2006 survey, completed right after the wall was built, shows at least 92' of the 160' wall at or near the 5.8' HTL.[5] An October 2007 survey depicts about 70' of the 160' wall at or near that HTL.

Other witnesses presented credible evidence that the wall is not now at its intended location. Staff described its observations and conclusions that the wall is not located at an elevation of 6.8' as claimed by the Respondent. After his July 24, 2006 visit to the site, Stanley White of OCC[6] noted that a vertical faced wall had been constructed about ten feet seaward from its planned location; he also observed that the wall had been built "straight out" from the corner of the existing seawall at elevation 5.8' and not set back as designed.[7] Azurre Dee Sleichert of

[3] (Ex. REP-46, p. 26.)
[4] This survey shows the wall at elevation 6.8', with only a relatively small portion curving out to meet the existing wall at a 5.8' elevation. I note that the 5.8' line on this survey seems to intersect with the 6.8' line of stakes at several points.
[5] This survey was prepared in response to the DEP's request for an "as-built" survey following issuance of the NOV.
[6] Ocean and Coastal Consultants, Inc., a coastal engineering consulting firm, designed several proposals for the site.
[7] The wall was designed with a sharp, almost 90-degree angle back from the existing concrete wall. There was testimony that such an angle would not be desirable and that the Respondent believed having the new wall meet the old was within the provisions of the COP. However, this does not explain why the rest of the wall continued from the corner of the existing wall in an almost straight line.

OCC observed that a planned 10-foot transition area or buffer from the 5.8' HTL to the planned wall is not now depicted on the "as built" September 2006 survey. Gene Robida, a DEP engineer, compared OCC's proposed design with the "as built" survey and concluded that the finished wall is ten to fifteen feet waterward of the planned location and is also tied in with the existing seawall in an almost straight line.

It is the fact-finder's exclusive province to determine the credibility of witnesses. *Richards v. Richards*, 82 Conn. App. 372, 376 (2004). I can only draw one conclusion from this explicit evidence. Even if the wall was intended to be built at elevation 6.8'[8], this testimony and the post-construction surveys Mr. D'Andrea prepared, which depict significant portions of the wall at or near elevation 5.8', establish the fact that the wall is not located at elevation 6.8'[9]

2
DEP: Statutory Determination of High Tide Line

Even if I was convinced that the entire wall was built and remains at elevation 6.8', one fact cannot be ignored to assess whether the DEP has jurisdiction in this matter. *There was substantial evidence that water comes in contact with almost the entire wall on a regular basis and no persuasive evidence that it does not.* This physical evidence of "the intersection of the land with the water's surface" is why the "location" of the wall is relevant only as it relates to determining the statutory HTL, defined as follows, and the jurisdiction of the DEP.

> ''[H]igh tide line' means a line or mark left upon the tide flats, beaches, or along shore objects the indicates the intersection of the land with the water's surface at the maximum height reached by a rising tide. The mark may be determined by …(2) a more or less continuous deposit of … debris on the foreshore or berm, (3) physical markings or characteristics, vegetation lines, tidal gauge, or (4) by any other suitable means of delineating the general height reached by a rising tide. The term includes spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm."

[8] There was testimony from Azurre Dee Sleichert that the design of the wall included a ten-foot transition area to the wall from the 5.8' elevation. This horizontal buffer area would, coincidently, place the wall at a 6.8'elevation.
[9] As was adamantly declared at the hearing, the Respondent has never stated that the wall has "moved". However, surveys depict parts of the wall at elevation 5.8'. Those parts of the wall are therefore not, or no longer, located at elevation 6.8'. "To move," means to change position or location. www.merriam-webster.com/dictionary.

Despite the continuous declarations of the Respondent that staff erred by never identifying an established line or elevation as the HTL for this site, §22a-359(c) does not contemplate or require this determination. Instead, in subsections (1) through (4), the statute outlines the variety of ways that may be used to identify the intersection of the land with the water's surface at the maximum height reached by a rising tide. Spring high tides and other tides that occur with periodic frequency (such as tides that may be high due to a storm) are included in this determination. Not included are storm *surges* where there is a departure from the normal or predicted reach of a tide due to the piling up of water against the coast due to strong winds, such as those accompanying a hurricane or other intense storm.[10]

DEP staff provided sufficient evidence of their observation of water touching almost all the wall, particularly during periods of rising waters. In visits to the site[11], staff photographed wrack material around the base of or lodged in the seawall and vegetation deposits in and around the wall, and took pictures of its observations of water touching the wall. Staff also analyzed tide gauge data to corroborate its observations, as provided by §22a-359(c)(4).[12] These observations and assessments are consistent with the variety of methods set out in §22a-359(c) that staff could apply to determine the HTL and support its conclusion that the wall is waterward of the HTL as defined in §22a-359(c). Staff's expertise and experience in applying the evidence they observed and evaluated according to the methods outlined in §22a-359(c) supports the conclusion that this wall is within the statutory HTL and therefore within the jurisdiction of the DEP. See *Connecticut Building Wrecking Co. v. Carothers*, 218 Conn. 580, 593 (1991). (An agency is entitled to rely on its own expertise within the area of its professional competence.)

