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ENVIRONMENTAL PROTECTION  
OFFICE OF POLICY, PLANNING AND SCIENCE  
COASTAL MANAGEMENT OFFICE

Coastal Permit Program Rules; Coastal Zone Management Rules

Adopted Repeal and New Rule: N.J.A.C. 7:7E-8.11: Public Access

Adopted New Rules: N.J.A.C. 7:7E-3.50 and 8A

Adopted Amendments: N.J.A.C. 7:7-1.3, 1.5, 7.5, through 7.14, 7.17, 7.18, 7.24, 7.26, and 7.29;  
7:7E-1.8, 3.22, 3.23, 3.40, 3.43, 4.13, 7.2, 7.3, 7.4, 7.7 and 7.11

Proposed: November 6, 2006 at 38 N.J.R. 4570(a)

Adopted: by Lisa P. Jackson, Commissioner, Department of Environmental Protection

Filed: with substantive and technical changes not requiring additional public notice and comment  
(see N.J.A.C. 1:30-4.3)

Authority: N.J.S.A. 13:19-1 et seq.; 12:3-1 et seq., 12:5-3, 13:9A-1 et seq.; Public Trust Doctrine  
(see *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005))

DEP Docket Number: 19-06-09/482

Effective Date:

Expiration Date: March 21, 2011, N.J.A.C. 7:7  
January 7, 2007, N.J.A.C. 7:7E

As the New Jersey coastline continues to be developed and redeveloped, it is essential that development be conducted in a manner that retains the public's access to, and use of, tidal waterways and their shores. As the New Jersey Supreme Court in *Matthews v. Bay Head Improvement Ass'n* held "Beaches are a unique resource and are irreplaceable. The public demand for beaches has increased with the growth of population and improvement of transportation facilities." 95 N.J. 306, 323 (1984). In light of the importance of the rights protected by the Public Trust Doctrine, the demand for access to tidal waterways and their shores, and the constant development pressures threatening to reduce the public's access to the waters and shores protected by Public Trust Doctrine, the Department proposed on November 6, 2006 new rules and amendments to the Coastal Permit Program rules, N.J.A.C. 7:7 and Coastal Zone Management rules, N.J.A.C. 7:7E, to refine and increase the predictability of the Department's existing public access requirements, and set forth more specific requirements for Shore Protection Program and

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Green Acres Program funding for projects along tidal waterways (See 38 N.J.R. 4570(a), November 6, 2006). The new rules and amendments adopted herein will ensure that the public's rights under the Public Trust Doctrine continue to be protected, and that improvements are accomplished in areas including parking, restrooms and linear and perpendicular access, to provide families and others a more realistic and meaningful opportunity to enjoy the public's resources.

In addition to the historic legal rights retained by the public to tidal areas, public funds are invested in numerous ways to protect these public resources and their adjacent lands. The lands and waters subject to public trust rights receive many State and Federal dollars that have been invested in beach replenishment, shore protection, road projects, water quality and monitoring programs, and solid waste monitoring. As a result of this investment, the public has the right to use these resources. State funds are also used to acquire and develop lands for parks and recreation through the Department's Green Acres Program. These programs are financed not just by the communities within which these lands and waters subject to public trust rights are located, but by residents Statewide. Additionally, residents Statewide contribute to fund various Federal programs that protect and enhance lands and waters subject to public trust rights. Therefore, the new rules and amendments adopted herein ensure that all residents who contribute to the protection of these lands and waters are able to exercise their rights to access and use the lands and waters.

In response to public comment, the Department has made several changes on adoption. These changes are described below in responses to comments and in the summary of Agency-Initiated Changes.

The Department is also publishing elsewhere in this issue of the New Jersey Register, a proposal of amendments to the rules adopted herein. This concurrent proposal responds to issues raised on the November 6, 2006 proposal that require further public notice and comment. Briefly, the proposed amendments would allow for the modification of the linear public access along a tidal waterway at commercial marinas, superhighways, and for homeland security. Amendments are also proposed to modify the requirements for municipalities participating in Shore Protection Program funding through a State Aid Agreement for projects along the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and Delaware Bay and their shores. Amendments are also proposed to the Green Acres funding requirements to change the timing for submission of the public access plan and Public Access Instrument, where applicable.

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**Summary of Hearing Officer's Recommendation and Agency Response:**

The Department held three public hearings on the proposed repeal, amendments and new rules. The hearings were held on the following dates and locations: November 28, 2006, Liberty State Park, Jersey City; December 1, 2006, New Jersey Department of Environmental Protection, Public Hearing Room, Trenton; and December 4, 2006, Richard Stockton College of New Jersey, Pomona. The comment period for the proposal closed on January 5, 2007. The comments received by the Department are summarized and addressed below. The hearing officer for the November 28 and December 1 hearings, Ruth Ehinger, Manager, Coastal Management Office and the hearing officer for the December 4, 2006 hearing, David Rosenblatt, Administrator, Office of Engineering and Construction, recommended that the Department adopt the rules with the changes described in the response to comments below and Summary of Agency-initiated changes. The hearing records are available for inspection in accordance with applicable law by contacting:

Department of Environmental Protection  
Office of Legal Affairs  
PO Box 402  
Trenton, New Jersey 08625

This rule adoption can be viewed or downloaded from the Department's web site at <http://www.state.nj.us/dep>.

**Summary of Public Comments and Agency Responses:**

The Department accepted comments on the November 6, 2006 proposal through January 5, 2007. The following persons submitted written comments and/or made oral comments at one of the public hearings.

1. Barbara V. Ackerman
2. Fred Akers, The Great Egg Harbor Watershed Association
3. Georg Albers-Schonburg
4. Jeff Algard, Lighthouse Pointe Condominiums
5. Robert Angulski
6. Robert O. Baldi, Baldi & Jenei, PC

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7. Jeremy and Carol Barkan
8. Samuel N. Barresi
9. Thomas R. Beaton, David Beaton & Sons, Inc.
10. Carl J. Beck
11. Scott Beim, Twin Lights Marina
12. Patricia Best, Sea Village Marina, LLC
13. John Bonamo
14. John Botsolas, Lanoka Harbor
15. Jeffrey Boyle
16. David H. Brogan, New Jersey Business and Industry Association
17. David Brown, Thompson Marine & Engine, Inc.
18. Edward Brown
19. George J. Browne
20. Frederick J. Brueggeman, Key Harbor Marina, LLC
21. Kenneth J. Burkhart
22. Stan and Kathy Bystrek, Stan's Marine Center
23. Kellie A. Cerillo, Holgate Marina LLC
24. Wendy Mae Chambers
25. Ronald K. Chen, Department of the Public Advocate
26. Michael Chrysanthopoulos, DBA Channel Club Marina
27. Andrew R. Ciesla, New Jersey State Senator, 10<sup>th</sup> District
28. Denis Cohalan, West Creek Marina
29. Steven J. Corodemus, Assemblyman, 11<sup>th</sup> District
30. Andrew J. Cuti
31. Martin Cziraky
32. Daina Dale, Borough of Harvey Cedars
33. William H. Damora, Will's Hole Marina, LLC
34. Melissa Danko, Brown's Boat Yard, Inc.
35. Melissa Danko, New Jersey Marine Trades Association
36. John Danzeisen

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37. Sal Di Bianca
38. Mary DeRogatis
39. David Dickerson, National Marine Manufacturers Association
40. Paul Di Maggio, Mermaid's Cove Marina
41. David DiPaolo, Riverbank Marina
42. Roland Dixon
43. Bob Duerr, Surfrider Foundation
44. William K. Dunbar, III, Mayor, Borough of Mantoloking
45. Michael Egenton, New Jersey State Chamber of Commerce
46. Brook Fishel, Association of Marina Industries
47. Sally Flieder
48. Nils B. Forsberg, Forsberg's Boat Works, Inc.
49. Thomas Fote, New Jersey Coast Anglers Association and New Jersey Federation of Sports Clubs
50. Adelaide Franklin, Main One Marina, Inc.
51. Jane Frotton, Borough of Atlantic Highlands Harbor Commission
52. Jack Fullmer, New Jersey Council of Diving Clubs
53. Charles Gaver, Jr.
54. Earl R. Gelnaw
55. David Giombetti, Silver Cloud Harbor Marina
56. Dianne C. Gove, Mayor, Long Beach Township
57. Susan Goldberg
58. Judith and Joe Golden
59. Elkins Green, New Jersey Department of Transportation
60. Kat Guarino
61. Steve Guarino
62. Reed Gusciora, Assemblyman, 15<sup>th</sup> District
63. Mary Gwenn
64. Teresa Anne Hagan
65. Brian Hall, Dillon's Creek Marina

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66. Dale Hardin, Corinthian Yacht Club of Cape May
67. Ed Harrison Jr., Baywood Marina
68. Mark Hattman, Sheltered Cove Marina
69. C. E. Hattman, Sheltered Cove Marina
70. Richard M. Hluchan, Ballard Spahr Andrews & Ingersoll, LLP on behalf of New Jersey Association of Realtors
71. James W. Holzapfel, Assemblyman, 10<sup>th</sup> District
72. Spencer Hondros, Spencer's Bayside Marina
73. Kenneth R. Horner
74. Walter L. Johnson, III
75. Dorothy Jedziniak
76. Ted Jedziniak
77. Desiree Kammerman, Kammerman's Atlantic City Marina
78. Eleftherios P. Katsanis
79. Walter J. Kavanaugh, New Jersey Senator, 16<sup>th</sup> District
80. Susan M. Kennedy, American Littoral Society on behalf of American Littoral Society; Citizens Right to Access Beaches (CRAB); Cohansey Area River Preservation; Divers Anonymous Dive Club of Clifton, New Jersey; Hackensack Riverkeeper; New Jersey Environmental Lobby; New York/New Jersey Baykeeper; Raritan Riverkeeper; Sierra Club; New Jersey Chapter, Surfers' Environmental Alliance
81. James J. Kilsdonk
82. Jenny King, Kings Crab Ranch & Marina
83. Amy Kleuskens, Clerk, Borough of Avalon
84. Robert F. Knabe, North Beach Taxpayers Association
85. William P. Knarre, Joint Council of Taxpayer Associations of Long Beach Island and Brant Beach Homeowners Association
86. Dona Kozlowski, Morrison's Seafood Inc.
87. Eli and Oddvar Krueger, Cranberry Cove Marina
88. Gary and Marilyn Langan
89. Thomas J. Leaming, Leaming's Marina, Inc.

