

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

In the Matter

- of -

the Application for a Permit to Construct a Dock Structure in a Tidal Wetland, Pursuant to the Federal Water Pollution Control Act, Section 401, New York Environmental Conservation Law Article 25, (Tidal Wetlands) and Article 15, Title 5 (Protection of Waters), and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York Parts 661 (Tidal Wetlands - Land Use Regulations) and 608 (Use and Protection of Waters),

- by -

MICHAEL MATTHEWS,

Applicant.

DEC No. 1-4724-00851/00007

DECISION OF THE COMMISSIONER

May 20, 2004

DECISION OF THE COMMISSIONER

The attached hearing report of Administrative Law Judge ("ALJ") Kevin J. Casutto is hereby adopted in part¹ as my decision in this matter, subject to the following comments. For the reasons stated in the ALJ's report and for the following reasons, the determination of the staff of the New York State Department of Environmental Conservation ("Department") to deny applicant Michael Matthews's application for certain Departmental approvals is confirmed, and the application is denied.

Proceedings

A detailed recitation of the proceedings in this matter through issuance of the hearing report is included in the ALJ's report and will not be repeated here. On November 25, 2003, the ALJ's hearing report was issued as a recommended decision for comment by the parties (see 6 NYCRR 624.13[a][2][ii]). Comments were due December 23, 2003, and, pursuant to agreement of the parties, replies were due February 17, 2004.

By letter dated December 22, 2003, Stephen R. Angel, Esq., of Esseks, Hefter & Angel, submitted comments on behalf of applicant. In that letter, applicant indicated that he disagreed with the ALJ's factual findings and conclusions of law and that he stood by the arguments made to the ALJ, including those made

¹ In indicated infra at 8 n 4, I do not adopt the ALJ's conclusion of law no. 17 (see Hearing Report, at 35).

in the post-hearing submissions. Applicant raised no specific challenges to the ALJ's recommended decision, however.²

By letter of the same date, Craig L. Elgut, Esq., Assistant Regional Attorney, Division of Legal Affairs, Region One, submitted comments on behalf of the Department. Staff indicated its support for the recommended decision, and offered no additional comments.

By letter dated December 24, 2003, Mr. Elgut indicated that the Department adhered to its previously expressed position on the application and that no responsive comments to applicant's comments would be filed. Mr. Elgut indicated that if Mr. Angel would waive responsive comments, he would be willing to so stipulate. No further submissions were received, either accepting Mr. Elgut's offer or otherwise. Accordingly, the record closed on February 17, 2004 (the date replies were due) (see 6 NYCRR 624.13[b][2]).

Discussion

In proceedings conducted pursuant to the Department's Part 624 permit hearing procedures, the applicant bears the burden of proof to demonstrate that its proposal will be in

² Mr. Angel's letter also alleges that the recommended decision was issued in order to discourage and overburden applicant. Such was not the intent. The ALJ's hearing report was issued as a recommended decision in order to afford applicant a final opportunity to raise arguments challenging the ALJ's factual and legal conclusions before final decision was issued.

compliance with all applicable laws and regulations administered by the Department (see 6 NYCRR 624.9[b][1]). Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence unless a higher standard has been established by statute or regulation (see 6 NYCRR 624.9[c]).

Applicant's proposed project would, if approved, require two Departmental permits. Although the construction of an open pile catwalk or dock not greater than four feet in width is classified as a "generally compatible use" in a regulated tidal wetland (see 6 NYCRR 661.5[b][14]), generally compatible uses are nevertheless subject to the requirements of an ECL article 25/6 NYCRR part 661 tidal wetlands permit (see 6 NYCRR 661.5[a][2]; see also ECL art 25 ["Tidal Wetlands Act"]). In addition, because the installation of the dozens of pilings required for the proposed project constitute "excavation" and "fill" within navigable waters of the State, the project requires a protection of waters permit pursuant to ECL 15-0505 and 6 NYCRR 608.5 (see, e.g., Matter of Joseph Berardino, Decision of the Commissioner, April 19, 1999, at 2). In addition, a water quality certification is required pursuant to 6 NYCRR 608.9 and section 401 of the federal Water Pollution Control Act (33 USC § 1341).

Review of the record demonstrates that applicant failed

to establish by a preponderance of the credible evidence that all applicable statutory and regulatory requirements would be met by his project. First, the record reveals that applicant's project, both during and after the dock's construction, would have an undue adverse impact on numerous present and potential tidal wetland values, including impacts on marine food production, wildlife habitat, flood, hurricane and flood control, cleansing ecosystems, absorption of silt and organic material, recreation, open space and aesthetic values. The record also reveals that those adverse impacts significantly outweigh the social and economic benefits that might be derived from a private dock built for personal convenience. Accordingly, the requirement for a tidal wetlands permit that a proposed activity not have an undue adverse impact on the present or potential values of the affected tidal wetland or its adjacent areas has not been satisfied (see 6 NYCRR 661.9[b][i]). In addition, the requirement for a protection of waters permit that a proposal not cause unreasonable, uncontrolled or unnecessary damage to the natural resources of the State has not been satisfied (see 6 NYCRR 608.8[c]).

Second, the record demonstrates that the requirement for both the tidal wetlands permit and protection of waters permit that the proposed activity be compatible with public health and welfare has not been met (see 6 NYCRR 661.9[b][ii]; 6

NYCRR 608.8[b]). Specifically, the shallow water near the proposed dock might present a hazard to those unfamiliar with the area who attempt to access the dock, and the dock would interfere with and limit the public's right of passage over the beach. Third, the record demonstrates that the proposed dock is neither reasonable nor necessary (see 6 NYCRR 661.9[b][iii]; 6 NYCRR 608.8[a]), particularly in light of the fact that applicant already enjoys reasonable access to navigable waters, at a level consistent with the access afforded others in the vicinity, and the reasonable alternative proposed by staff that would improve such access without the multiple environmental impacts associated with applicant's proposal. Finally, and significantly, the precedential effect that granting applicant's application would have on the vicinity is not only appropriately considered (see ECL 3-0301[1][b]), but weighs heavily against permit approval in this case and on this record.

Applicant contends that the adverse impacts associated with his proposal are "de minimis." Throughout these proceedings, applicant has contended that the purpose of the dock is for the storage of a small non-motorized dingy. Record evidence, however, supports the conclusion that the dock is not appropriately designed for the use applicant claims. The plans for the dock reasonably leads to the conclusion that it would, or certainly could, be used to accommodate multiple vessels,

including motorboats and other vessels larger than a dingy. It is appropriate to consider the reasonably foreseeable uses to which the dock as designed might be put, as well as the foreseeable adverse impacts associated with those uses, in determining whether permit requirements have been met.

In particular, applicant argues that no proof exists that he owns a motorboat. Citing a permit issued for a property located in the Town of Southampton on the Moneybogue Bay, applicant contends that his permits can be conditioned to prohibit use of the dock for motorboats. However, the record demonstrates that use of the dock for motorboats is reasonably foreseeable and permit restrictions prohibiting such use would have limited utility. The record is equally clear concerning the significant adverse impacts the use of a motorboat would have in the shallow tidal wetland environment in which applicant's dock would be constructed. Whatever the circumstances supporting the permit condition for the Moneybogue Bay property -- and applicant failed to establish those circumstances on this record -- the record in this case amply supports the determination that a permit condition prohibiting motorboat use would not be sufficient to avoid the multiple significant adverse impacts associated with the construction and use of applicant's proposed dock, whether related to motorboat use or otherwise.

Applicant also argues that, as the owner of upland

riparian property, he enjoys a common law right of reasonable access to navigable waters, including the right to build a dock or "wharf out," which must be taken into consideration in the permit application determination. He contends that his ownership of this right mandates issuance of the permits for which he has applied. He also asserts that the denial of his riparian right to build a dock would constitute a "taking" of his property and would require the State to pay "just compensation."³

Common law riparian rights are not unfettered. Such rights have long been qualified and are limited by the State's legitimate exercise of police power (see Matter of Gazza v New York State Dept. of Env'tl. Conservation, 89 NY2d 603, 613-614, cert denied 522 US 813 [1997]; Thousand Is. Steamboat Co. v Visger, 179 NY 206, 210 [1904]; see also Town of Oyster Bay v Commander Oil Corp., 96 NY2d 566, 576 [2001] [the riparian right is limited to reasonable access and must be exercised in a manner that does not unreasonably interfere with the rights of a public

³ A part 624 permit hearing proceeding is not a forum in which any "just compensation" claim applicant might have can be definitively resolved -- such a claim would be resolved upon judicial review (see ECL 25-0404; see also Matter of Spears v Berle, 48 NY2d 254, 261). Nevertheless, because applicant raises a takings argument in his challenge to Department staff's determination to deny his permit application, an analysis of applicant's takings claim is warranted (see, e.g., Matter of Roberts v Coughlin, 165 AD2d 964, 965-966 [3d Dept 1990]; Matter of Celestial Food Corp. of Coram, Inc. v New York State Liq. Auth., 99 AD2d 25, 27 [2d Dept 1984]; see also 3 Admin L & Prac § 12.17 [2d ed]).

owner]; see generally Stutchin v Town of Huntington, 71 F Supp 2d 76, 101-102 [ED NY 1999]). The New York courts have recognized that protection of the State's tidal wetlands is a legitimate governmental purpose and have upheld legislatively-enacted restrictions on the development of such wetlands that are reasonably related to that purpose (see, e.g., Gazza, at 616). Here, the restrictions imposed by ECL articles 15 and 25 are reasonably related to the protection of the State's tidal wetlands, and applicant fails to argue to the contrary. Thus, applicant's riparian right to reasonable access is limited by the legitimate exercise of State police power as expressed in the relevant ECL provisions and the regulations promulgated pursuant to their authority.⁴

Nothing in Commander Oil (supra), a case upon which applicant relies, is to the contrary. In that case, the Court made clear that the riparian owner's common law right to dredge was limited by the rights of others, including the rights of a public owner and public rights in general (see id. at 573-575).