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[10] There was much testimony as to the inclusion of storms in an assessment of the HTL. I believe the statute is clear: By explaining the nature of "strong winds" that would exclude a particular storm from this definition, all storms are *not* excluded, just storm surges "where there is a departure from the normal or predicted reach of a tide due to the piling up of water against the coast due to strong winds." Also, tidal data from sources such as the US Army Corps of Engineers and NOAA include averages from years of observation, which necessarily include storms.

[11] At the hearing, the Respondent questioned the authority of the DEP to go onto or near the site to inspect and/or photograph the wall without a warrant or other permission. This wall is not within the curtilage, or lands immediately surrounding the Respondent's a home; rather, it is an "open field" and therefore an exception to the warrant requirement of the 4th Amendment. State actors do not need probable cause or a warrant to enter and search an open field, and information gained as a result is not constitutionally tainted. *Hart v. Myers*, 183 F. Supp. 2d 512, 518-519 (D. Conn. 2002), quoting *United States v. Pinter*, 984 F. 2d 376, 379 (10th Cir.), cert. denied 510 U.S. 900 (1993). The Respondent also did not have a reasonable expectation of privacy regarding the wall. See *Dow Chem. Co. v. United States*, 476 U. S. 227, (1986) (No reasonable expectation of privacy in areas beyond those immediately surrounding a home). See also *Palmieri v. Lynch*, 392 F. 2d 73, 84-85 (2004), cert. denied 546 U.S. 937 (2004). (Intrusion minimal; governmental interest in protecting natural resources, beaches and waterways.)

The Respondent argues that the statute confers on staff an unreasonable degree of discretion since the methods staff chose to determine the HTL are "unfairly discretionary". Specifically, the Respondent is contesting the methods used by staff because their application does not result in a predictable determination of the HTL. The Respondent challenges the provisions of §22a-359(c), arguing exhaustively that the determination of a HTL should be based on more (arguably) accurate predicted high tides and assessments. The Respondent provided substantial evidence of his disagreement with the statutory criteria of §22a-359(c). For example, experts for the Respondent opined that "a more or less continuous deposit of debris", here evidenced by wrack, is not a reliable indicator of the HTL. Several of his witnesses argued at length regarding methods to ascertain a more accurate and predictable HTL through the use of observed tidal data.

The Respondent's argument is essentially that the statutory criteria do not provide a predictable or consistent HTL; i.e., the statute is flawed. However interesting this claim might be, I can provide no remedy in this administrative process. Not only am I bound by the principle that all statutes are presumed valid, but the proper forum to consider statutory change is the legislature, not this administrative forum. It is up to the state's General Assembly to consider whether §22a-359(c) should be repealed or amended, or if other statutory changes are necessary. If the Respondent believes the current statutory criteria do not set out the proper guidance to determine HTL, he may pursue change through a legislative avenue.

I also note here that the Respondent's own argument illustrates the wisdom of the legislature in adopting §22a-359(c) and the flexibility it affords to DEP staff to assess the HTL and assert its jurisdiction. The Respondent claims that the jurisdiction of the DEP should be based on an "established HTL." If this was true and he was able to show that his wall was above that elevation, the DEP could be faced with a situation where it could not claim jurisdiction and enforce its regulatory authority in a case where there is indicia of the maximum reach of a rising tide (i.e., water coming in contact with a wall). The statutory determination of HTL pursuant to §22a-359(c) is based on this physical evidence, providing the DEP with an appropriate basis to determine the HTL and assert its jurisdiction.

[12] "…[A]ny other suitable means of delineating the *general* height reached by a rising tide…." (Emphasis added.)

B
Application of the Statute

1
Arbitrary and Capricious

The Respondent claims that DEP staff has "arbitrarily and capriciously" applied §22a-359(c) to his property, particularly in this case "where the DEP has previously accepted elevation [5.8'] when it issued a Certificate of Permission for work on the existing seawall" and where he relied on that acceptance in building his wall. In addition to disputing its actions were as characterized, staff disagrees with the Respondent's interpretation of the impact of the COP.

The Respondent argues that because the DEP must and has not established a HTL for his property, the actions of DEP staff relative to this enforcement action were arbitrary and capricious. In order for me to find the actions of staff arbitrary, I must find these actions "so unreasonable as to be without rational basis." *Connecticut Light & Power Company v. Department of Utility Control*, 40 Conn. Sup. 520, 535 (1986). Staff's actions would be capricious if they were "not guided by steady judgment, intent, or purpose, lacking a standard or norm, lacking predictable pattern or law" and were "changeable, erratic [or] whimsical." *Whipple Hydropower I, Inc. v. Conn. Dept of Public Utility*, 1990 Conn. Super. LEXIS 341.

Section §22a-359(c) sets out a variety of methods that may be used to determine the HTL. These methods primarily involve visual observations of physical characteristics relating to a tidal event that has actually occurred. DEP presented sufficient evidence to support its actions and rationale for proceeding. The Respondent's disagreement with what the law should be does not mean that the actions of DEP staff in applying that law were arbitrary or capricious.

Evidence of staff's observations has been discussed, supra, and need not be repeated here. However, I emphasize that staff visited the site numerous times and confirmed observations of water level, debris and tidally influenced vegetation. After staff members involved in this matter concurred with observations made, it was determined that the wall was located within the state's jurisdiction and an NOV should issue. Staff assessments of the site were photographed and documented.