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90. Jeffrey Lentze, Lentze Marina, Inc.
91. Ruth Leo
92. Bonnie Leonetti, Clerk, Borough of Long Beach Township
93. Frank J. Little, Owen, Little & Associates
94. William Lockwood, Lockwood Boat Works, Inc.
95. Thomas E. Mackie, South Harbor Marine
96. Robert Mainberger
97. Kenneth Martell
98. Eugene R. McCann, Viking Yachting Center, Inc.
99. Donald M. McCloskey, PSE&G
100. Bartley E. McDermott, Conoco Phillips Bayway Refinery
101. Betsy McDonald, NY/NJ Baykeeper
102. Frank M. McDonough, New York Shipping Association, Inc.
103. Donald E. Mears, Lighthouse Marina
104. Marie S. Mease, Ocean Gate Yacht Basin, Inc.
105. Carl Mendell, Save LBI Beaches
106. Violet Meyer, Chestnut Neck Boat Yard
107. Donald Miller, Tradewinds Marina, Inc.
108. Bradford R. Minor, Jr., Minimar Marine
109. Julian V. Miraglia, Councilman, Borough of Stone Harbor
110. Julian V. Miraglia, Natural Resources Committee, Borough of Stone Harbor
111. Frank and Lynn Mizer
112. George Moffatt
113. Michael Moore
114. Michael J. and Nancy Moore, Sportsman's Marina & George's Boat Rentals
115. Debbie Morris
116. Merry Murtagh
117. Joseph Nigro
118. Bob and George Nylund, Tuckerton Marine Service Center
119. Jonathan Oldham, Mayor, Borough of Harvey Cedars

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120. Patrick O’Keefe, New Jersey Builders Association

121. Edwin J. O’Malley, Jr., O’Malley, Surman & Michelini on behalf of the Borough of Mantoloking

122. James E. Pacilio, Will’s Hole Marina, LLC

123. William R. Parsons, Jr., Dredge Harbor Yacht Basin

124. Denise Pelley, Brown’s Boat Yard

125. Kenneth A. Porro, Wells, Jaworski, Liebman & Patton, LLP on behalf of 67 oceanfront landowners on Long Beach Island

126. Brian E. Reynolds, Borough of Avalon Environmental Commission

127. James E. Richards, Richards Buttonwood Marina

128. Philip B. Robeson, ANSI Marine Corporation b/b/a Integrity Marine

129. David Robinson, Robinson’s Anchorage

130. Kersten Roehsler, Viking Terminal Marine, LLC

131. Anthony Russo, Chemistry Council of New Jersey

132. Chris Sabatini, Somers Point Marina

133. Jeffrey A. Savage and family

134. Tammy Parson Savidge, Dredge Harbor Yacht Basin

135. Joseph C. Scarpelli, Mayor, Township of Brick

136. Carl Schenk

137. Marjorie Z. Schindelar

138. Paul H. Schneider, Giordan, Halleran & Ciesla on behalf of Save LBI Beaches

Advocacy Group

139. Robert Schmidt

140. Frederick J. Schragger

141. Mary Ann Schultz, Chestnut Neck Boat Yard

142. Robin Scott, Ray Scott’s Dock

143. Bud and Maryann Sherman, Sherman’s Boat Basin

144. Harry Simmons, The American Shore and Beach Preservation Association

145. Dolores K. Sloviter

146. W.H. Smith

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147. David and Donald Southwick, Garden Harbor Marina T//A Southwick's Marina
148. Vincent Spadafora, Long Key Marina
149. John F. Spinello, on behalf of DuPont
150. John F. Spinello, Kirkpatrick & Lockhart Proston Gatos Ellis, LLP on behalf of Reliant Energy New Jersey Holdings, LLC
151. Albert and Joanna Stevens
152. Joe Stewart, Seaview Harbor Marina
153. Carter H. Strickland, Rutgers Environmental Law Clinic
154. Carter H. Strickland, Rutgers Environmental Law Clinic on behalf of Citizens Rights to Access Beaches (C.R.A.B.)
155. Linda Tavares, Cozy Cove Marina, Inc.
156. Jeff Tawes, Port Norris Marina
157. Gary Theno
158. Paul and Kimberly Townsend, Townsend's Marina, Inc.
159. Frederick J. Traber, Pier 47 Marina
160. John M. Van Dalen, Van Dalen Brower, LLC
161. Ann Marie VanHemmen
162. Roy D. Voss, Good Luck Point Marina, Inc.
163. Michael Wagner, Wagner's Marina
164. Michel T. Walter, Morgan Marina
165. Suzanne Walters, Mayor, Borough of Stone Harbor
166. John Weber, Surfrider Foundation Jersey Shore Chapter
167. Richard Weitzel, East Dover Marina, Inc.
168. Kathleen Wells, Borough of Ship Bottom
169. Edwards Wilmot, Great American Insurance Companies
170. Andrew Wilner, NY/NJ Baykeeper
171. Ken Winter, Winter Yacht Basin
172. David W. Wolfe, Assemblyman, 10<sup>th</sup> District
173. John D. Woolley, Lightning Jack's #3 Marina
174. Kenneth Zeng, Nassau Marina Holding, LLC

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175. The following 78 individuals, listed below, sent in form letters requesting the Department not adopt the proposal because it is bad for Long Beach Island and will not be in compliance with existing standards resulting in a loss of funding for the Long Beach Island Beach Restoration Project.

Stanley Berman

Stephen Brotschul

Pamela Brotschul

Richard J. Cavallo

Robert and Karen Cherins

Dennis B. Cummings

Constance M. Cummings

Janet De Fiore

Sal Di Bianca

Paul D. Diczok

Joan Dixon

James R. Doherty

Charles A. Farrell

Loretta Farrell

Fisher Family

Mariana Fitzpatrick

Richard and Christine Galiardo

Archie Gold

Joy P. Gold

Stephen Guarino

Brett and Marge Harwood

Mildred K. Hrbek

Beverly Irvine

Gregory Kopenhaver

William J. Kucker

William and Sheila Kunz

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Zama Lantzman

Scott Lantzman

Seymour and Susan Levine

Peter Lordi

Julia Luongo

Peter A. Luongo

Marc P. Luongo

Carolyn Mack

Francis Mantone

Jerald Mantone

Michael Mantone

Samuel Mantone

Kathy Maron

Marissa Maron

Andrew W. Maron

James Milder

Phyllis Milder

Robert R. Monaco

Patricia E. Monaco

William M. Moore

Geraldine R. Moore

John J. Parker

Gayle D. Regan

Vincent Rettew

Jeffrey Rich

Norman and Judy Rosenberg

Marilyn K. Rourke

Francis J. Rourke

Marc R. Rubin

Sabers Family

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Peter and Michele Sauber  
Marjorie Z. Schindelar  
Richard and Mary Smith  
Gilbert Stein  
Albert and Joanna Stevens  
Carol Trusso  
Susan Tysowski  
Vincent and Priscilla Ursino  
Hendrick and Cynthia VanLunen  
John Verdonck  
John Verdonck. III  
Maria Louise Verdonck  
Christopher Verdonck  
Toni E. Veteri  
Anthony T. Veteri  
Maureen Veteri  
Victoria J. Veteri  
Susan E. Walker  
Geoffrey Walker  
Barbara Welsch  
Martin J. Yarmark

176. The following 132 individuals, listed below, sent in form letters requesting the Department not adopt the proposal.

John L. Anderson  
Susan Anderson  
Lorraine Baker  
Gerald and Pat Bessey  
Elizabeth Bifulco  
James J. Bigham  
Judy and Jim Birle