⁴ In his discussion of the riparian rights and public trust doctrine, and in his conclusion of law no. 17, the ALJ concludes that the Tidal Wetlands Act "codifies" many of the rights, privileges or interests previously protected by the riparian rights and public trust common law doctrine (see Hearing Report, at 31, 35). I do not believe it is necessary to reach such a conclusion in order to conclude that the Tidal Wetlands Act legitimately imposes a limitation on the scope and exercise of riparian rights. Accordingly, I do not adopt the ALJ's reasoning and conclusions to this extent.

In addition, the riparian owner had obtained Departmental approvals to dredge, and the validity of those approvals was not addressed in that case (see id. at 569).

The administrative record developed in this case so far also fails to reveal a valid takings claim. The record is silent concerning when applicant acquired title to the property at issue. If applicant purchased the property after the relevant ECL provisions were adopted, he took title subject to those laws and regulations (see Gazza, at 616). Thus, the application of the relevant statutes and regulations to his property would not affect a taking (see id.).

Even assuming applicant purchased the property prior to the enactment of the relevant statutory and regulatory provisions, a takings claim is not established on this administrative record. In order to prevail on a regulatory taking claim, applicant would have to establish that the denial of a permit to construct a dock would extinguish "all economically beneficial uses" of his property or that his "reasonable investment-backed expectations" were interfered with to such an extent as to surpass constitutional boundaries (see id. at 616-619). The record developed so far in this case supports neither conclusion. To the contrary, the economically beneficial use of the property as a residence remains. Moreover, the denial of the relevant permits in this case would not

diminish in any way the reasonable access to navigable waters applicant presently enjoys.

In sum, review of the record in this proceeding demonstrates that applicant failed to carry his burden of establishing that his proposed project would comply with all applicable laws and regulations administered by the Department.⁵ Moreover, the record fails to support applicant's contention that the limitations the applicable laws and regulations impose upon his riparian right to construct a dock constitute a bar to permit denial. Accordingly, the determination of Department staff to deny applicant Michael Matthews's application for the applicable permits and certification is confirmed, and the application is denied.

For the New York State
Department of Environmental
Conservation

/s/

By: Erin M. Crotty, Commissioner

Dated: May 20, 2004
Albany, New York

⁵ Having failed to demonstrate compliance with the requirements for a tidal wetlands permit and a protection of waters permit, applicant also failed to satisfy the requirements for a water quality certification (see 6 NYCRR 608.9[a][6] [requiring a demonstration that state statutes, regulations, and criteria otherwise applicable to an activity have been complied with]).

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

In the Matter of the Application for a Permit to Construct a Dock Structure in a Tidal Wetland, Pursuant to the Federal Water Pollution Control Act, Section 401, New York Environmental Conservation Law Article 25, (Tidal Wetlands) and Article 15, Title 5 (Protection of Waters), and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York Parts 661 (Tidal Wetlands - Land Use Regulations) and 608 (Use and Protection of Waters), by

MICHAEL MATTHEWS

Applicant

DEC No. 1-4724-00851/00007

HEARING REPORT

by

/s/

Kevin J. Casutto
Administrative Law Judge

Summary

The Applicant, Michael Matthews, has applied to the New York State Department of Environmental Conservation for a Tidal Wetlands permit, Protection of Waters permit and Water Quality Certification (WQC). The Administrative Law Judge (ALJ) concludes that the proposed project is not compatible with the preservation, protection and enhancement of the present and potential uses of the wetland, nor is this project in the public interest. Therefore, the ALJ recommends denial of this permit application.

The ALJ finds that the Applicant has failed to meet his burden of demonstrating that the proposed project is compatible with the pertinent provisions of Environmental Conservation Law (ECL) Articles 15 and 25 and regulations issued pursuant thereto. Furthermore, the Applicant has not demonstrated that undue adverse environmental impacts would not occur to the present or potential values of the tidal wetlands, if the permits were to be granted. A preponderance of the evidence shows that the proposed project would cause undue adverse impacts on wetland values addressed in the report. In addition, the proposed project is not reasonable and necessary.

In sum, the ALJ recommends that Department Staff's tentative determination to deny this tidal wetlands permit application should be adopted by the Commissioner as the Department's decision in this matter.

Proceedings

Michael Matthews, (the "Applicant") has applied to the New York State Department of Environmental Conservation ("the Department" or "NYSDEC") for a Tidal Wetlands permit and related permits to install a dock at his residential property on Lake Montauk, Montauk (Town of East Hampton), Suffolk County, New York, pursuant to Environmental Conservation Law ("ECL") Article 25 and Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), and ECL Article 15, Protection of Waters, and 6 NYCRR Part 608.

Department Staff deemed this permit application complete on July 13, 2001. Staff determined that this is a Type II action pursuant to the State Environmental Quality Review law ("SEQR"; ECL Article 8, 6 NYCRR Part 617), and, thus, does not require preparation of an Environmental Impact Statement or further SEQR review.

The Legislative Hearing

On October 1, 2002 at 10:00 a.m., a legislative hearing was held before ALJ Kevin J. Casutto, at the Incorporated Village of East Hampton Offices, 86 Main Street, East Hampton, New York. At the legislative hearing, no members of the public offered comments on the permit application. No written comments were filed on this proposed project. An issues conference was held at the same location, immediately following the legislative hearing.

The deadline for receipt of filings for party status was September 24, 2002. No applications for party status were received. Therefore, Applicant and Staff were the only parties to this proceeding.

The Issues Conference

As presented by the Department Staff during the issues conference, issues on which the Applicant and Staff do not agree include compliance with standards of permit issuance, as set forth in 6 NYCRR 661.9(b)(1)(i) through (iii); compliance with ECL Article 15, Title 5, Protection of Waters, and 6 NYCRR 608.8(a) through (c); compliance with ECL 3-0301 (balancing of cumulative impacts and the precedent-setting nature of the application); and the public trust doctrine.

The Applicant identified the riparian rights doctrine as an additional issue. Subsequently, on October 4, 2002, the Applicant submitted a modified proposal with minor revisions to the proposed project.

These issues were the subject of an adjudicatory hearing held at the Montauk Firehouse, 12 Flamingo Avenue, Montauk, New York on November 19th and 20th, 2002. A stenographic record of the proceedings was not received by the ALJ until June 16, 2003¹. The parties' closing briefs were received by September 3, 2003. In the Applicant's closing brief, the Applicant raised for the first time, a challenge to the applicability of ECL Article 15 and 6 NYCRR Part 608 in this proceeding. DEC Staff was authorized to file a response to this issue by September 29, 2003. The hearing record closed on September 26, 2003, with the

¹ The delay in receipt of transcripts was attributable to the Applicant.

timely receipt of Staff's responsive filing on applicability of ECL Article 15/Part 608.

The Applicant was represented by the law firm of Esseks, Hefter & Angel, Stephen R. Angel, Esq., member. Two witnesses were presented by the Applicant; George R. Hampson, Benthic Biologist, and James L. Walker, Principal Planner, Inter-Science Research Associates, Inc., Southampton, New York.

Department Staff appeared by Craig Elgut, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation Region 1. Staff presented two witnesses, Charles T. Hamilton, NYSDEC Regional Supervisor, Office of Natural Resources, including the Bureau of Marine Habitat Protection and Lawrence Penny, Town of East Hampton, Natural Resources Director and Acting Administrator, Land and Water Management Division.

Applicant's Position

The Applicant owns real property along the shores of Lake Montauk, located at 127 East Lake Drive, Montauk, in the Town of East Hampton, County of Suffolk, State of New York (the "site"). The site is subject to regulation under the tidal wetlands program and is bordered on the north and the south by other residential properties. The site consists of a single family residence, with asphalt driveway and is located approximately at the mid-point of the eastern shoreline of Lake Montauk. The easterly border of the site is East Lake Drive, and to the west, the site is bordered by the waters of Lake Montauk.

The Applicant seeks to construct a residential 'T'-shaped dock structure as an accessory to the existing single family residence at the site.

Before submitting the current permit application, the Applicant initially sought a permit for a dock that would have consisted of a four-foot by forty-foot fixed pier catwalk and a four-foot by forty-foot floating dock (at the seaward-most end), separated by a ramp and with another ramp down on the offshore end. The Applicant proposed the floating dock portion to comply with permitting standards of the Town of East Hampton (the "Town"). The Applicant states that with minor revisions, this initial project received approvals from the New York State Department of State and the Army Corps of Engineers. Department Staff, however, denied this permit application by a Notice of Permit Denial letter dated March 20, 2000, citing among other reasons, insufficient water depth at the site.

The Applicant contends that he has revised the initial project proposal in an attempt to conform to DEC standards. The current project proposal is for a fixed dock structure that would consist of a four-foot by ninety-nine-foot fixed pier catwalk extending a maximum of eighty feet from apparent high water. The proposed project includes a 4-foot x 4-foot stairway leading down from a landward bluff at the site, to a fixed pier measuring 4-foot x 20-foot. This pier would lead to a pedestrian walkover comprised of two 4-foot x 4-foot stairways straddling the structure, leading to a 4-foot x 80-foot fixed pier. At the end of this pier would be a 4-foot x 20-foot "T". The water surrounding the seaward end of the dock is less than two feet deep at low tide. The dock would extend seaward from an upland portion of the bluff in a high marsh, into an area of intertidal marsh, then into an area of shoal and mudflat, and finally into an area known as a submerged aquatic vegetation area, dominated by the plant species *codium* (commonly referred to as Green Fleece).

During the adjudicatory hearing, the Applicant's representatives stated for the first time that the proposed dock would be used only for storing a dinghy and that no larger marine vessels would be brought to the structure. Instead, the Applicant would use a dinghy launched from the dock to access a larger vessel maintained at his mooring approximately 300 feet off-shore. In addition, the Applicant intends to use the dock for fishing. Currently, the Applicant stores a dinghy on the shore seaward of his home, as do most residents of Lake Montauk.