At the hearing, the Respondent presented an extensive challenge to the evidence of staff's observations, including the characteristics of vegetation and debris staff photographed at the site and the photographic and video evidence of water touching the wall. Staff was also questioned as to how it made its observations and its processes to apply the statutory criteria, including its use of tidal data to determine the HTL.

The Respondent's challenges did not convince me that staff was not qualified[13] or that staff abused its discretion or was arbitrary in its application of the statutory criteria of §22a-359(c). Moreover, the Respondent did not present persuasive evidence that staff erroneously applied the law or did not observe water touching the wall or the presence of debris and vegetation at the site. The Respondent's challenges showed an obvious disagreement with staff's conclusions, but did not convince me that staff did not act properly to determine a basis on which to assert jurisdiction in this case.

The Respondent is also wrong in his assertion that he was justified in relying on the HTL he identified in his application for a COP. The DEP did not "accept" any particular HTL when it issued the COP to the Respondent. Determination of a HTL was not a necessary factor in the review of the Respondent's application;[14] the COP would apply to a structure that the Respondent was conceding was waterward of a HTL he identified. §22a-363b(b). There was no need for the DEP to determine the exact extent of its jurisdiction when it issued the COP.

In addition, the Respondent was notified that the issuance of the COP did not constitute an agreement or acceptance of his information, which would include his identified HTL. Although the DEP relied on information provided with the application, the cover letter that accompanied the COP informed the Respondent that the DEP was prepared to take enforcement action in the event of *unauthorized future actions based on inaccurate or incomplete information.* The Respondent could not rely on the HTL he identified in his COP application as the basis for any future actions.

[13] The Respondent challenges to the credentials and job descriptions of DEP Staff were not only unwarranted, but also inappropriate in this administrative proceeding.
[14] This is also true in applications for permits and registrations for general permits, including the general permits noted by the Respondent.

2
Estoppel

DEP staff claims an allegation of estoppel is implied in the Respondent's charge that its actions were arbitrary and capricious. The Respondent argues DEP should be "estopped" from proceeding because it did not issue a cease and desist order to stop the construction of the wall.

The elements of any estoppel claim are not manifest in this case. *Kimberly Clark Corp. v. Dubno*, 204 Conn. 137, 148 (1987). Also, not only does the Respondent have no ability to assert that any particular action was most appropriate in this case, even if he could show the DEP should have issued a cease and desist order, even mistaken action or no action by public officials does not preclude an agency charged with protection of the public interest from eventually taking action. *Celentano v. Rocque*, 2006 Conn. Super. LEXIS 745, 24-25 (2006.)

The Respondent also makes a specious argument that would lead to an unacceptable result. He disputes the law under which the DEP has asserted jurisdiction and is essentially saying he did not have to stop because the DEP never made him. If this were true, anyone challenging an environmental law could keep violating that law until the DEP issued a cease and desist order and, eventually, the validity of the law were upheld. This would turn the presumption of the validity of environmental regulations on its head. See, e.g., *Bauer v. Waste Management of Connecticut, Inc*., 239 Conn. 515, 529, n. 6 (1996). (Belief action permissible because regulation invalid does not mean conduct stops only with a cease and desist order.)

Moreover, there is abundant evidence that the Respondent does not have the requisite "clean hands" to assert this claim. The record shows that he had actual or, through his contractors, constructive notice of the concerns of the DEP, including its preference for a non-structural solution to his erosion problem and its disagreement with his identified HTL.[15] He

[15] Based on his testimony, the Respondent appears to believe his liability should be reduced because he relied on his consultants' advice. However, a basic tenet of the law of agency applies in this case: "Qui facit per alium, facit per se." (He who acts through another is deemed in law to do it himself.)

also understood the implications of vegetation on this property regarding placement of the wall.[16]

DEP staff advised the Respondent as early as 1995 that a structural solution was possible; however, the objectives of the DEP in any solution to the erosion on his property would be to "minimize fill and encroachments waterward of the high tide line".[17] When the Respondent received his COP in 2005, he was informed that any work in tidal wetlands or waterward of the HTL that has not been authorized by a valid COP was a violation of state law.

By May 2005, the Respondent was aware that a structural solution would not be accepted (i.e., a permit would not be issued) by the DEP if a structure were in its jurisdiction. John Gaucher, the DEP coastal management liaison for the Stamford area, met him at his property, explained the relevant policies of the Coastal Management Act and asked him to look at non-structural alternatives.

In a letter to the Stamford Zoning Board in February 2006, which was copied to the Respondent's consultant, Gaucher outlined the exact reasons why the Respondent's Coastal Site Plan Review application was inconsistent with applicable policies of the Coastal Management Act and made clear that the proposal would need authorization (i.e., a permit) from the DEP for work to be conducted at or below the HTL. Gaucher also stated that the HTL probably extended further landward than as depicted on the Respondent's site plan. At a hearing before the Board in March, Gaucher testified as to the reasons for the DEP determination of inconsistency and again stated that the Respondent's application underestimated the HTL.