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A. Bobrow

Irene Bodenchak

Frank Bodenchak

James Boykins

Jeannette and Arnold Brenman

Alfonso G. Carrino

Charles and Maryann Chatfield

William R. Chess

John Chidestan

Roberta & Susan Christian

Lita and Stanley Cohen

Pauline C. Cohen

Richard and Joan Connor

Richard Corder

Francine Cunniffe

Geryl Deixler

Cara and David Depaul

Mary W. Derogatis

David Devory

Jean Marie Devory

Ernerst and Elinor Doubet

Richard P. Doyle

Diane Duncheskie

Stuart Ebler

Spencer Ewald

Brian Ewald

Robert Falcone

Robert Ferris

Hunter Ficke

Barbara L. Freeman

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Gary B. Freeman  
Gary Fuchs, Save LBI Beaches  
John W. Galiardo  
Mary and Robert Garton  
Cynthia Ghiz  
Diane Giachimo  
Brandon Shaw Gilgen  
Mary Givenn  
Joel Golden  
Virginia Green  
Julie Groisser, Save LBI Beaches  
Victor W. Groisser, Save LBI Beaches  
Lori Groisser, Save LBI Beaches  
William Groisser, Save LBI Beaches  
Carolyn Groisser, Save LBI Beaches  
Kathleen Guarino  
George S. Hassler  
Arlene Hassler  
Eldon and Lyn Hickerson  
Jacqueline Hicks  
Charles H. Hilton  
Dana Huech  
Chris Illegible  
Stephen Illegible  
Illegible Illegible  
Illegible Illegible, Save LBI Beaches  
Illegible Illegible, Save LBI Beaches  
Illegible Illegible, Save LBI Beaches  
John Illegible, Save LBI Beaches  
John Jarka

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Dewain Johnson

Barbara Kaplan

David Katz

Mary and Denny Kean

Barnes Keller

Illegible Keller, Save LBI Beaches

Sonia Keller

Michael Klein

John Klem

Edward Koch

Karen R. Koehler

Maria C. Kryer, Save LBI Beaches

David A. Lackland

Diane Lambert

Ernie Larini

Joan Leinweber

Bruce Leinweber

Sandy Lenger

Craig S. Lipka

Agnes C. Magtoto

Joanne Mainard

Burt Mandell

Nancy Markowich

Kenneth Martell

S.B. Martell

E.F. McCabe

Craig N. Mills

Burton and Barb Nemroff

Doris L. Neumann

No Name

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No Name

Jay Novich

Eugene J. Patten

Barbara Peda

Illegible Petralia

Roselyn M. Rider

Wendy Sabin, Save LBI Beaches

Jay Sal, Save LBI Beaches

Illegible Saul, Save LBI Beaches

Carl and Mary Scheider

S.M. Shapiro

Ariel Shaw

Joanna Shaw

Lori Shaw

Mutya Shaw

Noel Shaw

Pirooz Ellen Sholevar

Charles Shoulberg

Jessica Shoulberg

Abner and Joan Silver

Adam Srozcynski

Geraldine St. Onge

Derryl Stacy

Richard H. Stern

Araxy Tatarian

Lisa Tubbs

Helen G. Tucker

Scott T. Vautin

Illegible Vogel

Peggy Wacks

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Lawrence Walker

Ellen Weisberg

Terry Wiggins

Edna Wissing

Marilyn Yarmark

177. The following 165 individuals, listed below, sent in form letters objecting to the proposal.

James and Deborah Abrams

Barbara V. Ackerman

Rachele Ackerman-Martell

James and Irene Agresti

George Angelica

Leslie J. Armour

Ted Ast

Lynn and Raymon Atkinson

John P. Babcock

Frank Baldattino

Jeremy and Carol Barkan

Elizabeth V. Bauer

Bruce Jay Berger

Bruce Billow

Theodore Birks

B.H. Blama

John F. Bonamo

Suzanne C. Bonamo

Stephen Boyle

Jeffrey W. Boyle

Patricia Bradley

Jack Braun

Anne M. Brazill

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Dennis J. Bucceri

Judith E. Burr

Richard J. Campochiaro

Susan D. Carril

Michael Catena

Peter Cassera

Robert Cherins

Pasquale Chiacchio

Joseph Cleary

Bernard and Patricia Connor

Katherine C. Couch

Elizabeth Culkin

Frank D'Amelio

Theodore and Paula D'Amico

Robert Deasy

T. Delorenzo

Richard Deluccia

Katherine W. Derogatis

Adeline Derogatis

Jeffrey Derogatis

Andrew Derogatis

Richard and Arlene DiPadova

David J. Dominici

Toni Dominici

Gregory Droce

Katherine Droc

Ed Droc

Karen Droc

Tuck & Anne Elfin

William C. Ensslen

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Barbara Epstein

Robert J. Erwetowski

Audrey Escoll

John f. Ford, Jr.

Thomas G. Frederman

Cynthia Freeman

William H. Frey

Bernard Gallagher

Mary Gallagher

Carol A. Garino

Scott J. Gehsmann

Dawn M. Ghegan

Ralph Gonzalez

Michael F. Gries

Carol Hahn

Frances Hellinghus

Peter Henessy

Marlene and Ed Herman

Gerald & Mary Hofmann

Harold Illegible

Peter S. Johnson

Joseph and Dorothy Johnson

Thomas P. Keefe

James and Marie Keeler

Alphonse Kenworthy

Helen W. Kenworthy

Joseph G. Kiely

Debbie Kingsley

Melvin Kleinfield

Joan and John Klana

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Jessica L. Kolarsick

David Kolarsick

Frederick C. Kolarsick

Christine Kolarsick

Leone F. Komsa

Rebecca Komsa

Elizabeth Kosich

George Krzyzanows

Robert Kucharski

Phillip Kunz

Joseph C. La Reau

John & Patti Landrum

Howard Lawson

Patricia M. Leonard

Ellis Levin

Florence and Nathan Levine

Eleanor Linzenbold

Joseph and Linda Lochandro

Robert J. Longo, Jr.

Antoinette Macarthur

Glenn Maggio

Edward M. Marhefka

Samuel Masucci, Jr.

Tessie Matria

Gerald F. Matria

Elizabeth Mazzucco

Tammy McLean

David Mendelson

Maureen and James Merrow

Glenn Miller

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Stacey Miranda

Patrice Moramarco

Timothy J. Murphy

John Nalbour

Len Nerrie

Mr. and Ms. Nigro

Katherine and Louis Nordt

Doris and Dennis O'Shea

William and Edwina Olsen

James H. Page, Jr.

James Pasciolla

Teresa Patalfi

Ann Marie Petka

Jim Page

Suzanne D. Poor

Dorothy K. Power

William and Bonnie Pukas

Sharon Pushko

Evelyn G. Rabinowitz

Lois P. Raimo

David T. Regal

Joseph Rosito

David N. Rowan

Robert and Anne Saccani

Matthew J. Schaeffer

Patricia R. Schiavone

Nancy Schiumo

Mitchell A. Schwartzman

Norbert Seitel

Marlene B. Shapiro

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Tamar Sherer

Noel S. Small

Richard F. Smith

Bernice E. Smith

Judith and Robert Sobkow

Linda M. Stepenelli

Cecil and Judith Stewart

Robert Stoll

Norman Thomson

Nancy Tom

Robert J. Tomasulo

Helen D. Troast

Bernard J. Vaughan

Robert Vautin

Charles S. Venezia

Mimi and Tony Ventrasca

Jim N. Vigil

John Warren

John T. Whitehall, Jr.

Laura Wulster

Thil Yoganathan

Howard Zeidman

178. Andrew F. Ferguson

A summary of the comments and the Department's responses follows: The number(s) in parentheses after each comment identifies the respective commenter(s) listed above.

## **General**

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1. COMMENT: The rule is an extraordinary step forward for protecting public trust rights and the predictability the rule brings to homeowners, other private property owners, municipalities and nonprofit organizations is extremely important. (170)

2. COMMENT: There is a significant need for public access in the state. Ocean beaches define New Jersey. They are the main playground and recreational space for New Jersey citizens and the foundation of the State's multi-billion dollar tourist industry. As noted by the Supreme Court, "New Jersey beaches adjacent to its tidal areas are world famous because of their suitability for bathing, surf fishing and other forms of recreation." *Van Ness v. Deal*, 78 N.J. 174, 178 (1978). Tourism is a \$16 billion industry in New Jersey's coastal communities, See New Jersey Department of Environmental Protection, *2003-2007 New Jersey Statewide Comprehensive Outdoor Recreation Plan* 45 (Mar. 2003), available at <[http://www.nj.gov/dep/greenacres/pdf/scorp\\_final.pdf](http://www.nj.gov/dep/greenacres/pdf/scorp_final.pdf). A significant portion of the coastal population makes its living directly or indirectly in the tourism industry. Tourism requires readily accessible beaches that are open to the public, not private reserves closed off to all but the privileged few. The tourism industry was established in New Jersey in no small part because very little waterfront property was developed and the public could reach the water's edge and freely use the beach and the ocean. That public access can increase the economic vitality of localities is shown by the positive experience with the Hudson River walkway rule, which has increased the economic value of properties along the Gold Coast and has increased recreational opportunities for the new residents of those structures and thus the quality of life of those towns.

