

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 Catwalk, Ramp and Floating Dock 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 -

**99 LYNN AVENUE, LLC,**

Applicant.

DEC No. 1-4736-06478/00003

DECISION OF THE ASSISTANT COMMISSIONER

July 18, 2008

DECISION OF THE ASSISTANT COMMISSIONER<sup>1</sup>

Applicant 99 Lynn Avenue, LLC filed an application for a tidal wetlands permit pursuant to article 25 of the Environmental Conservation Law ("ECL") and part 661 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") to construct a catwalk, ramp and floating dock into the regulated tidal wetland area of Shinnecock Bay. These structures would extend into Shinnecock Bay from property that applicant owns at 99 Lynn Avenue, Hampton Bays (Town of Southampton, Suffolk County), New York. Staff of the New York State Department of Environmental Conservation ("Department") made a determination to deny applicant's application.

The attached hearing report of Administrative Law Judge ("ALJ") Daniel P. O'Connell, which confirms Department staff's determination and recommends denial of the application, is hereby adopted as my decision in this matter, subject to the following comments.

As discussed in the ALJ's hearing report, applicant's proposed project would, if approved, require two Department permits: a tidal wetlands permit and a protection of waters permit. With respect to the tidal wetlands permit,<sup>2</sup> the regulated uses associated with the proposal were identified from the chart set forth at 6 NYCRR 661.5(b) ("tidal wetlands use chart"). The regulated uses include the construction of an open pile catwalk and/or dock (use no. 14), the placement of piles supporting the catwalk, ramp and floating dock (use no. 57), and the construction of a dock less than 200 square feet in area (use no. 16) (see Hearing Report, at 13-14).

The construction of an open pile catwalk and/or dock not greater than four feet in width, as proposed by applicant, is classified as a "generally compatible use" in a regulated tidal

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<sup>1</sup> By memorandum dated July 15, 2008, Commissioner Alexander B. Grannis delegated decision making authority in this proceeding to Assistant Commissioner Louis A. Alexander. A copy of the memorandum is being forwarded to the parties together with this Decision.

<sup>2</sup> The New York State Legislature has declared it to be the public policy of the State to preserve and protect tidal wetlands (see ECL section 25-0102). The Department's regulations contain the standards to implement this legislative policy (see 6 NYCRR part 661).

wetland (see 6 NYCRR 661.5[b][14]). A "generally compatible use" is nevertheless subject to the requirements of an ECL article 25/6 NYCRR part 661 tidal wetlands permit (see 6 NYCRR 661.5[a][2]). Although the construction of a dock less than 200 square feet in area (use no. 16) is identified in the tidal wetlands use chart as a use not requiring a permit, where, as here, the dock is associated with other regulated activities, it is subject to the permit review process.

Because the installation of several pilings required for the proposed project constitute "excavation" and "fill" within navigable waters of the State, the project also requires a protection of waters permit pursuant to ECL 15-0505 and 6 NYCRR 608.5 (see, e.g., Matter of Michael Matthews, Decision of the Commissioner, May 20, 2004 at 3; Matter of Joseph Berardino, Decision of the Commissioner, April 19, 1999, at 2).

In addition to the two Department permits, a water quality certification is also required pursuant to 6 NYCRR 608.9 and section 401 of the federal Water Pollution Control Act (33 USC § 1341).

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 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]).

Review of the record demonstrates that applicant failed to establish by a preponderance of the evidence that all applicable statutory and regulatory requirements would be met by its project. The record reveals that applicant's project, both during and after construction, would have an undue adverse impact on numerous present and potential tidal wetland values, including marine food production, wildlife habitat, cleansing ecosystems, and absorption of silt and organic material. 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 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 (see 6 NYCRR 661.9[b][1][i]) has not been satisfied.

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 (see 6 NYCRR 608.8[c]) has not been satisfied on this record.

Furthermore, the requirement that the proposed activity be compatible with public health and welfare, which is applicable to both the tidal wetlands permit and protection of waters permit, has not been met (see 6 NYCRR 661.9[b][1][ii]; 6 NYCRR 608.8[b]). Specifically, the record indicates the risks associated with docking a motorized boat in the shallow water in the area of the proposed dock. The record also demonstrates that the proposed dock is neither reasonable nor necessary (see 6 NYCRR 661.9[b][1][iii]; 6 NYCRR 608.8[a]). Applicant already enjoys reasonable access to navigable waters. In addition, Department staff offered reasonable alternatives that would provide access without the multiple adverse environmental impacts associated with applicant's proposal.

Finally, the precedential effect that granting applicant's application would have on the vicinity is not only appropriately considered (see, e.g., 6 NYCRR 661.9[b][1][i] & ECL 3-0301[1][b]), but weighs heavily against permit approval in this case and on this record.

Applicant, in its closing brief, asserted for the first time that, as the owner of upland riparian property, it enjoys a common law right of reasonable access to navigable waters, including the right to build a dock or "wharf out." Applicant contended that this right must be taken into consideration in the permit application determination, and that this right mandates approval of its application. Applicant also argued that the denial of its riparian right to build a dock would constitute a "taking" of its property.

Applicant's argument based on riparian rights is untimely. Though provided the opportunity at the issues conference, applicant did not raise any issue concerning its riparian rights as such rights relate to its proposed application. As a result, applicant waived the right to have that issue considered in this proceeding (see Matter of 4C's Develop. Corp., Decision of the Deputy Commissioner, Jan. 22, 1998, at 2-3 [attempt to raise a new issue in closing briefs rejected as untimely]; see also Matter of City of Rensselaer v Duncan, 266 AD2d 657, 661 [3d Dept 1999] [issue first raised at conclusion of administrative adjudicatory proceeding not preserved for judicial review]).

In sum, the record in this proceeding demonstrates that applicant failed to carry its burden of establishing that its proposed project would comply with all applicable laws and regulations administered by the Department.<sup>3</sup> Accordingly, the determination of Department staff to deny applicant 99 Lynn Avenue, LLC's application is confirmed, and the application is denied.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_ /s/  
Louis A. Alexander  
Assistant Commissioner

Dated: July 18, 2008  
Albany, New York

To: Service List

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<sup>3</sup> 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 of compliance with state statutes, regulations, and criteria otherwise applicable to the activity]).

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Pollution Control Act, Section 401, New York  
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**99 LYNN AVENUE, LLC,**

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DEC No. 1-4736-06478/00003

HEARING REPORT

- by -

\_\_\_\_\_  
/s/  
Daniel P. O'Connell  
Administrative Law Judge

## Proceedings

With a cover letter dated November 2, 2005, Land Use Ecological Services, Inc., on behalf of 99 Lynn Avenue, LLC (Applicant) filed an application (Application No. 1-4736-06478/00003) for a tidal wetlands permit with Staff from the Department of Environmental Conservation Region 1 Office. Applicant owns property at 99 Lynn Avenue, Hampton Bays (Town of Southampton, Suffolk County), New York. The application was filed pursuant to Environmental Conservation Law (ECL) article 25 (Tidal Wetlands), and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) part 661 (Tidal Wetlands - Land Use Regulations). Applicant's application also included a request for a Water Quality Certification pursuant to Section 401 of the federal Clean Water Act (33 USC § 1341), as well as ECL article 15, title 5, and 6 NYCRR 608.9.

From the pre-existing bulkhead on the property, Applicant proposes to construct a set of steps (4 ft. x 5 ft.) down to 26 inches above average high water (AHW), then a 4 ft. x 93 ft. catwalk into Shinnecock Bay. From the catwalk, Applicant proposes to construct a seasonal ramp (3 ft. x 20 ft.), which would extend to a seasonal floating dock (6 ft. x 20 ft.; 120 square feet) (Exhibit 11). The total length of the proposed structure would be about 140 feet. As part of the review required by the State Environmental Quality Review Act (ECL Article 8 [SEQRA]), Department staff determined that Applicant's proposal is a Type II action (see 6 NYCRR 617.5[c][10]). Upon review, Staff denied the permit application by letter dated May 9, 2006.

Subsequently, the Office of Hearings and Mediation Services received the hearing request on September 25, 2006, and Administrative Law Judge (ALJ) Daniel P. O'Connell was assigned to the matter. The Notice of Public Hearing dated April 12, 2007 (the Hearing Notice) appeared in the Department's *Environmental Notice Bulletin* on April 18, 2007. Applicant duly published the Hearing Notice in the *Southampton Press, Western Edition* on April 19, 2007. The Hearing Notice scheduled the public hearing for May 15, 2007.

I. Legislative Hearing and Issues Conference.

As scheduled in the Hearing Notice, the public hearing commenced at 10:00 a.m. on May 15, 2007 at the Hampton Bays Public Library with a legislative hearing session to receive unsworn statements from the public. No one appeared to comment about the subject permit application.

