

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1010

In the Matter

-of-

the Denial of the Application for New York State Tidal Wetlands Permit, DEC ID No. 1-4736-08531/00001 Pursuant to Environmental Conservation Law Article 25 and Title 6 of the Official Compilation of Codes, Rule and Regulations of the State of New York (6 NYCRR), Part 661,

-by-

IRONMAN REALTY LLC

DECISION OF THE INTERIM COMMISSIONER

July 15, 2024

DECISION OF THE INTERIM COMMISSIONER

Ironman Realty, LLC (applicant or Ironman Realty) filed an application with the New York State Department of Environmental Conservation (Department or DEC) for a tidal wetlands permit pursuant to Environmental Conservation Law (ECL) article 25 to construct a walkway over a deeded right-of-way (ROW) on a nearby property and install a catwalk, ramp and floating dock seaward of the mean high water mark in Moneyboque Bay at property in Suffolk County (see APP Ex. C).¹

Ironman Realty owns an ocean-facing beachfront property at 175 Dune Road in Westhampton, New York, with an easement extending across Dune Road through a property located at 170 Dune Road allowing pedestrian access from 175 Dune Road to Moneyboque Bay (see APP Ex. D; CT Exs. F; G; H at 5).² Applicant submitted an application for a tidal wetlands permit on January 5, 2017, and amended the application with a revised site plan dated November 5, 2019 (APP Exs. C; D; CT Ex. B).

The amended application sought a permit to construct an elevated walkway across the easement on the property at 170 Dune Road and install a catwalk, ramp and floating dock with 8-inch float-securing piles in the tidal wetlands coastal shoals, bars and mudflats and into the littoral zone (APP Exs. C-E; DEC Ex. A). The elevated walkway would be roughly 115 feet in length and the catwalk, ramp and dock would extend roughly 56 feet into the Moneyboque Bay tidal wetland area (APP Ex. D). Notably, the property at 170 Dune Road already contains a catwalk as well as ramp and dock improvements in the tidal wetlands area (see DEC Exs. B-D).

The Department issued a Notice of Permit Denial dated August 19, 2022, which described the reasons for denying the requested permit in detail and explained the process for requesting a public hearing to appeal the permit denial (APP Ex. E). By letter dated August 24, 2022, applicant objected to the denial of the permit and requested a public hearing pursuant to part 621 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) (see 6 NYCRR 621.8).

The proceeding was referred to the Department's Office of Hearings and Mediation Services, and Administrative Law Judge (ALJ) Molly T. McBride was assigned to the matter. The ALJ held a legislative public comment hearing on July 26, 2023, an issues conference on September 6, 2023, and an adjudicatory hearing on September 6, 2023 (Tr. at 1, 7, 11).³ From these proceedings, the ALJ developed the hearing record and prepared the attached hearing report, dated May 13, 2024 (Hearing Report) (Tr. at 1-127).

¹ The department, the applicant and the ALJ entered exhibits into the hearing record identified by letter. Department exhibits will be cited as "DEC Ex.," applicant exhibits will be cited as "APP Ex.," and ALJ exhibits, which are referred to as "Court" exhibits, will be cited as "CT Ex."

² References to the larger "Moriches Bay" also appear in the hearing record (see e.g. DEC Ex. B; CT Ex. G).

³ A copy of the transcript of the September 6, 2023 hearing date can be found in the hearing record marked as "Transcript-full-09-06-23 Hearing". References to the hearing transcript are cited as "Tr."

The attached hearing report of ALJ Molly T. McBride, which recommends denial of the applicant's request to construct and install a catwalk, ramp and floating dock, is hereby adopted as my decision in this matter, subject to my comments below. The determination of Department staff to deny applicant's requested permit is affirmed for the reasons stated in the ALJ's hearing report, nonetheless I will briefly discuss my bases for that conclusion below.

The Tidal Wetlands Act

As reflected by the Department's August 19, 2022, Notice of Permit Denial, the applicant's proposal is not compatible with the declared public policy of the state's Tidal Wetlands Act "to preserve and protect tidal wetlands, and to prevent their despoliation and destruction" (ECL 25-0102; see CT Ex. J). The Tidal Wetlands Act, passed by the Legislature in 1973 and contained in ECL article 25, specifically recognizes the importance of tidal wetlands' unique habitat and benefits.⁴

The Department enacted regulations in 1977 to implement the Tidal Wetlands Act that are contained in 6 NYCRR Part 661. The stated purpose of the Part 661 regulations is to:

. . . allow only those uses of tidal wetlands and areas adjacent thereto that are compatible with the preservation, protection and enhancement of the present and potential values of tidal wetlands (including but not limited to their value for marine food production, wildlife habitat, flood and hurricane and storm control, recreation, cleansing ecosystems, absorption of silt and organic material, education and research, and open space and aesthetic appreciation), that will protect the public health and welfare, and that will be consistent with the reasonable economic and social development of the State.

(6 NYCRR 661.1; see also 6 NYCRR 661.2)

This statutory and regulatory framework provides context for the ALJ's hearing report and the discussion that follows.

Discussion

In the hearing report, the ALJ identified the witnesses who provided testimony for the applicant and the Department at the adjudicatory hearing and set forth findings of fact that listed the essential proof in the hearing record and detailed the potential adverse impacts to the tidal wetlands from the proposed project (Hearing Report at 3-6). Next, the ALJ set forth the applicable regulatory provisions for issuing tidal wetlands permits for regulated activities occurring within a tidal wetland as found at 6 NYCRR 661.9 and summarized the position of the parties with respect to the Department's denial of the permit (id. at 6-9).

