

DFW-1

Functionality

I. Summary:

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

II. Guidance:

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

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

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

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

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

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

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

III. Purpose and Background:

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

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

IV. Responsibility:

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

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

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

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

VI. References:

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