The Applicant's current proposal contains five mitigative measures: First, use of tropical hardwood roughs for pilings instead of CCA (chromium, copper, and arsenic) treated Southern Yellow Pine²; this type of wood is long-lasting and decay-resistant, requiring only infrequent replacement (and therefore, infrequent disturbance to the area). Second, a single set of pilings will be installed for each eight-foot-long pile bed, minimizing the disturbance to shellfish. Third, the proposed dock is to be elevated a minimum of four feet above the grade of the existing vegetated tidal wetlands, to minimize adverse impacts to the wetlands below from shading. Fourth, the proposal eliminates mooring piles, mooring poles, and tie-off poles. The Applicant asserts that this makes it impossible for a motorboat to be tied up at the dock and thus eliminates the turbulence and prop wash impacts associated with motorboat operation. Fifth,

² The Town of East Hampton prohibits use of CCA in wetlands projects.

the proposal also provides for two sets of stairs, at the landward limit of the dock, to permit persons walking along the shoreline to cross the dock. In addition, the Applicant is willing to seasonally remove the seaward-most forty feet of the dock to comply with East Hampton Town requirements.

The Applicant contends that the wetlands regulations characterize this type of project a 'Generally Compatible Use - Permit Required' (See 6 NYCRR 661.5(b)(14)) and this proposed project is not specifically precluded by any statute or regulation. The Applicant concludes that Department Staff erred in rendering its tentative determination to deny the permit, and that the Commissioner should grant the permit in this instance.

Staff's Position

On March 12, 2002, Staff issued its tentative determination to deny the current permit application based upon the following factors:

- The proposed project would have an undue adverse impact on the present or potential value of the affected tidal wetland area, in violation of 6 NYCRR 661.9(b)(1)(i).

- Due to shallow water at the end of the dock, propeller turbulence from motorboats would damage shoals and mudflats/littoral zone, eelgrass, and benthic habitat at the site inhabited by shellfish and benthic organisms and used by finfish for foraging and as nursery habitat.

- Shading from the dock and vessel use would harm eelgrass beds at the site.

- Awarding a permit would set a precedent, encouraging owners of other properties along the shoreline to apply for dock structures in an environmentally sensitive area.

- By causing adverse impacts to recreational and commercial shellfisheries and finfish habitat, the proposal would be harmful to the public health and welfare.

During the issues conference, Staff modified its position to state that not only eelgrass, but submerged aquatic vegetation including eelgrass and codium would be adversely impacted.

Staff concludes that the proposed project is neither reasonable nor necessary and the proposed project should therefore be denied.

Findings of Fact

Introduction

1. Mr. Michael Matthews (the Applicant) owns residential real property located at 127 East Lake Drive, Montauk, Town of East Hampton, County of Suffolk, State of New York (the "site").

2. The project site is a single-family residence on the southern portion of Lake Montauk on the eastern shore of the lake. The site consists of a single family residence, with asphalt driveway.

3. The site is bordered on the north and the south by other residential properties. The easterly border of the site is East Lake Drive and to the west the site is bordered by the waters of Lake Montauk.

4. The site consists of highly productive tidal wetlands known as high marsh, intertidal marsh, shoals and mud flats and littoral zone. See Tidal Wetlands Map 758-548. The littoral zone includes an area of submerged aquatic vegetation dominated by the plant species *codium*. Between the rear of the house and the shoreline, a bluff rises approximately eight feet above the beach level. From the toe of the bluff, high marsh plants are present, including saltwort, seaside lavender, *Spartina patens* and *Stachys sylvatica*. Moving toward Lake Montauk, next is a band of cobble approximately three or four feet wide; then, in the intertidal marsh, *Spartina alterniflora* and low marsh cod grass, approximately 20 to 30 feet wide; then, the shoal and mudflat area; finally, moving farther offshore, an area of submerged aquatic vegetation dominated by the plant species *codium*.

5. Lake Montauk is located about three miles west of Montauk Point on the South Fork of Long Island, in the Town of East Hampton, Suffolk County. Until the mid-1920's, when an inlet was created between Lake Montauk and Block Island Sound, the Lake was a freshwater lake with saltwater infiltration.

6. Lake Montauk is part of the Peconic Estuary System. Approximately four or five residential docks exist on Lake Montauk, but all are located in the northern one-third of

the Lake. Of those, all but one (the Kalikow dock) pre-date both the state tidal wetlands law and local wetlands law. The closest residential dock to the Applicant's property is approximately one mile away.

7. Several commercial marinas and Town marinas are located on Lake Montauk, primarily in the Star Island/northern one-third of the Lake, including Montauk Lake Club Marina and Gone Fishing Marina. These marinas serve the needs of the public.

8. In addition, the Montauk Lake Yacht Club, with a commercial marina, is located on Star Island in the northern portion of the Lake. The Montauk Lake Yacht Club is approximately 1,200 to 1,500 feet from the project site.

9. No residential docks or other structures are located along the southern two-thirds of Lake Montauk shoreline. This shoreline remain a pristine, natural shoreline.

10. Lake Montauk provides habitat for two types of fish, forage species or bait fish and recreational and commercial fish. In addition, Lake Montauk is the leading productive area in the Town of East Hampton for bay scallops.

11. Lake Montauk is part of the Peconic Estuary System. Therefore, the project site is located in an area designated as a federally protected estuary. The project site has been designated for further protection by both the State of New York and the federal government through implementation of the Comprehensive Conservation Management Plan for the Peconic Estuary ("CCMP"),³ and has been designated a Critical Environmental Area.

12. The lake bottom in the area below where the seaward section of the dock structure would be constructed is large rocks interspersed with sand sediment.

³ The CCMP is a 750 page management plan created to address impacts to the Peconic Estuary System. The plan was created through the joint efforts of the New York State Department of Environmental Conservation, the United States Environmental Protection Agency, the United States Fish and Wildlife Service, the Nature Conservancy, the County of Suffolk and the Town of East Hampton. The plan was adopted by Governor Pataki on July 19, 2001, and by USEPA Administrator Christine Todd-Whitman on December 3, 2001.

13. From the shoreline at the site, only a few eelgrass plants are visible.

14. Prior to submitting the current permit application, the Applicant initially sought approval for a dock proposal that would have consisted of a four-foot by forty-foot fixed pier catwalk and a four-foot by forty-foot floating dock (at the seaward-most end), separated by a ramp and with another ramp down on the offshore end. The Applicant proposed the floating dock feature to comply with permitting standards of the Town of East Hampton (the "Town"). With minor revisions, this initial project received approvals from the New York State Department of State and the federal Army Corps of Engineers. Nevertheless, Department Staff denied this permit application by a Notice of Permit Denial letter dated March 20, 2000, citing among other reasons, the insufficient water depth at the site.

15. The Applicant currently seeks to install a residential dock with a "T" section at the seaward end, extending approximately eighty feet in length seaward of approximate high water (AHW). Specifically, commencing from the upland and moving toward the waters of Lake Montauk, the proposed project includes a 4-foot x 4-foot stairway leading down from the bluff at the property to a fixed pier measuring 4-foot x 20-foot. This fixed pier would lead to a pedestrian walkover comprised of two 4-foot x 4-foot stairways straddling the structure, in turn leading to a 4-foot x 80-foot fixed pier. Connected to the seaward end of this fixed pier would be a 4-foot x 20-foot "T"-shaped dock section.

16. The permit application provided no information concerning the intended use of the dock structure. Based solely upon the design and location of the structure, the dock structure could be used as a landing place and docking facility for as many as six marine vessels, including motorized vessels.

17. For the first time during the adjudicatory hearing, the Applicant's representatives stated that the dock structure was not to be used for docking a vessel, but would be used to launch a dinghy that would be stored at the end of the dock on the "T" section. The dock also would be used as a fishing pier.

18. The Applicant currently maintains a mooring at the site, approximately 300 feet offshore, that can accommodate a large vessel. He currently obtains access to this mooring by launching a dinghy from the beach and then rowing approximately 300 feet to the mooring. Construction of the proposed dock would

allow the Applicant to launch the dinghy from the dock rather than the shoreline, thereby eliminating approximately 80 feet of rowing distance to the mooring.

19. A dinghy would be stored on top of the dock at the end of the "T" section. The distance from the water surface to the surface of the dock where the dinghy would be stored would be approximately four feet at high tide and six and one-half feet at low tide.

20. At low tide, the water depths at the project site range from no water at the landward portion of the proposed structure to less than two feet at the seaward terminus.

21. Based upon the Applicant's design specifications, between 50 and 75 pilings would be installed via hydraulic jetting as part of construction.

22. Degradation of water quality would adversely impact species in the area, including benthic organisms within the substrate of the beach and in the intertidal area adjacent to the site. These areas are habitat for forage fish that come in at high tide to forage on the intertidal beach, and return to deeper waters during low tide. Decreased water quality would adversely affect both benthic organisms, finfish and shellfish.

The Shellfish Survey

23. On September 17, 2002, Mr. Hampson conducted a site visit with Mr. Walker. As a result of this site visit, Mr. Hampson prepared a commercial shellfish survey. Exhibit 7.

24. In New York, September is a less productive time of year for tidal wetlands.

25. Non-commercial species of gastropods and shellfish such as *Crepidula* and *Littorina* are present at the site, although these species were not identified in Mr. Hampson's commercial shellfish survey.

26. The submerged aquatic vegetation at the site is predominately codium. Codium is a non-native invasive species. Some eelgrass is present along the shoreline at the site.

27. Eelgrass and codium do not compete for habitat. Instead, eelgrass grows in soft bottom sediments or sand substrates, whereas codium will grow on hard substrates including

shellfish, rocks and rocky substrates. Eelgrass will grow among codium where the sediment is present.

28. Codium, like eelgrass, has excellent wetlands values. Codium acts as a habitat for many species of fish and vertebrates in the water column, and provides a nursery environment where fish can lay their eggs and where young fish can evade predator fish. In these respects, codium has very similar wetlands benefits to eelgrass.

29. The presence of codium in the waters near the project site enhances the marine productivity of Lake Montauk.

Proposed Use of the Dock Structure

30. Dinghy docks typically are located 8 to 24 inches above the water. This allows for easy movement of the dinghy into and out of the water. Dinghy docks generally serve groups of boaters at yacht clubs, commercial marinas or homeowners' associations.

31. The proposed structure does not include any mechanism for lowering or raising the dinghy, nor any way for the Applicant to get himself down into the dinghy or back onto the structure from the dinghy. Nor does the proposal include any method for stabilizing the dinghy in the water while the Applicant is getting in and out of it.