⁴ Tidal wetlands in New York State are found on the Hudson River from the Troy Dam south to the southern tip of Staten Island, and along the entire shoreline of Long Island, including the shorelines of Gardiners Island, Shelter Island and Fishers Island. The statutory definition of a tidal wetland can be found at ECL 25-0103(1).

The ALJ addressed three primary determinations that are part of the overall standards required for the issuance of permits that are relevant to the proposed regulated activity in this matter: (1) whether the proposed regulated activity is compatible with the policy of the Tidal Wetlands Act to preserve and protect tidal wetlands (see 6 NYCRR 661.9[b][1][i]); (2) whether the proposed regulated activity is compatible with the public health and welfare (see 6 NYCRR 661.9[b][1][ii]); and (3) whether the proposed regulated activity is reasonable and necessary, taking into account such factors as reasonable alternatives to the proposed activity and the degree to which the activity requires water access or is water dependent (see 6 NYCRR 661.9[b][1][iii]) (see Hearing Report at 9-14).

First, the ALJ addressed the potential environmental impacts of the proposed activity as indicated by the hearing record including testimony offered by a Department Marine Biologist, the Department's Notice of Permit Denial, testimony from the applicant's expert witness and DEC guidance on the construction of catwalks in tidal wetlands (Hearing Report at 9-12; Tr. at 24-119; CT Ex. J; Nyako at 1-26⁵). I concur with the ALJ's well-reasoned analysis of the environmental impacts from the proposal as determined in the Hearing Report, and it is unnecessary to restate it here. Briefly, however, I find that the hearing record amply supports the ALJ's determination that the site contained regulated tidal wetlands identified as coastal shoals, bars and mudflats (SM) and littoral zone (LZ), that the project could negatively impact marine food production by causing detrimental shading, and that the project would impact wildlife habitat and flood, storm and hurricane control (Hearing Report at 5-6, 9-12; see 6 NYCRR 661.5; 6 NYCRR 661.8).

Second, the ALJ considered the cumulative impacts of the proposed activity, and I find that the hearing record supports the ALJ's determination that authorizing the construction of an additional docking structure at a coastal property that already has a dock appurtenant to the single-family dwelling on the property is incompatible with public health and welfare and would not comply with the Use Guidelines in State regulations pertaining to the construction of one open pile catwalk and/or dock for any principal building (Hearing Report at 12-13; see 6 NYCRR 661.5[b][14]; [15]). In this regard, I would note that the written Easement Agreement entered into between the owners of the properties at 170 and 175 Dune Road in 2005 (CT Ex. H) which would have allowed the applicant to build a wooden walkway without railings on the ROW and a dock at the end of the ROW is neither dispositive nor relevant for purposes of the independent permit determination that must be made by the Department in accordance with applicable statutes and regulations.

Third, the ALJ assessed the reasonable alternatives to the proposed activity and noted that the applicant had not proposed any alternatives to the proposed action, while the Department had identified alternatives, such as the use of a mooring, that would provide access to the bay with less impact to the tidal wetlands (Hearing Report at 13-14). The ALJ found that the applicant

⁵ Refers to the pre-filed direct testimony of Christian Nyako, a Department witness.

had not met the burden to show that the proposed activity was reasonable and necessary, and I concur with this finding as well (id.; see 6 NYCRR 661.9[b][1][iii]).⁶

In sum, my review of the applicable State tidal wetlands law and regulations, and the hearing record demonstrates that applicant failed to show that the proposal is reasonable and necessary and failed to demonstrate by a preponderance of the evidence that the project would comply with the permit issuance standards at 6 NYCRR 661.9(b)(1)(i-iii). Accordingly, the determination of Department staff to deny applicant's requested permit is affirmed and applicant's request for a tidal wetlands permit is denied.

For the New York State Department
of Environmental Conservation

By: _____ /S/
Sean Mahar
Interim Commissioner

Dated: July 15, 2024
Albany, New York

⁶ While the administrative record appears silent as to this item, it is nevertheless worth noting that applicant's real property and the proposed project are also located in a designated Coastal Erosion Hazard Area (CEHA) subject to ECL article 34 and 6 NYCRR Part 505. The CEHA law in ECL article 34, also known as the Shoreowner's Protection Act, and implementing regulations in 6 NYCRR Part 505, are intended to limit coastal development in order to minimize erosion and property losses from storms, flooding and waves (see <https://dec.ny.gov/sites/default/files/2024-05/cehacommunities.pdf>).

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- of -

IRONMAN REALTY LLC,

Applicant.

HEARING REPORT

/S/

Molly T. McBride
Administrative Law Judge
June 5, 2024

BACKGROUND

This hearing report arises from an application before the New York State Department of Environmental Conservation (Department or DEC) for a tidal wetlands permit pursuant to Environmental Conservation Law (ECL) article 25 sought by Ironman Realty LLC (Ironman or applicant) to construct a four (4) foot wide walkway over a right-of-way (ROW) and install a catwalk, ramp and float seaward of mean high water (MHW) in Moneybogue Bay, a subsection of Moriches Bay, Suffolk County.