Following the legislative hearing session, the issues conference (see 6 NYCRR 624.4[b]) immediately convened. As provided in the Hearing Notice, requests for full party status were due by May 9, 2007. No petitions were filed by the due date. In addition, no one appeared at the issues conference to present a late filed petition for party status as provided for by 6 NYCRR 624.5(c). Consequently, the only parties to the proceeding are Applicant and Department staff (see 6 NYCRR 624.5[a]).

During the issues conference, the parties discussed the regulated uses associated with Applicant's proposal that are identified in the chart at 6 NYCRR 661.5(b). I ruled that the issues for adjudication would be the permit issuance criteria for a tidal wetlands permit at 6 NYCRR 661.9(b)(1)(i, ii, and iii) (Tr. pp. 29-30), as well as the permit standards for the excavation or placement of fill in navigable waters at 6 NYCRR 608.8 (Tr. pp. 31-32).

II. Site Visit.

On May 15, 2007, the ALJ visited Applicant's property at about 1:00 p.m. with the parties and their representatives. The tide was ebbing during the site visit (see Exhibit 23-C).

III. Adjudicatory Hearing.

After the site visit, the parties returned to the Hampton Bays Public Library to commence the adjudicatory hearing. The hearing continued the next day, May 16, 2007, at the same location. On June 8, 2007, the adjudicatory hearing reconvened at the Department's Region 1 Offices on the SUNY Stony Brook Campus, and concluded on that date.

For the hearing, Applicant was represented by Anthony Palumbo, Esq. (Goggins & Palumbo, Mattituck, New York). Applicant's witnesses were Charles W. Bowman, President, Land Use Ecological Services, Inc.; William Bowman, Ph.D., Senior Scientist, Land Use Ecological Services, Inc.; Kelly (Cantara)



Risotto, M.A., Senior Ecologist, Land Use Ecological Services, Inc.; and Alfred Caiola, the managing member of 99 Lynn Avenue, LLC. Kevin P. Walsh, Esq. (Certilman, Balin, Adler & Hyman, LLP, Hauppauge, New York) prepared and filed Applicant's closing brief.

Department staff was represented by Gail Rowan, Esq., Assistant Regional Attorney. Staff's witnesses were Christian Nyako, Ph.D., Marine Biologist I, Office of Marine Habitat Protection; and Matthew Richards, Biologist, Office of Marine Habitat Protection.

Upon review of the stenographic record, Department staff moved to correct the transcript and proposed corrections. The stenographer reviewed the proposed corrections and, subsequently, issued a revised transcript in electronic form. Department staff proposed additional corrections to the revised transcript. Applicant did not object to the additional corrections proposed by Department which, in a letter dated March 10, 2008, I accepted. Staff's proposed changes to the revised transcript are hereby incorporated by reference. Upon the timely receipt of the parties' closing briefs, the hearing record closed on May 14, 2008.

### **Findings of Fact**

#### **I. Location and Description of the Site and the Proposal.**

1. 99 Lynn Avenue, LLC owns the real property located at 99 and 105 Lynn Avenue in Hampton Bays (Town of Southampton, Suffolk County), New York. The two properties are adjacent to each other. Alfred Caiola is the sole managing member of 99 Lynn Avenue, LLC. The other members of the limited liability corporation are Mr. Caiola's brother and sister. (Tr. pp. 106-107.)
2. The upland portion of the property located at 99 Lynn Avenue is developed with, among other things, a house, tennis courts, a detached garage and a pool. (Exhibit 6.)
3. The eastern boundary of 99 and 105 Lynn Avenue borders Shinnecock Bay, which is a tidal wetland (Exhibit 14, Tidal Wetlands Map No. 710526). Prior to November 2005, Applicant requested and obtained a tidal wetlands permit from the Department to replace an existing, but deteriorated,

bulkhead along the eastern boundary of 99 and 105 Lynn Avenue. (Tr. p. 194.)

4. From the newly reconstructed bulkhead on the property, Applicant proposes to construct a set of steps (4 ft. x 5 ft.) down to 26 inches above average high water (AHW), then a 4 ft. x 93 ft. catwalk into Shinnecock Bay. From the catwalk, Applicant proposes to construct a seasonal ramp (3 ft. x 20 ft.), which would extend to a seasonal floating dock (6 ft. x 20 ft. [120 square feet]). The overall length of the proposed structure would be about 140 feet. The proposed structure would be supported with 26 pilings; each piling would be six inches in diameter. (Exhibit 11.)

## II. Other Approvals.

5. With a cover letter dated April 27, 2007, Applicant received a permit from the US Army Corps of Engineers, Eastern Permit Section, to construct the proposal as described in Finding of Fact No. 4. The permit is effective for three years from April 27, 2007. The permit from the US Army Corps of Engineers requires Applicant to obtain all other necessary approvals before undertaking the authorized activities. (Exhibit 2.)
6. Applicant's consultants received a "General Concurrence" dated March 9, 2006 from the New York State Department of State (DOS), Division of Coastal Resources. The March 9, 2006 concurrence from the Division of Coastal Resources states in part that Applicant's "proposal meets the Department's general consistency concurrence criteria." The March 9, 2006 concurrence requires Applicant to obtain all other necessary approvals. (Exhibit 3.)
7. Subsequently, DOS Division of Coastal Resources sent a letter dated June 7, 2007 to Applicant's consultants. The letter states that the Division of Coastal Resources recently received information that eelgrass (*Zostera marina*) was present in and near the area where Applicant would construct the proposed catwalk, ramp and floating dock. The letter concludes that the eelgrass beds would be adversely impacted by the construction of the proposed structure and by the anticipated motorized boat traffic. As a result, the June 7, 2007 letter advises Applicant that the proposed activity would "be subject to a supplemental coordination and consistency review" pursuant to 15 CFR 930.66(a)(2) and (b). (Exhibit 25.) As of the date of the close of the

hearing record, the status of any further review by DOS Division of Coast Resources concerning Applicant's proposal is unknown.

8. Applicant obtained a permit (No. 9202) dated October 2, 2006 from the Board of Trustees for the Town of Southampton. The permit became void one year after the date of issue. Permit No. 9202 authorized Applicant to construct the proposed catwalk, ramp and floating dock as described above in Finding of Fact No. 4. The terms of the permit required Applicant to use "thru-flow deckboards." In addition, the seasonal dock structures were to be removed from the water by December 1 each year. Also, the permit limited the number of boats at the dock to two. The permit expressly stated that jet skis are considered to be boats. (Exhibit 4.)

### III. Shinnecock Bay.

9. The tidal wetlands associated with the 99 Lynn Avenue property are located within Shinnecock Bay, which is part of the Long Island South Shore Estuary Reserve. Shinnecock Bay is approximately 9,000 acres with extensive open water areas. Water depths in the bay are generally less than 10 feet below mean low water. Shinnecock Inlet connects Shinnecock Bay to the Atlantic Ocean. Shinnecock Inlet was formed by a breach through the barrier island during the hurricane of 1938. The inlet has been stabilized with stone jetties that were constructed in 1947 and 1954. Tidal fluctuations in Shinnecock Bay average approximately 0.7 feet, depending on the condition of the inlet, among other things. (Exhibit 21; Comprehensive Management Plan, Chapter 3.)
10. To the west, Shinnecock Bay is connected to Moriches Bay via the Quogue Canal. To the north, Shinnecock Bay is connected to Great Peconic Bay by the Shinnecock Canal. The direction of the flow of water through Shinnecock Canal is controlled so that water passes from Great Peconic Bay to Shinnecock Bay. (Exhibit 21.)
11. With respect to fish and wildlife values, Shinnecock Bay is one of three shallow, coastal bay areas on the south shore of Long Island, and represents one of the largest estuarine ecosystems in New York State. It is protected under the Long Island South Shore Estuary Reserve Act of 1993 (see Executive Law 46, Sections 960-970). Shinnecock Bay is used

as over-wintering habitat for waterfowl including scaup, brant, black ducks, red-breasted mergansers, buffleheads, goldeneye and others. In addition, this area provides habitat for marine finfish, shellfish and other wildlife. For example, the bay serves as a nursery and feeding area for bluefish, summer flounder<sup>4</sup>, winter flounder, windowpane flounder, scup, weakfish, tomcod, blue claw crab, as well as a number of forage fish species. Wildlife that use the fishery resource as their food source include harbor seals, least tern and common tern. The bay is also inhabited by hard clams, soft clams, bay scallops, and bank mussels. The bay's waters, including the subject site, are designated SA, and are certified for commercial shellfishing. (Exhibits 10 and 21; Comprehensive Management Plan, Chapter 3; Tr. pp. 210-212, 179.)

12. The tidal wetland areas of Shinnecock Bay located off shore from 99 and 105 Lynn Avenue are categorized as littoral zone (LZ), as well as coastal shoals, bars and mud flats (SM) (Exhibit 14, Tidal Wetlands Map No. 710526; Tr. pp. 85, 247). During low tide, coastal shoal areas may be exposed, or are covered by less than one foot of water. The coastal shoal areas extend about 20 feet seaward from the bulkhead. (Tr. pp. 85, 95.)

