April 30, 2004

Christopher J. McKenzie
Beveridge and Diamond, PC
15th Floor
477 Madison Ave.
New York, NY 10022-5802

Re: F-2003-0175
U.S. Army Corps of Engineers/New York District Permit Application # 2002-01646-L2; Richard Leibner - Install fixed elevated walk; Clam Pond - Fire Island National Seashore; Town of Islip, Suffolk County

Dear Mr. McKenzie:

The Department of State has completed its review of the Federal Consistency Assessment Form and consistency certification that you submitted for the above referenced activity.

Pursuant to 15 CFR Part 930.63, and based upon the submitted and file information regarding this proposal, the Department of State (DOS) objects to your consistency certification for this proposed activity. The consistency provisions of the Federal Coastal Zone Management Act prohibit the U.S. Army Corps of Engineers from authorizing this proposed activity as a result of this objection.

Subject of the review

Your client, Richard Leibner, has requested authorization from the U.S. Army Corps of Engineers/New York District to construct a catwalk and dock assembly consisting of a 4' x 45' fixed walk elevated a minimum of 4' above grade with 3' x 4' steps on either side, a 3' x 16' ramp, and two 6' x 12' floats secured by four pilings. Two 8" diameter mooring pilings would be installed approximately 12' west of the floats. The floats and ramp would be in place primarily during the summer and removed during other seasons. The fully assembled structure would be for Mr. Leibner's private use, accessory to the private residential use of his upland property, and would extend approximately 52 feet seaward of the mean high water line into Clam Pond, a small, shallow embayment along the north side of the Fire Island barrier island in the Town of Islip, Suffolk County. Clam Pond is part of the larger Great South Bay water body complex that lies between the Long Island south shore mainland and the northern shoreline of the Fire Island barrier.

Factors Relevant To This Review

Pursuant to the consistency provisions of the Federal Coastal Zone Management Act (CZMA), certain activities requiring Federal agency authorizations are required to be consistent with the policies of the New York Coastal Management Program (CMP). The proposed activity, which requires authorization from the U.S. Army Corps of

Engineers, is subject to the Federal consistency provisions of the CZMA, and is required to be consistent with the enforceable policies of the CMP.

A permit application and consistency certifications for Mr. Leibner's proposed activity were previously submitted to the U.S. Army Corps of Engineers and the DOS, beginning in 1998. That original application to the U.S. Army Corps of Engineers (Corps permit application #1998-09590-L2) was withdrawn from active processing and consideration by that agency in 1998. The DOS was informed of that withdrawal by copy of a letter dated November 4, 1998, from James W. Haggerty of the U.S. Army Corps of Engineers, to Lark Shlimbaum representing Mr. Leibner. Because the DOS has no authority to review and render a consistency decision for activities that are not undergoing active processing, review, and consideration by an involved Federal agency, the DOS closed its file (DOS file F-98-0586) and terminated its review of the proposed activity, and the consistency certification submitted for it, on December 18, 1998.

On March 3, 2003 the DOS received a resubmitted consistency certification and supporting information for Mr. Leibner's proposed structure. The DOS was informed by the U.S. Army Corps of Engineers that it was actively processing a new permit application to that agency (U.S. Army Corps of Engineers application #2002-01646-L2). That application to the Corps of Engineers and the consistency certification submitted for it is the subject of this decision.

Pursuant to Article 42 of the State Executive Law and implementing regulations in 19 NYCRR Part 602, Clam Pond and the Great South Bay, in the area where the structure would be constructed, is part of the State designated Great South Bay -West Significant Coastal Fish and Wildlife Habitat. The area was designated a Significant Coastal Fish and Wildlife Habitat in order to advance the implementation of policy #7 of the CMP. Prior to its designation as a Significant Coastal Fish and Wildlife Habitat the area was assessed and rated for its habitat functions and values. Documentation describing the habitat and its functions and values was developed to support the designation of the habitat and the implementation of policy #7 and other applicable policies of the CMP.

The habitat documentation for the area indicates the habitat is one of the largest protected, shallow, and important coastal bay and wetland ecosystem areas in New York State, supporting endangered and threatened species and other important species of commercial and recreational significance, and supporting important public commercial and recreational uses of those resources. That documentation indicates the habitat is an extremely productive area for marine finfish, shellfish, and other wildlife, and that much of this productivity is directly attributable to the extensive salt marshes and tidal flats within the area. The habitat documentation also indicates: the habitat receives heavy recreational fishing pressure of statewide significance; that the entire bay area is inhabited by shellfisheries of statewide commercial and recreational significance; the habitat is irreplaceable; fish and wildlife species would be affected by excessive turbidity; and that the construction of shoreline structures such as docks and piers in natural beach, tidal flats, or salt marsh not previously disturbed by development may result in the loss of productive areas which support the fish and wildlife resources of the Great South Bay-West habitat.