Ironman is the owner of beachfront real property located at 175 Dune Road Westhampton, New York. The property ownership includes an easement which extends across the property at 170 Dune Road, which is located across Dune Road from applicant's property at 175 Dune Road. Applicant submitted a tidal wetlands permit application dated January 5, 2017.¹ The application was subsequently amended to request a tidal wetlands permit to install a 4' by 115' open grate elevated walkway through a ROW with beach access steps over an existing bulkhead, a 4' by 25' open grate catwalk, a 3' by 12' ramp, two 8" open pilings, and a 6' by 20' float seaward of the MHW in Moneybogue Bay, (*see* App Ex. D)

By letter dated August 19, 2022, the Department denied the permit application. By letter dated August 24, 2022, applicant requested a hearing pursuant to 6 NYCRR 621.8. The matter was referred to the Department's Office of Hearings and Mediation Services (OHMS) to schedule a hearing.

PROCEEDINGS

LEGISLATIVE HEARING & ISSUES CONFERENCE

A notice of public comment period, legislative public comment hearing, issues conference and adjudicatory hearing was published in the Department's Environmental Notice Bulletin (ENB) on July 5, 2023 and in the Southampton Press Eastern Edition on July 13, 2023. Due to a failure to publish the notice in a newspaper of general circulation in a timely manner, the issues conference and adjudicatory hearing were adjourned until September 6, 2023 and a second notice of issues conference and adjudicatory hearing was published in the ENB on August 2, 2023 and in the Southampton Press Eastern and Western Editions on August 3, 2023.

I convened a legislative public comment hearing on July 26, 2023 via the WebEx webinar platform as noticed in the July 5, 2023 ENB. No oral comments were received at that public comment hearing although there were members of the public in attendance as well as the parties. The written comment period closed on September 1, 2023. No comments were received by OHMS by the close of the comment period. One written comment was received by OHMS

¹ The application was a Joint Application filed with the NYS DEC, Office of General Services and Department of State.

on September 6, 2023 opposing the project and voicing concerns about shallow water, channel traffic and conservation of nature and wildlife.

In accordance with the August 2, 2023 notice, I convened an issues conference pursuant to 6 NYCRR 624.4(b) by Webex webinar on September 6, 2023, at 9:30 a.m. Applicant was represented by James Hulme, Esq., Kelly & Hulme, PC. The Department was represented by Tiffany Chiu, Esq., DEC Office of General Counsel. Both applicant and DEC staff are mandatory parties to this proceeding (*see* 6 NYCRR 624.5[a]). In accordance with 6 NYCRR 624.5(b), and as set forth in both the July 5, 2023 and August 2, 2023 notice, any other person seeking full party status or amicus status was required to file a written petition with OHMS. No petitions for party status were received prior to the commencement of the issues conference.

During the issues conference, I confirmed with applicant and Department staff that the issues the parties sought to adjudicate were the basis for staff's denial of the tidal wetlands permit. (T.10).² The parties were asked if any issues were proposed for adjudication in addition to the basis for denial of the application. While applicant did not offer any further issues, Department staff proposed that it would show that the project does not comply with ECL 3-0301 (T.10)

ADJUDICATORY HEARING

I convened an adjudicatory hearing on September 6, 2023 via the Webex webinar electronic platform immediately after the issues conference. As noted, applicant appeared by its attorney James Hulme, Esq. of Kelly and Hulme. Applicant presented one witness, Aram Terchunian, President, First Coastal Consulting who prepared and submitted the tidal wetlands application on behalf of the applicant. The Department was represented by Tiffany Chiu, Esq., DEC Office of General Counsel. Staff presented one witness, Christian Nyako, Marine Biologist in the Department's Region 1 Bureau of Marine Habitat Protection.

The parties were directed to submit pre-filed direct testimony prior to the start of the adjudicatory hearing. Applicant failed to file the pre-field testimony of its witness and accordingly, Department staff requested to withhold filing pre-filed testimony of its witness as well until it presented its case. After applicant rested, a break was taken to allow applicant's counsel to review the Nyako direct prefiled testimony. The Nyako prefiled direct was moved into the record and applicant was then provided an opportunity to cross exam the witness. (T. at 67).

FINDINGS OF FACT

1. Respondent purchased 175 Dune Road, Westhampton Beach, New York by deed dated November 9, 2015 (App. Ex A)³ which is oceanfront property. The deed included an easement that grants applicant a ROW over 170 Dune Road. The easement grants applicant access to Moneybogue Bay across 170 Dune Road, including

²Page numbers refer to pages in the September 6, 2023 hearing transcript.

³ App. Ex. refers to Applicant's exhibits.

“... to pass and repass at all times hereinafter, on foot only, between Dune Road and Moriches Bay, also known as Moneybogue Bay, over, upon and across the westerly four feet of that portion of Lot 4 of the property located at 170 Dune Road.” (See App. Ex. A, schedule A).

2. Applicant submitted a tidal wetlands permit application on January 25, 2017 proposing to construct on the water side of 170 Dune Road a 4’ by 121’ elevated walkway, 26’ dock, 3’ by 12’ ramp, 6’ by 20’ float, and two 6” float-securing piles. (Court Ex. A). The application was subsequently amended to request a tidal wetlands permit to install a 4’ by 115’ open grate elevated walkway through a ROW with beach access steps over an existing bulkhead, a 4’ by 25’ catwalk from MHW into the bay, a 3’ by 12’ ramp, and a 6’ by 20’ float seaward of MHW in Moneybogue Bay secured by two 8” piles (project). (App. Ex. D).
3. The project area is adjacent to Moneybogue Bay which is designated as Significant Coastal Fish and Wildlife Habitat⁴, Class SA⁵ (Nyako at 12)⁶. The shoreline includes naturally vegetated area seaward of an existing bulkhead (*Id*). The site contains regulated tidal wetlands consisting of adjacent area, a band of high marsh dominated by wetlands vegetation, a sandy beach identified as coastal shoals, bars and mudflats (SM), intertidal area, and littoral zone (LZ). (T. 25). The wetland values for this area, as detailed by Department staff, are discussed herein.
4. There is a dock structure in place at 170 Dune Road and applicant does not have access to that structure. (T. 59). The structure includes a boat slip, deck, ramp and float. (T.13).
5. Applicant seeks the permit to allow access to navigable water for boat dockage. The application indicates that capacity is for two boats (Nyako at 12)
6. The parties agree that the dock structure placement in the application is the only location available to applicant in the ROW (T.43).