The evidence also shows that once it became aware that construction had proceeded at the site and there was a possible violation, DEP staff acted deliberately and decisively to obtain sufficient evidence of a possible violation and determine the DEP had jurisdiction.

[16] He was advised in 2004 that the toe of the slope included several species of wetland vegetation. His 2005 COP application noted the presence of tidal wetlands on site; his application for a Coastal Site Plan Review the same year noted the presence of a "rackline, indicating the typical extent of tidal waters and wave action… located near the edge of the phragmites."

Construction of the wall began in April 2006.[18] That same month, John Gaucher inquired via e-mail with the city planner as to the status of any work on the site. The planner responded that *"[f]or now, [the Respondent] has stated that he is not proceeding with any further preparation /staging work."*[19]

On June 20, John Roberge, an engineer who had conducted a peer review of the OCC design,[20] sent an e-mail to Norman Cole of the Zoning Board and noted that while on site he had observed a *"[c]ontractor already on-site, excavating and placing stone."* He asked: *"is this approved…aif (sic) it is… to what plan is he building????"* Cole forwarded this e-mail to Mr. Gaucher on June 26.

Gaucher went to the site on July 5, 2006. He saw that a significant part of the wall had already been completed; only a segment just to the south of the existing wall had no first course of stone. He observed that an "almost vertical" wall had been constructed waterward of the proposed structure and that the wall was well below the HTL. He also saw evidence of sedimentation washing into Long Island Sound and that a large amount of fill was behind and above the wall. He observed that all shoreline vegetation at the site was gone, covered by the wall. Gaucher took photographs of the wall, including portions showing non-native materials being used as backfill.

That same day, Gaucher called the DEP in Hartford to file a "complaint". Staff complaints are often filed from the field; such complaints often serve as the first official report of a possible violation. Jeffrey Westermeyer took his call, received the information and filled out the complaint form pursuant to the procedures for this process. Westermeyer was subsequently assigned to this matter.

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[17] I note that the 1995 correspondence from the DEP, which informed the Respondent as to actions he could take to address his erosion problem, proposed, "convening a pre-application meeting …to discuss potential remedial alternatives." (Ex. REP-1)

[18] The Respondent testified that local approval was imminent, but that the City did not give its final approval because of the objections of the DEP. He began work in order to keep the contractor on site and to use the materials that had been stockpiled, with the permission of the City, on his property.

[19] The Respondent had begun staging work preparatory to the construction of the wall.

On July 6, Westermeyer contacted the Respondent to arrange a meeting at the site.[21] On July11, the Respondent sent e-mail to Westermeyer indicating he had arranged for his surveyor and contractor to meet Westermeyer on site that day. Westermeyer and his supervisor Peter Francis went to the site on July 11. No one else was present. They took photographs of their observations of the water level, debris and tidally influenced vegetation. They determined the wall had been constructed within the state's jurisdiction and an NOV should issue. Westermeyer filled out an inspection report, which indicated that a violation had occurred and that an NOV would be issued.

The next day, July 12, Westermeyer filed the report and tried to contact the Respondent. He and the Respondent spoke a day or two later when the Respondent returned his call. Westermeyer informed the Respondent that he had been at the site on July 11 and observed work being performed waterward of the HTL and that an NOV would be issued. The Respondent told Westermeyer that he believed the work was not waterward of the HIL. Also, although no local approval had been received, he believed such approval was "imminent" so he had decided to start the work.

An NOV was issued on August 7, 2006, stating that the wall had been constructed without authorization and requesting that the Respondent submit a plan for review and approval to remove the wall. Correspondence sent with the NOV also advised the Respondent not to engage in activity that might result in further environmental harm.

The Respondent knew that the DEP and policies of the Coastal Management Act did not support a structural solution and that there was an elevation at which the DEP could assert jurisdiction, even as early as the time when concepts for a wall or other structural solution were being designed. He was told by the DEP in May 2005 that he should look at non-structural

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[20] Roberge also advised that the HTL appeared to extend beyond the noted 5.7' elevation, and that a more appropriate jurisdictional line would be approximately 6.8'.

[21] The Respondent's e-mail to Westermeyer on July 11, 2006 resolves the question of when they first spoke. (Ex. DEP-113) The Respondent tells Westermeyer of his actions "since we spoke last Thursday" (i.e., July 6). The Respondent also testified that the two had spoken on that date about the presence of sedimentation. Based on the e-mail, it is also apparent that Westermeyer wanted to meet at the site. Any disputes over actual dates of these or other conversations are, however, of little significance. Dates of alleged conversations and communications are all within days of each other.

alternatives. In December 2005 and February 2006, the DEP stated the Respondent's plan was inconsistent with the Coastal Management Act, recommended it be denied and made clear authorization was needed for work to be conducted at or below a HTL that likely extended further landward of the HTL identified by the Respondent.

The Respondent has indicated that he knew he had to wait for local approval before starting construction. He was told that the approval process had stopped because of DEP concerns regarding jurisdictional issues. He proceeded.

This is not a case of the Respondent being led to believe there were no environmental concerns about his wall or consequences if it was not placed above the reach of the high tide. While I do not believe the Respondent acted without a sincere intent to address the erosion of the slope on his property, the Respondent acted willfully and before he had local approval and with a full understanding and appreciation of what could happen if a completed wall was within the jurisdiction of the DEP. The Respondent knew the law and did not do what the law required. He cannot now be excused from its consequences.