Clam Pond is a relatively small, shallow, irregularly-shaped, Great South Bay embayment up to approximately 1,200 feet wide across its widest areas. Intertidal and high marsh vegetation fringe much of Clam Pond, and the eastern side of Clam Pond is open to the Great South Bay.

Copies of the State Department of Environmental Conservation's official tidal wetlands maps of the area on file with this Department, file record photographs submitted on behalf of your client's proposed activity and the consistency certification submitted for it, and personal knowledge of the area based on field investigations by DOS staff and other agency representatives indicate that all of Clam Pond and the shoreline abutting it is comprised of both vegetated and unvegetated tidal wetland areas, including: intertidal marsh; high marsh or salt meadow; shoals, bars and mud flats;

and littoral zone areas. These tidal wetland areas constitute relatively shallow waters less than six feet (6') deep at low tide. The file record and field inspections of the area indicate that the depth of water in the area at the seaward end of the proposed structure, and adjacent to that area, is approximately two feet (2') deep at low tide. The file record photographs submitted on your client's behalf also show that the proposed structure would traverse an existing sandy shoreline seaward of a vegetated upland area, extending into shallow intertidal coastal shoals, bars and mudflat tidal wetland areas. The file record photographs submitted on behalf of your client also show an existing cleared walkway through your client's vegetated upland to the sandy shoreline adjacent to Clam Pond. Those photographs also show that the sandy shoreline exists in the areas both landward of mean high water and the intertidal area seaward of mean high water, and that other than an existing upland walkway through the vegetated area upland of the sandy shoreline where the structure is proposed, the natural beach, tidal flats, and other areas the structure would traverse are undeveloped.

The shallow vegetated and unvegetated tidal wetland areas in and surrounding Clam Pond are highly productive areas having significant physical and biological values, providing significant values for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, and public uses of those areas and resources, including: commercial fishing and shellfishing; recreation, including recreational fishing and shellfishing, waterfowling, and other forms of water-dependent recreation; education; research; and open space and aesthetic appreciation. These wetlands are essential for the propagation and survival of and support important species and public uses of the designated Great South Bay-West Significant Coastal Fish and Wildlife Habitat, which includes Clam Pond. The shallow vegetated and unvegetated areas in Clam Pond and elsewhere in the Great South Bay comprise and constitute one of the most important elements of the Great South Bay-West Significant Coastal Fish and Wildlife Habitat, and their physical and biological functions and values are sensitive to physical and other disturbances. Shallow vegetated and unvegetated tidal wetland are especially sensitive to: scour and erosion of sediments and the loss of vegetation around and near pilings and other physical structures; shading of aquatic vegetation by structures overlying that vegetation, resulting in a loss in vegetative growth and primary productivity and reductions in the values of aquatic vegetation for other species and the marine ecosystem; and other valuable benefits provided by those areas.

During its review of this proposed activity staff of the Department of State's Division of Coastal Resources analyzed topographic maps, orthophotography, and coastal geomorphological trends in the Clam Pond and surrounding Great South Bay and Fire Island barrier areas. That analysis indicates that the Clam Pond area has been shoaling in over the past few decades, and that breaching of an eastern spit enclosing part of the pond, and subsequent redistribution of a portion of the sediment into the pond, is resulting in generally decreasing water depths in the pond. This is a normal geomorphological process leading to conditions conducive to new vegetated wetland relied upon by other important species that are important elements of the Great South Bay Significant Coastal Fish and Wildlife Habitat, including conditions necessary for the survival and propagation of eelgrass (Zostera marina), a species of submerged aquatic vegetation that is one of the most important, productive, and sensitive species of aquatic vegetation in Clam Pond and other areas of the designated Great South Bay habitat. As water depths decrease in Clam Pond, and absent anthropogenic physical disturbances and destruction of them, eelgrass beds are likely to become the dominant submerged aquatic vegetation in the pond, except in shallower intertidal areas that are exposed during daily tidal cycles, where low salt marsh vegetation (Spartina alterniflora) currently exists, and can expand as water depths gradually decrease.