In fact, until the middle of the 20th century, access to and use of New Jersey's beaches was completely free and open to the public. *Secure Heritage, Inc. v. City of Cape May*, 361 N.J. Super. 281, 289 (App. Div. 2003), certif. denied, 178 N.J. 32 (2003) (citing *Neptune City v. Avon-by-the-Sea*, 61 N.J. 296, 300 (1972)). In the Diamond Beach area, free and open public access continued until 1996, as the record in the recent *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005) case showed. Completely open and free beaches are the rule in Florida, Oregon, Texas, and other coastal states through statutes, customs, or Public Trust Doctrine. The need for badges to get on to the beach in New Jersey always puzzles visitors to the State.

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Yet New Jersey faces the prospect of permanently losing many of its treasured beaches to a wave of development. The Supreme Court on several occasions has noted the threats to publicly available beaches and the importance of protecting the resource, see *Lusardi v. Curtis Pt. Property Owners Ass'n*, 86 N.J. 217, 227 (1981); *Van Ness v. Deal*, 78 N.J. 174, 180 (1978); *Avon*, 61 N.J. at 307, as has the Legislature, see N.J.S.A. 13:19-2 (reciting justifications for the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq. (“CAFRA”)). This crucial common resource has remained open to the public only through enforcement of the public trust doctrine through coastal regulation permitting decisions and judicial enforcement. The broader issues of public demand and the uniqueness of title are highly relevant to establishing the scope of public trust rights and its recognition of the demand for and scarcity of trust resources underlies its reasoning. E.g., *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 323, 331 n.10 (1984), cert. denied, 469 U.S. 821 (1984) (referring to the 1977 Statewide Comprehensive Outdoor Recreation Plan and the 1977 Beach Access Study); see also *Lusardi*, 86 N.J. at 227 (noting high demand for the use of unique and scarce waterfront lands); *Deal*, 78 N.J. at 180 (same); and *Avon*, 61 N.J. at 307 (same).

The rush to sell coastal properties for short-term profits sacrifices the long-term interests of the coastal zone and the State as a whole. Municipalities own approximately 51% of New Jersey’s ocean beaches. See *New Jersey Beach Access Study Commission, Public Access to the Oceanfront Beaches: A Report to the Governor and Legislature of New Jersey* 3, figure 2, & App. 3 (Apr. 1977). At one time, it appeared that municipal beaches would be closed to non-residents, but judicial decisions have kept those areas open to all members of the public. See *Deal*, supra; *Avon*, supra.

Disputes over public trust rights have now moved to the private areas of the coast. As of the late 1970s, private landowners controlled at least 26% of the Atlantic Ocean coast, a larger percentage than that owned by the federal government (about 13%) and the State (about 9 percent) combined. *Beach Access Study*, p. 3, figure 2, & App. 3. These private holdings are generally closer to roads and population centers than the remote and primitive National Wildlife Refuges, National Recreational Areas or State parks, and thus are more likely to be used on a day-to-day basis if available to the public.

Moreover, the amount of privately held coastline is growing because many municipal lands are being converted to private lands, whether by the outright sale of public properties to increase the tax

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base or through municipalities' failure to vigilantly assert ownership rights against the de facto or adverse possession of paper streets and other properties by private parties. For example, in a case litigated by C.R.A.B. and others, *Samson v. Bayhead Point Homeowners' Assn'*, Ocean Co. No. C-225-02, public access problems in one part of Point Pleasant Beach started with the sale of public streets and public beach access easements to a private developer, which occurred without public notice or the referendum required by law. Municipal sales were also at issue in *Matthews*, where the private Bay Head Improvement Association came to own seven strips of land from street ends to the high water mark, which it then closed to all except Association members. *Matthews*, 95 N.J. at 314. And in the *Atlantis* case several municipal properties were transferred to private condominium developers, thereby sowing the seeds of the present dispute. In the recent *Atlantis* case, the record showed that Lower Township had abandoned actual and paper streets to Seapointe Village Condominiums, a private landowner.

The sell-off of public access property to private interests was foreseen by the 1977 *Beach Access Study*, which recommended that the Legislature “[p]rohibit municipalities from selling municipally-owned beach property, including lots, street ends and land back to the road nearest the beach, unless there has been a public hearing and the State has been offered a right of first refusal.” *Beach Access Study* at 9. The Legislature has not passed any such law, so municipalities have been free to sell off street ends or other properties used for beach access, and have even vacated such properties without holding required referenda.

The privatization of the coast is also fueled by demographic trends. An additional one million people are expected to live in New Jersey in the next 15 years. See New Jersey Department of Environmental Protection, *2003-2007 New Jersey Statewide Comprehensive Outdoor Recreation Plan* 45 (Mar. 2003), available at <<http://www.dep.state.nj.us/greenacres/scorp.pdf>>. The external and internal movement of people is towards the New Jersey coast: “Four coastal counties, Atlantic, Cape May, Monmouth and Ocean, had the highest population growth in the 1990s. These four counties accounted for more than one quarter of New Jersey’s population growth between 1990 and 2000. . . . Coastal municipalities can see their summer population double and even triple.” To capture the premium for oceanfront housing for this new population, private land developers have the incentive to sell homes by promising a wholly private beach, which occurred in the Point Pleasant Beach case.

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The privatization trend has set the stage for disputes over public trust rights, because the increased development and privatization of coastal upland areas has made it increasingly difficult for members of the public to reach the water's edge through privately owned physical barriers. It is no answer that some commercial beachfront properties may sell access rights, because unlike municipal properties there are no guarantees that private beaches will remain open. The Citizen's Right to Access Beaches' (C.R.A.B.) Point Pleasant Beach litigation, for example, had its genesis in the sale of a former commercial beach in Point Pleasant Beach for private and exclusive residential development, which in turn prompted three adjacent private properties to enforce rules against public access and left at least 2,000 annual badge holders searching for another beach that would accept them. This all-too-common turn of events will deprive New Jersey citizens of a significant portion of the coast if untempered by public trust rights.

Current public trust obligations also reflect another twentieth-century development, the significant governmental resources devoted to cleaning up oil and sewage spills, to regulating fishing, navigation and pollution, and to providing other support for the coastlines, all actions that preserve the quality of the waterfront and immediate offshore zone and benefit private and public beach owners alike.. (154)

3. COMMENT: The rules are supported especially the requirements of the public trust rights rule that clearly identify public parking spaces and lots, eliminate restricted parking near the beach, designate accessways to the ocean, provide additional restrooms and require municipalities to submit a public access plan. (52)

4. COMMENT: The proposed rules are in line with the spirit of the Surfrider Foundation, that is, making the natural resources of the coast more open and accessible to all. (166)

5. COMMENT: The public access rules are a major step forward for New Jersey and for anyone who likes to swim, surf, fish, scuba dive, run, walk or just sit and enjoy our beaches and other tidal lands and waters. Notably, these rules:

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Reaffirm important Public Trust Doctrine principles, including the inalienable rights of the public to access and enjoy public trust lands and waters, and acknowledge that it is the duty of the State, as the Trustee, to protect those rights;

Strengthen existing regulatory standards so that they are consistent with important State Court decisions clarifying the public's rights under the Public Trust Doctrine;

Ensure that the hundreds of millions of public dollars spent on shore protection and beach nourishment projects are for the benefit, use and enjoyment of all of us, and not just a select few private residents or municipalities;

Provide consistent guidance for municipalities, homeowners and other entities located along these lands and waters regarding their responsibility to allow or provide public access, reducing the need for litigation;

Guarantee that public access is meaningful by requiring appropriate signs, parking, accessways and public restroom facilities as well as the abolishment of existing signs, barriers or practices that hinder public access;

Allow fees municipalities charge for the use of recreational facilities and safeguards at publicly owned beaches or waterfronts to include the costs associated with public access essentials, such as restroom facilities, showers and parking;

Recognize the import of, and provide access for, those who fish at night and throughout the entire calendar year;

Facilitate an increase in visitors to towns that provide meaningful public access, which translates into more customers for local stores, restaurants, gas stations, hotels and the summer rental market, in support of a strong Shore economy; and

Through the conservation easement and public access instrument provisions, ensure that this public access is not a temporary "privilege" that can be revoked and, instead recognize that public access is a right that has been in existence long before we got here, and that it will be recognized and enjoyed by generations to come long after we are gone.

For all of these reasons, the commenters support the proposed public access rules and urge their formal adoption. (80)

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6. COMMENT: Four commenters indicated their general support for the public access rules. (36, 101, 112, 161)

7. COMMENT: The Department is commended for its continued stewardship of the State's coastal resources. The Department is urged to work closely with local stakeholders, including county and municipal officials, to develop practical regulations that will encourage access and recreational opportunities for the public. In addition, it is equally important to consider the regional characteristics and unique limitations that each beach and coastal area presents. (144)

8. COMMENT: The proposed rules are a good start in bringing clarity and predictability to what has been a case-by-case adjudication in courts without any predictability on behalf of the citizens, environmental groups or landowners. The Department has taken a good step towards ensuring consistency throughout the State and this step is supported. (153)

9. COMMENT: The rules are a significant step towards fulfilling the State's obligation to protect public trust rights. Instead of the standards developed through case-by-case adjudication, the rules will provide clarity, consistency, and predictability to public trust access rights. (154)

10. COMMENT: The Public Trust Doctrine is a legal precedent dating back to Roman times. It holds that navigable rivers, streams, wetlands, seashores and bays belong to the people. The doctrine declares that all of us have an unassailable right to access and use the waterfront for traditional purposes such as navigation, commerce and fishing. A growing body of United States case law has expanded that definition to include assurance of diverse recreational uses, as well as a guarantee of the protection of habitats and natural systems. Through this rule, the Department is putting the Public Trust Doctrine into action. The commenter supports the new rules and amendments. (57)

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RESPONSE TO COMMENTS 1 THROUGH 10: The Department acknowledges these comments in support of the rule.