32. A dinghy is typically eight feet long and three feet wide. Because the proposed dock would be only four feet wide, it would be very difficult for a person to safely manipulate a three-foot wide dinghy onto the dock (with only six inches additional width on each side). As a result, it would be virtually impossible to get a boat up and out of the water in a safe manner.

33. Methods that would allow the Applicant to dock multiple vessels at the proposed structure, include use of fiberglass whips (which act like arms that attach to the dock and keep the boat away from the dock) and use of fenders and fender boards (which act like a cushion between the boat and the dock; the boat would be tied to cleats installed on the dock).

34. Generally, people do not fish for the juveniles found in the vegetated areas at the site. Snapper and winter flounder - fish identified by the Applicant's witnesses - do not inhabit the codium beds, but instead would be found much farther offshore.

35. In the event motorboats were docked at the site, "prop wash" or "prop dredging" would occur resulting in severe adverse impacts to the highly productive wetlands at the site. Prop wash (or prop dredging) occurs when a vessel is tied to a dock or a series of pilings and the boat's engine is put in gear. Because the boat stays in place, the energy from the propeller (or prop) creates a water outwash, and that water causes the bottom to be altered and dredged, pushing the bottom sediments out.

36. Operation of a motorboat at the site would disturb the bottom sand and sediments located at the site, resulting in adverse impacts such as loss of submerged aquatic vegetation. In addition, prop wash causes turbidity, which affects the ability of sunlight to travel down into the water. Turbidity, in turn, diminishes the ability of submerged aquatic vegetation to photosynthesize, usually resulting in complete loss of that aquatic vegetation population. Lastly, sediment which is suspended due to prop wash will increase siltation over the aquatic plant life as the silt settles, thereby suffocating the submerged aquatic vegetation.

37. Water depths are shallow at the seaward end of the proposed dock, which would result in propeller turbulence by motor boats using the dock. This would cause a significant loss of highly productive tidal wetlands known as shoals and mudflats and littoral zone (SM/LZ).

The Regulatory Standards: 6 NYCRR Parts 608 and 661

38. Several wetlands values would be diminished if the Applicant's proposed project were to be authorized. Specific wetlands values (and adverse impacts) include the following:

a) Marine Food Production - Marine food production begins at the high marsh and intertidal marsh areas and also includes the shoals and mudflats areas and the submerged aquatic vegetation area. Marine food production through photosynthesis produces plant growth, that eventually provides nutrients back to the water column. In addition, the animals and fish that inhabit in the sediments and shallow waters of this wetlands area, as part of the food chain, contribute to marine food production that is attributable to this wetland area. Submerged aquatic vegetation in the project area, both codium and eelgrass, provide nutrients into the ecosystem, as well as a habitat for bait fish which are then consumed by predatory species

of fish. Construction of the dock, potential prop dredging, siltation and shading caused by the structure will adversely affect marine food production values.

b) Marine and Wildlife Habitat - Various species of finfish, shellfish and birds use the wetlands at the project site to nest, forage and hide from predators. A reduction in submerged aquatic vegetation at the site will adversely affect the wetland values of marine habitat. The presence of the dock structure and increased human activity will adversely affect wildlife habitat values, by reducing available foraging area for birds and by discouraging shy birds from using this area as habitat.

c) Flood and Storm Control - The wetlands at the project site attenuate wave energy and act like a sponge to prevent flooding of the upland. The loss of submerged aquatic vegetation caused by the installation and use of the proposed dock will adversely impact wetlands values for flood and storm control and cleansing of the ecosystem. The proposed project would diminish the wetland's ability to absorb silt and organic material that primarily comes from runoff.

d) Cleansing of the Ecosystem / Treating Pollution / Settling and Filtering Sediment - Wetlands at the project site process contaminants that would otherwise be harmful to marine life. A reduction of submerged aquatic vegetation at the site will adversely affect these wetland values.

e) Absorption of silt and organic material - The wetland vegetation at the project site controls silt from runoff due to upland sources such as the roadway and Applicant's driveway and parking pad. A reduction of submerged aquatic vegetation at the site will adversely affect these wetland values.

f) Recreation - Members of the public enjoy the wetlands at the project site for a variety of recreational uses, including fishing, shellfish harvesting, walking, swimming and boating. In addition, the Applicant and his family enjoy many benefits of being a waterfront property owner, including boating, kayaking, swimming, canoeing and walking, as well as the aesthetics of a pristine view of Lake Montauk. These recreational uses of the existing natural setting

currently are enjoyed by the Applicant, his neighbors and other members of the public using the beach and the lake. Installation of a dock at the site would adversely impact these recreational uses and the natural and unspoiled shoreline setting.

g) Aesthetics and Open Space - The shoreline in the project area is undeveloped, without any water structures, an intertidal marsh at full growth. At the other properties along the shoreline, the larger vessels all are moored off on mooring buoys. The shoreline of Lake Montauk has been managed by the Town of East Hampton and the Department for decades as an undisturbed shoreline. The natural wetlands and water in combination are aesthetically beautiful in their own right as a large horizontal expanse of open space. The Applicant's proposed dock would adversely impact the open space values of the shoreline. Additionally, this structure would be very high above the water. On top of it, allegedly, dinghies and kayaks and canoes would be stored. The boat storage, too, would adversely impact the aesthetic appreciation of this shoreline of Lake Montauk.

h) Other Adverse Impacts - The proposed project will cause adverse impacts to the wetlands at the site during the construction and installation of the dock structure. A work barge would be used to install the pilings and other portions of the structure. The barge would sit on the bottom during construction, damaging and crushing the benthic community. Also, motorized operation of the barge will result in lateral movement of the vessel, resulting in damage by cutting or crushing the submerged aquatic vegetation.

If constructed, the proposed dock will cause some shading to the submerged aquatic vegetation at the site, even though the dock has been elevated to reduce shading impacts. The installation of between 50 and 75 pilings associated with the proposal will cause siltation to the shoals and mudflats at the site, in turn causing destruction to the benthic community. The existence of the structure will reduce the area available to wading birds that otherwise would use the area for foraging, and shyer species of wildlife will avoid the area due to the increased human activity.

39. The Applicant does not require this structure to gain access to, or enjoy the use of, the water seaward of his home. The Applicant currently has access to the waters of Lake Montauk and to his mooring via a dinghy. Construction of the proposed dock would merely change the Applicant's mode of access to the waters of Lake Montauk.

40. The proposed dock would invite dangerous use due to the shallow water conditions that exist at the site. The size and location of the dock would mistakenly appear to represent a safe haven to boaters in distress, boaters requiring medical attention or boaters seeking safety due to the onset of a storm. The dock structure will invite these unwitting boaters into the dangerous conditions that exist due to the shallow water depths at the site.

41. In considering reasonable alternatives to the proposed regulated activity, the impacts associated with the Applicant's proposal must be considered in light of its intended purpose or function - - *i.e.*, the purpose identified by the Applicant, that the dock will be used only as a residential dinghy dock.

42. The catwalk will be at a height approximately six and one-half feet above the water surface (at low tide), to reduce adverse shading impacts. However, at that height above the water surface, the activities of raising and lowering the three-foot wide dinghy to and from the top of the narrow four-foot wide catwalk would be difficult and dangerous.

43. The proposed project would limit public access along this portion of shoreline. The stairs proposed by the Applicant will impede the currently existing open shoreline access at the site. The dock and stairs will create more limited access and dangerous circumstances for those members of the public seeking to use this portion of Lake Montauk shoreline.

44. As an alternative to the Applicant's dock structure proposal, a rack system installed above high tide would allow the Applicant to safely store his dinghy (and other small boats, such as a canoe, kayak or sunfish), and also would afford him access to the waters of Lake Montauk and his mooring. A rack system would be a much safer and more reasonable alternative that would accomplish the Applicant's stated goals as well as would the proposed dock.

45. Regarding social and economic benefits to the people of the State of New York, conservation of existing

wetlands values and maintenance of water quality are necessary to support public recreational uses and the commercial shellfishing.

Discussion

The Applicant bears the burden to demonstrate compliance with each of the standards for permit issuance set forth in the applicable regulatory sections, by a preponderance of the evidence. See 6 NYCRR 624.9(b) and (c). Also, the Applicant bears the burden of demonstrating that the proposed activity will be in complete accord with the policy and provisions of the Tidal Wetlands Act. See ECL §25-0402; see also *Matter of McKinney*, 52 AD2d 881 (2d Dept. 1976). In addition, pursuant to ECL §1-0101, the Department's mandate is to promote patterns of development which minimize adverse impacts on the environment. Lastly, in addition, pursuant to ECL §3-0301(1)(b), the Commissioner must consider the cumulative impacts of a proposed project and its precedent setting nature.

The Applicant contends that pursuant to 6 NYCRR 661.5(b)(14), the proposed project is characterized as a "Generally Compatible Use," which weighs in favor of granting the permit, citing *Matter of State of N.Y. Northeastern Queens Nature & Historical Pres. Comm'n v. Flacke*, 89 A.D.2d 928, 928, 453 N.Y.S.2d 773, 774 (2d Dep't 1982). However, in *N.Y. Northeastern Queens Nature & Historical Pres. Comm'n*, the court merely noted that the proposed regulated activity, installation of an underground sewer, was a "generally compatible use". First, the cited case is distinguishable from the present matter because Staff supported issuance of the tidal wetlands permit in *N.Y. Northeastern Queens Nature & Historical Pres. Comm'n*, but opposes issuance of the tidal wetlands permit here. More important is the principle of law articulated by the court that "[it is a] requirement that the Commissioner of the New York State Department of Environmental Conservation independently consider environmental impact before issuing permits pursuant to article 25 of the Environmental Conservation Law [citations omitted]." *N.Y. Northeastern Queens Nature & Historical Pres. Comm'n, id.* The fact that a proposed project is a generally compatible use does not eliminate the Commissioner's mandate to review the proposal under the standards for permit issuance on a case-by-case basis for each permit application. See 6 NYCRR 661.9.