Eelgrass beds have expanded westward from areas in the Great South Bay into Clam Pond. Eelgrass mapping from the mid-1980's does not show eelgrass in Clam Pond. However, recent aerial photographs, verified by field inspections of the area, indicate the presence of significant eelgrass beds in Clam Pond. Information in the file record provided on behalf of Mr. Leibner as part of his permit application and consistency certification documents the presence of eelgrass in Clam Pond, approximately fifty feet (50') seaward of his shoreline property. The presence

of eelgrass in that area is significant because eelgrass beds disappeared from most areas in the Great South Bay and elsewhere on Long Island in earlier parts of the 20th century, and while eelgrass beds have become reestablished in certain areas in the Great South Bay and other areas around Long Island, they have not returned to many other areas where they once existed and provided important habitat functions and benefits. In this regard, eelgrass beds are among the most productive components of the estuarine ecosystem, providing significant shelter and food resources for many important species constituting and using the Great South Bay-West habitat. Eelgrass beds are especially important for hard clam and bay scallop populations, which are important recreational and commercial shellfisheries. The decline in populations of bay scallops coincided with losses of eelgrass, to the point where viable populations of bay scallops no longer exist in many areas of the Great South Bay and elsewhere around Long Island. Clam Pond is an area where bay scallops, reintroduced to the area after their decline, have survived.

Pursuant to Article 46 of the State Executive Law, the Great South Bay and Clam Pond are part of the State designated Long Island South Shore Estuary Reserve. That legislation required the preparation of a comprehensive management plan for the reserve by the South Shore Estuary Reserve Council, comprised of agency and public representatives. That plan, the Long Island South Shore Estuary Comprehensive Management Plan (SSER CMP), was completed and officially adopted by the Reserve Council in 2001. The importance and significant ecological and habitat values of wetlands, submerged aquatic vegetation such as eelgrass, and habitats of high functional quality, such as the Great South Bay-West habitat, are recognized in the SSER CMP. One of the important recommendations of the SSER CMP states:

> "Support productivity of commercially and ecologically important estuarine species by sustaining existing habitats of high functional quality and restoring degraded habitats, particularly submerged aquatic vegetation (SAV) beds and shallows."

Technical reports were prepared during the development of the SSER CMP. One of those technical reports is the July 1997 Wetland Technical Report, which identifies four wetland impairments having principally anthropogenic origins. One of those impairments is:

> "...fragmentation of wetland values principally due to private access structures."

Throughout its initial and subsequent reviews of Mr. Leibner's proposed activity and the consistency certifications submitted for it, and in accordance with Federal and State consistency provisions, the DOS coordinated its review of Mr. Leibner's proposed activity with other agencies, including the U.S. Army Corps of Engineers, the National Park Service, and the New York State Department of Environmental Conservation. During that coordination the Superintendents of the FINS, representing the U.S. Department of the Interior's National Park Service, wrote to DOS on September 29, 1998, and to the Corps of Engineers on February 13, 2003, and to you on March 23, 2004, opposing the authorization of new docks in the Seashore District, including the structure proposed by Mr. Leibner. The Superintendents of the FINS also indicated why the National Park Service is opposed to such structures in the FINS.

Those letters indicate that new structures, including the one proposed by Mr. Leibner in Clam Pond, physically obstruct and privatize publicly owned waterways, segment habitat, are visual intrusions of man-made structures into a predominantly natural setting, and do not comport with Seashore standards. With regard to Mr. Leibner's proposal specifically, and other docks in the area, the Superintendent indicated in a letter dated March 23, 2004 that:

> "All of the existing docks around Clam Pond are illegal, as having been constructed without a permit under 36 C.F.R. Section 5.7"; and
>
> "these docks constitute prohibited uses within the Seashore District"; and

> "none of the other docks on Clam Pond have been built with permits from the Seashore"; and
>
> "approving this request would represent a major and significant change in existing policy, opening the door to a myriad of others...Allowing a proliferation of docks around Clam Pond would not be consistent with the Act (referring to the Federal Seashore Act), would alter the 'relatively unspoiled natural features' of the Seashore, and is likely to cause significant harm to the resources of the Seashore."