#### IV. Site Visits and Observations.

13. Applicant's consultants visited the site and the adjacent tidal wetlands on May 19 and 31, 2005; September 1, 2005; March 10, 2006; and May 8, 2007.
14. Department staff visited the site and the adjacent tidal wetlands on November 16, 2005, as well as on May 8 and 10, 2007.
15. On the dates noted above, the site visits occurred at or near the time of low tide (Exhibits 22 and 23). During some of those visits, Applicant's consultants and Department staff measured the water depth of the tidal wetlands seaward from the bulkhead to a distance of about 140 feet.
16. The water depth data collected by the parties are reported in Table 1, which is attached to this Hearing Report as Appendix A. At 140 feet seaward from the bulkhead, the

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<sup>4</sup>Summer flounder is also known as fluke (Tr. p. 364).

average water depth during low tide is 2.28 feet, based on the data collected during the site visits. The water depth at low tide ranges from 2.08 feet to 2.60 feet, based on this data. The data reported in Table 1 are incorporated by reference into these Findings of Fact.

17. The location of Applicant's proposed structure is part of a very large shallow area of Shinnecock Bay. Water deeper than 2.5 feet during low tide is more than 400 feet away. Consequently, any boat using the proposed catwalk, ramp and floating dock would have to travel over this large shallow area of Shinnecock Bay to go to deeper water. (Tr. pp. 370-371.)
18. In addition to measuring the water depth during low tide, Applicant's consultants and Department staff surveyed the area seaward of the bulkhead for wildlife and plant life. During various site visits, Applicant's consultants and Department staff observed, among many other things, eelgrass (*Zostera marina*) beds. (Exhibit 17-D; Tr. pp. 116, 208, 248, 264, 339, 362.)
19. Applicant's consultants mapped the eelgrass beds (see Exhibits 9 and 15). According to Applicant's consultants, the landward edges of the beds begin about 100 feet seaward from the bulkhead and extend toward the middle of Shinnecock Bay (Exhibits 9 and 15). Applicant's consultants selected the location of the proposed catwalk, ramp and floating dock to avoid the eelgrass beds (Tr. pp. 131, 164, 209-210, 232). Staff, however, observed eelgrass at about 70 feet from the bulkhead at the location of the proposed structure (Exhibit 18; Tr. pp. 269-273).
20. Eelgrass is a seed plant. Once established, the outward edges of beds may spread by extension of the rhizomes. During the season, it grows about six inches long depending on the water depths (Tr. pp. 165, 167). Eelgrass beds are important habitat for fish, invertebrates and other wildlife species. Eelgrass beds can be impacted by mechanical disturbances, water quality conditions related to nutrient concentrations, turbidity, and water temperature (Tr. p. 177).
21. In addition to eelgrass, other species of submerged aquatic vegetation (SAV) are present in the area where the proposed catwalk, ramp and floating dock would be located. Examples of species of SAV observed on the site include: rockweed

(*Fucus*), sea lettuce (*Ulva*) (Tr. p. 248), and hollow green weed (*Enteromorpha*) (Tr. pp. 264-266).

V. Potential Adverse Impacts.

22. The installation of the pilings would temporarily disturb the sediments, and continue to adversely impact the benthic community where the piles are located. (Tr. pp. 392, 456.)
23. Due to the shallow water depths, the catwalk, ramp and floating dock would shade the SAV that lies underneath the proposed structure, and kill the SAV due to a lack of sunlight despite the use of "thru-flow" deckboards. Thru-flow deckboards provide 40% open space. (Tr. p. 406.)
24. As it rises and falls with the tide cycle, the proposed floating dock would cause turbidity by re-suspending the bottom sediments in the water column, which could kill the plant life in the area. If, on occasion, the floating dock and boats tied to it rest on the bottom sediments, they would be compacted, which would harm the organisms living there. As a result, the benthic community would be forced to leave the area under the floating dock, or die. Higher level organisms in the food web that directly or indirectly feed on the submerged aquatic vegetation, algae and other organisms under the proposed catwalk, ramp and floating dock would lose these areas as habitat and as a food source. (Exhibit 21; Tr. pp. 384, 404, 499.)
25. The area of the proposed floating dock would be 120 square feet. The existing aquatic vegetation and algae that would be located under the proposed floating dock currently provide the following tidal wetland benefits: (1) marine food production; (2) wildlife habitat; and (3) absorb silt and organic material. If the existing SAV dies, these tidal wetland benefits would be eliminated. (Tr. pp. 402, 414-416.)
26. Motorized boats going to and from the proposed floating dock would also damage SAV that is growing in this area. These water craft create turbidity by stirring up the bottom sediments, both directly by the propeller contacting the material, or by the pressure of water from the propeller (called "propeller wash" or "prop-wash"). The increase in suspended sediments, if a regular occurrence, has the potential to suffocate the SAV and benthic organisms,

thereby adversely affecting the tidal wetland benefits associated with them. (Tr. pp. 178, 388.)

27. Submerged aquatic vegetation, such as eelgrass, may be uprooted and benthic communities could be disturbed by the propellers from motor boats. The risks associated with running boats aground, raise a safety concern for both the pilot and passengers. Such boating operations would effectively dredge a channel. This process is referred to as "prop dredging," and it causes the same adverse environmental impacts as other forms of dredging. (Tr. pp. 385, 469.)

VI. Other Docks in the Vicinity of the Site.

28. There are four existing fixed-timber docks in the vicinity of the proposed catwalk, ramp and floating dock. One is located north of the site and three are located south of the site (Exhibit 5). The northern fixed-timber dock is about 425 yards away. The fixed-timber docks located south of Applicant's property are, respectively, about 350 yards, 600 yards and 725 yards away.
29. On May 8, 2007, Applicant's consultants visited each of the four existing fixed-timber docks and measured the water depth at the seaward end of each structure. In all cases, Applicant's consultants stated, in general terms, that the water depth was two feet or less during the May 8, 2007 site visit. Applicant's consultants did not testify about the precise depth of the water, or offer any documentary evidence, such as field notes to corroborate their testimony. (Tr. pp. 183, 185, 188.)
30. Exhibit 17-I is a photograph of one of the four fixed-timber docks located near Applicant's property. It is not known whether the fixed-timber dock depicted in Exhibit 17-I is located to the north or the south of Applicant's property. Staff observed this fixed-timber dock during the May 8, 2007 site visit. This fixed-timber dock is in a dilapidated condition. (Tr. p. 267.)
31. One of the fixed-timber docks located south of Applicant's property is owned by John Perretti. Mr. Perretti's property is located at 18 Donellan Drive East in Hampton Bays. Department staff issued a tidal wetlands permit to Mr. Perretti on October 8, 1997, which authorized the construction of a 150 feet long fixed-timber dock supported

on piles in Shinnecock Bay. Staff modified the permit on April 15, 1998. (Exhibit 24.)

VII. Alternatives.

32. At the time of the hearing, Mr. Caiola kept his 38-foot Intrepid with three Mercury 275 Verado outboard motors at the Hampton Watercraft and Marina in Hampton Bays, New York (Tr. pp 108-109).
33. Potential alternatives to the proposed catwalk, ramp and floating dock include the following. Mr. Caiola could continue to use the Hampton Watercraft and Marina, or trailer his boats and use a public launch facility, maintained by the Town of Southampton, on the south side of Shinnecock Bay. At the site, Applicant could install a mooring and access it with a dingy. (Tr. pp. 423-424.)

**Discussion**

I. Official Notice.

Pursuant to 6 NYCRR 624.9(a)(6), the ALJ or the Commissioner may take official notice of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the Department of Environmental Conservation. During the proceeding, Department staff asked me to take official notice of the following: (1) 6 NYCRR Part 923 (Shinnecock Bay-Mecox Bay Drainage Basin); (2) the Long Island South Shore Estuary Reserve Act (Executive Law Article 46, §§ 960-970); (3) the Comprehensive Management Plan required by Executive Law Article 46, § 966; and (4) *Matter of John Perretti*, Decision and Order of the Commissioner, January 17, 2001. (Tr. pp. 342, 371, 427.) Applicant's counsel did not object (Tr. pp. 342, 372, 428).

The class and standard for the tidal salt waters of Shinnecock Bay are SA, pursuant to 6 NYCRR 923.4, Table 1. The best usage for Class SA saline surface waters are shellfishing for market purposes, primary and secondary contact recreation and fishing. Class SA waters are suitable for fish propagation and survival. (See 6 NYCRR 701.10.)

