

# DFW-1

## Functionality

### I. Summary:

The intent of this guidance is to facilitate consistent determinations regarding the functionality of legally existing structures under the Tidal Wetland Act, this guidance provides a simple interpretation of the term “functional” and guidance for its application.

### II. Guidance:

A simple interpretation of the term functional is provided below. It is necessarily broad in scope; a more specific, detailed interpretation is impractical due to the high variability in site conditions and types of structures which the term must address. Ultimately, each structure must be classified as functional or non-functional on a case-by-case basis, depending on the specific circumstances at the site.

**Functional** – A structure is considered functional if it is currently operating as designed for its intended use and has been maintained in working order (e.g. in the case of a bulkhead that forms the barrier between land and water, it keeps the water on the water side and the land on the land side).

**Non-Functional** – A structure is considered non-functional if it is not currently operating as designed for its intended use and has not been maintained in working order (e.g. in the case of a bulkhead that forms the barrier between land and water, it has degraded due to neglect and at present the tidal wetland boundary has moved landward of the outermost bulkhead face).

Factors considered in the determination of functionality could include, but are not limited to:

- Greater than 50% of the footprint of the structure is missing;
- Structural integrity is compromised; the structure is not useable as it was intended  
Example: a dock that can no longer be utilized (walked on for access or boat dockage) due to substantial sections or supports missing;
- Tidal wetland boundary has moved landward of a legally existing fabricated structure. The value of the resource that has accreted or that has formed landward of the bulkhead needs to be factored in to this consideration. Just leaking fill or minimal standing water in a few sink holes landward of the bulkhead does not constitute a non functional bulkhead . If the structure has deteriorated or degraded significantly enough that substantial pieces are missing , large amounts of fill have washed out from behind the structure and the area has established itself as a valuable habitat, that structure would be deemed non- functional;
- Sections are missing from a substantial fabricated structure which is over 100’ in length;
- Sanitary system has failed - Condemnation of a structure for structural reasons;

- Failure to repair a structure due to a damaging event that rendered the then-functional structure non-functional\*. [See note under Procedure]

The above factors are guidelines, not absolute thresholds for pass/fail.

### **III. Purpose and Background:**

The determination of whether a structure is functional is significant in a number of regulatory situations. The Department's jurisdiction under the Tidal Wetlands Act may be dependent on whether a road, bulkhead or other structure is functional under Part 661.4(b) (1)(ii). Several "uses", which define the regulatory status of an activity under the Tidal Wetlands Act, classify a project based on whether the project constitutes the repair, replacement, modification or expansion of an existing functional structure. (Use #21, #22, #24-26, Part 661.5). These use guidelines also dictate the procedural requirements that will be applied to the permit application, by determining whether the project is deemed a major or minor project under the Uniform Procedures Act (UPA) regulations (Part 621.4(k)). The Department must also make functionality determinations when complying with the State's coastal zone management program, Executive Law Article 42, and the policies and local waterfront revitalization plans implementing it.

While the term functional is used in the regulatory provisions recited above, the term is not defined in the statutes or regulations implementing them. This guidance has been developed to clarify the interpretation NYSDEC staff gives to this term.

### **IV. Responsibility:**

The Regional Marine Habitat Protection Units and the Division of Environmental Permits are responsible for implementing this guidance document and the DFWMR Marine Habitat Section is responsible for maintaining the document.

**V. Procedure:** The regional Marine Habitat Protection Unit, will implement the guidance. Division of Environmental Permits will make any Uniform Procedure Act determination that is required through the use of this guidance.

After an application is received *that involves a determination of functionality, a tentative, determination of functionality* is made by DEP in order to classify the project as major or minor under UPA, and identify the appropriate use category. A field inspection by MHP technical staff may then be conducted prior to a final determination. Field staff report their observations to their supervisor who confirms the final determination. For this determination the site conditions found at and within the vicinity of the project site are taken into consideration, as well as the present condition of the structure in question.

Applications involving the repair or replacement of a structure due to a recent damaging event. Application should be made to the Department immediately following the damaging event that rendered the regulated structure non-functional. Documentation showing that the structure was functional prior to the event may include photos prior to the event, prior surveys, aerial photos, recent state or local permits, or certificates of occupancy of the structure.

**VI. References:**

- Tidal Wetlands Land Use Regulations, 6 NYCRR Part 661
- Uniform Procedures Act Regulations, 6 NYCRR Part 621

## DFW-2

### Calculation of Average Setback

#### I. Summary:

The intent of this guidance is to establish consistent application of the average setback provision in Part 661.6.a.1. The provision states “where numerous and substantially all structures which are (i) of the type proposed by the applicant, (ii) lawfully existing on Aug 20, 1977, (iii) within 500’ of the subject property, are located closer to the subject tidal wetland than the minimum setback required by this paragraph, placement of a structure as close as the average setback of these existing structures from the subject tidal wetland shall fulfill the requirements of this paragraph.”