Clam Pond and other portions of the Great South Bay adjacent to the Fire Island barrier island, and the upland portions of the Fire Island barrier island in the subject area, are within the Fire Island National Seashore (FINS). The FINS is a national seashore park. The northerly boundary of the FINS in this area extends northward from the shoreline 4,000' into the Great South Bay, encompassing all of the underwater lands and waters in that area. Encompassing approximately 19,500 acres that include the lands and waters in Clam Pond and portions of the Great South Bay, the FINS was established for the purposes of

> "conserving and preserving for the use of future generations certain relatively unspoiled and undeveloped beaches, dunes, and other natural features within Suffolk County, New York, which possess high values to the Nation as examples of unspoiled areas of great natural beauty in close proximity to large concentrations of urban population." (Title 16, Section 459e, U.S. Code)

The purposes of creating the FINS include preserving various cultural and natural resources in perpetuity, making this valuable part of America's heritage available to over 4 million visitors each year for public use, experience, enjoyment, understanding, and appreciation of the Seashore's unique natural resources, cultural, and recreational resources and values. These resources and values are of local, regional, State and national importance.

In accordance with the Federal legislation that established the FINS, the U.S. Department of the Interior adopted regulations delineating areas within the FINS that include Community Development, Dune, and Seashore Districts. These distinct districts and the areas within them were established to achieve specific public objectives. The proposed activity involves the construction of a private dock assembly in both the FINS Community Development and the Seashore Districts.

Mr. Leibner's upland property and all of Clam Pond are in the Fire Island National Seashore (FINS). The upland part of the structure would be within the FINS Community District, which was established to provide for residential and certain other uses of those upland areas. The area where the structure is proposed seaward of the mean high water line is within the FINS Seashore District, which includes the lands and waters in the National Seashore seaward of the mean high water line along the shore. All of Clam Pond is in the Seashore District of the National Seashore. The FINS Seashore District was established as an area where new structures and uses are to be limited to protect that area and its natural resources for important public uses.

Recognizing the need to provide for access to the FINS, the legislation establishing the FINS and its implementing regulations include provisions for public access to and use and enjoyment of the natural resources within the National Seashore, especially the public in-water and upland areas in the Seashore. Except for limited government, emergency, and utility purposes, and in limited circumstances for certain year-round residents needing access to and from their residences in the late fall, winter, and early spring seasons, motor vehicles such as cars and trucks are not allowed on the Fire Island barrier in the FINS. This is to protect the qualities and values of the natural resources and character of the FINS. The general public, including the owners of private property in the National Seashore, has and is provided access to and from the Seashore by a variety of private vessels and public ferries. Once reaching the Fire Island barrier by vessels, most visitors and residents walk and some use bicycles to travel from place to place along upland areas of the barrier island.

Using varieties of motorized and unmotorized vessels, the general public has access to and from and commonly does access shallow nearshore and shoreline areas throughout the length of the Great South Bay shoreline in the National Seashore. Many private vessels that are used for public access to the Seashore are anchored in the Great South Bay offshore of shallower nearshore areas. Most of those anchored vessels are concentrated near public and community marinas where passengers disembark, embark, and load and unload supplies. Visitors to the Seashore also disembark from vessels to swim, fish, take shellfish, wade in shallow nearshore areas along the shore, wade to shore and walk along the intertidal shoreline, stroll along the shoreline throughout the Seashore District, and walk farther inland to use other public areas and resources and private areas in the National Seashore. Many private vessels used for access to and from the Seashore are also anchored and moored in offshore anchoring and mooring areas near and in slips in public and other marina facilities along the north side of the Fire Island barrier in the FINS. Many owners of upland property in the National Seashore also access the National Seashore and their property in these manners.

Access to and from the National Seashore from the Long Island mainland is also provided via seasonal ferries, and access to areas within the Seashore along the north side of the Fire Island barrier is also provided by water taxis. Ferry and water taxi passengers disembark at ferry docks and terminals and either walk or ride bicycles to and use areas throughout the National Seashore, including the publicly owned shoreline along and in-water areas in the Great South Bay. One such marina is located along the shoreline a short distance of approximately 320' east of Mr. Leibner's property. A ferry landing facility is approximately 180' farther east of that marina.

The preceding means of access are the common and traditional means of access to and within the FINS. Through these means of access, and in addition to other uses of the FINS and the areas within it, the general public uses the lands and waters and other valuable resources of the designated Great South Bay-West habitat in the Seashore District for a wide range of lawful water-dependent uses, including but not limited to recreational and commercial shellfishing, swimming, wading, strolling, fishing, waterfowling, nature study and education, open space recreation and appreciation, and navigation by motorized and non-motorized vessels that include canoes and kayaks and inflatable and sailing vessels.