The Long Island South Shore Estuary Reserve Act (effective July 28, 1993) established a council to manage and protect the South Shore Estuary Reserve System (SSERS) as a single integrated



estuary. Shinnecock Bay is part of the SSERS. One of the purposes of the council is to develop a comprehensive management plan (see Executive Law Article 46, § 966) that State agencies and local governments would subsequently implement. DOS Division of Coast Resources has posted the comprehensive management plan on its website.<sup>5</sup>

Chapter 3 of the Comprehensive Management Plan notes that the tidal wetlands of the SSERS, which include Shinnecock Bay, are a significant source of primary productivity and provide critical foraging, nursery, and nesting habitat for many coastal species. Beds of submerged aquatic vegetation (SAV) occupy much of the SSERS's shallow tidal wetlands and phytoplankton communities contribute to the biological productivity of the SSERS. SAV beds, which consist of eelgrass, among other species, depend on good water quality, and occupy as much as 20% of SSERS's tidal waters. The eelgrass beds provide additional ecosystem benefits in terms of finfish and shellfish nursery habitat, as well as foraging areas for many fish, crabs, and bird species.

Hard clam and other shellfish provide important nutrient cycling and water filtration functions for the SSERS's waters, as well as substantial recreational and commercial values. The council has made the restoration of the SSERS's hard clam population a priority given the ecological and economic importance of this species to the south shore of Long Island. Also present in the SSERS are crustaceans, such as the blue crab. The blue crab species is a significant component of the food web and has the potential to be an increasingly important commercial and recreational species.

The SSERS has also long been recognized for its abundant shore and colonial waterfowl populations including a number of rare or endangered species. These include the piping plover, roseate tern, least tern, and others such as the common tern. The presence of these bird species are considered reliable indicators of the SSERS's health. Bird conservation management in the SSERS has also focused on the region's abundant waterfowl, such as geese and duck. The most numerous species observed in the SSERS include black duck (a species of concern), brant, scaup, and Canada goose. The SSERS is an important overwintering area. Midwinter aerial surveys show an average population for

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<sup>5</sup>[http://www.nyswaterfronts.com/Final\\_Draft\\_HTML/Main\\_Page.htm](http://www.nyswaterfronts.com/Final_Draft_HTML/Main_Page.htm)

all species of over 42,000 birds and peak counts of over 82,000 birds. As a result, the SSERS supports a substantial recreational base through hunting and birdwatching.

Finally, Chapter 3 of the Comprehensive Management Plan reports that another key community is the SSERS's finfish population, which provides commercial and recreational benefits. Valuable finfish species include winter and summer flounders, striped bass, bluefish, and blackfish.

In *Perretti (supra)*, the Commissioner considered whether to revoke the tidal wetlands permit issued to Mr. Perretti, which authorized the construction of a 150 feet long fixed-timber dock on piles in Shinnecock Bay. Department staff issued the permit to Mr. Perretti on October 8, 1997, and modified it on April 15, 1998. Mr. Perretti's property is located at 18 Donellan Drive East in Hampton Bays, which is south of Applicant's property.

In this administrative enforcement action, Staff requested an order from the Commissioner that would revoke Mr. Perretti's tidal wetlands permit, and require him to remove the fixed-timber dock. Staff asserted that the approved plans for the fixed-timber dock did not reflect the actual conditions at the site where it had been constructed. In addition, Staff alleged that Mr. Perretti did not comply with the terms and conditions of the permit.

After a hearing before an ALJ, the Commissioner concluded that Staff did not prove that Mr. Perretti provided false or inaccurate information concerning the depth of the water during low tide in the vicinity of where the fixed-timber dock had been built. However, the Commissioner concluded that Mr. Perretti did not comply with the terms of the permit when he installed 18 "ice pilings" to serve as a wave break. The Commissioner denied Staff's requests to revoke the permit and to order Mr. Perretti to remove the fixed-timber dock. Finally, the Commissioner directed Mr. Perretti to remove the ice pilings, however, because the permit did not authorize their installation.

During the hearing concerning the captioned matter, Mr. Richards, the Department staff Biologist, explained that the *Perretti* Decision underscores the importance of conducting site inspections to verify the information that applicants provide to the Department with their permit applications. Mr. Richards also said that Staff must carefully consider the potential adverse environmental impacts that may be associated with an application, including potential cumulative impacts. Mr. Richards observed

that once a structure is installed and adverse impacts subsequently result, those impacts cannot be corrected. According to Mr. Richards, the adverse impacts are permanent. (Tr. pp. 431-432.)

## II. Other Docks in the Vicinity of the Site.

There are four existing fixed-timber docks in the vicinity of Applicant's proposed catwalk, ramp and floating dock. One is located north of the site and three are located south of the site (Exhibit 5). Mr. Perretti's dock is one of the three fixed-timber docks located south of Applicant's property; however, it is not known which one of the three is the Perretti's.

Except for Mr. Perretti's fixed-timber dock, the precise length of each of the other existing fixed-timber docks is not part of this hearing record. Mr. Perretti's fixed-timber dock is 150 feet in length. In addition, the distance of these fixed-timber docks from Applicant's property is not known. However, these distances can reasonably be inferred from the hearing record, as described below.

Exhibit 6 is a survey of Applicant's property prepared by Raynor, Marcks and Carrington, Licensed Land Surveyors. The survey took place on May 14, 2003. The survey drawing was prepared on July 30, 2004, and provides the precise dimensions of the 99 Lynn Avenue property. The northern property line from Lynn Avenue to the bulkhead is 1182.90 feet and the southern property line is 1199.11 feet. The average length of the property is 1190.01 feet, which is about 400 yards (1190.01 feet/3 = 396.70 yards).

On Exhibit 5, the approximate width of 99 Lynn Avenue from Lynn Avenue to the shoreline of Shinnecock Bay is about 4 inches, which represents about 400 yards. Using this ratio (4 inches = 400 yards), it is possible to approximate the distance from 99 Lynn Avenue to the four existing fixed-timber docks. The northern fixed-timber dock is about 425 yards away. The fixed-timber docks located south of Applicant's property are, respectively, about 350 yards, 600 yards and 725 yards away.

## III. Issues for Adjudication.

As noted above, the parties discussed the regulated uses associated with Applicant's proposal that are identified in the chart at 6 NYCRR 661.5(b) during the issues conference. The catwalk was identified as Use No. 14, and is considered a

generally compatible use (GCp) that requires a tidal wetlands permit. The piles that would support the catwalk, the ramp and the floating dock were identified as Use No. 57, which applies to regulated activities not specified in the chart at 6 NYCRR 661.5(b). The proposed floating dock would be 120 square feet (6 ft. x 20 ft.), and was identified as Use No. 16. In coastal shoals and in the littoral zone, no permit is required (NPN) for a floating dock less than 200 square feet. However, the proposed floating dock is associated with other regulated uses and, pursuant to 6 NYCRR 661.7(a), may be regulated when, as here, the other elements of a proposal are regulated.

Given the water depth of Shinnecock Bay in the area where the proposed dock would be located, Staff claimed that the propeller from Applicant's motor boat would churn up the bottom sediments of the wetland - a condition referred to as "propeller - or prop-dredging." Consequently, Staff argued that the operation of Applicant's motor boat in this area should be characterized as a dredging activity (see 6 NYCRR 661.5[b][27]) that would be regulated. I denied Staff's request (Tr. pp. 30-33).<sup>6</sup> I ruled that the issues for adjudication would be the permit issuance criteria for a tidal wetlands permit at 6 NYCRR 661.9(b)(1)(i, ii, and iii) (Tr. pp. 29-30), as well as the permit standards for the excavation or placement of fill in navigable waters at 6 NYCRR 608.8 (Tr. pp. 31-32).

The need for Applicant to obtain a water quality certification pursuant to Section 401 of the federal Clean Water Act (33 USC § 1341), as well as ECL article 15, title 5, and 6 NYCRR 608.9 was discussed during the issues conference. Staff contended that Applicant was required to obtain a water quality certification, and Applicant disagreed. (Tr. pp. 20-21.)

Applicant argued that the certification was not needed from the Department because the US Army Corps of Engineers did not identify the proposal as a "major" project, but consider it to be a "minor" one, which obviated the need for a certification (Tr. p. 21). Applicant's consultant, however, could not identify the criteria that the US Army Corps of Engineers uses to determine whether a particular proposal is considered major or minor (Tr. p. 21). Staff pointed out that the joint application filed by Applicant included a request for a water quality certification

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<sup>6</sup>During the issues conference, Staff reserved the right to appeal the ruling (Tr. p. 33). In its closing brief, however, Staff did not appeal from this ruling.

(Tr. p. 23). I ruled that Applicant would be required to obtain a water quality certification, and whether Applicant could meet the standards for a water quality certification would be an issue for adjudication (Tr. p. 31). No appeal was filed in the closing briefs.