C
Extent of Jurisdiction

The Respondent argues that if I find that the DEP has established its jurisdiction, it may only pursue an enforcement order over that portion of the wall that is at or below the 5.8' HTL. The DEP argues it has established jurisdiction over the entire wall.

The language of §22a-361(a) guides my decision: "The Commissioner … shall regulate … the erection of structures and the placement of fill, *and work incidental thereto*, in the tidal, coastal or navigable waters of the State waterward of the high tide line." (Emphasis added.)

Work was performed that was incidental to construction and maintenance of the wall. The builder of the wall testified that the tide interfered with his work on the wall. Riprap, which was waterward of the 5.8' HTL, was placed at the toe of the wall. Leonard D' Andrea prepared a survey purporting to show the volume of beach removed due to the construction of the wall to

support a claim that subsequent events have altered the contours of the shore. All of this incidental work places the entire wall within the jurisdiction of the DEP.

D
Impact of Subsequent Events on Jurisdiction

The Respondent argues possible "impacts from forces of nature, during and/or subsequent to construction of the wall, should be considered in evaluating the issue of jurisdiction." Specifically, he contends that these "events" have impacted how a "seawall otherwise constructed out[side] of the DEP's jurisdiction could somehow appear to be within its jurisdiction." He maintains that the 6.8' elevation of the wall has not changed, but that the topography of the rocky shorefront, has changed and continues to change, allowing water to now reach the wall.

Mr. D'Andrea testified at length as to how the rocky shorefront of the property has been impacted due to activities such as the removal of the riprap from the base of the wall. He gave an exhaustive explanation to support this assertion. I have carefully reviewed and considered his reasoning and have afforded his arguments about impacts to the shorefront every reasonable benefit of the doubt.[22] However, I just cannot reconcile his conclusions with the evidence presented and the relationship between changes in topography and water's elevation.

I cannot agree with D'Andrea's theory regarding the impacts of changes to the topography of the beach on water reaching the wall. While I agree it is possible that natural shifting of shore materials, or changes due to human activities (e.g., building the wall or removing riprap from the toe of the wall) might cause the elevation or topography of the shorefront to change, it is entirely another matter to conclude that these changes would be the reason water now reaches the wall.

The elevation of the water's surface, a HTL at an elevation measured at NGVD, is not a matter of topography.[23] Any subsequent events that might impact the topography of the beach

[22] In fact, I called Mr. D'Andrea back to another hearing session to explain his theory once again.
[23] I note that NGVD is a measure of a point in the water, not on the land.

will not change the elevation of the water's surface. Basically, the maximum height reached by a rising tide does not change.

If shore materials, such as riprap, are removed, to the extent these materials acted as a "barrier" to the tide, water will now reach farther up the shore but only at the height of the water. In other words, the water will only reach the wall that is at the elevation of the HTL, i.e., the maximum reach of the rising tide. Here, water is reaching a wall where portions of the wall have been depicted as being at elevation 5.8', but is also reaching the wall where it is claimed to be at elevation 6.8'. Changes to the topography of the shorefront did not change the water's elevation; the reach of the tide touches the wall because that wall is at the same elevation as the HTL, which would be at an elevation greater than 5.8' if the wall is located at a higher elevation and water is reaching its base.

Finally, regardless of the extensive arguments put forth by the Respondent, the fact remains -- a significant part of the wall is still waterward of the statutory HTL. Section 22a-359(c) defines HTL as "a line or mark…that indicates the intersection of the land with the water's surface at the maximum height reached by a rising tide."[24] The "intersection of the land with the water's surface" places the wall within the jurisdiction of the DEP. The DEP has the authority to enforce this Order issued to the Respondent.

III

ADDITIONAL ISSUES

The parties were directed to address whether the Respondent has properly alleged any grounds beyond jurisdiction for contesting this Order. They were also told to discuss whether further proceedings are necessary for additional fact-finding regarding issues raised by the Respondent. For the reasons stated below, I will address the issues raised that are beyond the issue of jurisdiction, however, as will be evident below, no further proceedings are necessary.

Section 22a-3a-6(i)(4) of the DEP Rules of Practice provide that an answer or request for hearing "shall state specifically any findings to which the respondent objects and any other

grounds for contesting the order…."[25] The Respondent's answer and request indicates it is filed in regard to the "attached order" and that "[w]e specifically disagree with the finding that the Respondent erected a retaining wall waterward of the high tide line…." The basis of the Respondent's appeal was the DEP's jurisdiction to render this "Removal Order of the Commissioner…."[26] While not necessarily axiomatic, it is nevertheless reasonable in this case to consider the Respondent's appeal to include an appeal from Order's direction regarding removal of the wall.[27]

Ultimately, however, in this case this question is of no consequence. At my direction, the parties have addressed issues that have been raised that go beyond the question of the assertion of jurisdiction by the DEP. As these questions may have ramifications for similar enforcement matters, I will address the issues raised by the Respondent.