There are docks along the Long Island mainland along the northern shoreline of the Great South Bay-West Significant Coastal Fish and Wildlife Habitat, and along the Clam Pond and southerly shoreline of the habitat in the FINS. The vast majority of docks in the Great South Bay, numbering in the hundreds and having been reviewed and lawfully constructed in accordance with State and Federal regulations, are along much of the northern shoreline and tributaries of the Great South Bay habitat where the shoreline is intensely developed. In those areas many natural resource and habitat functions and values and opportunities for public access and use of shoreline and shallow nearshore areas are significantly less than they are along the considerably less developed, natural, and high value public park shoreline areas in the FINS Seashore District. Much of those developed areas along the north side of the Great South Bay habitat are bulkheaded to the low tide line, thereby limiting opportunities for the public to traverse the shoreline. Most of those areas lack highly productive and sensitive vegetated wetlands and submerged aquatic vegetation, and most of the shallow nearshore waters in those areas are closed to the taking of shellfish as a result of impairments to water quality from runoff from intensely developed areas, limiting the commercial use of those resources and public recreational uses and enjoyment of those resources.

Other than including public lands and waters that the public has general rights of access to use, those areas are not within public parks or similar areas where natural resource values are higher than elsewhere, and where the general public is encouraged to visit and provided with the means to access, use and enjoy those resources because of their special charateristics and values.

Conditions on and in Clam Pond in the area of the proposed project are very different. The shoreline and shallow nearshore areas of the Great South Bay-West habitat in Clam Pond and adjacent to Mr. Leibner's upland is not

bulkheaded to the water's edge. The shoreline and shallow nearshore areas of Clam Pond adjacent to Mr. Leibner's upland consists of and has within it undeveloped, high quality and highly productive intertidal and other wetland areas, sensitive and important eelgrass, and important shellfisheries, all within the Seashore District of a national park where the general public has access to and is encouraged to use and enjoy the area and its resources for a wide range of lawfull purposes, including shellfishing, canoeing, kayaking, wading, strolling along intertidal and other areas, waterfowling, and nature study.

File records indicate there are six dock assemblies in Clam Pond, and two in a small embayment off the southwest side of Clam Pond. There is nothing in the DOS file record regarding Mr. Leibner's proposal nor any other DOS records indicating when all of those docks were constructed, whether they were reviewed by DOS, or whether they were lawfully constructed in accordance with all applicable Federal and State standards. A review of DOS records for docks in Clam Pond indicates that DOS did not review any of those docks for their consistency with the CMP. Some of them may have originally been constructed prior to the regulation of activities in tidal wetlands by the State pursuant to the State's Tidal Wetlands Act, the development and approval of the CMP, and the designation of the Great South Bay habitat as a means of implementing CMP policies.

The DOS file records regarding Mr. Leibner's proposed activity, other docks, and other in-water structures seaward of the mean high water line in the Seashore span several years, involving proposals throughout the relatively undeveloped and high value natural areas of the Seashore District of the FINS. Those records indicate that the FINS, DOS, and the U.S. Army Corps of Engineers have previously recognized the unique natural resources and characteristics of the Seashore District, which includes significant portions of the State designated Great South Bay-West habitat. Given the resource characteristics and values of that area, proposals for new docks and other structures seaward of the mean high water line, in the Seashore District and designated Great South Bay-West habitat, have not been authorized.

The file records regarding this matter indicate that representatives of the DOS and the FINS have expressed these and related concerns to your client, you, and your client's other agents over a period of more than five years. The U.S. Army Corps of Engineers had similar concerns beginning more than five years ago when, after becoming aware of DOS and FINS concerns and applicable Federal standards in the Seashore District, that agency withdrew the original and subsequent applications from active processing.

Purpose of the Proposed Activity: The stated purpose of the proposed activity is "Private boat dockage".

Applicable Policies: The applicable policies of the CMP are policies #7, #20, and #44.

Policy Analysis

POLICY #7: SIGNIFICANT COASTAL FISH AND WILDLIFE HABITATS, AS IDENTIFIED ON THE COASTAL AREA MAP, SHALL BE PROTECTED, PRESERVED, AND WHERE PRACTICABLE, RESTORED SO AS TO MAINTAIN THEIR VIABILITY AS HABITATS.

The proposed dock assembly would be constructed seaward of the mean high water line in Clam Pond, crossing a natural beach and shoal, bar, mudflat, and shallow open water littoral areas. All of the area in Clam Pond is within the State designated Great South Bay-West Significant Coastal Fish and Wildlife Habitat. The area was designated by the State as a Significant Coastal Fish and Wildlife Habitat in accordance with Article 42 of the State Executive Law and implementing regulations in 19 NYCRR Part 602 in order to advance the implementation of policy #7 of the CMP.