As a secondary position, citing ECL §25-0403(3), the Applicant contends that a permit may be granted with special permit conditions to address Staff's concerns with the proposed project. In contrast, Staff contends that use of the dock as a dinghy dock is implausible as proposed and, therefore, the

Commissioner must consider that the dock structure may be used for docking motorboats.

For reasons described below, I conclude that Staff properly denied the Applicant's permit application for this proposed project.

- The Shellfish Survey

On September 17, 2002, Mr. Hampson conducted a site visit with Mr. Walker. As a result of this site visit, Mr. Hampson prepared a commercial shellfish survey. Exhibit 7.

Mr. Hampson is a Senior Research Associate at the University of Massachusetts, Dartmouth, with his primary area of expertise in benthic biology. Staff notes that Mr. Hampson was retained by the Applicant just prior to the adjudicatory hearing to conduct an eelgrass report. (Mr. Walker, the Applicant's other witness, was retained by the Applicant much earlier, to prepare and process the permit application.)

Although Mr. Hampson is a benthic biologist, he did not conduct sampling that would indicate the health of the wetland. Such sampling would include sampling for the presence of flora and fauna (for example, for the presence of dermersal fish eggs, ichthyoplankton, fish or benthic worms). Instead, Mr. Hampson conducted a shellfish survey at the site to identify only commercial shellfish species, even though the Applicant had not requested such a survey.

During this site visit, Mr. Hampson first characterized the salt marsh plants that were present: *Phragmites* at the landward mark of mean high water, *Spartina alterniflora* and *Spartina patens*. Then, using two one-foot long commercial rakes, he and Mr. Walker obtained bottom samples at various distances, measured from the mean high water (MHW) line, proceeding to the offshore area. He and Mr. Walker each made a transect approximately 30 feet apart in the vicinity of the proposed dock (providing replicate sampling). They were able to use the rakes only out to 65 feet from MHW (-65 MHW). Beyond that point, to -185 MHW, Mr. Hampson made visual observations. Mr. Hampson summarized the results of this survey in Exhibit 7, the shellfish survey.

Staff argues that Exhibit 7 is not a scientific study and is flawed. Mr. Hampson used a small, one-foot rake, whereas shellfishing along this area of Lake Montauk requires use of a commercial chain harness designed for this type of environment. Exhibit 7 contains no explanation of the distinction between data

from MHW to -65 MHW, and data reported at distances beyond -65 MHW to -185 MHW (although in his testimony, Mr. Hampson explained that the rakes could not be used beyond -65 MHW.). Moreover, Staff asserts that the one time September 17, 2002 site visit by Mr. Hampson (and Mr. Walker) was reflective only of a qualitative "snapshot characterization" of site conditions and therefore should not be relied upon to evaluate the value of the involved wetlands.

Information documented in Exhibit 6 (the field notes) was not completely represented in Exhibit 7. Mr. Hampson acknowledged that he did not memorialize water depths for any of the data he collected at the site. Nor did he conduct benthic core sampling or sediment analysis at the site, although he did acknowledge that a true benthic study would include a benthic core sample. Nor did Mr. Hampson sample for benthic worms, dermersal fish eggs, ichthyoplankton or juvenile fish or fish. Mr. Hampson did not include non-commercial species in his commercial shellfish survey. For example, Exhibit 6 indicates the presence of *Littorina*⁴ at -32 MHW, but Mr. Hampson did not include that in Exhibit 7. On cross examination, Mr. Hampson conceded that due to limitations of the sampling equipment he used, Exhibit 7 is a qualitative, not quantitative study.

Yet, as a result of this one site visit, Mr. Hampson concluded that the wetlands at the project site have no value and that the proposed dock structure would not have any adverse impacts, even though Mr. Walker, the Applicant's other witness, acknowledged that shellfish beds and highly productive tidal wetlands exist at the site.

In sum, the commercial shellfish survey does not identify the methodology employed or equipment used to conduct the study and is best characterized as a qualitative, not quantitative, assessment of the site. This commercial shellfish survey is of limited value in assessing the existing wetlands and potential adverse impacts should the proposed project be permitted. Highly productive tidal wetlands known as shoals, mud flats and littoral zone exist in the tidal wetlands baselands at the site. Therefore, due to these infirmities, Exhibit 7 must be given lesser evidentiary weight.

⁴ *Littorina* is genus of small pectinibranch mollusks, having thick spiral shells, abundant between tides on nearly all rocky seacoasts. They feed on seaweeds. The common periwinkle is a well-known example.

- Identification of Submerged Aquatic Vegetation

Initially, Staff identified the submerged aquatic vegetation at the site as eelgrass, a native species of value to wetlands. Instead, Mr. Hampson has shown that the submerged aquatic vegetation at the site predominately is codium (commonly referred to as Green Fleece). Codium is a non-native invasive species, which the Applicant contends, has little wetlands value. Mr. Hampson's uncontroverted testimony is that significant codium beds exist on the lake bottom seaward of the site. He reported that codium first appeared at approximately 65 feet from the mean high water line, at which point it covered roughly 5-10% of the bottom, and increased to 10% at 72 feet out, 50-75% at 74 feet out, 50-75% at 82 feet out and 75-100% at 102 feet out. In view of the discussion of Exhibit 7, above, these reports of codium percentages are taken to be visual qualitative estimates. However, it is uncontroverted that the submerged aquatic vegetation at the site is predominately codium. Some evidence of eelgrass was noted along the shore area.

Mr. Hamilton explained that eelgrass and codium do not compete for habitat. Instead, eelgrass grows in soft bottom sediments or sand substrates, whereas codium will grow on hard substrates including shellfish, rocks and rocky substrates. Eelgrass will grow among codium where the sediment is present.

DEC Staff contends that codium, like eelgrass, also has excellent wetlands values. Codium acts as a habitat for many species of fish and vertebrates in the water column, and provides a nursery environment where fish can lay their eggs and where young fish can evade predator fish. In these respects, codium has very similar wetlands benefits to eelgrass.

The presence of codium in the waters near the project site enhances the marine productivity of Lake Montauk. The codium grows in this particular area where the eelgrass has some difficulty growing, due to the hard substrate.

- Proposed Use of the Dock Structure

The application materials do not specify a use for the proposed dock as a "dinghy dock"; in fact, the application does not specify any use. For the first time, during the adjudicatory hearing, the Applicant announced that the purpose of the dock is a "dinghy dock." DEC Staff's understanding of this proposed project was that the Applicant was proposing the dock to accommodate motorboats (as many as six). But, at the adjudicatory hearing, Mr. Walker testified that the Applicant's

intended use of the proposed dock would be only for storing a dinghy and as a fishing pier.

On the other hand, Staff asserts that proposed use of the dock as a dinghy dock is not credible. Mr. Hamilton stated that of all the tidal wetlands permit applications and dinghy dock structures he has reviewed during his lengthy career, he has never seen a dinghy dock with open pile construction, this high above the water. Mr. Hamilton persuasively testified that dinghy docks typically are very close to the water, for ease of moving the dinghy in to and out of the water. He stated that dinghy docks generally are used at yacht clubs, commercial marinas or homeowners' associations, not at single family residences. In fact, he could not recall any wetlands permit application for a dinghy dock for a individual, such as the Applicant proposes. Moreover, the proposed project provides for no type of landing devices, ladders, stairs or other means to get to the water. The omission of such features in the Applicant's proposal supports Staff's contention that the Applicant will use the structure for purposes other than a dinghy dock.

Further, a dinghy is typically eight feet long and three feet wide. Because the proposed dock would be only four feet wide, it would be very difficult for a person to safely manipulate a three-foot wide dinghy onto the dock (with only six inches additional width on each side). Such use of the proposed dock structure would not be safe because it would be virtually impossible to get a boat up and out of the water in a safe manner.

Mr. Walker stated that it is impossible to tie a motorboat to this type of dock, because the Applicant's proposal does not specify any mooring poles or tie-up poles. But, Mr. Hamilton disagreed with this conclusion and testified that several methods would allow the Applicant to dock multiple vessels at the proposed structure, including fiberglass whips (which act like arms that attach to the dock and keep the boat away from the dock) and fenders and fender boards (which act like a cushion between the boat and the dock; the boat would be tied to cleats installed on the dock). Mr. Hamilton testified that a vessel of approximately 20 to 22 feet long easily could be docked at this proposed structure. Therefore, the proposed dock could accommodate multiple vessels, including motorboats.

The Applicant's witnesses also stated that the proposed structure would be used as a fishing pier. However, Mr. Hamilton noted that the shallow water conditions and heavy vegetation at the site make it a poor fishing area. Generally, Mr. Hamilton

testified, people do not fish for the juveniles found in the vegetated areas at the site. Snapper and winter flounder - - fish identified by the Applicant's witnesses - - do not inhabit the codium beds, but instead would be found much farther offshore.

In addition, both Mr. Hamilton and Mr. Penny noted that if the structure is built, the Department would have no authority to police whether boats are tied to the dock or what kind of boats are tied to the dock. In the event motorboats were docked at the site, "prop wash" or "prop dredging" would occur resulting in severe adverse impacts to the highly productive wetlands at the site. Prop wash (or prop dredging) occurs when a vessel is tied to a dock or a series of pilings and the boat's engine is put in gear.⁵ Because the boat stays in place, the energy from the propeller (or "prop") creates a water outwash, and that water causes the bottom to be altered and dredged, pushing the bottom sediments out. Operation of a motorboat at the site would disturb sand located at the site, resulting in adverse impacts such as loss of submerged aquatic vegetation. Prop wash causes turbidity, which affects the ability of sunlight to travel down into the water. Lack of sunlight, in turn, diminishes the ability of submerged aquatic vegetation to photosynthesize, usually resulting in complete loss of that aquatic vegetation population. Finally, sediment which is suspended due to prop wash will increase siltation over the aquatic plant life when the silt settles, thereby suffocating the submerged aquatic vegetation.