#### II. Guidance:

The following is provided in order to clarify terms in the regulation and the procedure.

A. The term “numerous” measures whether a large number, at least 50%, of the lots within 500 feet of the subject property had similar structures in place on August 20, 1977; but in no case is “numerous” less than five such structures. By using the term “numerous” the regulation intended relief only where an area was already fairly well-developed when Article 25 was enacted. Where a few structures existed, but many lots were undeveloped, this analysis is not appropriate. For this reason the word “numerous” takes the number of lots into consideration. However, when, due to large lot size, this formulation could result in a very small number of structures (i.e., less than five) being deemed “numerous”, this guidance also requires a minimum of 5 similar pre-existing structures before this analysis can be applied.

B. The term “substantially all” requires that nearly all (80%) of the pre-existing similar structures be located within 75 feet (30 feet in NYC) of the wetland boundary, before the proposed project will be subject to the average setback calculation.

C. “...of the type proposed by the Applicant...” The average setback must be developed by measuring the setbacks of like structures. The setback of a proposed single family dwelling must be compared with the setback of existing single family dwellings, not including any attached or unattached accessory structures (i.e. decks, patios, garages, pools, etc). Likewise, the setback of proposed accessory structures must be compared with other similar accessory structures. This comparison is made irrespective of the size of the proposed or existing structures. Issues related to the coverage of a given structure must be addressed through 661.6.a.4.

D. "...the subject tidal wetland..." The average setback must be developed utilizing setbacks from the wetland that abuts the subject property.

### **III. Purpose and Background:**

The average setback provision in 661.6.a.1 is not being interpreted and applied consistently. This guidance is intended to provide a standardized process to be followed when calculating the average setback.

### **IV. Responsibility:**

It is the responsibility of the Regional Marine Habitat Protection Unit and the Division of Environmental Permits to implement this guidance and for the DFWMR Marine Habitat Protection section to maintain the document.

### **V. Procedures:**

The Regional Marine Habitat Protection Units will evaluate and implement the guidance. Division of Environmental Permits will make any Uniform Procedure Act determination that is required through the use of this guidance.

## **AVERAGE SETBACK CALCULATION**

**Applicants requesting consideration of this calculation must include a survey or aerial photo dated prior to 8/20/77.**

**The 500' radius must be clearly identified on the survey or photo. The scale of the survey or photo must be provided, and must list and describe all lots, including vacant lots, involved in this calculation (i.e. describe the lots and structures in accordance with steps 2 through 7 directly below).**

1. Measure 500' radius outward from all edges of the subject property and identify the properties/lots within that radius that have any part of the respective property that abut the subject tidal wetland, in part or in whole, within this demarcation. Land locked lots are not included in this calculation. This includes all lots, whether with or without structures. **See Figure 1.**
  - a. There are 19 lots within 500' of the subject property but only 11 of the lots abut the subject tidal wetland. One lot is a public road (right of way) and does not count and lots south of the road abut a different wetland or waterbody.
2. Locate all structures existing within this demarcation.

6 of the 11 properties that qualify have structures within the 500' demarcation.
3. Identify all structures that are "of the type proposed."

6 of these structures are “of the type proposed.”

4. Identify all structures built before the effective date of part 661 (8/20/77) utilizing the appropriate tidal wetland map or other information showing structures predating the law for that area.

5 of the 6 structures were built before 8/20/77.

5. Identify all that are less than 75’ from the subject wetland (30’ in New York City).

5 of the 6 structures are less than 75’ from the subject tidal wetland (see note on Figure).