A. Undue Adverse Impacts.

For a permit on any tidal wetland, the first standard is whether the proposed activity is compatible with the public policy set forth in ECL article 25, which is to preserve and protect tidal wetlands by preventing their despoliation and destruction. In applying this permitting standard it is necessary to evaluate whether the proposed activity would have an "undue adverse impact on the present or potential value of the affected tidal wetland." Recognized wetland values include marine food production; wildlife habitat; flood, hurricane and storm control; cleansing ecosystems; absorption of silt and organic material; as well as recreation, education, research or open space, and aesthetic appreciation. The potential undue adverse impacts must be balanced with the social and economic benefits that may be derived from the proposed activity. (See 6 NYCRR 661.9[b][1][i].)

The parties do not dispute the tidal wetland values and benefits of Shinnecock Bay in general, or those of the wetlands located adjacent to Applicant's property, in particular. Applicant's consultants and Department staff visited Applicant's property at various times. During their testimony, the parties' respective witnesses identified the wildlife and plant life that they saw during their particular site visits. Their observations were similar. In addition, the parties' respective witnesses recognized that the tidal wetlands would provide a suitable habitat for other plant and animal species that were not specifically observed during the various site visits. For example, Applicant's consultants prepared Exhibit 10, which is entitled, "Biological and Essential Fish Habitat Assessment." Exhibit 10 identifies several plant and animal species that are likely to be found in parts of Shinnecock Bay where Applicant's proposed structure would be located. The plant and animal species identified in Exhibit 10 are also discussed in the Comprehensive Management Plan for the South Shore Estuary System, as well as in Exhibit 21. Exhibit 21 is a coastal fish and wildlife habitat rating form for Shinnecock Bay, which Staff offered.

Moreover, the parties essentially agree what the potential impacts from Applicant's proposal would be. For example, Applicant's consultants acknowledged that the installation of the piles would suspend sediments in the water column and, thereby, increase turbidity. Applicant's consultants also agreed with Department staff that the proposed catwalk, ramp and floating dock would shade a portion of the tidal wetland, which would impact plant growth. Finally, Applicant's representative, Mr. Caiola, recognized that he could not dock his 38-foot Intrepid at the proposed structure because the water depth during low tide would be too shallow (Tr. pp. 108-110).

The dispute between the parties centers on whether these potential impacts are unduly adverse so as to contravene the public policy to preserve and protect tidal wetlands. On the one hand, Applicant argues that some impacts, such as the installation of the piles, would be temporary, and therefore not unduly adverse. In addition, Applicant contends that the other potential impacts are not unduly adverse given the size and scope of the proposed structure compared to the size of Shinnecock Bay. On the other hand, Staff maintains that the potential impacts are unduly adverse, and that they would lead to the destruction of the tidal wetlands at the site and the benefits these wetlands provide.

1. Submerged Aquatic Vegetation.

As noted above, there is agreement among the parties' experts that SAV is extremely important to the ecosystem at the site and throughout Shinnecock Bay (Exhibit 10 and 21; Comprehensive Management Plan, Chapter 3; Tr. pp. 178, 212, 362, 375, 408-409). There are some isolated eelgrass beds at the site and extensive eelgrass beds in the vicinity of the site (Tr. p. 362). SAV, in general, and eelgrass, in particular, serve as the base of the food web, providing food for microorganisms which become food for other invertebrate and vertebrate animal species which, in turn, become a food source for other species, including shore and colonial waterfowl and, in fact, humans.

In addition, SAV provide shelter and protection for juvenile fish and other organisms, thus enhancing the overall survival of each of these species. Accordingly, any adverse impact to SAV will have a corresponding adverse impact on each and every organism that depends on SAV for food or protection. With respect to the Applicant's site, the primary adverse impact to SAV is the effect of shading caused by the proposal.

Applicant's consultant, Charles Bowman, referred to 6 NYCRR 661.5(b)(14), and described the proposal as an open pile catwalk and/or dock not greater than 4 feet wide. According to Mr. Bowman, this regulated use is considered to be generally compatible, permit required (GCp). Mr. Bowman also stated there would be a floating dock that is less than 200 square feet in area, as described in 6 NYCRR 661.5(b)(16). Mr. Bowman observed that no permit is necessary in either the shoal and mud flat area, or the littoral zone for a floating dock that is less than 200 square feet in area. In contrast, Mr. Bowman noted that the area of the proposed floating dock would be 120 square feet (6 x 20 feet). Finally, Mr. Bowman stated that pilings are generally permitted as part of the proposed structure as long as the number of piles is not excessive. (Tr. p. 87.)

Applicant's consultant, William Bowman, Ph.D., explained how he considered each element of the proposal. The location of the proposed catwalk, ramp and floating dock was selected to avoid the eelgrass beds. Dr. Bowman said that the surfaces of the structural elements would be thru-flow deckboards, which would allow light to pass through, and thereby limit any shading. According to Dr. Bowman, installing the piles would result in a temporary, and very limited, localized disturbance to SAV growing on the bottom of the tidal wetland. (Tr. p. 119.)

Dr. Bowman opined further that any long term effects from Applicant's proposal would be localized. He observed that compared to the size of the tidal wetland, the area of the proposed structure is comparatively small. Dr. Bowman stated that some adverse environmental impacts associated with construction could be avoided by authorizing construction during certain periods. For example, Dr. Bowman recommended that construction should be avoided during the peak growing season so as not to impact SAV. To avoid potential impacts to a particular life stage of windowpane flounder and winter flounder, such as the eggs or larvae, Dr. Bowman recommended that construction of the proposal should be prohibited during the late winter when adults of these two fish species are spawning. (Tr. p. 120, 179.)

With respect to shading, Department staff Biologist Richards opined that the proposal would limit the amount of sunlight and, accordingly, limit or eliminate the amount of SAV that could grow beneath the proposed catwalk, ramp and floating dock. Mr. Richards observed that the thru-flow deckboards required by the Town's permit would block 60% of the sunlight. In addition, the east-west orientation of the proposal would result in a shadow

being cast for a longer period of time over a large area of the tidal wetland. (Tr. pp. 406-407.)

Applicant's argument that the size of its proposal is minuscule when compared to the entire area of Shinnecock Bay is irrelevant and does not negate the existence of important tidal wetland functions at the site, which are essential to the survival of the marine community located there. With respect to minimizing adverse impacts associated with construction, the recommendations to avoid certain periods demonstrate how the many and varied life cycles in the tidal wetlands interact. For example, with the end of the eelgrass growing season comes the arrival of the migratory waterfowl, who eat the eelgrass until the spawning season for windowpane flounder and winter flounder begins in the late winter.

I conclude that the potential impacts to submerged aquatic vegetation at the site would be unduly adverse on the current and potential values of the affected tidal wetland specifically with respect to marine food production, wildlife habitat, as well as the absorption of silt and organic material. As a result, Applicant failed to demonstrate by a preponderance of the evidence that its proposed structure consisting of a catwalk, ramp and floating dock would comply with the permit issuance standard at 6 NYCRR 661.9(b)(1)(i).

## 2. Water Depths.

A separate consideration, related to 6 NYCRR 661.9(b)(1)(i), that may contribute to potential undue adverse environmental impacts is the depth of the water at the site during low tide. The water depth data described below is presented in Table 1 of Appendix A to this hearing report.

Water depths in Shinnecock Bay are generally less than 10 feet below mean low water. Tidal fluctuations average approximately 0.70 feet. (Exhibit 21.) The location of Applicant's proposed structure is part of a very large shallow area of Shinnecock Bay. In the vicinity of the project site, water deeper than 2.50 feet during low tide is more than 400 feet away. (Tr. pp. 370-371). Consequently, any boat using the proposed floating dock would have to travel over this large shallow area, which is generally covered with SAV.

Applicant's consultants visited the site and the adjacent tidal wetlands on May 19 and 31, 2005; September 1, 2005; March 10, 2006; and May 8, 2007. Department staff visited the site and



the adjacent tidal wetlands on November 16, 2005, as well as May 8 and 10, 2007. On these dates, the site visits occurred during or near the time of low tide. (Exhibits 22 and 23; Tr. pp. 139, 183, 248, 256, 268.)

Exhibit 9 in the hearing record is a plan (1 inch = 30 feet) prepared by Applicant's consultants dated February 4, 2004 (Tr. p. 197). The plan depicts the more seaward portion of the 99 Lynn Avenue property and the tidal wetland. The plan also includes scaled drawings of Applicant's proposed steps, catwalk, ramp and floating dock.

Ms. Risotto testified that she, and other personnel from Land Use Ecological Services, Inc., went to the site on May 19 and 31, 2005 during low tide (11:10 a.m. and 9:55 a.m., respectively) to measure the depth of the water in the vicinity of the bulkhead, and to locate any eelgrass beds. Starting near the northern boundary of the 99 Lynn Avenue property, and at 50 feet intervals along the bulkhead, Ms. Risotto explained that she measured the water depths in an easterly direction from the bulkhead at approximately 10 feet intervals. From the bulkhead, Ms. Risotto's measurements extended 140 feet into the tidal wetland. (Tr. pp. 203.)