I. ECL Article 15, Protection of Waters, and 6 NYCRR 608.8 Standards.

Section 608.8 of 6 NYCRR provides that the proposed project is in the public interest if the project is reasonable and necessary [608.8(a)], will not endanger the health, safety or welfare of the People of the State of New York [608.8(b)] and will not cause unreasonable, uncontrolled or unnecessary damage to the natural resources of the State, including soil, forests, water, fish, shellfish, crustaceans and aquatic and land-related environment [608.8(c)].

The Applicant, in his closing brief, raised a challenge for the first time to the applicability of ECL Article 15/6 NYCRR 608 in this proceeding. Specifically, the Applicant contends that

⁵ The terms "prop wash," "prop dredge" and "power dredge" are interchangeable terms.

6 NYCRR 608.8 is inapplicable to the present case because that regulation was promulgated pursuant to ECL §15-0503, and ECL §15-0503(3)(a) exempts the type of dock proposed by Applicant from the permit requirements of ECL Article 15.

However, ECL §15-0505 provides that, "[n]o person . . . shall excavate or place fill below the mean high water level in the navigable waters of the state, or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the state . . . without a permit." See also 6 NYCRR 608.5.

It is uncontroverted in the record, DEC Staff notes, that the project site is within navigable waters of the state, within the Peconic Estuary and within regulated tidal wetlands. Therefore, this project requires a protection of waters permit pursuant to ECL §15-0505 and 6 NYCRR 608.5.

The installation of dozens of pilings required for this proposed project constitute "fill" as that term is defined in 6 NYCRR 608.1(g). In addition, the hydraulic jetting method used for installation of pilings such as these pilings is dredging or excavation. See *Matter of Joseph Berardino*, Decision of the Commissioner, DEC Case No. 1-4738-00605/00004 (April 19, 1999). In sum, the Applicant's challenge to the applicability of 6 NYCRR 608.8 must be rejected. The Part 608 standards are evaluated below.

II. The Regulatory Standards: ECL Articles 15 and 25 and 6 NYCRR Parts 608 and 661

- 6 NYCRR 661.9(b)(1)(i): Undue Adverse Impact on Wetlands Values and 6 NYCRR 608.8(c): unreasonable, uncontrolled or unnecessary damage to the natural resources of the State

6 NYCRR 661.9(b)(1)(i) states that the department will issue permits for a proposed regulated activity on a tidal wetland only if the proposed activity will not have an undue adverse impact on the present or potential value of the affected tidal wetland area or adjoining or nearby tidal wetland areas. 6 NYCRR 608.8(c) states that the basis for issuance of a Protection of Waters permit will be a determination that the proposal is in the public interest in that the proposal will not cause unreasonable, uncontrolled or unnecessary damage to the natural resources of the State. In this instance, the natural resources of concern are the tidal wetlands.

Wetland values include marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, recreation, education, research or open space and aesthetic appreciation, taking into account the social and economic benefits which may be derived from the proposed activity.

The Applicant contends that the proposed dock, as a dinghy dock, will not have any undue adverse impact on the present or potential value of the affected tidal wetland area or adjoining or nearby tidal wetland areas. DEC Staff, however, identified several wetlands values that would be diminished if the proposed project were to be authorized. The specific wetland values are discussed below:

Marine Food Production - Submerged aquatic vegetation in the project area, whether eelgrass or codium, provides nutrients for the ecosystem, as well as a habitat for bait fish which are then consumed by predatory species of fish. As discussed above, potential prop dredging, siltation and shading will adversely affect marine food production values.

Marine and Wildlife Habitat - Various species of finfish, shellfish and birds use the wetlands at the project site to nest, forage and hide from predators. A reduction in submerged aquatic vegetation at the site will adversely affect the wetland values of marine habitat. The presence of the dock structure and increased human activity will adversely affect wildlife habitat values, by reducing available foraging area for birds and by discouraging shy birds from using this area as habitat.

Flood and Storm Control - The wetlands at the project site attenuate wave energy and act like a sponge to prevent flooding of the upland. The loss of the submerged aquatic vegetation caused by the installation and use of the dock structure will adversely impact wetlands values for flood and storm control and cleansing of the ecosystem. The proposed project would diminish the wetland's ability to absorb silt and organic material, that primarily comes from runoff.

Cleansing of the Ecosystem / Treating Pollution / Settling and Filtering Sediment - Wetlands at the project site process contaminants that would otherwise be harmful to marine life. A reduction of submerged aquatic vegetation at the site will adversely affect these wetland values.

Absorption of silt and organic material - The wetland vegetation at the project site controls silt from runoff due to

upland sources such as the roadway and Applicant's driveway and parking pad. A reduction of submerged aquatic vegetation at the site will adversely affect these wetland values.

Recreation - Members of the public enjoy the wetlands at the project site for a variety of recreational uses, including fishing, shellfish harvesting, walking, swimming and boating. In addition, the Applicant and his family enjoy many benefits of being a waterfront property owner, including the many recreational uses identified during the hearing - - boating, kayaking, swimming, canoeing and walking, as well as the aesthetics of a pristine view of Lake Montauk.

These recreational uses of the existing natural setting are currently enjoyed by the Applicant, his neighbors and other members of the public using the beach and the lake. Installation of a dock at the site would adversely impact these recreational uses and the existing natural and unspoiled shoreline setting.

Aesthetics and Open Space - The legislative findings for ECL Article 25 state that wetlands comprise a large part of the remaining natural and unspoiled areas along the crowded coastal reaches of the state; that the benefit to the public of these natural open areas in a region of rapid population growth is significant; and that wetlands offer unique open space and aesthetic qualities while at the time permitting full play to their other natural values. ECL §25-0101, Legislative Findings. These findings are amplified in the regulatory language of 6 NYCRR 661.9 (and in 6 NYCRR 661.2, which is referenced in section 661.9(b) (1) (i)).

Mr. Hamilton described the shoreline in the project area as an undeveloped shoreline without any water structures, a beautiful intertidal marsh at full growth. At other properties along the shoreline, the vessels all are moored off on mooring buoys. Staff asserts that the Applicant's proposed dock would adversely impact the open space values of the shoreline.

Additionally, this structure would be very high above the water. On top of it, allegedly, dinghies and kayaks and canoes would be stored. The boat storage, too, would adversely impact the aesthetic appreciation of this shoreline of Lake Montauk, which has been managed by the Town of East Hampton and the Department for many years as an undisturbed shoreline. The natural wetlands and water in combination, are aesthetically beautiful in their own right because they are a kind of horizontal open space.

- Other Adverse Impacts

Under 6 NYCRR 661.1, the social and economic benefits which may be derived from the proposed activity are articulated in terms of "reasonable economic and social development of the State." Department Staff's position is that the Applicant's proposal would not serve the public at all. Instead, only the Applicant would benefit socially or economically from installation of the dock. Moreover, in Staff's view, the Applicant does not require this structure to gain access to, or enjoy the use of, the water seaward of his home. See *Matter of Miller*, May 13, 1975, WL 23810, (N.Y. Dept. Env. Conserv.) [if it has not been demonstrated by the Applicant that the site selected for the proposed dock is a reasonable or necessary location, then the project as proposed is a convenience only to the Applicant with no corresponding public benefit.]

Section 661.9(b)(1) of 6 NYCRR references the findings set forth in 6 NYCRR 661.2. Subdivision 661.2(m) provides that "[g]iven the critical values served by tidal wetlands, the limited extent of the land-water boundary, and the many types of land use and development that require water access and should be located where they will not substantially impair tidal wetland values, land use and development that does not require water access generally should not be located in tidal wetlands or adjacent areas." Staff contends that because the Applicant currently has access to the water and his mooring, it would be inappropriate to grant the Applicant's proposed project because granting the project would cause a greater level of intrusion and adverse impacts to the involved wetland system.

In addition, Staff asserts that the proposed project will cause adverse impacts to the wetlands at the site during the construction and installation of the dock structure. A work barge would be used to install the pilings and other portions of the structure. This barge would sit on the bottom during construction, causing adverse impacts to the benthic community, damaging the animals that live in the mud and crushing them. In addition, motorized operation of that vessel will cause damage by cutting the codium.

If constructed, the proposed dock structure will cause some shading to the submerged aquatic vegetation at the site. The installation of the many pilings associated with the proposal will cause siltation to the shoals and mudflats at the site, in turn causing destruction to the benthic community. The existence of the structure will reduce the area available to wading birds that would otherwise use the area for foraging, and shy species

of wildlife will avoid the area due to the increased human activity.

Finally, in addition to the wetland values described above, Staff identified as an adverse impact that no other residential docking structures exist on the southern two-thirds of Lake Montauk, which remains an undisturbed shoreline area. See also photographic Exhibits 14 through 16, depicting the shoreline.⁵

- 6 NYCRR 661.9(b)(1)(ii) and 6 NYCRR 608.8(b)

Section 661.9(b)(1)(ii) of 6 NYCRR requires that the proposed project must be compatible with the public health and welfare. Section 6 NYCRR 608.8(b) of 6 NYCRR states that the basis for issuance of a Protection of Waters permit will be a determination that the proposal is in the public interest in that the proposal will not endanger the public health, safety or welfare.

Staff reasonably asserts that the proposed project will endanger the health, safety and welfare of the people of the State in two respects. First, because of the shallow water conditions that exist at the site, the size and location of the dock would mistakenly appear to represent a safe haven for boaters in distress, boaters requiring medical attention or boaters seeking safety due to the onset of a storm. Second, the proposed project will limit public access along this portion of shoreline, thereby adversely affecting the public safety and welfare.

- 6 NYCRR 661.9(b)(1)(iii) and 6 NYCRR 608.8(a)

Section 661.9(b)(1)(iii) of 6 NYCRR requires a determination whether the proposed project is reasonable and necessary, taking into account such factors as reasonable alternatives to the

⁶ Exhibits 14, 15 and 16 depict the nearby Town of East Hampton Beach, showing the undisturbed nature of the shoreline encompassing the project site. The nearby Town beach provides access for bathers, people watching the water, having lunch, access to go shellfishing and access for people to go out to their moored vessels via dinghy. Exhibit 16 depicts the sailboats, sunfishes, catamarans and dinghies that are all stored upland of the water and then are carried into the water. Exhibit 18 depicts moored vessels that are accessed via dinghy from the town beach.

proposed regulated activity and the degree to which the activity requires water access or is water dependent. Section 608.8(a) of 6 NYCRR states that the basis for issuance of a Protection of Waters permit will be a determination that the proposal is in the public interest in that the proposal is reasonable and necessary.