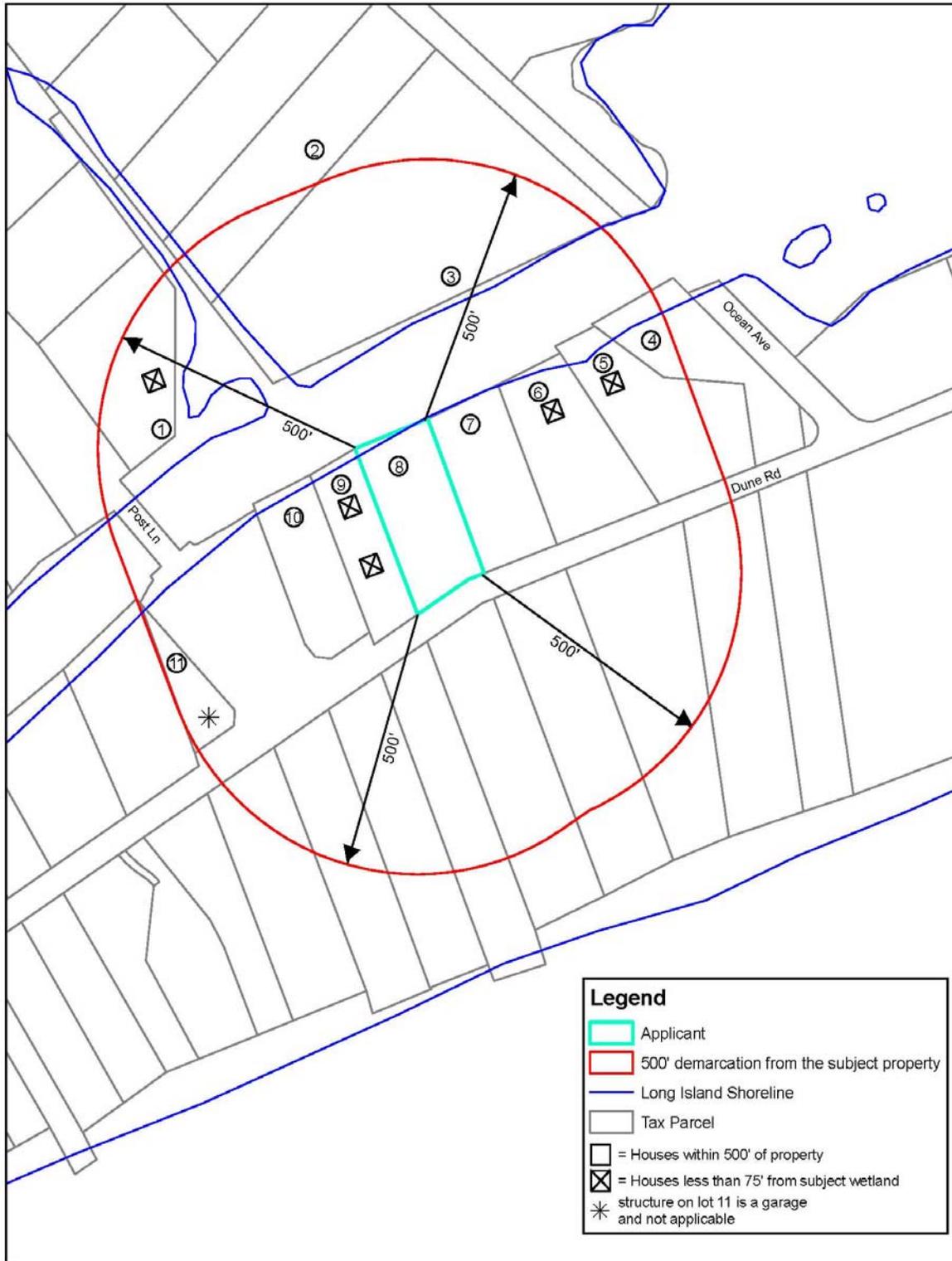
6. **Numerous:** Is the number of structures identified in paragraph 4 greater than or equal to half (50 %) of the properties/lots that abut a tidal wetland identified in paragraph 1 and equal to 5 in number or greater? If not, the proposal does not satisfy the “numerous” requirement.

If there are numerous structures identified in paragraph 4 , move on to paragraph 7 and calculate substantially all. Divide the number of structures identified in paragraph 4 by the number of lots from paragraph 1. If this amount is greater than or equal to 50 % and greater than 5 structures of the type proposed and built before the effective date of the law, the proposal meets the requirement that such structures are “numerous”. There are 11 lots and 5 structures of the type proposed and built prior to 8/20/77  $(5/10) = .45$  or 45%, thus the proposal does not satisfy the “numerous” requirement. You would not move on to the next step and calculate substantially all. However, for purposes of this guidance, substantially all is calculated.

7. **Substantially all:** Divide the number of structures identified in paragraph 5 by the number of structures identified in paragraph 4. If this number is less than 80% then the proposal does not meet the requirement that “substantially all” such structures are within 75 feet of the wetland boundary. Five of the 6 structures were built before the effective date of the law, are similar and are less than 75’, so  $5/6 = .83$  or 83%.

**This cases does meet the substantially all requirement but does not meet the numerous requirement, so the average setback rule would **not** apply . You need to meet both criteria for the rule to apply.**

Figure 1. Average Setback Calculation Diagram



## DFW-3

# Replacement of Hard Shoreline Stabilization Structures

### I. Summary:

The intent of this guidance is to provide a basis for consistent permit application reviews for replacement of functional and lawfully existing shoreline stabilization structures under the Tidal Wetlands regulatory programs.

### II. Guidance:

This guidance applies to the replacement of functional and lawfully existing shoreline stabilization structures. Structures that are not functional or lawfully existing as defined in this guidance document, are not authorized for replacement structures. Applications to replace non-functional structures are evaluated as applications for new structures. Structures that are not lawfully existing are subject to enforcement as provided in Part 621.3 (f), Uniform Procedures.