After collecting the data, the plan identified as Exhibit 9 was revised to incorporate the water depth measurements and the location of the eelgrass beds. (Tr. pp. 203-204.) The water depth measurements on Exhibit 9 are expressed in feet and tenths of feet. The negative sign before each measurement on Exhibit 9 is used to show that the bottom of the wetland is lower than the surface of the water.

No distinction is made on Exhibit 9 between the water depth data collected on May 19, 2005 and that collected on May 31, 2005. Based on the data collected during the May 2005 site visits, Applicant's consultants proposed to locate the catwalk, ramp and floating dock approximately 70 feet from the northern boundary of the 99 Lynn Avenue property to avoid eelgrass beds. (Tr. p. 203.) The water depth data reported in Table 1 (see Appendix A) is limited to the location of the proposed catwalk, ramp and floating dock that Applicant's consultants selected.

Department staff visited the site on November 16, 2005 during the 2:00 p.m. low tide. The purpose of the visit, in part, was to confirm the water depth data that Applicant had collected on May 19 and 31, 2005. For the November 16, 2005 site visit, Department staff brought a copy of Exhibit 9 to the site.

During this site visit, Dr. Nyako measured the water depths and called out the values at various distances from the bulkhead. Mr. Richards recorded the data on the copy of Exhibit 9 that Staff had brought to the site. Exhibit 15 in the hearing record is a copy of Exhibit 9 on which Staff recorded the water depth measurements during the November 16, 2005 site visit. (Tr. pp. 248-251).

Staff's measurements from the November 16, 2005 site visit are provided in feet and inches (Tr. pp. 298-301; 337). Therefore, in order to compare the measurements obtained by Applicant's consultants with those obtained by Staff, the data needs to be converted to the same units of measure. One inch is 1/12 of a foot or 0.08 feet. In Table 1 of Appendix A to this report, the feet and inches provided by Department staff have been converted into feet and tenths of feet to compare the data collected during the various site visits.

Exhibit 6 is a survey of 99 Lynn Avenue by Raynor, Marcks and Carrington, Licensed Land Surveyors, prepared on July 30, 2004. Exhibit 6 depicts the proposed locations of the house and other features on the upland portion of the property, as well as the location of Applicant's proposed steps, catwalk, ramp and floating dock. The survey was revised on May 21, 2006 to incorporate water depth measurements collected during low tide (see Exhibit 22-c) by the surveyors on March 10, 2006 at 11:30 a.m. These measurements are presented in Table 1 of this report (see Appendix A).

Department staff visited the site on May 10, 2007 during low tide, and took water depth measurements at the location of the proposed catwalk, ramp and floating dock. Staff's notes from the visit are identified in the hearing record as Exhibit 18. (Tr. pp. 268-270.) These water depth measurements are presented in Table 1 of Appendix A.

During their testimony, the parties' witnesses discussed the various circumstances that affect the tides. All witnesses agreed that the tides are influenced by the phases of the moon. The fluctuations in the tides tend to be higher during full and new moons. Another condition that influences the tides is the wind. If, for example, there is a strong prevailing wind blowing across Shinnecock Bay, the water level, irrespective of the tidal cycle, would be higher downwind from the prevailing wind. On the side of the bay that is closest to the direction of the prevailing wind, the water level would be lower. (Tr. pp. 123-124.)

Applicant's consultants challenged the water depth measurements that Department staff collected on November 16, 2005. Exhibit 27 is a copy of a letter dated December 2, 2005 from Kelly Cantara (Risotto) and a copy of a tide chart for November 2005. In her December 2, 2005 letter, Ms. Cantara points out that the moon was full on November 15, 2005, which was the day before Staff's November 16, 2005 inspection. Ms. Cantara also notes there was a recent storm, which would have also influenced the tides. Given the phase of the moon in combination with the weather conditions, Ms. Cantara contended that Staff's November 16, 2005 water depth measurements are lower than average and, therefore, not representative of the usual conditions.

Exhibits 22(A-C) and 23(A-C) are sets of tide charts for the Ponquoque Bridge on Shinnecock Bay and correspond to the dates of the site visits made by Applicant's consultants and Department staff. Unlike the tide chart attached to Ms. Cantara's December 2, 2005 letter (Exhibit 27), Exhibits 22 and 23 do not include any information about what the phases of the moon were in relationship to the site visits.

At 140 feet seaward from the bulkhead where Applicant proposes to locate the catwalk, ramp and floating dock, the average water depth during low tide is 2.28 feet based on the data collected during the various site visits. At this distance from the bulkhead and based on the data collected during site visits, the water depth measurements during low tide ranges from 2.08 feet to 2.60 feet, which is a variation of 0.52 feet (or about 6 inches).

Upon review of the hearing record, I find that all the data presented in Table 1 (see Appendix A) is reliable. Applicant's consultants and Department staff collected the data using the same procedure. Furthermore, a low tide variation of 0.52 feet is reasonable, given the many recognized factors that influence the tides. The variation in the data collected at the site during low tide is reflected in the tide charts offered for the record (see Exhibits 22, 23 and 27). Therefore, based on the record of this proceeding, I find that the water depth at the site during an average low tide is slightly greater than 2.00 feet.

Mr. Bowman testified that 6 NYCRR part 661 is silent about the minimum depth of water required for a dock. According to Mr. Bowman, Department staff had routinely approved tidal wetland permits for docks at locations where the water depths during low tide ranged from 0.50 to 1.00 feet. However, Mr. Bowman noted

that recently Staff seems only to approve docks that would be located in water at least 2.50 feet or more during low tide. Although requested, Mr. Bowman stated that Staff has not produced for him any written documentation that sets forth such a policy. Mr. Bowman noted that one of the bases Staff identified for denying his client's tidal wetland permit was that the water depth at the end of the floating dock during low tide would be 2 feet 1 inch (*i.e.*, 2.08 feet; see Table 1 of Appendix A). (Tr. pp. 88-89.)

As part of his testimony, Mr. Bowman did not identify any permits issued by Department staff that supported his claims concerning Staff's past and present approval practices. Moreover, the Commissioner has previously determined that the merits of each tidal wetlands permit application is considered on a case by case basis (*see Matter of Stephen Kroft*, Decision of the Commissioner, July 8, 2002; *Matter of Richard and Carol Leibner*, Decision of the Commissioner, March 16, 2000, vacated on other grounds, *Leibner v New York State Dept. of Env'tl. Conservation*, 291 A.D.2d 558 [2<sup>nd</sup> Dept. 2002]).

Although he owns more than one boat, Mr. Caiola testified that he would only dock his 18-foot Boston Whaler at the proposed structure. According to Mr. Caiola, his 18-foot Boston Whaler draws from 12 to 14 inches (14 inches is 1.17 feet) depending on the load in the boat, and that the propeller on the outboard Mercury motor draws 1.50 to 2.00 feet. (Tr. p. 107.) Mr. Bowman testified that the draft of the propeller would be about 1.50 feet deep (Tr. p. 90). Therefore, based on the data collected at the site, the clearance, during low tide, between the propeller of Mr. Caiola's outboard motor on the Boston Whaler and the bottom of Shinnecock Bay would range from 0.00 to 0.50 feet.

It is significant to note that Mr. Caiola said, during his testimony, that he would not bring his 38-foot Intrepid to the proposed catwalk, ramp and floating dock because he does not use it in shallow water. The boat draws 22 inches (*i.e.*, 1.83 feet), and the three Mercury 275 Verado outboard engines when lowered draw about 28 inches (*i.e.*, 2.33 feet). (Tr. pp. 108-110.)

Neither the statute nor the regulations require a permit from the Department to operate a motorized boat in a tidal wetland (*see* 6 NYCRR 661.5[b][13]; Tr. p. 487). The construction of structures, as proposed here, would nonetheless encourage the operation of motorized boats in the tidal wetlands, and does require a permit (*see* 6 NYCRR 6 NYCRR 661.7[a]).

The water depth during low tide at this location is not sufficient to avoid the potential adverse impacts associated with operating motorized boats. Motorized boats going to and from the dock would damage the vegetation that is growing in this area. These water craft would create turbidity by stirring up the bottom sediments, both directly by the propeller contacting the material, or by the pressure of water from the propeller. The resuspension of sediments, if a regular occurrence, has the potential to suffocate vegetation and organisms nearby, adversely affecting the benefits associated with them. Vegetation may also be uprooted and benthic communities disturbed by the propellers. Such boating operations would create a channel resulting in adverse environmental impacts characteristic of dredging operations.

I conclude that the potential impacts identified in the preceding paragraph, which are associated with the shallow water conditions at the site, would be unduly adverse to the current and potential values of the affected tidal wetland specifically with respect to marine food production, wildlife habitat, as well as the absorption of silt and organic material. As a result, Applicant failed to demonstrate by a preponderance of the evidence that its proposed structure consisting of a catwalk, ramp and floating dock would comply with the permit issuance standard at 6 NYCRR 661.9(b)(1)(i).