11. COMMENT: The commenter opposes the proposed rulemaking and requests that it be withdrawn. The regulations are imprecise and vague in terms of the Department's ability to compel private landowners to dedicate lands, and construct improvements, in the name of public access. (70)

12. COMMENT: The commenter opposes the new regulations on the Public Trust Doctrine. (13)

13. COMMENT: The Department should adopt a more restrained application of the Public Trust Doctrine. (38)

14. COMMENT: The Department should withdraw this proposal in total, and start with a clean slate to come up with a reasonable, cost-effective and realistic approach to meeting the goals of the Public Trust Doctrine. The rule should consider the rights of all the public, including the property owners. (53)

RESPONSE TO COMMENTS 11 THROUGH 14: Since their inception in 1978, the Coastal Zone Management rules have contained standards for public access that pertain to both private and public landowners. The amendments to the Coastal Zone Management rules and Coastal Permit Program rules relating to public access add clarity and predictability to the existing rules. The Department has determined that the rules adopted herein are necessary for the Department to fulfill its role as trustee of the public's rights to tidal waters.

15. COMMENT: The rule proposal was hard to find on the Department's website; subject to hearings conducted in the midst of the holiday season when interested individuals would likely be

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distracted and held over an extremely brief 6-day period; and was not reviewed by the Department's Bureaus that will be implementing the amended rules. (45, 102)

RESPONSE: The proposed regulations were posted on the Department's rules and regulations web page as well as the Department's Coastal Management Program's web page. A new public access web page was also developed and available to the public in November 2006. In addition to providing a link to the rule proposal, the web page provides the public with a map of public access points along the Atlantic Ocean from Monmouth County to Cape May County, a guide to the Public Trust Doctrine and a guide to the November 6, 2006 rule proposal. As required by the Administrative Procedure Act (APA), notice of the proposal was published in local newspapers, posted on the Department's web site and provided to the news media that have press offices at the State House. Further, in accordance with N.J.A.C. 1:30-3.3(a)5, the Department provided a 60-day comment period on this proposal. While the APA does not require that public hearings occur for all rulemaking and the statutes which these rules implement similarly do not mandate the conduct of hearings for rulemaking, the Department determined that it would be appropriate to provide an opportunity for comment to be provided in that manner. Additionally, the Department decided to schedule three different hearings at various geographic locations to attempt to make attendance at a hearing as convenient as possible for those interested in participating and providing public comment through that forum. While the APA does not independently require hearings on rulemaking proposals, it does require that any public hearings held on a rule proposal be held during the public comment period and no sooner than 15 days after publication of the notice of proposal in the New Jersey Register. Therefore, the earliest date a public hearing on this proposal could have been held was November 20, 2006. In scheduling the three public hearings, the Department did take into account the holiday season and scheduled the hearings as close to November 20, 2006 as possible so they would be conducted prior to the holidays. The three public hearings scheduled in different parts of the State, in conjunction with the 60-day public comment period during which written comments could be submitted, provided a more than adequate opportunity for those impacted by or interested in the rule to provide comment, as evidenced by the 545 commenters that participated in the public process by providing oral comments at the public hearings or written comments.

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Lastly, development of this proposal was a Department-wide effort involving staff of the Coastal Management Office, Division of Land Use Regulation, Bureau of Coastal and Land Use Enforcement, Office of Engineering and Construction, Division of Parks and Forestry, Division of Fish and Wildlife, and Green Acres Program.

16. COMMENT: Several commenters requested an additional public hearing on the proposal be held in Toms River, Ocean County. (27, 45, 172, 71, 149, 150, 135, 43)

17. COMMENT: The Department should extend the public comment period to enable the public to adequately assess the impact the proposed amendments and new rules will have on the business community. (16, 149, 150)

RESPONSE TO COMMENTS 16 AND 17: As discussed in response to comment 15, the APA does not require that public hearings be held for all rulemaking and the statutes that these rules implement similarly do not mandate the conduct of hearings for rulemaking. However, the Department determined that it would be appropriate to provide the public with the opportunity to provide comments at a public hearing. Accordingly, the Department held three different public hearings at various geographic locations in an attempt to make attendance at a hearing as convenient as possible for those interested in participating and providing comment through that forum.

In addition, as required by the APA, the Department held a 60-day public comment period for this proposal. The public had more than adequate opportunity for those impacted by or interested in the rule to provide comments. In addition, as noted in response to comment 15, the Department posted on its public access web page a guide to the rule proposal to assist the public in understanding the proposed amendments.

18. COMMENT: A public hearing on the proposal should have been held in Bergen or Hudson County and in other areas that are not close to the beaches, for those people that do not use the beaches where the hearings were held. (49)

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RESPONSE: The Department held three different public hearings at various geographic locations in an attempt to make attendance at a hearing as convenient as possible for those interested in participating and providing comment through that forum. The first of these hearings was held on November 28, 2006 in Liberty State Park, Jersey City, Hudson County.

19. COMMENT: Codifying the Public Trust Doctrine, which is a time honored doctrine which the courts on many occasions have characterized as an “evolving” doctrine is unwise. Codifying it simply reduces the doctrine to the specific language utilized in the code, eliminating flexibility, thereby restricting its use in future unforeseen circumstances. In addition, premising the entire legal authority of the rule on a doctrine that was developed for an entirely different purpose and that pre-dates even the State’s constitution is questionable. Rather than create a public trust right, the proposed rule robs an extremely important doctrine of its vitality. (45, 102)

RESPONSE: The rule is intended to preserve and protect the common law rights under the Public Trust Doctrine. The specific rights and protections recognized under the Public Trust Doctrine continue to develop through individual court decisions. The definition of “Public Trust Doctrine” at N.J.A.C. 7:7E-1.3 recognizes this, stating “The specific rights recognized under the Public Trust Doctrine, a common law principle, continue to develop through individual court cases.”

20. COMMENT: The proposed regulations overstate the scope of lands covered by the public trust doctrine, and illegally extend the scope of the Department’s regulatory authority. (70)

21. COMMENT: Decisional law, including *Matthews v. Bay Head Improvement Association*,<sup>95</sup> N.J. 306 (1984), recognizes that a person who would exercise his Public Trust Doctrine rights must do so with respect for habitation and buildings. The dry sand area proximate to any oceanfront residence is an inextricable component of the “habitation” referenced in the *Matthews* decision. The *Matthews* court recognized this essential component in the design of its criteria which would define that portion of the dry sand available to a member of the public as contrasted with the private property rights of the upland owner. It appears that, by means of the proposed public trust rights

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rule, the Department is attempting to attain policy goals which are not founded upon the authorizing statutes or controlling decisional law of the State of New Jersey.

The proposed Public trust rights rule constitutes an impermissible expansion of the Public Trust Doctrine, as has been articulated by the New Jersey Supreme Court. *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984). In *Matthews*, the Court enumerated standards to be applied, on a case-by-case basis, as guidance for reconciliation of private and public rights on the beach, above the mean high water line. The decision in *Raleigh Ave. Beach Ass'n. v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005) represents a subsequent relevant expression of the Supreme Court concerning access to the "dry sand." *Raleigh, supra* was, consistent with established principles, decided closely upon the facts present; it did not modify or expand the guiding criteria set forth in *Matthews, supra* concerning beach access, perpendicular or lateral.

Until and unless the Public Trust Doctrine is more precisely expanded by decisional law, the rights of private property owners to their dry sand property (or tidal waters edge property) should not be diminished by administrative rulemaking which is not founded upon legitimate legislative authorization and settled decisional law. This conclusion presupposes the existence of reasonable public access, perpendicular or lateral, as presently exists along the coast.

The proposed Public trust rights rule is not supported by either legislative authorization or the decisional law of the State of New Jersey. The Department may aspire to attainment of its policy goals, but must also do so within the confines of defined legal parameters. (121)

22. COMMENT: The proposed rules are arbitrary, capricious and not supported by statutory authority. (133)

RESPONSE TO COMMENT 20 AND 22: The New Jersey Supreme Court has addressed the authority of the Department over public access. In *Raleigh Avenue Beach Ass'n. v. Atlantis Beach Club, Inc.*, 185 N.J. 40, 44 (2005), the Court found that the Department could address public access as part of the CAFRA process, stating:

CAFRA was enacted by the Legislature in 1973. *In re Egg Harbor Assocs.*, 94 N.J. 358, 362 (1983). Although CAFRA is primarily an environmental protection statute, "the powers

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delegated to DEP extend well beyond protection of the natural environment.” *Id.* at 364. Specifically, CAFRA delegates powers to the DEP and requires it to adopt rules and regulations governing land use within the coastal zone “for the general welfare.” *Ibid.* The [L]egislature amended CAFRA in 1993, significantly expanding its jurisdiction. *In re Protest of Coastal Permit Program Rules*, 354 N.J. Super. 293, 310 (App. Div. 2002).