This guidance applies to the replacement of hard structures such as bulkheads, seawalls, jetties, groins, revetments and retaining walls. Soft solutions such as beach nourishment, dune restoration, berms, biologs and planting are not considered under this guidance other than to note that soft stabilization methods are preferred wherever such methods can be practically applied.

### Terms:

A. Hard Shoreline Stabilization Structure -refers to any structure or man-made feature whose purpose is to stabilize the shoreline substrate and protect it from erosion. Hard shoreline stabilization structures include, but are not limited to, bulkheads, seawalls, retaining walls, revetments, rip-rap, jetties and groins.

B. Functional - A structure is considered functional if it is currently operating as designed for its intended use and has been maintained in working order (e.g. in the case of a bulkhead that forms the barrier between land and water, it keeps the water on the water side and the land on the land side). Please refer to DFW-1 Guidance on Functionality.

C. In-Kind Replacement - refers to the replacement structure will be of the same construction type and materials. Examples include replacement of an existing navy-style, wood bulkhead (a bulkhead where both the wales and the timber piles are seaward of the bulkheads sheathing) with a new navy-style, wood bulkhead; replacement of an existing rock revetment with a new rock revetment of similar core stone and armor stone sizes; and replacement of an existing concrete seawall with a new concrete seawall of the same thickness, height and footing.

D. In-Place Replacement - refers to replacement in the same location as the existing structure

with no seaward extension of the outermost bulkhead face. In-place replacement requires removal of the existing structure.

E. Seaward Replacement - means replacement of the existing structure with a new structure that is constructed seaward of the existing structure. The seaward distance may be variable depending on construction type and materials, the location of existing structures and/or the desire to reclaim or create upland area.

F. Lawfully Existing - means any structure constructed in full compliance with all applicable Department statutes, rules and regulations, including having all Department permits that may be required.

#### **A. In-Kind / In-Place Replacement:**

Replacing a functional and lawfully existing shoreline stabilization structure requires a permit from the Department under 6 NYCRR 661 (Tidal Wetland Land Use Regulations). Depending on the location of the structure and the construction techniques proposed, a permit may also be required under 6 NYCRR 608 (Protection of Waters). In-kind, in-place replacement of existing, functional structures is specifically identified as a generally compatible activity (GCp) under Use Category 22 of the Tidal Wetland Land Use regulations [Part 661.5(b)]. Proposed projects that fall into this category may result in temporary construction impacts but are expected to cause few long-term changes to existing conditions at a project site. Therefore, these projects are generally granted permits by the Department, subject to conditions designed to minimize or mitigate construction impacts and the environmental disturbance associated with the project.

#### **B. Alternatives to In-Kind Replacement:**

When in-place replacement of an existing, functional structure is proposed but the construction type or material will be altered, further review may be required to determine whether these alterations are minor and the proposed project still qualifies as in-kind replacement or if the alternatives are significant. For example:

- Change of Materials: Some towns prohibit the use of treated woods in structures that will be in contact with tidal waters. Property owners in these areas must construct replacement structures from alternative materials such as vinyl, fiberglass or untreated hardwoods. Similarly, wood treatments such as CCA have not provided the long-term protection that was initially expected in marine and estuarine environments. As a result, most applications for bulkhead replacement currently propose alternative materials whether or not these alternatives are required by local code. If the proposed material, such as vinyl or fiberglass, is expected to reduce chemical leaching from the structure or provide a longer life for the replacement structure so that disturbance for long term maintenance is reduced over time then the proposed change in material may be viewed as an approvable project improvement. Generally approvable materials for replacing existing, functional bulkheads include

fiberglass, steel, vinyl and treated or untreated wood. Generally acceptable examples of bulkhead replacement proposing a change in bulkhead materials are: smooth faced bulkheads replaced with navy style bulkheads are approvable should the seaward most face of the bulkhead sheathing of the new structure be in the same location as the seaward most face of the replacement structures sheathing; similarly, smooth faced bulkheads or navy style bulkheads replaced with corrugated bulkheads of steel and fiberglass are approvable should the seaward most face of the corrugated sheathing of the new structure be in the same location as the seaward most face of the replacement structures sheathing.

Some changes in construction materials, such as changing from wood to poured concrete, will result in more extensive construction impacts and require specialized permit conditions to mitigate potential impacts before the project can be authorized. Such proposals may require complete technical review and evaluation on a site-by-site basis.