B. Public Health and Welfare.

For a permit on any tidal wetland, the second standard is whether the proposed activity is compatible with the public health and welfare (see 6 NYCRR 661.9[b][1][ii]). Applicant argues that the proposed catwalk, ramp and floating dock are compatible with the public health and welfare because the proposed structure would not adversely impact public access, water quality or navigation. To support this argument concerning public access, Applicant refers to the now expired Town of Southampton permit (Exhibit 4), which approved a design that would have allowed the public to traverse the site. In addition, water quality would have been maintained because the Town permit prohibited use of any treated lumber products. Furthermore, any impacts to water quality that could result from construction would be temporary, and therefore negligible.

Department staff contends that Applicant's proposal would not be compatible with the public health and welfare. In the

Notice of Permit Denial dated May 9, 2006,<sup>7</sup> Staff stated that Applicant failed to meet the standard at 6 NYCRR 661.9(b)(1)(ii) because a boat could not be safely docked at the site due to the shallow water. During the hearing, Mr. Richards opined that public health and welfare are related to public resources, such as shellfish and finfish, which would be adversely impacted by the proposed catwalk, ramp and floating dock. Mr. Richards stated that the public would not benefit from Applicant's proposal because there would be adverse environmental and economic impacts. (Tr. pp. 420-421.)

The water depth during low tide at this location is not sufficient to avoid potential adverse impacts associated with operating motorized boats. There are risks associated with running the boat aground, which raises a safety concern for both the pilot and passengers. In fact, Mr. Caiola acknowledged during his testimony that he would not bring one of his boats to this area because the water would be too shallow (Tr. p. 110). As a result, Applicant failed to demonstrate by a preponderance of the evidence that its proposed structure consisting of a catwalk, ramp and floating dock would comply with the permit issuance standard at 6 NYCRR 661.9(b)(1)(ii).

C. Reasonable and Necessary.

For a permit on any tidal wetland, the third standard is whether the proposed activity is reasonable and necessary, taking into account such factors as reasonable alternatives to the proposed regulated activity and the degree to which the activity requires water access or is water dependent (see 6 NYCRR 661.9[b][1][iii]). The principal purpose of the proposed catwalk, ramp and floating dock is to provide access to the waters of Shinnecock Bay for boating, which is a water dependent activity.

As noted above, Mr. Caiola has a 38-foot Intrepid with three Mercury 275 Verado outboard motors. At the time of the hearing, Mr. Caiola kept the Intrepid at the Hampton Watercraft and Marina in Hampton Bays, New York. (Tr. pp. 108-109.) Given these circumstances, I conclude that keeping the 18-foot Boston Whaler at the marina is a reasonable alternative to the proposal particularly because Mr. Caiola already keeps the Intrepid at that location.

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<sup>7</sup>Pursuant to 6 NYCRR 624.12(b) the record of the hearing includes Staff's May 9, 2006 Notice of Permit Denial.

As part of Department staff's direct case, Mr. Richards identified other alternatives to the proposed catwalk, ramp and floating dock. According to Mr. Richards, the Town of Southampton maintains a public boat launch facility on the south side of Shinnecock Bay. Mr. Richards estimated that Applicant's property is about a three minute drive to the Town's public boat launch facility. (Tr. p. 423.) Applicant offered no evidence to refute Mr. Richards' testimony concerning the public boat launch.

Mr. Richards also stated that Applicant could install a mooring and access it with a dingy. Although traditional moorings caused adverse environmental impacts, Mr. Richards explained that modern moorings significantly reduce, if not eliminate, the adverse environmental impacts associated once with traditional moorings (Tr. p. 424). Mr. Richards did not offer details about the design of modern moorings to explain how the potential adverse impacts are minimized. Dr. Nayko observed a mooring in the vicinity of Applicant's property during the May 8, 2007 site visit (Exhibit 17-I; Tr. p. 267). Establishing recreational moorings in tidal wetlands characterized as shoals and mudflats, or littoral zones does not require a tidal wetlands permit from the Department (see 6 NYCRR 661.5[b][10]).

Based on the foregoing, I conclude that Applicant failed to show that the proposal is reasonable and necessary. Moreover, Applicant did not present any alternatives to the proposal. Department staff, however, offered several reasonable alternatives. Accordingly, Applicant failed to demonstrate by a preponderance of the evidence that its proposed structure consisting of a catwalk, ramp and floating dock would comply with the permit issuance standard at 6 NYCRR 661.9(b)(1)(iii).

D. 6 NYCRR Part 608 (Use and Protection of Waters) and § 608.9 (Water Quality Certification).

With regard to the standards for issuance of a protection of waters permit, 6 NYCRR 608.8 states, in pertinent part that:

"[t]he basis for the issuance or modification of a permit will be a determination that the proposal is in the public interest, in that: (a) the proposal is reasonable and necessary; (b) the proposal will not endanger the health, safety or welfare of the people of the State of New York; and (c) the proposal will not cause unreasonable, uncontrolled or unnecessary damage to the natural resources of the State, including soil, forests, water, fish,

shellfish, crustaceans and aquatic and land-related environment."

The standards outlined above for a permit pursuant to 6 NYCRR part 608 are substantially the same as the permit standards for a tidal wetlands permit identified at 6 NYCRR 661.9(b)(1)(i, ii, and iii). For the reasons outlined in detail above (see Section III.C), Applicant did not demonstrate that the proposed catwalk, ramp and floating dock are reasonable and necessary taking into account the reasonable alternatives (see 6 NYCRR 661.9[b][iii]). I rely on that same rationale to conclude that Applicant failed to demonstrate by a preponderance of the evidence that the proposed would comply with the permit issuance standard at 6 NYCRR 608.8(a).

Whether Applicant's proposal would be compatible with the public health and welfare was discussed within the context of the standard at 6 NYCRR 661.9(b)(ii) (see Section III.B). I rely on that same rationale outlined in Section III.B to conclude that Applicant failed to demonstrate by a preponderance of the evidence that the proposed would comply with the permit issuance standard at 6 NYCRR 608.8(b).

For the reasons outlined in detail above (see Section III.A.1 and 2), Applicant did not demonstrate that the proposed catwalk, ramp and floating dock is compatible with the policy of the Tidal Wetlands Act to preserve and protect tidal wetlands and to prevent their despoliation and destruction (see 6 NYCRR 661.9[b][i]). I rely on that same rationale to conclude that Applicant failed to demonstrate by a preponderance of the evidence that the proposed would comply with the permit issuance standard at 6 NYCRR 608.8(c).

In addition to a tidal wetlands permit and a protection of waters permit, Applicant requires a Water Quality Certification pursuant to section 401 of the Federal Water Pollution Control Act (33 USC § 1251 et seq.) and 6 NYCRR 608.9. With regard to the standards for issuance of a water quality certification, 6 NYCRR 608.9(a) states, in pertinent part, that:

"[a]ny applicant for a Federal license or permit to conduct any activity, including but not limited to the construction or operation of facilities that may result in any discharge into navigable waters... must apply for and obtain a water quality certification from the department. The applicant must demonstrate compliance with... (6) State statutes,



regulations and criteria otherwise applicable to such activities."

Based on the foregoing discussion, Applicant's proposal to construct a catwalk, ramp and floating dock does not comply with the standards for a tidal wetlands permit as outlined at 6 NYCRR 661.9(b)(1)(i, ii and iii). In addition, Applicant's proposal does not comply with the standards outlined at 6 NYCRR 608.8 for a use and protection of waters permit. Because Applicant has not demonstrated compliance with these State regulatory requirements for permits, Applicant has not met the standards for a water quality certification.

#### IV. Cumulative Impacts.

Referring to ECL 3-0301(1)(b), and *Perretti, supra*, Staff argued at the issues conference and in its closing brief, that when making permit determinations, the Commissioner must consider the cumulative impact of those determinations upon water, land, fish, wildlife and air resources. To support this argument, Staff noted there are other dock structures in the vicinity of Applicant's property. Given these circumstances, Department Staff expressed concern that if this proposal is approved, cumulative adverse impacts upon the tidal wetlands could result.

The hard look required by ECL article 8 (State Environmental Quality Review Act [SEQRA]) allows the Commissioner to duly exercise his authority to consider cumulative impacts within the context of making permit determinations. I note that as part of its application, 99 Lynn Avenue, LLC completed Part I of the Short Environmental Assessment Form (Short EAF).<sup>8</sup> Part II of the Short EAF is completed by the lead agency, which in this case is Department staff. Part II, Item C6 of the Short EAF provides the lead agency with the opportunity to explain the long term, short term, cumulative, or other effects of the proposal. Based on the record of this proceeding, it is not known how Staff completed Part II of the Short EAF. However, the Notice of Public Hearing (Exhibit 1) states that Staff determined that the proposal was a Type II action pursuant to 6 NYCRR 617.5(c)(10).