More specifically, CAFRA regulates activities in the coastal zone by requiring developers/property owners to obtain a permit from the DEP before undertaking "the construction, relocation, or enlargement of any building or structure and all site preparation therefore, the grading, excavation or filling on beaches or dunes,... includ[ing] residential development, commercial development, industrial development, and public development." N.J.S.A. 13:19-3; see *Protest of Coastal Permit Program Rules*, *supra*, 354 N.J. Super. at 310, 807 A.2d 198 (citing N.J.S.A. 13:19-5, 19-5.2, 19-5.3).

The DEP exercises its statutory authority under CAFRA through the Coastal Permit Program Rules, N.J.A.C. 7:7-1.1 to -10.6, and the Coastal Zone Management Rules, N.J.A.C. 7:7E-1.1 to -8.22; see *Protest of Coastal Permit Program Rules*, *supra*, 354 N.J. Super. at 312, 807 A.2d 198. The Coastal Permit Program Rules directly address permitting requirements for "[a]ny development located on a beach or dune." N.J.A.C. 7:7-2.1(a)(1).

The Department also maintains the "general 'power to promote the health, safety, and welfare of the public.'" *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40, 61 (N.J. 2005) (quoting *In re Egg Harbor Assocs.*, 94 N.J. 358, 372 (1983)). See also, generally, N.J.S.A. 12:3 et seq., N.J.S.A. 12:5-3 et seq., and N.J.S.A. 13:9A.

As noted in the response to comment 19, the rule is intended to preserve and protect the common law rights under the Public Trust Doctrine. The specific rights and protections recognized under the Public Trust Doctrine continue to develop through individual court decisions. The definition of “Public Trust Doctrine” at N.J.A.C. 7:7E-1.3 recognizes this, stating “The specific rights recognized under the Public Trust Doctrine, a common law principle, continue to develop

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through individual court cases.” For that reason, the amended regulations do not specify a precise area of privately owned shoreline landward of the mean high water line, or a percentage thereof, that must be subject to public access and use in every case. The Department recognizes that the Matthews factors may be applicable to a particular piece of property and that these factors are applied on a case-by-case basis.

23. COMMENT: The proposed rule arbitrarily mandates that a fully developed residential community must provide parking and restroom facilities for members of the public who may wish to utilize the beaches. The enabling legislation did not and does not contemplate that and implementation of these rules would lead to an unfunded mandate that municipalities and private property owners would be obliged to provide such amenities as an unintended consequence of the ownership of tidal shorefront private property. As proposed under the new rules, the Public Trust Doctrine would be administratively expanded, utilized as a device to attain the implementation of policy goals. (122)

RESPONSE: Tidal shorefront property in New Jersey has long been impressed with public trust rights, and it is unreasonable for private investors to appropriate resources impressed with public rights for exclusive private use. See, e.g., *National Ass'n of Homebuilders v. State, Dept. of Env'tl Protect.*, 64 F. Supp. 2d. 354 (D.N.J. 1999) (clarifying that the public trust doctrine is a background common law principle in New Jersey).

24. COMMENT: While the public does have a right to access and use tidal waterways and shores under the common law principle known as the “Public Trust Doctrine,” that Doctrine is not the only principle to be considered in the context of the rules affecting beach access.

Another fundamental principle under the State and Federal constitutions is the sanctity of private property. Private property rights likewise predate the founding of this country and are grounded in historic legal authority such as the Magna Carta.

Decisions of the Supreme Court of New Jersey have struck a balance between the public’s rights to beach access under the Public Trust Doctrine on the one hand, and the rights of private property

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owners, the character of coastal neighborhoods, and the interests of the residents of these communities, on the other hand. The proposed rules are inconsistent with this case law.

In *Matthews*, the Supreme Court noted that the question of the public's right to privately-owned dry sand beaches arises in two contexts: (1) perpendicular access ("the right to cross privately owned dry sand beaches in order to gain access to the foreshore"); and (2) access "of the sort enjoyed by the public in municipal beaches...namely, the right to sunbathe and generally enjoy recreational activities." 95 N.J. at 322-23. The Court determined that "the public interest is satisfied so long as there is reasonable access to the sea," and that "private land owners may not in all instances prevent the public from exercising its rights under the public trust doctrine." *Id.* at 326. Yet the Court also determined that "the public's rights in private beaches are not coextensive with the rights enjoyed in municipal beaches." Thus the Court mandated that the extent of public access must be determined on a case-by-case basis: "the particular circumstances must be considered and examined before arriving at a solution that will accommodate the public's right and the private interest involved." *Id.* at 324.

The Supreme Court recognized that private land owners have an interest in upland dry sand that differs from that of a municipality, and hence the public's right of access is more limited. As stated by the Court:

"Precisely what privately-owned upland sandy area will be available and required to satisfy the public's rights under the public trust doctrine will depend on the circumstances. Location of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and the extent of the public demand, and usage of the upland sand by the owner are all factors to be weighed and considered in fixing the contours of the usage of the upper sand." [*Id.* at 326] See, *NHBA v DEP*, 64 F. Supp.2d. at 360 (requiring an examination of the site-specific reasonableness factors under *Matthews* to determine the extent of privately-owned land required to satisfy the public's rights under the Public Trust Doctrine.)

Both the State and Federal constitutions prohibit the government from taking private property without paying just compensation. New Jersey Constitution, Art. I¶20; United States Constitution 5<sup>th</sup> and 14<sup>th</sup> Amendments. The protections afforded under both constitutions are coextensive. *Litman v. Gimello*, 115 N.J. 154, 161. *Cert. Den.*, 493 U.S. 934, (1989).

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A taking of private property without just compensation may occur either as a physical occupation of property by the government or another, or through governmental regulatory taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-28, 102 S.Ct. 3164, 3171-72, 73 L.Ed. 2d. 868 (1982) (requiring landlords to allow television cable companies to place cable facilities in their buildings effected a taking even though the facilities occupied only one and one-half cubic feet of space); *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (holding that State regulation barring all construction on barrier island residential lots constitutes taking requiring just compensation unless common-law principles would have prohibited all habitable or productive improvements on lots); *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946) (noise from airplane glide path projecting onto land is in the nature of an easement, requiring compensation under Fifth Amendment); *Gulf Power Co. v. U.S.*, 998 F.Supp. 1386, 134-95 (N.D. Dist. Fla. 1998), *affd*, 187 F.3d 1324 (11<sup>th</sup> Cir. 1999) (where the government forced utilities to grant cable companies access to their power lines); *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979) (holding that government's requirement of public access to marina joined to bay due to private development of inland lagoon constituted exercise of eminent domain power, requiring payment of compensation); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) (holding that condition of permit to construct residence requiring grant of public easement across beach-front section of private property constituted taking).

It is well established in cases involving government regulatory dedication exactions that to survive judicial scrutiny under the Taking Clause, the dedication exaction must substantially advance a legitimate state interest. *Agins v. City of Tiburon*, 447 U.S. 225, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d. 106, 112 (1980). In order to do so, there must be an "essential nexus" between the required dedication and the interest the government seeks to protect. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837, 107, S.Ct. 3141, 3148-3149, 97 Ed.2d 677, 689 (1987). Additionally, where an "essential nexus" exists, the taking Clause requires that there be "rough proportionality" between the exaction and the proposed development. Specifically, the government "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan v. City of Tigard*, 512 U.S. 374, 391, 114 S.Ct. 2309, 2319-20, 129 L.Ed.2d 304 (1994).

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The Supreme Court repeated its mandate “for a case-by-case consideration in respect of the appropriate level of accommodation” in *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc., Spura*, 185 N.J. at 55. After quoting extensively from its earlier decision in *Matthews*, the Court then “turn[ed]...to an application of the *Matthews* factors to the circumstances of [the] case” before it in order to make a “case-by-case” determination. The *Raleigh* Court looked at the following *Matthews* factors:

“Location of the dry sand area in relation to the foreshore.”

“[E]xtent and availability of publicly-owned upland sand area. Here the court looked at proximity of available public beaches and the public’s access thereto.”

“[N]ature and extent of the public demand”

“[U]sage of the upland sand land by the owner.”

In examining the location of the dry sand area in relation to the foreshore, the Court considered the nature and extent of development in the area and convenience to pedestrians. The Court paid most attention to the usage of the upland sand by the land owner. In *Raleigh*, the beach had historically been open to the public, and had been readily available for perpendicular access as well as for unlimited use of the dry sand beach. The Court found it unreasonable to deny access “after years of public access and use.”

Thus, under the case law cited in the rule proposed, the Public Trust Doctrine requires a case-by-case determination of the specific circumstances of each case to appropriately balance the public’s rights under the Public Trust Doctrine, on the one hand, and other considerations such as private property rights on the other hand. The Court mandated consideration of the demand for public access in a particular area; the character and nature of the development in the area; the nature and extent of access traditionally afforded in the area; the availability of public beaches and their adequacy to meet demand.