The respondent has specifically raised the following issues. 1) Whether the DEP had sufficient probable cause to initiate an enforcement action on August 7, 2006, the date the NOV was issued; 2) Whether the Respondent violated General Statutes §22a-361; 3) Whether the "conduct of the DEP" regarding the construction of the wall is an uncompensated taking under the Connecticut Constitution, Article I, §11; and 4) As applied to this Respondent and his property, whether the DEP's interpretation and application of the legislative goals and policies contained in §22a-92(b)(2) amount to an uncompensated taking under the Connecticut Constitution Article I, §11.

A
Probable Cause/Violation of §22a-361

DEP staff notes that the NOV is not a subject of this appeal; therefore, arguments directed to the NOV are not relevant. The DEP also argues that, in any event, probable cause is

[24] In this case, it also highly probable that the actual HTL is higher in elevation from where it reaches the wall, as the wall could serve as a barrier to the maximum reach of the tide.
[25] I also note that §22a-3a-6(i)(4) provides that any party, including DEP staff, may file a motion for a more particular statement from a respondent if the answer or request for hearing does not give adequate notice of the grounds for contesting the order. A respondent may also request for permission to file an amended answer.
[26] In addition to alleging a violation of §22a-361, the Order directs the Respondent to submit for DEP review and approval "a plan to restore the filled area of the site to its condition prior to the commencement of any unauthorized work." This plan "shall include provisions for removal of the retaining wall and restoration of the site…."
[27] At the hearing, the parties' arguments were limited to threshold jurisdictional issues; however, it was evident that both parties were prepared to proceed on the issue of the enforcement action contained in the Order.

not needed for the issuance of an NOV, which is a communication to secure voluntary compliance with applicable law and not a formal enforcement action.[28]

Despite staff's point, I will consider this issue, as I believe the Respondent's intent is to challenge this enforcement *process*, which he believes was initiated by the NOV. I will therefore address his argument regarding probable cause and the alleged violation of §22a-361.

The Order finds that the Respondent "has not received a certificate or permit from the Commissioner under section 22a-361…for the erection and maintenance of [a] structure…" and that "by virtue of [this fact], Respondent has violated CGS section 22a-361." The Respondent argues that probable cause must address the elements contained in §22a-361, specifically, that more evidence is needed as to the condition of the resource the DEP seeks to protect.

Section 22a-359(a) provides that the Commissioner "shall regulate dredging and the erection of structures and the placement of fill, and work incidental thereto, in the tidal, coastal or navigable waters of the state waterward of the high tide line." Under §22a-361(a), "[n]o person…shall dredge, erect any structure, place any fill, obstruction or encroachment or carry out any work incidental thereto or retain or maintain any structure, dredging or fill, in the tidal, coastal or navigable waters of the state waterward of the high tide line until such person…has … secured … a certificate or permit for such work…." To engage in any of the activities described in §22a-359(a), a party must first file an application with the commissioner to secure permission to carry out that work. *DiPietro v. Zoning Bd. of Appeals*, 93 Conn. App. 314, 319 (2006). Decisions made by the Commissioner pursuant to this section shall be made "with due regard for … management of coastal resources…." §22a-359(a).

The Respondent does not have a certificate or permit for the construction of the seawall. Accordingly, he has violated the clear requirements of §22a-361 that a permit is needed for undertaking work waterward of the HTL. To the extent a decision to issue a permit would take into account the need to manage coastal resources, a decision to issue an order against the Respondent for his failure to obtain a permit is also for the purpose of protecting those resources.

[28] Staff also correctly notes that General Statutes §22a-6 provides that the Commissioner may initiate complaints as to any actual or *suspected* violation of any statute administered by her. §22a-6(a)(3). It seems unlikely, therefore, that a standard of "probable cause" would be required for an informal enforcement response.

The Respondent argues for the chance to put on the full amount of testimony related to the condition of the bluff on his property, the resource that the DEP "putatively sought to protect in this instance." Section 22a-93(7) of the Coastal Management Act defines "coastal resources" as "the coastal waters of the state, their natural resources…and *adjacent shorelines*, both developed and undeveloped…." (Emphasis added.) "Bluffs and escarpments" are listed as examples of these resources. Regardless of the condition of the bluff (i. e., whether it is modified or in a natural state) and whether this would impact a level or type of protection, the shoreline remains a coastal resource worthy of protection. Evidence of the condition of the bluff would therefore not impact the fact that the Respondent's property is a coastal resource that would be considered if the Commissioner was issuing a permit in this matter and, in her decision to issue this order for failure to obtain a permit to protect that resource. I need no further evidence as to the condition of the bluff to determine that the Respondent has violated §22a-361 by his failure to obtain a permit to erect a structure waterward of the HTL.

The Respondent also seeks to respond to issues raised by the DEP concerning structural solutions; to describe various structural methods used in the area around his property; and to address the need for a structural solution to his property. These issues could have been considered during a permit application process and would have been if the Respondent filed such an application. The Respondent, who was aware of the concerns of the DEP, instead chose to plan his wall landward of the HTL to avoid these very issues. Now that he is subject to the jurisdiction of the DEP, he cannot now come and ask for consideration of these issues during an enforcement proceeding due to his violation of the permitting requirement. In short, he cannot now seek consideration of these issues "after the fact".