All of the shoal, bar, mudflat and shallow litoral areas in Clam Pond have been designated and mapped as tidal wetland areas by the New York State Department of Environmental Conservation in accordance with Article 25 of the State Environmental Conservation Law and implementing regulations in 6 NYCRR Part 661. Those tidal wetlands (see also policy #44) comprise and constitute one of the most important elements of the State designated Great South Bay-West habitat.

The habitat documentation for the Great South Bay-West Significant Coastal Fish and Wildlife Habitat area indicates that the habitat is comprised of salt marshes, intertidal flats and shallows that are extremely productive areas for marine finfish, shellfish and other wildlife, that habitat supports a commercial shellfishing industry and waterfowling of regional significance, and that the habitat is irreplaceable. An impact assessment included in the habitat documentation for the area states:

> "Construction of shoreline structures, such as docks...in areas not previously disturbed by development (i.e., natural beach, tidal flats, or salt marsh) may result in the loss of productive areas which support the fish and wildlife resources of Great South Bay-West".

The natural beach and shoal, bar, mudflat, salt marsh, and shallow open water littoral wetland areas where the dock is proposed have not been disturbed by development.

The construction of docks results in varying degrees of increased turbidity and sedimentation while piles are driven or jetted into sediments. The substrate and vegetation where docks are constructed is also disturbed by human traffic and construction equipment while docks are being constructed. To varying degrees this sedimentation reduces primary productivity, interferes with the respiration of certain aquatic species, alters the suitability of spawning areas, reduces habitat diversity, and smothers benthic organisms. Noise and vibration along with increased turbidity may also drive species from the area. Plant and animal species in and on the substrate where pilings are embedded are physically destroyed. Those not physically destroyed immediately during construction are often lethally injured, and others, weakened beyond their normal physical tolerance ranges, eventually die or are impaired to the point where they cannot function normally.

After their construction, the physical presence of docks causes physical and other changes to the marine environment. Tidal and wind-driven currents and waves scour sediments from around pilings, resulting in physical changes to the substrate that limit vegetative growth around pilings. The physical presence of a dock over intertidal and open water areas reduces primary productivity in the area under and adjacent to the dock as a result of shading. Shading also results in etiolation, causing stress and resulting in the decreased numbers of aquatic plants, their productivity, and productivity of other species dependent upon the productivity of aquatic vegetation. In shallow areas where floats associated with a dock touch the substrate, sediments are scoured from around the floats, suspended in the water column, and transported elsewhere. Sediments under floats in two feet or less of water are often suspended through the "winnowing" of those sediments, resulting from changes in water pressure under the floats caused by the motion of floats as they move up and down with the movement of water by waves. These effects limit and in some cases prevent new vegetative growth under and adjacent to pile supported catwalks and floats in and over the water. In very shallow areas where floats touch the substrate, the floats crush and destroy organisms under them when the tide is down, during extremely low tides, and when the floats are lowered through the troughs of waves. In sandy shoal, bar, and mudflat areas where there are few strongholds or other hard surfaces to attach to, encrusting and other sessile organisms not ordinarily associated with the area attach to and often proliferate on dock pilings and the undersides of floats, changing the aquatic community and ecosystem structure of the area. This can lead to the introduction of undesired organisms and undesired changes in ecosystems. When propellor-driven vessels use docks, and the propellor is within a foot to two feet of the substrate, the propellor wash drives sediments form the substrate, creating furrows and plumes of sediments in the water column behind the path of the vessel. This is especially damaging to

the substrate, water quality, and organisms in the substrate and water column, and these adverse effects, in addition to those caused by the physical presence of docks in the water, are accentuated in very shallow areas. The preceding and other adverse effects result in reductions and can lead to the total loss of important aquatic vegetation and organisms under and adjacent to docks. These and other adverse effects are compounded as the numbers of docks increase in an area.

With regard to Mr. Leibner's proposed dock assembly, constructing the pile supported catwalk and float dock assembly in this area would result in the scour of sediments around the dock pilings, increased erosion of wetlands and the suspension and resuspension of sediments in shallow areas, and adverse effects resulting from and associated with the physical presence of the dock and its shading of the wetland and habitat area in Clam Pond. The construction and longer term physical presence of the dock would segment the nearshore area of the habitat. To varying degrees all of these effects would result in physical changes leading to losses and impairments to the viability and values of this significant and important habitat, leading to impairments to important water-dependent uses of the fish and wildlife resources constituting and dependent on the habitat, such as fishing, shellfishing, and waterfowling, and non-consumptive uses of the habitat for wildlife photography, bird watching, nature study, research, and education (see also Policies #20 and #44). These impairments and the physical presence of the dock would also reduce the open space and aesthetic value of the wetlands constituting the habitat. All of these effects would impair the habitat functions and values of the area where the dock assembly is proposed, and would likely prevent the ability of eelgrass and other submerged aquatic vegetation, including intertidal marsh, to expand into the area covered by the dock assembly.