Yet, as set forth below, the rule proposal does little more than pay lip service to such case-by-case determinations and, instead, relies largely on the one-size fits-all cookie cutter approach.

Proposed N.J.A.C. 7:7E-3.50 and 8.11 are inconsistent with the Public Trust Doctrine as recognized by the Supreme Court of New Jersey because the rules fail to consider private property rights, the nature and character of residential neighborhoods and the legitimate interests of the residents of those neighborhoods. The proposed rules would rely too much on broad, across the

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board mandates, and far too little on circumstance-specific, case-by-case determinations. Provisions of the rule must be removed prior to adoption.

The Public trust rights rule is the key provision in the proposed rules. It proposes a set of uniform standards that the Department seeks to impose throughout the New Jersey shore, with special standards governing the beaches on the Atlantic Ocean, Raritan and Sandy Hook Bay, and Delaware Bay beaches. Proposed N.J.A.C. 7:7E-8A seeks to implement this through the Shore Protection Project and Green Acres funding programs. (121, 138)

25. COMMENT: *Matthews v. Bay Head Improvement Association*, 95 N.J. 306, cited in the proposal, indicates that regulations applying to the Public Trust Doctrine and beaches are meant to be handled on a case-by-case basis. However, the proposed regulations do not provide for case-by-case analysis. Circumstances cited in *Matthews* that could influence the degree of access to satisfy the public's rights under the Public Trust Doctrine include location of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand by the owner. Those factors are clearly different between two communities like Point Pleasant or Seaside which have boardwalks, and isolated smaller towns along the shore. (62)

26. COMMENT: How far inland will the proposed public access rules apply? (74)

RESPONSE TO COMMENTS 24 THROUGH 26: As noted in the response to comment 19, the rule is intended to preserve and protect the common law rights under the Public Trust Doctrine. The specific rights and protections recognized under the Public Trust Doctrine continue to develop through individual court decisions. The definition of "Public Trust Doctrine" at N.J.A.C. 7:7E-1.3 recognizes this, stating "The specific rights recognized under the Public Trust Doctrine, a common law principle, continue to develop through individual court cases." For that reason, the amended regulations do not specify a precise area of privately owned shoreline landward of the mean high water line, or a percentage thereof, that must be subject to public access and use in every case. The

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Department recognizes that the *Matthews* factors may be applicable to a particular piece of property and that these factors are applied on a case-by-case basis.

27. COMMENT: An attempt to define the Public Trust Doctrine and its parameters by administrative rule might result in an inadvertent limitation of its authority. The proposed rules describe the Public Trust Doctrine in detail in four separate provisions: (i) a comprehensive definition of the “Public Trust Doctrine” is added to the “Definitions” section of the Coastal Permit Program Rules, N.J.A.C. 7:7-1.3; (ii) a concise definition of public trust lands and waters is included in the new Lands and Waters Subject to the Public Trust Rights rule, N.J.A.C. 7:7E-3.50(a); (iii) another in-depth explanation of the Public Trust Doctrine is set forth in the rationale section of the new Lands and Waters Subject to the Public Trust Rights rule at N.J.A.C. 7:7E-3.50(e); and (iv) a similar lengthy comprehensive explanation of the Public Trust Doctrine is set forth in the rationale section of the new Public Trust Rights rule at N.J.A.C. 7:7E-8.11(r).

While the proposed provisions account for the fact that the Doctrine will continue to change through language such as that at proposed N.J.A.C. 7:7E-8.11(o) which provides that “no authorization or approval under this chapter shall be deemed to relinquish public rights of access to and use of lands and waters subject to public trust rights” and proposed N.J.A.C. 7:7-1.5(b)19 which provides that an “authorization of construction shall not constitute a relinquishment of public rights to access and use tidal waterways and their shores,” the rules do not make it clear that the Department has neither the intention or authority to limit the rights under the Public Trust Doctrine in any way. Therefore, a disclaimer should be added to N.J.A.C. 7:7-1.3, and N.J.A.C. 7:7E-3.50(a) and (e), and 8.11(r) stating:

“The Department recognizes that the rights of the public under the Public Trust Doctrine are inalienable and that the incorporation of these common-law principles into the Coastal Permit Program Rules and the Coastal Zone Management Rules in no way diminishes or relinquishes any of those rights.” (80)

RESPONSE: The public trust rights under the Public Trust Doctrine are inalienable. The rule recognizes this at N.J.A.C. 7:7E-8.11(o), which provides “No authorization or approval under this

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chapter shall be deemed to relinquish public trust rights of access to and use of lands and waters subject to public trust rights.”

28. COMMENT: The rules are based on a misinterpretation of the Public Trust Doctrine. (61, 151, 21, 60)

RESPONSE: Lands and waters subject to public trust rights include tidal waterways and their shores. This includes lands both now or formerly below the mean high water line and certain portions of the shores above the mean high water line. Tidal waterways and their shores are subject to the Public Trust Doctrine and are held in trust by the State for the benefit of all the people, allowing the public to fully enjoy these lands and waters for a variety of uses. As the Public Trust Doctrine has evolved over the years, courts have ruled that the dry sand and filled areas are also subject to certain public trust rights under the Public Trust Doctrine. Therefore, these rules are in accordance with the Public Trust Doctrine.

29. COMMENT: The Department relies upon CAFRA and the Public Trust Doctrine as authority to adopt the proposed rules. In the past, the New Jersey Builders Association, among others, has challenged the Department’s regulatory authority that was not explicit in one statute, but rather resulted from a combination of statutorily delegated powers. See *In re Stormwater Mgmt. Rules*, 384 N.J. Super. 451 (App. Div. 2006).

To determine “whether a particular regulation is statutorily authorized, a ‘court may look beyond the specific terms of the enabling act to the statutory policy sought to be achieved’” and to the relevant “legislative scheme” in its entirety. *In re Stormwater Mgmt. Rules*, 384 N.J. Super. at 461 (citing *N.J. Guild of Hearing Aid Dispensers v. Long*, 75 N.J. 544, 562 (1978); *Kimmelman v. Henkels & McCoy, Inc.*, 108 N.J. 123, 129 (1987)). In addition, “the grant of authority to an administrative agency is to be liberally construed in order to enable the agency to accomplish its statutory responsibilities.” *N.J. Guild of Hearing Aid Dispensers*, 75 N.J. at 562. “[C]ourts should readily imply such incidental powers as are necessary to effectuate fully the legislative intent.” *Id.*

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Accordingly, “regulations which fall within the scope of the statutorily delegated authority” are presumed valid. *Soc’y for Env’tl. Econ. Dev. v. N.J. Dep’t Env’tl. Prot.*, 280 N.J. Super. 1, 4 (1985).

In *In re Stormwater Mgmt. Rules*, the court upheld a Department regulation that created a buffer on each side of certain waters, despite lack of express statutory authority for the agency to do so. 384 N.J. Super. at 464. In reaching its conclusion, the court considered the “broad scope of water quality and pollution concerns voiced by the Legislature” and “the totality of powers vested in the Department to enable it to address these concerns.” *Id.* Similarly in *Soc’y for Env’tl. Econ. Dev.*, the court determined that Department had the power to enact a certain comprehensive set of regulations by combining (1) the Department’s “broad powers of conservation and ecological control”; (2) some more specific powers of the Department; (3) “[t]he broad scope of environmental concerns expressed by the Legislature in various enactments”; and (3) “the totality of powers accorded by the Legislature to DEP to enable it to address those concerns.” 280 N.J. Super. at 7-8.

Moreover, in *Atlantis*, the Court held that the scope of Department’s authority included jurisdiction to review beach-use fees proposed by a beach club. 185 N.J. at 61 (noting that the defendant’s upland sands had to be available for use by the general public under the public trust doctrine). The Court similarly adopted an expansive view of the Department’s interstitial powers, finding authority to oversee beach fees in a combination of (1) CAFRA, since the defendant’s walkway over the dunes consisted of a development, and as such, triggered the Act; and (2) “DEP’s general ‘power to promote the health, safety and welfare of the public.’” *Id.* at 61 (quoting *In re Egg Harbor*, 94 N.J. Super. 358, 372 (1982)). The Court also took into account the public trust doctrine and that “the use of dry sand has long been a correlate to use of the ocean and is a component part of the rights associated with the public trust doctrine.” *Atlantis*, 185 N.J. at 54.

Under the principle that the Department may adopt rules under its broad authority to protect the environment, and may blend statutory and other authority to so do, it is clear that the agency has ample authority to adopt the proposed rules under the broad powers delegated by CAFRA, the requirements of the public trust doctrine, Legislative concerns regarding coastal resources, and public policy.

*General Legislative Purpose and Public Policy to Provide Access to the Coast.* Beach access is promoted by extensive case law, State policy and legislation, including CAFRA’s intent, inter alia, to protect the “recreational interest of all people of the State” and promote public welfare. N.J.S.A.