⁴ 19 New York Administrative Code (ADC) 602.5(a)states: “(a) *Significant coastal fish and wildlife habitat areas* are those habitat areas which:

(1) exhibit to a substantial degree one or more of the following characteristics:

(i) the habitat is essential to the survival of a large portion of a particular fish or wildlife population (*e.g.*, feeding grounds, nursery areas);

(ii) the habitat supports a species which is either endangered, threatened or of special concern as those terms are defined at 6 NYCRR Part 182;

(iii) the habitat supports fish or wildlife populations having significant commercial, recreational or educational value; or

(iv) the habitat is of a type which is not commonly found in the State or a coastal region of the State; and

(2) are to varying degrees difficult or even impossible to replace in kind”.

⁵ 6 NYCRR 701.10 states that the best usages of Class SA waters are shellfishing for market purposes, primary and secondary contact recreation and fishing. These waters shall be suitable for fish, shellfish and wildlife propagation and survival.

⁶ Refers to prefiled testimony of Christian Nyako, DEC witness.

7. Department review of the application included a review of environmental conditions as well as evaluating structures already on site, considering cumulative impacts. (Nyako at 16-17).
8. The Department issued a notice of permit denial dated August 19, 2022. (Court Ex. J) The permit denial stated that the activities requested are not compatible with the public health and welfare, are not reasonable and necessary, do not serve to preserve and protect tidal wetlands and the natural resources of the state, and will have undue and adverse impacts on the present and potential values of the tidal wetland (*Id.*)
9. Applicant requested a hearing in response to the denial of the permit application by letter dated August 24, 2022. Applicant requested the hearing be adjourned for several months to allow applicant to pursue other options. Subsequently, in April 2023, applicant asked that the hearing be scheduled.

Potential Adverse Impacts

10. The construction of the proposed project would negatively impact the tidal wetlands in the project area by causing increased detrimental shading of the SM and LZ and decreasing food production (Nyako at 11).
11. The construction of the proposed project would limit food supply and result in a decrease in production of marine finfish and shellfish, contributing to an overall decline in the populations and abundance of various marine species found in the coastal waters (Nyako at 18-19).
12. The construction of the proposed project would eliminate wading birds and waterfowl access to foraging in the area under the structure, particularly beneath the float (Nyako at 18).
13. The installation of the proposed pilings would result in the direct loss and destruction of tidal wetlands and the benthic habitat and community that currently exists where the pilings are proposed to be located (*Id.*)
14. The presence of the proposed structure will alter water movement and sediment transport patterns in the area (Nyako at 18).
15. Activities associated with construction and use of the structure will increase turbidity and sedimentation, diminishing the habitat value of the area and its contribution to the productivity of the system (*Id.*)
16. Installation of the structure as proposed will result in fragmentation of the marsh and provide conditions for increased erosion and marsh loss in the affected area (Nyako at 18).

17. Construction and use of the proposed structures will cause undue adverse impacts to the present and potential values of the affected wetland for marine food production, wildlife habitat, flood, storm and hurricane control, cleansing the ecosystem, the absorption of silts and organics, recreation, education and research (Nyako at 18-19).
18. The adverse impacts from the construction and use of this project are incompatible with the public's interest in protecting and maintaining important fishery and shellfishery stocks and the project is incompatible with the public's interest in maintaining essential habitat and recreational and commercial opportunities for important marine and wildlife species (*Id.*)
19. The issuance of a permit for a second dock structure to an easement holder at the same property could have a negative precedential impact that could result in an influx of multiple docks on one property and is not compatible with the policy of the Tidal Wetlands Act (Nyako at 23).
20. The Department offered reasonable alternatives to applicant that did not include accessing the existing dock structure (*Id.*)

APPLICABLE REGULATORY PROVISIONS

Pursuant to ECL 25-0102 “It is declared to be 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 the state.” The Department is tasked with preserving and protecting the State’s natural resources, including tidal wetlands. The standards for issuing tidal wetland permits for a proposed regulated activity are set forth in 6 NYCRR 661.9. The applicant has the burden of establishing that the applicable standards of section 661.9 will be met (6 NYCRR 661.9[a]).

The applicable standards for regulated activities occurring within a tidal wetland area are provided in subdivision 661.9(b):

“(b) Standards for permits on any tidal wetland.

(1) Overall standards. The department shall issue a permit for a proposed regulated activity on any tidal wetland only if it is determined that the proposed activity:

(i) is compatible with the policy of the Act to preserve and protect tidal wetlands and to prevent their despoliation and destruction in that such regulated 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 for 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, as more particularly set forth in the findings in section 661.2 of this Part, taking into account the social and economic benefits which may be derived from the proposed activity;

(ii) is compatible with the public health and welfare;

(iii) 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”.