For several years, in order to protect and preserve the relatively undeveloped natural character and limit inappropriate uses of the Great South Bay habitat in the Seashore District, new private docks accessory to the single family residential use of privately owned upland have not been authorized in Clam Pond, and in other areas of the habitat that are in the FINS Seashore District. The authorization and construction of Mr. Leibner's dock assembly, in this area, would be precedent-setting, and could lead to similar proposals and the construction of similar structures in Clam Pond and similar areas of the Great South Bay habitat.

The cumulative effects of docks and their associated human uses in unvegetated and vegetated wetlands, mudflats, shoals, bars and shallow open water areas constituting the designated habitat in Clam Pond and similar areas would degrade the quality and integrity of the designated habitat area by changing the physical, biological, and chemical parameters that the habitat area and many species using the area are dependent upon. These effects would result from increased scouring around dock pilings, increased erosion of vegetated wetlands and the suspension and resuspension of sediments, and the shading of in-water areas. Secondary effects resulting from the use of docks by motorized and certain other non-motorized vessels, such as sailboats with keels, would include the erosion of wetland areas and the suspension and resuspension of sediments in shallow areas resulting from vessel wakes, vessel motors and vessel keels in shallow areas, and the increased presence and use of vessels in these areas. The physical presence of these docks and their associated uses would interfere with the use of undeveloped areas of the habitat by species dependent upon the area, including but not limited to shellfish, finfish, and important waterfowl and colonial waterbirds, leading to a decline in the use of the area by the effected species, a decline in the viability of the area as a habitat for these species, and a decline in the habitat values of the area for important human uses.

Given all of the preceding information, the proposed dock assembly and the adverse effects resulting from it would not be consistent with policy #7 of the CMP.

POLICY # 20: ACCESS TO THE PUBLICLY OWNED FORESHORE AND TO LANDS IMMEDIATELY ADJACENT TO THE FORESHORE OR THE WATER'S EDGE THAT ARE PUBLICLY OWNED SHALL BE PROVIDED AND IT SHALL BE PROVIDED IN A MANNER COMPATIBLE WITH ADJOINING USES.

The explanation for policy #20 states in part:

> "In coastal areas where there are little or no recreation facilities providing specific water-related recreational activities, access to the publicly owned lands of the coast at large should be provided for numerous activities and pursuits which require only minimal facilities for their enjoyment. Such access would provide for walking along a beach...or to a vantage point from which to view the seashore. Similar activities requiring access would include biclyclng, birdwatching, photography, nature study, beachcombing, fishing and hunting."

The explanation of policy also indicates that public interests in underwater lands and waterways include navigation, commerce, fishing, bathing, recreation, and environmental and aesthetic appreciation.

All of Clam Pond consists of shallow tidal wetland areas (see also policy #44) constituting an important element of the State designated Great South Bay-West Significant Coastal Fish and Wildlife Habitat (see also policy #7). Almost all of the tidal wetlands in Clam Pond are undeveloped, consisting of valuable fish and wildlife habitat and open space recreation areas in a national park, accessible to and used by the general public for a wide range of uses compatible with the natural resource and open space character values of the tidal wetlands and habitat in the area.

To a distance of approximately fifty two feet (52') from the shore, the proposed dock assembly would physically prevent the general public from traveling along the important intertidal and shallow shoreline and nearshore areas where the structure is proposed, thereby physically interfering with the ability of the public to use that area for canoeing, kayaking, walking, wading, swimming, and other lawful uses of Clam Pond. This interference with the public's ability to access and use the shoreline and nearshore water areas is significant in Clam Pond and the FINS, a national park, on Long Island, near New York's metropolitan area, one of most developed and populated regions in the United States, where the demands for such uses are high.

The direct and cumulative effects of constructing this dock and others in Clam Pond and similar areas would reduce the ability of the public to access and use this area and its important public resources.

Given all of the preceding information, the construction of this proposed dock assembly in Clam Pond and its effects would not be consistent with CMP policy #20.

POLICY #44: PRESERVE AND PROTECT TIDAL AND FRESHWATER WETLANDS AND PRESERVE THE BENEFITS DERIVED FROM THESE AREAS.