All potential impacts of Applicant's proposal have been considered pursuant to the applicable permit regulations. If

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<sup>8</sup>Pursuant to 6 NYCRR 624.12(b), the record of the hearing includes the Short EAF that Applicant filed with this application.

other, similar applications are filed, Department staff will review those applications on their own merits. The Commissioner's determination about the pending application for a tidal wetlands permit in this matter would not dictate the same result elsewhere. As previously noted, the merits of each tidal wetlands permit application are considered on a case by case basis (*see Kroft, supra; Leibner, supra*).

#### V. Riparian Rights.

In its closing brief, Applicant asserts, for the first time in this proceeding, that permit denial would constitute a taking of its riparian rights. As an owner of waterfront property, Applicant asserts further that it has the following riparian rights: (1) the use of the water for general purposes such as boating, fishing, bathing and domestic use; (2) "wharfing out" to navigability; and (3) access to navigable waters. To support its assertions, Applicant refers to the following case law: *Town of Hempstead v Oceanside Yacht Harbor, Inc.*, 64 Misc 2d 4, rev'd on other grounds, 38 AD2d 263 (2d Dept. 1972), aff'd 32 NY2d 859 (1973); *Durham v Ingrassia*, 105 Misc 2d 191; *Town of Islip v Powell*, 78 Misc 2d 1007; and *Town of Oyster Bay v Commander Oil Corp.*, 96 NY2d 566. For the premise that a "taking of riparian rights is a taking of real property," Applicant cites *Matter of the City of New York*, 264 AD 555, 564 (1<sup>st</sup> Dept. 1942), aff'd 298 NY 843 (1949). Based on the foregoing case law, Applicant argues that it has a right to the requested permit in order to install and maintain the proposed catwalk, ramp and floating dock as a way to "access" and to "wharf out" to Shinnecock Bay.

During the issues conference, the parties had the opportunity to raise any factual or legal issues for the Commissioner's consideration. At the beginning of its direct case, Applicant's counsel made a brief opening statement, and argued that Applicant was prepared to demonstrate that it would meet the applicable permit issuance standards identified as the issues for adjudication (Tr. pp. 41-42). Neither during the issues conference nor at any time during the adjudicatory hearing, did Applicant contend, or offer any evidence to show, that its riparian rights would be unduly restricted if the Commissioner denies the requested permit.

When the administrative permit hearing concluded, the parties agreed to the simultaneous filing of written closing briefs (Tr. p. 510). Reply briefs were not contemplated and, to date, no request has been made to file a reply brief. At this point in the proceeding, Applicant's assertion concerning its

riparian rights is untimely raised. Accordingly, Applicant has waived the right to have the issue considered within the context of this proceeding (see *Matter of 4C's Develop. Corp.*, Decision of the Deputy Commissioner, January 22, 1998, at 2-3; *Matter of City of Rensselaer v Duncan*, 266 AD2d 657, 661 [3d Dept 1999]).

In the event that the Commissioner chooses to consider Applicant's newly asserted claim, I note that issues related to riparian rights were considered in the *Matter of Michael Matthews*, Decision of the Commissioner, May 20, 2004. Prior to July 2001, Mr. Matthews had filed an application with Region 1 Department staff for a permit to build a dock in a tidal wetland in the Town of East Hampton, Suffolk County, pursuant to ECL articles 15 and 25 and the implementing regulations. Mr. Matthews had also requested a water quality certification.

At that time, Mr. Matthews argued that, as the owner of waterfront property, he had the same riparian rights asserted here by 99 Lynn Avenue, LLC. Mr. Matthews argued further that a denial of the requested permit would constitute a denial of his riparian rights and, thereby, result in a taking of his property that would require the State to pay just compensation.

In *Matthews* (*supra* at 7, n 3), the Commissioner held that the administrative permit hearing is not the proper forum to resolve just compensation claims, and that such claims may only be resolved upon judicial review. To support this holding, the Commissioner relied on ECL 25-0404 and *Matter of Spears v Berle*, 48 NY2d 254, 261 (see also, *Matter of Haines v Flacke*, 104 AD2d 26 [2d Dept 1984]). Nevertheless, because Mr. Matthews raised a takings argument within the context of Department staff's determination to deny his permit application, the Commissioner held further that an analysis of the as-applied due process aspects of the takings claim was warranted (*citing*, *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]; and 3 Admin L & Prac § 12.17 [2d ed]).

The Commissioner determined in *Matthews* (*supra* at 7-8) that common law riparian rights are not unfettered, and have been limited by the State's legitimate exercise of police power. To support this determination, the Commissioner cited *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]; and *Commander Oil Corp.*, 96 NY2d at 576 [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 owner]).

The New York courts have recognized the protection of the State's tidal wetlands as a legitimate governmental purpose, and have upheld legislation that restricts the development of such wetlands (see e.g., *Gazza*, at 616). Here, as in *Matthews*, the restrictions imposed by ECL articles 15 and 25 are rationally related to the protection of the State's tidal wetlands and, thereby, reasonably limit Applicant's riparian right.

In *Matthews* (at 8-9), the Commissioner determined that nothing in *Commander Oil Corp.* (*supra*), which is a case upon which 99 Lynn Avenue, LLC also relies, is to the contrary. In *Commander Oil Corp.*, 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). In addition, the riparian owner had obtained the necessary approvals from the Department of Environmental Conservation to dredge, and the validity of those approvals was not addressed in *Commander Oil Corp.* (see *id.* at 569).

As discussed in detail above, the record of this proceeding demonstrates that Applicant did not show how its proposal would comply with all applicable laws and regulations. Furthermore, there is no record about Applicant's assertion that permit denial would be an inappropriate limitation of its riparian rights.

### **Conclusions**

1. Construction of the proposed catwalk, ramp, and floating dock would result in potential impacts to submerged aquatic vegetation at the site. These impacts would be unduly adverse on the current and potential values of the affected tidal wetlands specifically with respect to marine food production, wildlife habitat, as well as the absorption of silt and organic material. As a result, with respect to submerged aquatic vegetation, Applicant did not demonstrate by a preponderance of the evidence that its proposed structure consisting of a catwalk, ramp and floating dock would comply with the permit issuance standard at 6 NYCRR 661.9(b)(1)(i).
2. The water depth during low tide at this location is not sufficient to avoid the potential adverse impacts associated

with operating motorized boats. These potential impacts would be unduly adverse to the current and potential values of the affected tidal wetland specifically with respect to marine food production, wildlife habitat, as well as the absorption of silt and organic material. As a result, with respect to the depth of the water at the site, Applicant failed to demonstrate by a preponderance of the evidence that its proposed structure consisting of a catwalk, ramp and floating dock would comply with the permit issuance standard at 6 NYCRR 661.9(b)(1)(i).

3. Given the water depth during low tide at this location, there are risks associated with running any motorized boat aground, which raises a safety concern for both the pilot and passengers. As a result, Applicant did not demonstrate by a preponderance of the evidence that its proposed structure consisting of a catwalk, ramp and floating dock would comply with the permit issuance standard at 6 NYCRR 661.9(b)(1)(ii).
4. Applicant failed to show that the proposal is reasonable and necessary. Moreover, Applicant did not present any alternatives to the proposal. Department staff, however, offered several reasonable alternatives, such as docking Applicant's water craft at local marinas, using a boat launch maintained by the Town of Southampton, or establishing a mooring. Accordingly, Applicant failed to demonstrate by a preponderance of the evidence that its proposed structure consisting of a catwalk, ramp and floating dock would comply with the permit issuance standard at 6 NYCRR 661.9(b)(1)(iii).
5. Applicant does not meet the standards outlined in 6 NYCRR 608.8 for a use and protection of waters permit.
6. Applicant's proposal to construct a catwalk, ramp and floating dock complies with neither the permit standards for a tidal wetland as outlined at 6 NYCRR 661.9(b)(1)(i, ii and iii) nor the standards outlined at 6 NYCRR 608.8 for a use and protection of waters permit. Consequently, Applicant has not met the standards for a water quality certification pursuant to 6 NYCRR 608.9(a)(6).
7. Given Applicant's untimely assertion, Applicant has waived the right to show how its riparian rights would be unduly restricted if the Commissioner denies the requested permit. In addition, there is no record concerning Applicant's

assertion that permit denial would be an inappropriate limitation of its riparian rights.

### **Recommendations**

The Commissioner should deny the tidal wetlands permit application filed by 99 Lynn Avenue, LLC for the proposed catwalk, ramp and floating dock. The Commissioner should also deny the approvals required by 6 NYCRR part 608 for a protection of waters permit, as well as the Water Quality Certification required by 6 NYCRR 608.9. The denial should be without prejudice to Applicant to file a subsequent permit application for an alternative proposal that could be consistent with the applicable statutory and regulatory criteria.