POSITION OF THE PARTIES

- Department Staff

Department staff’s August 19, 2022, denial states that “The activities for which the permit is requested are not compatible with the public health and welfare, are not reasonable and necessary, do not serve to preserve and protect tidal wetlands and natural resources of the state, and will have undue and adverse impacts on the present and potential values of the tidal wetland” (*see* Denial letter, Court Ex. J). The Department detailed how 6 NYCRR 661.9(b)(i)-(iii) is not satisfied:

(1) 661.9(b)(i): The construction of a catwalk, ramp, and float at a residential property that is already served by a docking structure is not compatible with the policy of the Tidal Wetlands Act. The proposed project will cause undue adverse impacts to marine food production by causing increased detrimental shading of the SM and LZ. Intensely shaded areas of marine waters exhibit a decrease in primary production which limits the available food for other marine organisms and results in decreased species diversity, a decrease in abundance and decreased growth of those species which remain in the location of the structure. The limited food supply and decrease in production of marine finfish and shellfish, contributes to an overall decline in the populations and abundance of various marine species (many of which are commercially and recreationally important species of Long Island estuaries) found in our coastal waters. Wading birds and waterfowl will no longer have access for foraging in the area under the structure, particularly beneath the float.

In addition to coverage and shading impacts, the installation of pilings results in the direct loss and destruction of tidal wetlands and the benthic habitat and community that currently exists where the pilings are proposed to be located. The presence of the proposed structure will alter water movement and sediment transport patterns in the area. Furthermore, activities associated with construction and use of the structure will increase turbidity and sedimentation, diminishing the habitat value of the area and its contribution to the productivity of the system. Installation of the structure as proposed will result in fragmentation of the marsh and provide conditions for increased erosion and marsh loss in the affected area.

Construction and use of the proposed structures will cause undue adverse impacts to the present and potential values of the affected wetland for marine food production, wildlife habitat, flood, storm and hurricane control, cleansing the ecosystem, the absorption of silts and organics, recreation, education and research. Public use of the area for activities such as fishing, shellfishing and kayaking will be adversely impacted. The proposed structure will also negatively impact open space and the aesthetics of the area. Use of the proposed structures, including access and egress through the existing shallow water habitat, will result in prop dredging, an activity that occurs when the propeller of motorized vessels comes in close contact with the bottom and/or creates turbulence that moves sediment, benthic materials, plants and animals. Prop dredging creates deeper water depths such as a channel or hole at the mooring site and this action destroys benthic marine habitat and disrupts the benthic inhabitants and juvenile finfish. The movement of a boat in shallow water also increases turbidity causing the productive surfaces of the habitat to be covered with sediments. Submerged aquatic vegetation (SAV), commonly known as eel grass, is mapped in Moneybogue Bay in areas surrounding the project site. Boat traffic to and from this area has the potential to destroy this vegetation.

(2) 661.9(b)(ii): Authorizing the construction of an additional docking structure at a site that already has one dock appurtenant to the single-family dwelling is incompatible with public health and welfare. Moneybogue Bay, a subsection of Moriches Bay, is listed as a Significant Coastal Fish and Wildlife Habitat by the Department of State; all impacts from this project need to take this into consideration. Moneybogue Bay has a considerable amount of intertidal marsh and high marsh along the shore, as well as submerged aquatic vegetation within the LZ. Fisheries rely on the productivity of areas such as Moneybogue Bay and the availability and quality of essential fish habitats for spawning, foraging, juvenile nurseries and for baitfish production. The bay also hosts a variety of shellfish species including hard clams, soft clams, American oysters and ribbed mussels. A commercial and recreational shellfishery is supported in this area of Moneybogue Bay. The area also serves as a foraging site in the spring and summer for a variety of gulls, wading birds and shorebirds including least terns and common terns, both threatened species, and wintering waterfowl including but not limited to the Northern Pintail, American Widgeon, American Black Duck and Mallard.

The Atlantic States Marine Fisheries Commission's Habitat Program Strategic Management Plan specifically states that "... coast wide degradation of water quality and coastal habitats underlies the need for stepped up protection of marine habitats." The adverse impacts associated with this project are incompatible with the public's interest in protecting and maintaining important fishery and shellfishery stocks. Similarly, the project is incompatible with the public's interest in maintaining essential habitat and recreational and commercial opportunities for important marine and wildlife species.

(3) 661.9(b)(iii): It is Department policy not to permit more than one docking structure per residential lot. The Department has not authorized any docks at the ends of rights-of-way in this area and granting a permit in this instance would have a negative precedential effect. A reasonable alternative to installing a catwalk, ramp and float in this location

would be to install an elevated walkway through the ROW to gain access to Moneybogue Bay. As indicated in prior correspondence, DEC has no objection to an elevated walkway through the ROW as proposed, though a walkway built over a ROW may not extend into the water or tidal wetlands. An elevated walkway is preferable to foot traffic on the existing vegetation as the elevated walkway protects the vegetation and will allow sunlight to reach the vegetation, permitting growth. (Court Ex. J)

- Applicant

Applicant argues that the mitigative measures proposed in the application, (open deck grating for catwalk) will allow for less impacts than the Department noted in the denial. Applicant also argued that marinas and multifamily buildings are allowed multiple docks, therefore the Department should not have denied this application because it would result in multiple dock structures at one parcel (T. 39). Applicant notes that in reading the regulations, 6 NYCRR 661.5(b), use categories 14 & 15, address a dock “per principal building” rather than “per lot” (App. closing brief at 4). Therefore, applicant argues applications should be read as to user/structure associated with the dock structure rather than the location of the structure and denying the permit due to the presence of an existing dock is an incorrect interpretation of 6 NYCRR 661.5(b) (14) & (15). Applicant also noted that the proposed project complies with the Departments guidance document for catwalks and docks in tidal wetlands and therefore, the permit should be issued.