The proposed dock assembly would be constructed in tidal wetland areas that are officially delineated on the New York State Department of Environmental Conservation's Tidal Wetlands Inventory Maps as shoals, bars, mudflats, and littoral zone wetland areas. The benefits derived from these areas include but are not limited to: habitat for wildlife and fish, including a substantial portion of the State's commercial fin and shellfisheries and contribution to associated aquatic food chains; recreational opportunities; educational and scientific opportunities; and aesthetic open space in many otherwise densely developed areas.

The preceding policy #7 analysis indicates the proposed dock would have several adverse effects on the tidal wetland

areas that constitute important elements of the Great South Bay-West Significant Coastal Fish and Wildlife Habitat. Those effects would result from both the direct effects of scour, erosion, sedimentation and shading of wetlands in the habitat as a result of the construction and physical presence of the structure, and other secondary effects could result from certain uses of the proposed structure, especially motorized vessels. In addition, the preceding policy #20 analysis identifies the types of adverse effects the construction and presence of the proposed dock would have on important open space, aesthetic, recreation, and other public uses and appreciation of the tidal wetlands that constitute important elements of an important fish and wildlife habitat. The construction and private use of the proposed dock assembly does nothing to protect and preserve tidal wetlands and their benefits as open space and aesthetic appreciation, and no public benefits would be derived from the construction and use of the proposed dock in tidal wetland areas in Clam Pond. Rather, it would impair wetlands and the benefits derived from them.

Given all of the preceding information, the proposed dock is not consistent with CMP policy #44.

Conclusion

Based on the foregoing information and analysis, the proposed activity would not be consistent with policies #7, #20, and #44 of the New York Coastal Management Program.

Alternatives

Pursuant to 15 CFR Part 930.63, the DOS may describe alternatives which, if adopted, may permit the activity to be conducted in a manner consistent with the New York Coastal Management Program.

The proposed dock assembly is not necessary for "Private boat dockage" or to launch, embark, or disembark from relatively small vessels along the shoreline of the applicant's upland, nor is it necessary for access to and from the applicant's upland property and the water, whether for recreational navigation or other lawful purposes.

Photographs of the site where the dock assembly is proposed indicate that a wooden walkway extends from a residence across a cleared upland area to a point slightly landward of the mean high water line along the shore. The cleared upland near the end of and on either side of that wooden walkway leading from the upland toward Clam Pond is comprised of a lawn, rather than natural and more common wetland species. The foreshore just seaward of the mean high water line is sandy. From that area, at all phases of the tide, Mr. Leibner could access the navigable waters of Clam Pond and launch, embark, return to shore, and disembark from vessels such as canoes, kayaks, "Zodiak" or other types of inflatable vessels, small sailing vessels such as "Sunfish" and "Hobie Cats" or other shallow draft sailing vessels with retractable keels, and rowboats. Other alternatives, depending on the type and size of vessel that might be used, include mooring a vessel farther offshore in the Great South Bay where the depths of water are greater than they are in Clam Pond, or mooring a vessel in a slip at a nearby marina.

Mr. Leibner could also access his upland property by using ferries that transport passengers to and from the National Seashore and by walking to and from his upland from ferry terminals, or by using water taxis to and from areas within the National Seashore. These are the common means of accessing public and private property in the area.

None of these alternatives would be inconsistent with any of the enforceable policies of the New York Coastal Management Program.

Appeal

Pursuant to 15 CFR Part 930, Subpart H, and within 30 days from receipt of this letter, you or your client may request that the U.S. Secretary of Commerce override this objection. In order to grant an override request, the Secretary must find that the proposed activity is consistent with the objectives or purposes of the Coastal Zone Management Act, or is necessary in the interest of national security. A copy of the request and supporting information must be sent to the New York State Department of State and the U.S. Army Corps of Engineers. The Secretary may collect fees from you for administering and processing your request.

Given that the appeal process can be a lengthy one, if you or your client would like to continue discussions with this office while pursuing an appeal of this decision, please call William Feldhusen at (518) 473-2470. You or your client may also contact Mr. Feldhusen if you would like to speak to our Legal Division.

The U.S. Department of Commerce and others are being notified of this decision by copy of this letter.

Sincerely,

Sam Messina
Deputy Director
Division of Coastal Resources

c: OCRM - John King
COE/New York District - Richard Tomer
FINS - Barry Sullivan, Acting Superintendent
NYS DEC/Region 1 - John Pavacic
En-Consultants, Inc. - Roy L. Haje

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