- Change in Project Design:  
The Department does not typically require changes in project design for the replacement of legally-existing, functional structures with the specific exception of structures that are determined to have an adverse impact on other properties or when site conditions have significantly changed. In these situations, the Department seeks to modify the project design to maintain shoreline protection while minimizing adverse impacts associated with the structure. Examples include, but are not limited to, requiring stone riprap when a bulkhead return is showing clear signs of scour on adjacent properties or requiring low profile construction for proposed groin replacements to minimize impacts on sediment transport and down-drift properties. Low profile groin construction limits the height of the new structure to 18" above the height of the down drift beach with the length of the structure not to extend seaward of apparent low water (low water determined on the date and time of site inspection not a mean low water determined from an 18 year average. This construction helps to retain the existing up drift beach or shoreline while continuing to allow some sediment transport over the structure and reducing the distance that transport is pushed offshore. Similarly, wave break replacement typically requires that the proposed replacement structure provides a minimum of two inch spacing between the slats, with the bottom of the structure no less than two feet from the existing bottom grade.

Changing site conditions may also require substantial changes to the proposed project, for example when the tidal wetland boundary has significantly changed or when significant amounts of vegetated wetlands have become established. In some situations, a replacement hard structure may no longer be feasible or may need to be significantly reduced in scope. Under these circumstances, determining appropriate alternatives may require a full technical review.

- Change in the Type of Structure: A proposal to change the type of hard structure at a project site, such as replacing an existing rock revetment with a new bulkhead or an existing bulkhead with a new rock revetment, will require a complete technical review even when an in-place replacement is proposed. Determinations for project authorization must be made on a site-by-site and case-by-case basis. Some considerations when designing these changes would be: changes that would result in avoidance of further seaward encroachment of the proposed structure and no increase in potential for seaward beach scour or erosion.
- Change in Elevation: Increasing the elevation of an existing structure may be proposed for a variety of reasons. For example, increasing the elevation of a bulkhead may provide flood control benefits in addition to the structure's primary function of controlling erosion. Some towns have established a minimum elevation requirement for all replacement bulkheads. These are typically low-lying communities that are prone to flooding during storm events. Increasing the height of an existing structure may address practical construction difficulties at the project site. For example, if dredging is proposed, the height of the existing bulkhead may not provide sufficient capacity to contain the dredged material. Removing the material from the site will require additional costs for transportation and disposal and may also require sediment testing and contaminant analysis to determine appropriate disposal options under the state regulations for the management of solid waste materials [Part 360-1.2(a)(4)(ix)].

Minor increases in the elevation of existing bulkheads are authorized by the Department without additional technical review. However, because increasing the elevation of an existing structure can have environmental and aesthetic impacts; these expedited authorizations are generally provided within limits according to the following guidance:

Minor increases in elevation are authorized for replacement bulkheads only. Proposals to increase the elevation of replacement groins, jetties, wave breaks, revetments or other shoreline stabilization structures will require further technical review.

The replacement bulkhead may be increased to 18" or no higher than the height of both adjoining structures.

Applications that propose to increase the height of an existing structure that do not meet the above criteria or to increase the height of a shoreline stabilization structure other than a generally approvable bulkhead may require further technical review and impact assessment. The principal issues of concern are variable depending on the type of structure and existing conditions at the project site. However, impacts to be assessed are likely to include one or more of the following: impacts to existing drainage patterns; current and sediment transport patterns; tidal flow; loss of habitat; and/or public health and welfare.

When the applicant requests increases in bulkhead heights greater than the above noted criteria, the new bulkhead may be increased if the applicant provides justification that potential storm water or habitat related impacts have been addressed in the proposal. Generally, if these issues have been addressed, the height increase will be approvable.

Sites where tidal wetlands are present landward of the existing bulkhead (e.g., low-sill bulkheads) require technical review.

### **C. Alternatives to In-Place Replacement:**

Landward replacement of existing, functional structures typically results in fewer construction impacts to adjacent tidal wetlands and, in most cases, is preferable to both in-place and seaward replacement. Factors to consider in the landward replacement of existing structures include the following:

- In the vast majority of cases, landward replacement will occur in the adjacent area (AA) and not in a regulated tidal wetland. If the activity is limited to the adjacent area, it is identified as a generally compatible (GCp) activity under Part 661.
- In areas where the existing structure is functional, substantial and greater than 100 feet in length, landward replacement may actually occur beyond the Department's jurisdiction. For an activity to take place behind a bulkhead and be non-jurisdictional the bulkhead also needs to predate the law (August 20, 1977). Under these circumstances, the project does not require a permit from the Department as long as the existing structure remains intact. Removal of the existing structure will still require a Tidal Wetland permit.
- When a vegetated marsh is present and adjacent, or in close proximity, to the seaward face of the existing structure, landward replacement prevents the encroachment that occurs from seaward replacement and also protects against the disturbance and sedimentation that are frequently associated with in-place construction. Once the landward replacement structure is completed and can effectively retain sediments, the existing structure can be cut to grade and removed.

If, however, landward replacement requires the relocation or removal of more substantial accessory structures such as garages, guest houses, in-ground pools or significant utility line disturbance, it may result in unreasonable financial and practical hardship. In such cases, it is again the burden of the applicant to properly document and demonstrate that such site conditions exist and preclude the replacement alternative.