DISCUSSION

The project area is adjacent to Moneybogue Bay, a subsection of Moriches Bay which is classified as “Significant Coastal Fish and Wildlife Habitat” by the Department of State and as Class SA waters (*see* 6 NYCRR 701.10). The best usage of Class SA waters are “...shellfishing for market purposes, primary and secondary contact recreation and fishing. These waters shall be suitable for fish, shellfish and wildlife propagation and survival” (*Id.*) Pursuant to 6 NYCRR 661.5(b), the proposed construction of catwalk, pier, ramp and float seaward of MHW at the proposed site is a generally compatible use that requires a permit (GCp).

Environmental Impacts

As noted above, 6 NYCRR 661.9(b)(i) provides that a permit will only be issued if it is determined the proposed activity “(i) is compatible with the policy of the Act to preserve and protect tidal wetlands and to prevent their despoliation and destruction in that such regulated 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”. DEC biologist Nyako conducted the technical review of the application. He conducted two site visits and reviewed the tidal wetlands map for the location as part of his technical review as well as reviewing a survey, location map, photos of the site, aerial photos of the site and the submerged aquatic vegetation layer for eelgrass on Google Earth (Nyako at 13-14). He learned that the site had a history of multiple permits issued prior to this project, with the most recent in 2021 authorizing the

reconstruction of a bulkhead and boat slip, retaining wall and walk, and raising the bulkhead by 18” (Nyako at 13). These permits relate to separate structures, not associated with the application that is the subject of this hearing. The site visit included visual observations, assessment of the wetlands on site where he observed “... *Phragmites* intermixed with *S. patens* (HM) in the natural shoreline area seaward of a bulkhead”. “... shoals, mudflats and littoral zone” (*Id* at 15.)⁷ He noted the existing dock on site and testified “(P)ermitting an additional dock is incompatible with the policy of the Tidal Wetlands Act and will cause undue adverse impacts, such as coverage and shading impacts, and the direct loss and destruction of tidal wetlands” (Nyako at 17, Court Ex. J). Nyako concluded that an additional dock on this site would not be compatible with the public health and welfare, not reasonable and necessary because there are reasonable alternatives, and issuing a dock at the end of a right of way, a first for this area, would have negative precedential effect (Nyako at 17). He testified that the proposed project would impact “marine food production from shading, permanent destruction of tidal wetlands from pilings, destruction of submerged aquatic vegetation and increased sedimentation from boat traffic, decreased foraging area for wading birds and waterfowl, fragmentation of the upland and SM/LZ and destruction of the benthic marine habitat” and is therefore not compatible with preserving and protecting tidal wetlands (Nyako at 18). He provided further testimony on how the proposed project would negatively affect the following: (1) wildlife during construction and use; (2) how the storm control value of the site would diminish if the project is permitted; (3) how present and potential values for cleansing of the ecosystem would be diminished by the project; (4) impacts to the tidal wetlands from this project could increase the amount of runoff and contaminants that enter and persist in tidal wetlands which compromises the ability of wetlands to effectively absorb silt and organic material; (5) project could impact recreational use in the area by decreasing the potential ability of the area to produce shellfish and provide habitat for finfish and other wildlife; (6) the construction of the catwalk would cause shading, even with open decking, which disturbs vegetation and also the project would result in vegetation being cleared and the vegetation impacted is important for ecosystem cleansing and absorbing silt and organic materials (Nyako at 18-22). Nyako testified as to “wetland values”, a term from marine ecology science and from ECL Article 25 and part 661 (Nyako at 10). He explained that the wetland values include marine food production, wildlife habitat, flood and hurricane and storm control, cleansing of the ecosystem, absorption of silt and organic material, recreation, education, or research, open space, and aesthetic appreciation (*Id.*) As indicated, Department provided detailed testimony to support the denial letter, detailing how the requirements of 6 NYCRR 661.9(b)(i) will not be met if the permit is issued.

Applicant’s expert witness Aram Terchunian testified that the project was designed to avoid impacts to vegetated wetlands (T. at 55). He further testified the area where the catwalk is proposed is not identified as a significant nursery or breeding area, and the design plan is to avoid impacts to the maximum extent practicable and to comply with the guidance documents provided by the Department (*Id.*) Mr. Terchunian disagreed with Mr. Nyako’s conclusion that the project is incompatible with the public’s interest in maintaining essential habitat and recreational and commercial opportunities for important marine and wildlife species (*Id.*) He

⁷ *Phragmites* and *S. patens* are perennial vegetation found in wetlands.

noted that the design complies with the Department's guidelines found at 6 NYCRR 661.5 as well as the Tidal Wetlands Catwalk Guidance document DFW-6⁸ issued by the Department (*Id.*)⁹ Department's guidance document DFW- 6 "provides guidance on the issuance of permits for residential open pile catwalks/docks and floating docks in the Tidal Waters of the Marine and Coastal District". The guidance document states, in part:

"Although deemed compatible, activities of this type (referencing GCp) must also meet the applicable standards for permit issuance. A permit will be issued if the proposed activity is compatible with preserving and protecting tidal wetlands in that the regulated activity will not have undue adverse impact on the wetlands values, is compatible with public health and welfare, is reasonable and necessary taking into account alternatives, water dependent use and whether or not the activity complies with use guidelines and developmental restrictions." (DFW-6 IV *citing* 6 NYCRR 661.9[b]).