Staff argues that taking into account reasonable alternatives, the impacts associated with the Applicant's proposal must be considered in light of its intended purpose or function. Here, the purpose identified by the Applicant is questionable - *i.e.*, that the dock will be used only as a residential dinghy dock. Because the structure reasonably was not designed to function as a dinghy dock, Staff asserts, the inescapable conclusion is that the Applicant will use this dock as a landing place for a larger, possibly motorized, marine vessel. Once a Departmental permit is issued authorizing a dock structure, the Department cannot regulate how the structure is used. Therefore, Staff argues, the Commissioner must consider not only the purported uses identified by the Applicant, but also all other reasonable uses that the dock structure could serve.

In sum, the project as proposed reasonably cannot serve the purpose for which it is intended - that of a dinghy dock. The proposed structure would require the Applicant to manipulate the dinghy on a narrow four-foot wide catwalk, then lower the dinghy into the water more than six feet below. After lowering the dinghy into the water, the Applicant would then have to find a way to tie the dinghy to the structure, so that he can climb down into the dinghy. Then he would have to untie the dinghy from the structure, so that he can row out to his mooring (and any large vessel that he may have moored there). The proposed structure does not include any mechanism for lowering or raising the dinghy, nor any way for the Applicant to get himself down into the dinghy or back onto the structure from the dinghy. The proposal also fails to include any method for stabilizing the dinghy in the water while the Applicant is getting in and out of it.

As an alternative to the Applicant's dock structure proposal, Staff recommends that the Applicant submit an application for a permit to construct a walkway from the top of the bluff to the bottom of the bluff and a rack system above high tide. The walkway would provide the Applicant with safe access to the beach area, while a rack system would allow the Applicant to safely house his dinghy (and other small boats, such as a canoe, kayak or sunfish), and also allow for access to the waters of Lake Montauk and his mooring. In Staff's view, a rack system would be a much safer and a much more reasonable alternative that

would accomplish the Applicant's stated goals substantially as well as would the proposed dock.

Staff concludes that when compared with the Applicant's current method for launching his dinghy from the beach, the proposed dinghy dock method would not only be cumbersome and dangerous, but would take more time and require more effort. The proposed structure would only "save" the Applicant about eighty feet of rowing distance to the mooring or about twenty oar strokes. Accordingly, Staff concludes that in considering the adverse impacts and possible dangers associated with the proposed structure, the proposed project is neither reasonable nor necessary.

Parenthetically, any changes to the structure as proposed, such as adding a device to raise and lower a dinghy or the installation of additional pilings in which to tie a dinghy once placed in the water, would require additional permits from the Department. Staff contends that if the Applicant intends subsequently to include any such modifications to the proposed structure, those modifications should have been proposed as part of the instant application.

III. Other Standards

- Precedent Setting Effect

DEC Staff contends that the Commissioner must consider the mandates of ECL §3-0301(1)(b), which requires the Department to consider the cumulative impacts of a proposed project and its precedent setting nature. Citing ECL §3-0301(1)(b), the Commissioner held in *Matter of Leibner*, that "the cumulative impact of permitting decisions for structures like the one proposed [a dock] is a reasonable factor for Staff to consider." Decision of the Commissioner, DEC Case No. 1-4728-02263/00005, (March 16, 2000; WL 542851) *vacated on appeal on other grounds* 291 AD2d 558 (2nd Dept.) *lv. denied*, 98 NY2d 606 (2002).

Additionally, Staff contends that pursuant to ECL §1-0101, the Department must promote patterns of development which minimize adverse impacts on the environment. With respect to this permit review, courts generally "give a great deal of deference to the determinations of the Department under the Act where based on scientific testimony as to the environmental value of the wetland, the prospect of injury to it, and possibility of alternatives to altering it." (Weinberg, Practice Commentaries, McKinney's Laws of New York, Book 17½, ECL §25-0404 at pages 441-442).

Here, based upon the testimony of Mr. Penny and Mr. Hamilton, Department Staff has concluded that the granting of this permit application will have a precedent setting effect, resulting in significant adverse impacts to the Lake Montauk wetlands system. Additionally, such a determination would not promote patterns of development which minimize adverse impacts on the environment.

The Applicant counters that Staff's concerns that permitting Applicant to construct a dock would cause a precedential effect leading to many more applications to construct docks on the Lake, is overstated. The Applicant contends that the granting of Applicant's permit would not bind the DEC to grant every future application for a dock in Lake Montauk. Instead, the Applicant continues, even if the DEC grants a permit to Applicant it would still be entitled to take into account, in considering future permit applications, the various relevant statutory and regulatory factors discussed in this case.

In the Applicant's view, the precedent for residential docks in Lake Montauk already has been set because the Department has issued a wetlands permit to the Kalikow family for a residential dock on Star Island, in the northern one-third of Lake Montauk. In addition, a commercial dock already exists approximately 1,200 to 1,500 feet from the proposed dock. However, both witnesses presented by Staff addressed the precedential effect of granting this permit application. Mr. Penny testified that the Applicant's proposal, if granted, would be precedent-setting because approximately 75 other residential parcels in the immediate area of the Applicant's parcel, that currently do not have docks, would likely seek to install them. Mr. Penny also testified that cumulative impacts would result from an increase in the number of docks being constructed as well as from their use.

Mr. Hamilton stated that the shoreline of Lake Montauk has been managed for many years as a natural, undisturbed shoreline. Staff concludes that, from a cumulative standpoint, if all of the approximately 200 waterfront owners on Lake Montauk sought to install a dock at their properties, that would ruin the aesthetic and open space values of Lake Montauk, and would have a substantial adverse impact on these highly productive tidal wetlands.

Therefore, it is reasonable to conclude that the cumulative impacts of this and possible future docks along the southern shoreline of Lake Montauk will eventually contribute to adverse impacts on wetland values. These adverse impacts include impacts

to aesthetics and open space, degradation of local water quality and impacts to natural benthic communities and other communities through disturbance and degradation of habitats, shading of submerged aquatic vegetation and other adverse impacts.

IV. The Riparian Rights Doctrine and the Public Trust Doctrine.

The common law doctrines of riparian rights and public trust have been asserted, respectively, by the Applicant and DEC Staff. Briefly, the riparian rights doctrine holds that the landowner adjacent to a navigable water body of the state, has certain rights including the right of access to the water body and consequently a right of "wharfing out", *i.e.*, of constructing a dock or structure by which to gain access to the water. Historically, this common law doctrine encouraged the use of waterways for commerce, at a time when rivers were the highways of commerce. The Applicant asserts the riparian right of wharfing out to support its contention that its application for environmental permits should be granted. The Applicant concludes that the riparian right of wharfing out is a type of special permission or license from the people of the State of New York to shorefront property owners to use public waters, to build docks on public waters, and to have access to public waters.

On the other hand, Staff asserts that the public's common law right to access and use the shoreline is long established under the public trust doctrine. Briefly, the public trust doctrine stands for the proposition that the foreshore, or land between high and low watermark, is subject, first, to the *jus publicum*, the right of navigation, and when the tide is out, the right of access to the water for fishing, bathing, and other lawful purposes to which the right of passage over the beach may be necessary and incident. See *Tiffany v. Town of Oyster Bay*, 234 N.Y. 15 [1922]. Staff contends that under the public trust doctrine, members of the public may walk along the foreshore, may sunbathe on it, may beach a boat there and even may traverse it with a baby carriage. Staff concludes that the public trust doctrine and, more importantly, the Tidal Wetlands Act supersedes the Applicant's common law riparian rights and public policy arguments.

The New York Court of Appeals issued an important decision on riparian rights two years ago, cited by both Staff and the Applicant for their respective positions. *Town of Oyster Bay v. Commander Oil Corp.*, 96 N.Y.2d 566, 734 N.Y.S.2d 108 (2001). The specific issue in *Commander Oil* was the riparian owner's right to dredge underwater lands that had become shallower due to

sedimentation, to allow continued access to navigable waters. The Town of Oyster Bay is the owner of the disputed underwater lands and was opposed to the dredging. Deciding in favor of *Commander Oil*, Court held that a riparian owner may dredge if the dredging is necessary to preserve reasonable access to navigable water and does not unreasonably interfere with the rights of the underwater owner. *Id.* at 568. The Court's determination in *Commander Oil* is of little direct relevance to this permit application review, since it does not address the riparian right of wharfing out (additionally, I note that in *Commander Oil*, DEC was not opposed to the project, and in fact granted a permit authorizing the dredging [*Commander Oil*, 96 NY2d at 569]).

However, in *Commander Oil*, the Court did articulate important principles of the two common law doctrines that are applicable to the present matter. The Court stated that the riparian owner's right of access is not absolute, but qualified by other rights in the owner of the submerged land; the riparian owner's rights cannot be enlarged at will or according to his convenience or necessity. *Commander Oil* at 572 (citing *Hedges v West Shore R.R. Co.*, 150 NY 150, 158 [1896]).

The question before the Court in *Commander Oil* was whether *Commander Oil*, as a riparian property owner, had the right to conduct maintenance dredging in order to assure access to navigable waters from a shoreline facility for its barges. In response to this question, the Court held, "[i]n sum, well over a century of common law adjudication has established the riparian owner's right to reasonable access, and nothing in these cases would preclude *Commander* from dredging to preserve such access, if the court was satisfied that dredging was necessary... [but]... We underscore that in reversing, we do not hold that, as a riparian owner, *Commander* has a general right to dredge or a particular right to dredge to maintain the prior depth of the basins." *Id.* at 573.

The Court emphasized that a "riparian owner's right is not to maintain the foreshore in any fixed condition, but rather to enjoy *reasonable access* to navigable water [emphasis supplied]." *Id.* at 574-575.