Seaward Replacement of an existing structure encroaches on, and frequently results in the loss of, existing wetlands and waterways. If the existing structure is landward of the wetland boundary and the proposed seaward replacement remains in the adjacent area, then the project is generally compatible (GCp) under the Tidal Wetlands regulations.

Seaward replacement of an existing hard structure in a regulated wetland is categorized as either presumptively incompatible (PIp) in vegetated marsh areas or generally compatible (GCp) in shoals, mud flats and the littoral zone (use category #29). However, any structure that requires the placement of fill in a regulated wetland is classified as presumptively incompatible (PIp) (use category #30). If the fill material is dredged material, then the activity is listed as Incompatible (use category #31) in vegetated marshes and a permit shall not be issued for this activity. These activities may require authorization under Protection of Waters Part 608.

Under the regulations, proposed projects must conform to the standards of permit issuance. The regulations provide general guidance only with regard to the type of wetland impacted. The Department must evaluate the value of the impacted wetlands and the impacts of the proposed project. In the case of seaward replacement structures, particular attention should be paid to whether or not the proposed project: 1) will cause *undue* adverse impacts; 2) is compatible with public health and welfare and; 3) is reasonable and necessary, taking into account *reasonable* alternatives. Construction of seaward replacement structures that result in the filling and loss of tidal wetlands or public waters is a presumptively incompatible activity and requires site-specific justification and appropriate mitigation for Department authorization.

Examples of situations when seaward replacement structures may meet the burden required for authorization include, but are not limited to:

- When the seaward replacement structure is proposed in the adjacent area (landward of apparent high water) and no vegetated marshes are impacted. It should be noted that even in the adjacent area, seaward replacement of an existing structure is likely to accelerate and/or increase adverse impacts associated with the structure (e.g., wave reflection during storm events). Therefore, the distance the replacement structure is authorized to move seaward should be minimized to reasonable construction requirements.
- When landward and in-place replacement alternatives are not feasible without significant risk to structural integrity of primary structures or public infrastructure such as roadways, utilities, etc. It is the burden of the applicant to properly document and demonstrate that such site conditions exist and preclude other replacement alternatives, including construction alternatives such as helical anchors in place of tie-back systems or replacement of the existing structure in sections.

Risk to an accessory structure does not generally provide sufficient justification for seaward replacement of an existing shoreline structure. For example, docks, decks, patios, sprinkler systems and above-ground

pools can reasonably be removed and replaced, when necessary, as part of the proposed project. Sheds can also be temporarily relocated. However, relocation or removal of more substantial accessory structures such as garages, guest houses or in-ground pools, may result in unreasonable financial and practical hardship. In such cases, it is again the burden of the applicant to properly document and demonstrate that such site conditions exist and preclude other replacement alternatives.

- When in-place or landward replacement will result in significant environmental disturbance, risk of disturbance and relative economic hardship. Examples would include when in-place or landward replacement would result in significant disturbance to an existing, well vegetated bluff area or would require removal of an existing concrete seawall (extensive excavation, disturbance and cost).

### **III. Purpose and Background:**

Under the Tidal Wetland Land Use Regulations (6NYCRR Part 661.5), Use Guideline #22 categorizes the "In-kind and in-place replacement of existing functional bulkheads and similar structures", as a generally compatible use - permit required (GCp), in all areas of jurisdiction. Replacement structures that are not constructed in-kind and in-place are defined by Use Category #29, which identifies construction of groins, bulkheads and other shoreline stabilization structures as a generally compatible use - permit required in shoals, mudflats and littoral zones as well as in the adjacent area. It is only when these stabilization structures are proposed in vegetated marshes or when the project includes filling in any tidal wetlands that this activity is identified as a presumptively incompatible activity under the regulations.

Historically, program staff interpreted "in-place" replacement to include replacement of the existing structure with a new structure built as much as 18 inches seaward of the existing structure where no vegetated wetlands were impacted by the structure, the replacement structure did not result in unreasonable encroachment in narrow waterways or canals, and no prior seaward replacement had been authorized.

The Department no longer classifies 18-inch seaward replacements as "in-place", but requires review under the permit standards. The impacts associated with additional loss of habitat need to be considered and minimized where possible. For example: changes in available construction materials over time have made it more difficult to maintain most seaward replacement of structures within 18 inches. Instead, these materials typically require a face-to-face distance of two to three feet between structures. Moreover, authorization of an 18-inch replacement has historically been limited to a one-time only replacement, in non-vegetated wetlands. In the nearly thirty years that have passed since the Tidal Wetland Land Use regulations were implemented most bulkheads that might once have been allowed a seaward replacement, have already undergone at least one replacement or have become non-functional. These sites would no longer be considered reasonable locations for the authorization of an 18-inch replacement.