Applicant's argument that complying with DFW-6 is sufficient for permit issuance is without merit. DEC staff must conduct a thorough review of all projects applying the tidal wetlands standards, as DEC Staff did here. 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 [2nd Dept. 2002]).

As to the shading issue Mr. Terchunian testified that the shading issued raised by Department staff is not a valid objection (T.48). He stated the project calls for open deck grating that allows at least fifty percent sunlight penetration and, the use of this is recommended in the Department's catwalk guidelines, DFW-6 (*Id.*) He noted DFW-6 recommends the use of open deck grating in areas of submerged aquatic vegetation, and although he employed this recommended product out of an "abundance of caution", the area does not contain the more sensitive submerged aquatic vegetation that the Department refers to in the guidance document (T. 48-49). DEC biologist Nyako agreed that the catwalk is proposed to be open grating, but the proposed float, positioned in the wetlands, can not be open grating and therefore, the shading issues he addressed are not mitigated by open decking material (T. 77-78). Nyako stated although the proposed project may comply in part with the Department's Tidal Wetlands Catwalk Guidance document as to materials used, i.e. open grate, the project is not compatible with the policy of the Tidal Wetlands Act to preserve and protect tidal wetlands and the project will have an undue adverse impact on both present and potential values of the area (Nyako at 18).

Mr. Terchunian testified that he disagreed with Mr. Nyako's conclusions but provided no support other than referencing the use of open grate material for the catwalk portion of the project (T. at 62). Mr. Terchunian did not address the impact to the wetlands from those parts of the project where no open grate material is proposed.

⁸ DEC Tidal Wetlands Guidance on Catwalks and Docks, DFW-6.

Mr. Nyako testified in detail about the adverse impacts to the tidal wetlands from the proposed project and provided sufficient detail to establish the likelihood of the impacts should the project be permitted (Nyako prefiled at 18-22). He concluded that the project is not compatible with the State's policy to preserve and protect the tidal wetlands at the site (*Id.*) Applicant notes that although the denial letter and the testimony of Christian Nyako enumerated many negative impacts to the environment if this permit application is approved, applicant notes that the Department has permitted "dozens of permits within Moneybogue Bay, and hundreds of permits within Moriches Bay, of open pile dock structures "so dock structures must not destroy habitat nor impair habitat viability" (T. 16-22). As noted in the testimony of Christian Nyako, the Department contends the pilings and the float both would result in extensive environmental impacts to the area and this project does not meet tidal wetlands standards. I conclude that the potential impacts to tidal wetlands as detailed above would be unduly adverse on the current and potential values of the affected tidal wetland including 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).

Cumulative Impacts

The Department denied the permit on the basis of 6 NYCRR 661.9(b)(ii), stating that the proposed project is not compatible with the public health and welfare. Department staff provided testimony that authorizing the construction of an additional docking structure at a site that already has one dock appurtenant to the single-family dwelling is incompatible with public health and welfare and it fails to comply with the Use Guidelines found at 661.5 (14) & (15). Applicant argued that DEC staff was wrong to deny the application on the basis that there is a dock already in place at 170 Dune Road. Applicant argued that DEC staff misinterpreted the language of 6 NYCRR 661.5.

Mr. Nyako, in his testimony, detailed how the project is not compatible with the public health and welfare.

"Q. This project is proposed over and at the end of a right-of-way. How does that affect your technical review? A. The right-of-way is not a legal subdivision, so I look at the entire lot as a whole and not just at the right-of-way. This means that not only do I look at the environmental conditions, but I also evaluate the project in terms of what other structures are already on the site. There's already a dock with a float at this property. I considered the cumulative impacts of an additional dock (Nyako at 16).Q. What is the significance of a dock already being present at the site? A. We are concerned with a proliferation of docks and cumulative impacts. Permitting an additional docking structure is incompatible with the policy of the Tidal Wetlands Act and will cause undue adverse impacts, such as coverage and shading impacts, and the direct loss and destruction of tidal wetlands. An additional dock is not compatible with public health and welfare" (Nyako at 16-17).

Nyako testified in his direct testimony that the Department has a policy of permitting one dock per lot (Nyako at 23, 6 NYCRR 661.5[b][14]). “Constructing one open pile catwalk and/or dock not greater than four feet in width for *any principal building*” (*emphasis added*) and “Constructing open pile catwalks and docks more than four feet in width; or constructing more than one open pile catwalk and/or dock not greater than four feet in width for *any principal building*”. (6 NYCRR 661.5[b][14] *emphasis added*). Applicant’s attorney argued that the Part 661 Use Guidelines use the term “principal building” and not the term “lot” as used by Nyako to discuss when a dock would be permitted. When asked why he uses the term “per lot” rather than the language in the regulations, “principal building”, Mr. Nyako testified that the Department has always interpreted the regulations to limit one dock per lot and interprets the term “principal building” to mean “per lot”. (T.74-76). Applicant has argued that the term “principal building” should lead the dock in question to be reviewed with 175 Dune Road, since the owner of 175 Dune Road will be the user (T. 75). To follow applicant’s argument, the principal building (175 Dune Road) does not have a dock in place and so the Use Guidelines would authorize this application. DEC staff argued that to follow the applicant’s premise could result in a property owner granting unlimited easements that could result in many dock structures for one lot, negating the limitations created in Part 661.5 (DEC Closing Brief at 6). I agree with the Department’s position. To follow applicant’s argument would eliminate the protections created in the Use Guidelines, stripping away the Department’s ability to protect tidal wetlands and open “... the floodgates for a proliferation of docks” (*Id.*)

Applicant failed to demonstrate by a preponderance of the evidence that its proposed project would comply with the permit issuance standard at 6 NYCRR 661.5(b)(1)(ii).