A riparian owner's right of access is not absolute, but is qualified. In this case, the common law riparian rights are qualified by the requirements of ECL Articles 15 and 25 and regulations promulgated pursuant thereto. By analogy to *Commander Oil*, then, the Applicant too, as a riparian owner, is entitled only to reasonable access to the navigable waters, not

any fixed condition or unfettered access such as an absolute right to construct the proposed dock structure.⁷

To the extent that riparian rights are privileges as the Applicant acknowledges, those privileges historically were granted by the sovereign, now by the State. With the Legislature's enactment of the Tidal Wetlands Act (L.1973, c. 790), the prominence of the riparian right of wharfing out, or the public trust doctrine in reviewing an application for environmental permits is greatly diminished. Instead, ECL Articles 15 and 25 (and related regulations), as expressions of the state's police powers, codify many of the rights, privileges or interests first articulated in these common law doctrines.⁸

ECL §25-0102 provides that, "it is . . . the public policy of this state to preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to the reasonable economic and social development of this state." The 1973 legislative findings to the Tidal Wetlands Act elaborate further:

"The legislature hereby finds and declares that tidal wetlands constitute one of the most vital and productive areas of our natural world, and that their protection and preservation are essential. . . . The legislature further finds that vast acreage in the tidal wetlands in the state of New York has already been irreparably lost or despoiled as a result of

⁷ In *Commander Oil*, environmental concerns raised by the Town of Oyster Bay were procedurally precluded from consideration on remittal. *Commander Oil* at 575. Therefore, the Court in *Commander Oil* did not address environmental issues, which implicate the police powers of the State. In the instant case, those environmental concerns are directly at issue.

⁸ In *Stutchin v. Town of Huntington*, 71 F.Supp.2d 76 (EDNY, Sept. 1999), the issue was whether the plaintiff could be denied a dock as a riparian land owner. The court held that the rights of riparian owners must yield to the State's legitimate exercise of police power. Specifically, the Court stated, the right of access for navigation, and the right to make a landing, wharf, or pier for one's own use, or for the use of the public, are subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, whatsoever these may be. *Stutchin* at 101 [citations omitted].

unregulated dredging, dumping, filling, excavating, polluting, and like activities; that the remaining tidal wetlands are in imminent jeopardy of being lost or despoiled by these and other activities; that if the current rate of loss continues, most of the state's tidal wetlands will be entirely lost before the end of this century; and that presently many creeks and tidal wetlands are so polluted that shellfish harvesting is banned. Accordingly, the legislature finds that it is in the interest of the state, consistent with the reasonable economic and social development thereof, to preserve as much as possible of these remaining wetlands in their present natural state and to abate and remove the sources of their pollution." McKinney's ECL §25-0101, legislative findings, Section 1 of L. 1973, c. 790 (eff. Sept. 1, 1973).

Therefore, ECL Articles 15 and 25 and 6 NYCRR Parts 608 and 661, as enacted by the legislature in an exercise of the state's police powers, provide the relevant permitting standards applicable to this permit application. In my view as pertains to the interests asserted in this case, the rights, privileges and interests articulated in the common law doctrines of riparian rights and public trust each are represented in these regulatory standards, which have been discussed in this Report.

Testimony in the record suggests that the Applicant owns some of the underwater land seaward of his home and more specifically that he owns all of the underwater land above which the proposed structure would be installed. However, no other evidence in the hearing record supports this testimony. Staff correctly asserts that because ownership of this underwater land was not established during the hearing, ownership must be construed against the Applicant. In any event in this case, ownership of the underwater land is not determinative of the issue of whether the proposed dock is necessary to afford the Applicant reasonable access to navigable waters.

In this instance, the Applicant currently enjoys reasonable access to the navigable waters of Lake Montauk via a dinghy launched from the shoreline. Therefore, the proposed dock is not necessary to provide the Applicant with reasonable access to the navigable waters. Instead, the Applicant and his family, as riparian owners, have not been " 'denied their riparian right of access to the navigable portions of the bay'; rather they merely have had their 'mode of access...limited to a dinghy launched from the foreshore of their property.' " *Stutchin v Town of*

Huntington, 71 F.Supp.2d 76 at 102, quoting *Montero v Babbitt*, 921 F.Supp. 134, 139 [EDNY 1996].

Staff urges that an appropriate balance of interests would allow the Applicant reasonable water access as a waterfront property owner but avoid impacts to the wetland as an important biological resource. That balancing, Staff argues, requires the Applicant to maintain his dinghy on the beach or on a rack system above high tide. Staff correctly concludes that since the Applicant intends to row to his mooring seaward of his home (as he has done and continues to do), rowing from the beach or from a dinghy dock would make no significant difference.

Conclusions of Law

1. The site is subject to regulation under the Department's Tidal Wetlands and Protection of Waters programs. In the State of New York, tidal wetlands are afforded substantial protection. In the legislative notes to ECL Article 25, the Tidal Wetlands Act, the New York State Legislature has articulated the value of the state's tidal wetland resources. L.1973, c.790, Section 1 (Legislative Findings); McKinney's Consolidated Laws, ECL §25-0101 (Historical and Statutory Notes).

2. The one-time September 17, 2002 site visit by Mr. Hampson was reflective only of a qualitative "snapshot characterization" of site conditions, not a quantitative assessment. The Hampson site visit cannot be relied upon as a quantitative evaluation of the involved wetlands values.

3. The Applicant's dinghy dock proposal reasonably cannot serve the purpose for which it is intended.

4. The installation of dozens of pilings required for this proposed project constitute "fill" as that term is defined in 6 NYCRR 608.1(g). In addition, the hydraulic jetting method used for installation of pilings such as these pilings is excavation. See *Matter of Joseph Berardino*, Decision of the Commissioner, DEC Case No. 1-4738-00605/00004 (April 19, 1999).

5. Pursuant to 6 NYCRR 661.5(b)(30), the filling of shoals, bars and mudflats is a "Presumptively Incompatible Use".

6. In considering the adverse environmental impacts and possible dangers associated with the proposed structure, the proposed project is neither reasonable nor necessary. The Applicant already enjoys reasonable access to the navigable

waters of Lake Montauk; the proposed project would merely alter his mode of access.

7. The proposed project is not in the public interest in that it is not compatible with public health, safety and welfare. The project would have an adverse impact on the present and potential values of existing tidal wetlands, which are natural resources of the State.

8. The proposed project will result in adverse impacts to wetlands values, including adverse impacts to recreational and commercial shellfisheries and finfish habitat(6 NYCRR 661.9(b)(1)(ii)).

9. In balancing the preservation and protection of the wetlands with reasonable economic development of the state, the proposed project reasonably would not contribute to the economic development of the state. Instead, only the Applicant would benefit socially or economically from installation of the dock. (The contribution to the state's economy from the contractor to install the dock would be minimal.)

10. The record in this case shows that the proposed project is not compatible with the preservation, protection or enhancement of the present and potential uses of this tidal wetlands. The proposed project will result in despoliation and destruction of tidal wetland values.

11. The proposed project is not in the public interest in that it will cause unreasonable, uncontrolled and unnecessary damage to the present and potential values of existing tidal wetlands, which are natural resources of the State.

12. Construction of the dock would be precedent setting, because no other residential dock structures exist in the southern two-thirds of Lake Montauk. Reasonably, approval of this dock would encourage other nearby property owners to apply for dock structures in this environmentally sensitive wetlands area.

13. From a cumulative standpoint, if even some of the waterfront owners on Lake Montauk sought to install a dock at their properties, the aesthetic and open space values of Lake Montauk would be ruined. Such construction would have a substantial adverse impact on these highly productive tidal wetlands. The cumulative impacts of this and future docks along the southern shoreline of Lake Montauk will eventually contribute to adverse impacts on wetland values.

14. In addition, denial of this permit application will promote patterns of development that minimize adverse impacts on the environment.

15. Because the proposed project does not meet the requirements for tidal wetlands and protection of waters permits, the project is not in compliance with the requirements of 6 NYCRR 608.9(a)(6), for a water quality certification. Accordingly, the certification of water quality required pursuant to 6 NYCRR 608.9 cannot be made.

16. A riparian owner's right is not to maintain the foreshore in any fixed condition, but rather to enjoy reasonable access to navigable waters.

17. A riparian owner's right of access is not absolute, but is qualified. In this instance, the Applicant's riparian rights are qualified by the requirements of the Tidal Wetlands Act and regulations promulgated pursuant thereto. The Tidal Wetlands Act, as an expression of the state's police powers, codifies many of the rights, privileges or interests first articulated in the riparian rights and public trust common law doctrines.

18. Therefore, ECL Articles 15 and 25 and 6 NYCRR Parts 608 and 661, as enacted by the legislature in an exercise of the state's police powers, provide the relevant permitting standards applicable to this permit application.

19. The Applicant currently has reasonable access to the navigable waters of Lake Montauk via a dinghy launched from the shoreline. Therefore, insofar as the common law doctrines of riparian rights and public trust are applicable to this case, the proposed dock structure is not necessary to provide the Applicant with reasonable access to the navigable waters. Instead, the Applicant and his family, as riparian owners, have not been "denied their riparian right of access to the navigable portions of the bay"; rather they merely have had their 'mode of access . . . limited to a dinghy launched from the foreshore of their property.' " *Stutchin v Town of Huntington*, 71 F.Supp.2d 76 at 102, quoting *Montero v Babbitt*, 921 F.Supp. 134, 139 (EDNY 1996).

20. In sum, the Applicant has failed to meet his burden of demonstrating that the proposed project is compatible with the spirit and intent of the pertinent provisions of ECL Articles 15 and 25 and regulations issued pursuant thereto. The Applicant has not demonstrated that public safety and welfare

would be secured, that no undue adverse impact would occur on the present or potential value of the tidal wetlands were this dock project to be granted, nor that the proposed project is reasonable and necessary. The project does not meet the requirements for a Tidal Wetlands permit, Protection of Waters permit or Water Quality Certification.

Recommendations

After a review of the entire record, and based upon the foregoing findings of fact and conclusions of law, it is recommended that the Commissioner should deny the application of Michael Matthews for a tidal wetlands permit, Protection of Waters permit and Water Quality Certification. Department Staff's tentative determination to deny this application for a tidal wetlands permit and related permits should be adopted by the Commissioner as the Department's final determination in this matter.