B
Enforcement Action Not Uncompensated "Taking"

The Respondent alleges that the "conduct of the DEP" regarding the construction of the wall amounted to an uncompensated taking of his property under the Connecticut Constitution,

Article I, §11.[29] He also claims that as applied to him and his property, the DEP's interpretation and application of the legislative goals and policies contained in §22a-92(b)(2) constitute an uncompensated taking. [30]

The "conduct of the DEP" in this matter was an exercise of its broad discretion to enforce environmental laws. This discretion extends to the selection of the appropriate enforcement action. *Cadlerock Properties Joint Venture, L.P. v. Commissioner of Environmental Protection*, 253 Conn. 661, 670 (2000). See also *Celentano v. Rocque*, supra, 745. (Agency has extensive authority to select appropriate action).

The Respondent seeks further fact-finding as to whether the DEP's interpretation and application of the legislative goals and policies contained in §22a-92(b)(2)[31] of the Coastal Management Act amount to an uncompensated taking as applied to him and his property. Specifically, the Respondent cites statements by staff as to DEP policy regarding the DEP preferences for non-structural solutions and argues that more testimony and evidence is needed to debate this policy in reference to its impact on the value of his property. [32]

However, based on the facts of this case, it is not appropriate that I consider the interpretation and application of the Coastal Management Act by the DEP. The Order from which the Respondent has appealed concerns a violation of §22a-361 due to his unpermitted construction of a wall. If the Respondent had sought a permit to construct this wall, the DEP would then have had the occasion to interpret and apply the legislative goals and policies reflected in §22a-92(b)(2) as to his property. The comments by staff referred to by the Respondent explained the DEP's preference for non-structural solutions when the Respondent

[29] Article I, §11 provides that "[t]he property of no person shall be taken for public use, without just compensation therefore."

[30] Any implicated claims of estoppel and laches cannot prevail. Acts of agents of the state cannot estop the state where those agents are acting in their governmental capacity. *Town of Westport v. Kellems Company*, 15 Conn. Supp. 485, 491 (1948). The doctrine of laches may not be invoked against a governmental agency. *Joyell v. Commissioner of Education*, 45 Conn. App. 476, 486 (1992).

[31] Section §22a-92(b)(2) provides, in relevant part: "Policies concerning coastal land and water resources within the coastal boundary are: (A) To manage coastal bluffs and escarpments so as to preserve their slope and toe; to discourage uses which do not permit continued natural rates of erosion and to disapprove uses that accelerate slope erosion and alter essential patterns and supply of sediments to the littoral transport system…."

[32] To prove an uncompensated "taking" has occurred, a property owner must show that his property cannot be used for any reasonable and proper purpose, as where the economic utilization of the land is, for all practical purposes, destroyed." *Horak v. State*, 171 Conn. 257, 261 (1976).

was considering his early options for addressing his erosion problem, which could have involved a permit from the DEP. Later staff comments were given when the DEP was making its comment and recommendation on the Respondent's application with the Town of Stamford. §§22a-109(d); 22a-110. Any further information on these or any additional facts regarding the DEP's interpretation of the Coastal Management Act would not be relevant to this appeal.

In any event, and regardless of any additional proceedings, enforcement actions of the DEP do not amount to a taking. The regulation of coastal management is a valid exercise of the state's police power. See *Brecciarolli v. Commissioner of Environmental Protection*, 168 Conn. 349, 357 (1975). (Protection of natural resources from impairment and destruction is proper area for regulation under police power.)

Neither the U.S. nor Connecticut Constitutions deny the state power to regulate the uses to which an owner may devote his property. *Figarsky v. Historic District Cmsn of Norwich*, 171 Conn. 198 (1976). "All private property is held subject to the right of the government to limit its use through the valid exercise of the police power and the owner is not entitled to compensation for the diminution in value of his property resulting from restrictions placed upon its use by valid exercise of the police power." (Citations omitted.) *DeMello v. Plainville*, 170 Conn. 675, 679 (1976). The regulation of coastal resources is a legitimate exercise of police power by the DEP. I need no further evidence of any actions by the DEP in this regard; this enforcement action by the DEP does not constitute a "taking".

C
Removal Order As Remedy for Violation of §22a-361

The Commissioner is obligated to conserve and protect "air, water, land and other natural resources" pursuant to the provisions of the Environmental Policy Act, CGS §§22a-1 through 22a-13. *Red Hill Coalition, Inc. v. Town Planning and Zoning Commission*, 212 Conn. 727, 736 (1989). Specifically as relevant here, she is to "provide for the protection…of …marine and coastal water resources including, but not limited to, wetlands…and shorelines." §22a-5.

As part of her obligation to manage coastal resources, the Commissioner regulates the erection of structures and accompanying work in the tidal, coastal and navigable waters of the state. §22a-359(a) The permit requirement of §22a-361 is consistent with the duty of the

Commissioner to protect public trust property and the public interest in an effectively managed coastline. While isolated violations of §22a-361 may only have direct impacts to littoral rights of neighbors, the potential harm to greater interests of the public as a whole warrants relief such as the removal of an offending structure to prevent a coastline where seawalls are so prevalent that the coast is, in effect, "armored" and devoid of natural bluffs.