Reasonable alternatives

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 Moneybogue Bay for boating.

The Department advised applicant that it did not oppose an elevated walkway through the right of way to gain access to Moneybogue Bay. (DEC Closing Brief at 4, Nyako at 17). Nyako testified that the project is “not reasonable and necessary because there are reasonable alternatives”, which were communicated to applicant (Nyako at 23). The reasonable alternatives outlined by DEC staff include “construction of an elevated walkway to gain access to the bay, to allow for an offshore mooring location of a motorized vessel, use of a launching ramp or use of a local commercial marina” (Nyako at 23). Staff indicated that the Department has not issued permits at the end of a ROW in this area and doing so would have a precedential effect (Nyako at 18).

Applicant did not to dispute or question the reasonable alternatives other than to question Mr. Nyako about potential impacts from using an offshore mooring and whether impacts would be the same (T. 101-102). Mr. Nyako said the impacts would be much less with the use of an

offshore mooring, even if the applicant used a kayak to paddle to the mooring.(T.100-101). Mr. Nyako also explained how he determined that adding an additional dock would have an undue adverse impact, in part due to the precedential effect (*Id.*) Mr. Nyako stated that he understands undue adverse impact to mean unwarranted, not reasonable and necessary, and in this case he concluded it was not reasonable and necessary as there are other alternatives (T.109-110). Mr. Nyako's testimony is reasonable, and despite questioning by applicant's counsel, is acceptable.

Department staff cited the Commissioner's Decision in *Matter of Anthony Siniscalchi*, (NY Dept Env Conserv ,Commissioners Decision, October 8, 2003) where the Commissioner denied the tidal wetlands permit application, in part, because Department staff provided reasonable alternatives that would minimize impacts to the wetlands (*Siniscalchi Decision* at 2). Reasonable alternatives are available to applicant and there has been no offer of proof as to why those alternatives are not reasonable.

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).

CONCLUSIONS OF LAW

1. The project is a regulated activity that requires an ECL Article 25 tidal wetlands permit pursuant to 6 NYCRR 661.5(a)(2).
2. The project does not comply with the standards in 6 NYCRR 661.9(b)(1)(i) in that the project is not compatible with the policy of the Tidal Wetlands Act to preserve and protect tidal wetlands and to prevent their despoliation and destruction in that such regulated activity will not have an undue adverse impact on the present or potential value of the affected tidal wetland area.
3. The project does not comply with the standards in 6 NYCRR 661.9(b)(1)(ii) in that it is not compatible with the public health and welfare. Authorizing the construction of an additional docking structure at a site that already has one dock appurtenant to the single-family dwelling is incompatible with public health and welfare and does not meet the permitting standards of 6 NYCRR 661.9(b)(ii).
4. The project does not comply with the standards in 6 NYCRR 661.9(b)(1)(iii) in that it is not reasonable and necessary, taking into account the reasonable alternatives that exist to the proposed project.

RECOMMENDATION

I recommend that the application be denied without prejudice to pursue a new application.

**HEARING
EXHIBIT CHART**

IRONMAN REALTY LLC
DEC ID No. 1-4736-08531/00001

Exhibit No.	Description	Rec'd?	Offered By
A	Tidal Wetlands Map 698-518		DEC
B	Nearmap Aerial 3/19/23		DEC
C	Nearmap Aerial 10/15/22	✓	DEC
D	Nearmap Aerial 3/19/23	✓	DEC
E	Site photo (vegetation) 4/26/17	✓	DEC
F	Site Photo (bulkhead & vegetation) 8/19/20		DEC
G	Site Photo (fence & bulkhead)		DEC

Exhibit No.	Description	Rec'd?	Offered By
A	Initial application cover letter First Coastal 1/05/17	✓	Court
B	Joint TW application	✓	Court
C	State Environmental Assessment Form	✓	Court
D	NYSDEC Form D-2	✓	Court
E	Photos submitted with application	✓	Court
F	Original Site Plan with cross section submitted with application	✓	Court
G	Survey Applicant Dune Rd property October 2015	✓	Court
H	Deed 175 Dune Rd	✓	Court
I	Agent Permittee Authorization Form	✓	Court
J	NYSDEC Denial letter 8/19/22	✓	Court

Exhibit No.	Description	Rec'd?	Offered By
A	Deed for 175 Dune Road to Ironman Realty LLC	✓	Applicant
B	Deed for 170 Dune Road		Applicant
C	Application of Ironman Realty LLC for TW permit (also Ct Ex. B)	✓	Applicant
D	Revised Site plan to amend application dated 11/5/19	✓	Applicant
E	Permit Denial letter from Department dated 8/19/22 (Ct E. J)		Applicant
F	6 NYCRR 661.5 (Court took official notice)		Applicant
G	Overhead photo of 170 Dune Rd	✓	Applicant
H	Overhead Map of 170 Dune Rd	✓	Applicant