**IV. Responsibility:**

The regional Marine Habitat Protection Units and the Division of Environmental Permits are responsible for implementing this guidance document and the DFWMR Marine Habitat Section is responsible for maintaining the document.

**V. Procedures:**

The regional Marine Habitat Protection Units will implement the guidance. The Division of Environmental Permits will make any Uniform Procedures Act determination that is required through the use of this guidance.

**VI. References:**

- 6 NYCRR Part 608;
- 6 NYCRR Part 661;
- 6 NYCRR Part 621;
- 6 NYCRR 360;

## DFW-4

### Footprint/Perimeter of Existing Marina/Mooring Areas/Boat Basins

#### I. Summary:

The two terms “perimeter” and “footprint” are used by staff to describe the areal coverage of a marina or mooring facility in the implementation of Protection of Waters (Environmental Conservation Law Article 15) and Tidal Wetlands (Environmental Conservation Law article 25) regulatory programs, respectively. Though they seem similar, these terms speak to different areal representations of such facilities and are not interchangeable. This guidance provides clarification of these terms to ensure more consistent application under both regulatory programs.

#### II. Guidance:

##### Protection of Waters

No permit is required under ECL Article 15 (Protection of Waters) for “a docking facility providing dockage for five or fewer boats and encompassing within its perimeter an area of less than 4000 square feet;” nor for “the relocation, replacement, and/or rearrangement of floating docks, ramps, walkways and anchoring devices within the established perimeter of a docking facility or mooring area” 6 NYCRR 608.4(c)(2) and (6).

The term “perimeter” is defined as “a boundary of a docking facility or mooring area consisting of a series of connected imaginary lines on a plan or map, encompassing all related structures such as docks, bulkheads, breakwaters, pilings, piers, platforms or moorings and the travel lanes and berthing areas that function together to create a facility or area at which vessels may be docked or moored.” 6 NYCRR 608.1(m).

Note that this definition includes travel lanes and berthing areas. (See figure 1) Travel lanes should be viewed to accommodate two-way vessel traffic and would generally have an overall width of no more than 40 feet.

##### Tidal Wetland Program

No permit is required under ECL Article 25 (Tidal Wetland Act) for “the relocation or rearrangement of floating docks, open pile docks, and similar structures within an established marina or boat basin where such activities involve no disturbance of a tidal wetland other than removing or relocating anchors or pilings.” 6 NYCRR 661.5(b)

The term, “within an established marina or boat basin facility” means within the existing or established footprint of the facility. The term “footprint” means the limit of structures, such as docks, pilings, piers or platforms, at an established marina or docking facility excluding travel

lanes and mooring areas. The seaward limit of structures may be connected with imaginary lines as required on a plan or map, to define the limit of the existing or proposed footprint (see figure 1). An “established marina or boat basin” is a lawfully existing marina or boat basin facility with functional docking/mooring structures.

### **III. Purpose and Background:**

Clarification on the definition and use of these terms would provide for more consistent application of the regulations among the regions.

The most common misinterpretation has been the failure to include non-structural components (i.e., travel lanes and berthing areas) in defining the perimeter of a facility. For example, certain activities proposed to be conducted at docking facilities are exempt from permitting under Protection of Waters regulations based on the facility having within its perimeter an area of less than 4,000 square feet (6 NYCRR 608.4(c)(2)). Miscalculating the area of the facility by failing to include these non-structural components underestimates the area of the facility. As a result, facilities and activities may be incorrectly exempted from permitting requirements.

The term “footprint” does not appear, and is thus not defined, in regulation. However, the term has utility, and is commonly applied by staff in the regulatory process. For example, the rearrangement of docks within an established marina is considered exempt (NPN) from permitting under the Tidal Wetland Land Use regulations (661.5 Use #18). The Department interprets “within an established marina” to mean within the existing or established footprint as described above (also see figure 1).

“Footprint” is different from “perimeter” in that it excludes exterior travel lanes and berthing areas. This is an important distinction as it can affect the Use Category of a proposed activity under the Tidal Wetland program regulations. For example, the relocation of docks beyond the existing footprint, but within the perimeter of an established marina (i.e into the exterior travel lanes), would be deemed expansion or substantial modification of the existing facility, which is a regulated activity requiring a permit under Part 661 (Use #25), even though it might be exempt from permitting under the Protection of Waters program.

### **IV. Responsibility:**

The regional Marine Habitat Protection Units and the Division of Environmental Permits are responsible for implementing this guidance document and the DFWMR Marine Habitat Section is responsible for maintaining the document.

### **V. Procedures:**

The regional Marine Habitat Protection Units will implement the guidance. Division of Environmental Permits will make any Uniform Procedure Act determination that is required through the use of this guidance.