This Order to enforce a statute that protects the public interest in the coast is similar to any statute that protects the public interest. Any violation of a statute that protects public interests in and of itself could warrant injunctive relief. See, e.g., *Celentano v. Rocque*, supra, 745. (Violation of dam safety statute authorizes Commissioner to order injunctive relief.) Therefore, in upholding this Order to remove this structure, it is instructive to examine the standards that the courts use for granting injunctive relief when it is sought by public agencies.

Public officials, such as a zoning enforcement officer or a wetlands commission, may seek injunctive relief for violations of the zoning or wetlands code. In *Johnson v. Murzyn*, 1 Conn. App. 176, 181 (1984), the court decided that holding a zoning enforcement official to the threshold burdens normally incident to the seeking of injunctive relief (i.e., proof of irreparable harm and that the plaintiff has no adequate legal remedy) would seriously undermine the official's power to enforce the zoning regulations. The court also confirmed that by enforcing the regulations, the zoning authority acts on behalf of all property owners within the municipality to impose their right to require conformity with the regulations in exchange for their own submission to restrictions imposed upon their own property. Id.

Similarly, the Commissioner must act to ensure environmental regulations are consistently upheld to protect natural resources and to ensure all residents of the state act in conformity with those regulations. She is not and cannot be held to burdens incident to injunctive relief as these may seriously undermine her authority to act on behalf of all the residents of the state in protecting natural resources.

The courts have found, however, even when sought by a public official, a decision to grant injunctive relief must be compatible with the equities of the case. The Connecticut Supreme Court discussed this issue in depth in *Bauer v. Waste Management* 239 Conn. 515

(1996) where the Court affirmed a superior court decision granting an injunction to the town's zoning enforcement officer ordering the removal of solid waste from a landfill. The Court considered arguments as to the lack of harm in leaving the material, the environmental harm of removing the excess solid waste, and the general balancing of the equities.

The Court upheld the trial court and rejected all of these arguments. First, the zoning enforcement officer did not have to prove the harm to the town; the only showing necessary is that the municipal ordinance restricting the height of the landfill was violated. As to the potential environmental harm of the removal, the trial court reasoned that the removal action would be subject to DEP jurisdiction and a plan approved by the DEP.[33] Therefore, the impact to the public would be considered and Waste Management's concerns about environmental impacts would not be overlooked.

Waste Management was ordered to remove solid waste deposited at the landfill. The Court confirmed that the zoning enforcement officer only had to demonstrate a violation of the statute and not irreparable harm or lack of an adequate legal remedy. The Court also rejected Waste Management's argument that it would be harmed due to the costs of removing the waste.[34] In weighing the equities, the court held that Waste Management acted gravely and willfully and at its own risk by knowingly placing fill at the landfill in violation of the ordinance.[35]

My consideration of the equities in this case is impacted by its facts and the environmental policies that are implemented through statutes such as §22a-361. First, the DEP does not have to prove harm to the environment; the only showing necessary is that the statute in

[33] Experts had testified at trial that such a removal could be done with proper safeguards for the public. The trial court rejected what it considered to be biased testimony about the potential of the removal to cause an environmental "catastrophe."

[34] I have considered whether the hearing should continue for me to make findings of fact on the issue of cost to the Respondent to remove the wall. However, such considerations would be premature. The ordered restoration plan has not yet been submitted or approved. Therefore, the restoration required, including the extent of the removal of the wall, has not yet been determined.

[35] The Court rejected Waste Management's argument that it expected a court decision upholding the unconstitutionality of the ordinance. The Court held that because that decision was being appealed and the enforcement of the ordinance had not been stayed, Waste Management could not rely on the unconstitutionality of the ordinance.

question was violated. Any potential environmental harm due to the removal of the wall will be addressed through the plan to restore the site, which will be subject to DEP review and approval. The Commissioner will consider potential impacts to the public and will not ignore concerns of the Respondent regarding any environmental impacts.

A remedy as rigorous as removal of an unpermitted wall is necessary to ensure that the coastal management goals reflected in §22a-361 are not pre-empted by private interests. Unpermitted activities that impact coastal resources cannot be accommodated at the risk of losing consistent coastal management.

Finally, I cannot ignore the fact that the Respondent, whatever his motives, acted willfully and at his own risk and in full knowledge of the requirements of §22a-361 of the General Statutes and with notice of the myriad issues implicated by his planned seawall. I must also note the gravity of this violation; a wall has been erected over a protected natural resource. In order for the public trust to maintain its meaning and effect, public rights in trust resources must be recognized as separate from and superior to private rights. The private interests of the Respondent impacted by this remedy are outweighed by the significant and paramount public interest in preserving the natural coastline.

IV
CONCLUSION

The Respondent's stone retaining wall is within the jurisdiction of the DEP. The wall was erected and is being maintained waterward of the statutory high tide line in tidal, coastal, and navigable waters of the State without a certificate or permit from the Commissioner, in violation of §22a-361. To the extent other issues have been raised beyond the issue of jurisdiction, no further proceedings for additional findings of fact are needed. Therefore, no further proceedings will be conducted.

I *uphold and affirm the Order* directing the Respondent to submit for review and written approval a plan to restore the filled area, which plan shall include provisions for removal of the wall and restoration of the site.

___/s/ Janice B. Deshais _____
Janice B. Deshais, Hearing Officer