### **VI. References:**

- 6 NYCRR Part 661;
- 6NYCRR Part 608

Figure 1. Marina Footprint , Marina Perimeter and Mooring Area Perimeter



## DFW-5

### Maintenance Dredging Guidance

#### I. Summary:

This guidance clarifies the Department's interpretation of the term "Maintenance Dredging", establishes the facts necessary to demonstrate when a permit for maintenance dredging may be sought, and describes the circumstances under which maintenance dredging is allowable.

#### II. Guidance:

The following is provided in order to clarify terms in the regulation and the definition of maintenance dredging.

- Tidal Wetlands regulations (6 NYCRR 661.4(r)) define maintenance dredging as: "Excavation to restore the depths of underwater lands to elevations which are demonstrated to the reasonable satisfaction of the Department to have been lawfully in existence within 20 years preceding the date of application". While dredging is a presumptively incompatible activity in a regulated area, maintenance dredging is a generally compatible activity (6 NYCRR 661.5).
- The Use and Protection of Waters Regulations, Part 608, do not define the term "maintenance dredging".
- Uniform Procedures Act regulations at 6 NYCRR 621.4(a)(4)(ii) identify "maintenance dredging occurring at least once every ten years" as a "minor" activity for the purposes of Protection of Waters permit. The term "maintenance dredging" is not specifically defined.

Part 661 is the only one of the three regulations that contains a definition of the term "maintenance dredging". The definition includes the 20 year time frame. The 20 year time frame is an integral part of the definition of maintenance dredging. Without a time frame, there would be no basis for a distinction between maintenance dredging and new dredging. The ten year time frame mentioned in Uniform Procedures is not part of a definition of the term, so it does not directly conflict with the Part 661 definition. Under these two provisions, Maintenance dredging occurring at least once every ten years is considered a minor project under UPA. Maintenance dredging occurring less frequently than once in ten years but more frequently than once in 20 years is considered UPA major, but is still maintenance dredging under tidal wetland regulation.

Maintenance dredging should be allowed to maintain water depths in support of grand-fathered or permitted water-dependent uses. It must involve only the removal of recent (i.e. within 20 years of the application date) unconsolidated sediments, such as mud, sand and gravel. Maintenance dredging does not include horizontal or vertical expansion into previously undisturbed areas. Examples of when maintenance dredging as described above applies include but are not limited to routine removal of accumulated sediment from: channel beds, harbors, marinas, boat launches, port docking facilities, channels providing access to residential docking facilities, areas surrounding permanent (fixed) water intakes or outfall pipes. Maintenance dredging is allowable for the purposes described above, if it is proved to the satisfaction of the Dept that the depths were lawfully in existence within 20 years preceding the application date.

The following offer some examples of acceptable forms of documentation of the existence of a certain depth at a location within 20 years of the date of application and aid in defining lawfully in existence . They include but are not limited to:

1. Previously issued permits authorizing dredging to the requested depth at the location in question.
2. Properly dated as-dredged depth survey of the location in question submitted to comply with a previous permit.
3. Properly dated soundings or underwater topographic survey prepared by a licensed surveyor or licensed professional engineer.

There may be times where little or no documentation is available to demonstrate previously existing water depths. However, given the totality of site specific conditions, it is reasonable to assume that deeper water existed for purposes of historical water access and/or navigation. Under such circumstances, restoring reasonable water depths in these areas would be characterized as maintenance dredging. An example would include proposed dredging of the littoral zone immediately seaward (within ten feet) of an existing bulkhead undergoing replacement or reconstruction on a residential man made canal. Such dredging usually removes backfill which has leaked through the bulkhead as the structure wears out. Other examples of such projects would include proposed dredging to remove road sediments from chronic stormwater discharge outfalls hampering navigation, or shoaling due to storm events that requires dredging for appropriate operation and maintenance of a marina, channel or other navigation related activity.

### **III. Purpose and Background:**

The term “Maintenance Dredging” appears in the Tidal Wetlands Land Use Regulations and the Uniform Procedures Regulations in association with two different time intervals, resulting in an apparent inconsistency between the two regulations and some confusion for staff. The pertinent sections of the involved regulations are analyzed, and a compatible approach for applying the requirements of both regulations as they now exist is provided. Several other issues associated with maintenance dredging requiring clarification are addressed. These include the questioning of the need for any time interval in the definition of the term, the circumstances under which maintenance dredging applies, and the identification of acceptable forms of documentation for the existence of depths to meet the definition.

### **IV. Responsibility:**

The regional Marine Habitat Protection Units and the Division of Environmental Permits are responsible for implementing this guidance document and the DFWMR Marine Habitat Section is responsible for maintaining the document.

### **V. Procedure:**

The Regional Marine Habitat Protection Unit will implement the guidance. Division of

Environmental Permits will make any Uniform Procedure Act determination that is required through the use of this guidance.

**VI. References:**

- 6 NYCRR Parts 608, 621 & 661.