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13:19-2. Additionally, “CAFRA mandates DEP to utilize, in performing its statutory role, all relevant considerations of an enlightened public policy” and to “advance the ‘best long term, social, economic, aesthetic and recreational interest of all people of the State.’” *Egg Harbor*, 94 N.J. at 371. Considering that the shore has unique characteristics, which are desirable for “bathing and other recreational activities,” it is the State policy to “encourage[e] maximum access to the ocean beach” and to “afford[] recreational opportunities along the Atlantic seacoast for as many citizens as possible. *Lusardi*, 86 N.J. at 227, 231 (quoting *Deal*, 78 N.J. at 180). Accordingly, concerns about “the reduced ‘availability to the public of its priceless beach areas,’ . . . is reflected in a statewide policy of encouraging, consonant with environmental demands, greater access to ocean beaches for recreational purposes.” *Lusardi*, 86 N.J. at 227 (finding that local officials must consider CAFRA and State policies “for the use of coastal resources,” when making zoning decisions. *Id.* at 227-29. Therefore, public access to New Jersey beaches is one such “enlightened public policy” that the Department must consider while performing its statutory function and protecting the “interest of all people of the State.” See *Egg Harbor*, 94 N.J. at 371 (citations omitted).

CAFRA authorizes the Department “to regulate land use within the coastal zone for the general welfare.” *Egg Harbor*, 94 N.J. at 364 (holding that the DEP had the power to condition a construction permit within a coastal zone upon the inclusion of a fixed percentage of affordable housing in the construction project). Through CAFRA, the Legislature intended to preserve “those multiple uses which support diversity and are in the best long-term, social, economic, aesthetic and recreational interests of all people of the State.” N.J.S.A. 13:19-2. Accordingly, the Legislature found that “all of the coastal area should be dedicated to those kinds of land uses which promote the public health, safety and welfare, protect public and private property.” *Id.*

CAFRA requires that the Department “adopt rules and regulations to effectuate the purposes of the Act.” N.J.S.A. 13:19-17(a). The Department has the authority to “deny permit applications,” or to “issue a permit subject to such conditions as the commissioner finds reasonably necessary to promote the public health, safety and welfare, to protect public and private property,” among other things. N.J.S.A. 13:19-11. The Court has recognized these powers of DEP as broad. See *Atlantis*, 185 N.J. at 61; *Egg Harbor*, 94 N.J. at 364.

In *Egg Harbor*, the court found that the Department had the authority to condition construction permits upon a “mandatory set-aside” for affordable housing. *Egg Harbor*, 94 N.J. at 372. In

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reaching this conclusion, the Court considered that: (1) the condition was consistent with other DEP rules, including rules encouraging the construction of affordable housing; (2) CAFRA considers the need for “residential growth within the coastal area”; (3) CAFRA “expressly empowers [DEP] either to deny or grant conditionally a permit for construction of a facility that violates the purposes of the statute”; and (4) “land use regulation, as one aspect of the State’s police power, should be used to promote the general welfare.” *Id.* at 363-66. In summary, the Court found that the conditional permit was within the powers delegated by CAFRA, which “[a]lthough primarily an environmental act, . . . requires that DEP use its power to promote the health, safety and welfare of the public.” *Id.* at 372.

The proposed changes to N.J.A.C. 7:7E-8.11, requiring that permit holders set aside an area for public access to the shore, is comparable to the set-aside for affordable housing in *Egg Harbor*. First, the proposed amendments are consistent with the existing public access rules promulgated by DEP. N.J.A.C. 7:7E-8.11. Second, CAFRA considers “those multiple uses” of the coastal area which “are in the best long-term . . . interests of all people of the state.” N.J.S.A. 13:19-2. Third, the same powers expressly delegated to the Department, which the Court considered in *Egg Harbor*, equally apply. See 94 *N.J.* at 365. Finally, public access falls within land use regulation, which as the Court noted, is tied to general welfare. See *id.* at 366. In addition, like concerns surrounding affordable housing, the right to public access to the shore has a history of case law and public policy considerations.

The broad nature of CAFRA also allows DEP to deny a permit for aesthetic reasons. *Toms River Affiliates v. Dep’t Env’tl. Prot.*, 140 *N.J. Super* 135, 150 (App. Div. 1976). In *Toms River*, the Department denied a permit application for the construction of a ten-story building in a low-building neighborhood, for reasons that included aesthetic concerns. *Id.* at 149. The Coastal Area Review Board affirmed the Department’s decision to prevent “an aesthetic intrusion upon the existing characteristics of the involved coastal area.” *Id.* at 150 (affirming the Board’s decision). The proposed rule, set forth in N.J.A.C. 7:7E-8.11, requiring visual access to the shore appeals to the same senses as aesthetic interests.

Because the State holds shore resources in trust for the public, the State is responsible for regulating these resources. *Cf. State, Dep’t of Env’tl Prot. v. Jersey Cent. Power & Light Co.*, 133 *N.J. Super*. 375, 392 (App. Div. 1975) (“The State has not only the right but also the affirmative

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fiduciary obligation to ensure that the rights of the public to a viable marine environment are protected.”). The Legislature may delegate state powers to state agencies. See, e.g., *Egg Harbor*, 94 *U.S.* at 366. Moreover, “the statutory grant of power by the Legislature to an agency can be implied.” *Stormwater*, 384 N.J. Super. at 461 (citing *N.J. Dep’t of Labor v. Pepsi-Cola Co.*, 170 N.J. 59, 61 (2001); *N.J. Guild*, 75 N.J. at 562).

Given the Department’s longstanding and broad role of regulating the State’s environment, and coastal resources in particular, the Department is the most appropriate state agency to regulate the Public Trust Doctrine. The Public Trust Doctrine presents questions that are similar in kind to those that the Department has a long history of considering. Under CAFRA, for instance, the Department is required to manage the coastal area in a way that considers both environmental protections and public interest. N.J.S.A. 13:19-2. Similarly, the Public Trust Doctrine requires the State to hold, protect and regulate shore resources for the benefit of the public. *Arnold*, 6 *N.J.L.* at 71.

In addition to regulating coastal development under CAFRA, DEP is responsible for other coastal matters, such as: (1) reviewing “[a]ll plans for the development of any waterfront upon any navigable water or stream of [New Jersey],” such as “a dock, wharf, bulkhead, [or] bridge” N.J.S.A. 12:5-3; (2) “develop[ing] a priority system for ranking shore protection projects and establish[ing] appropriate criteria thereof” N.J.S.A. 13:19-16.2; (3) granting approval for the State “to lease or otherwise permit county or municipal . . . use of riparian lands,” under certain conditions; and (4) “mak[ing] an inventory and maps of all tidal wetlands within the State,” the boundaries of which “define the areas that are at or below high water” N.J.S.A. 13:9A-1. DEP also has the broader role of “formulat[ing] comprehensive policies for the conservation of the natural resources of the State.” N.J.S.A. 13:1D-9. Thus, regulation of the public trust doctrine pertains to the same subject as several of Department’s existent statutory functions. (154)

RESPONSE: The Department acknowledges this comment in support of the rule.

30. COMMENT: While public access to New Jersey’s natural resources for today’s Public Trust Doctrine beneficiaries is a valuable and important goal, there is a far higher value on the long term protection and sustainability of these natural resources for the Public Trust Doctrine beneficiaries of the future. Since recreational overuse of our public trust natural resources by today’s public

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beneficiaries could possibly deny public use by future beneficiaries, these rules promote degradation and the Department is abdicating its fiduciary responsibility to protect the public trust resources for continued use by future generations through this new rule proposal.

In the “preamble” to the proposed rules, the Department makes the following statement: “The allowance of some impact to natural areas, provided impacts are minimized, reflects the Department’s attempt to strike a balance between the potentially conflicting goals of providing public access and the need to protect natural resources.”

The vagueness of the definition of a “natural area” and the complete lack of specificity for “some impacts” and how “impacts are minimized” in this statement and throughout the new rules, clearly demonstrates the Department’s renewed priority to sacrifice environmental protection of natural resources in the coastal zone in favor of the economic gains of increased public access. Given the fact that under the Public Trust Doctrine the preservation of public trust resources is actually a protected “public use,” the scant three sentence environmental impact statement in the rules’ notice concluding a positive environmental impact is further evidence of a clear and deliberate abdication of Public Trust resource protection goals in order to facilitate public access goals under this new rule.

Two examples of public uses which result in the long term traditional degradation of the State’s natural resources highlight these concerns that these rules increase the threats to natural resource damages and reduce the Department’s public trust natural resource protections under the Public Trust Doctrine.

The public use of power boats and personal watercraft creates powerful boat wakes which erode coastal marshes, sod banks and beaches. In recognition of this degrading public use, there is a “No Wake” zone in tidal channels narrower than 200 feet with the goal of trying to reduce boat wake erosion on a voluntary basis. The Department and Marine Police cannot control boat wake erosion because of the size of New Jersey’s coastal zone, the vast proliferation of personal watercraft and power boats, and the shrinking budgets for enforcing such regulations. By providing unlimited public access in all areas of the coastal zone for boating, there will be increased erosion damage to the public trust natural resources through boat wakes. The Department, through these rules, abdicates its responsibility to protect these resources by not addressing this issue in favor of boaters.

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A second example is that the rule will result in the overfishing of New Jersey's marine fisheries. Based on the extensive economic impact justifications in the preamble of the proposed rules, and only three sentences about the environmental impacts, it seems clear that the Department's intent of these new rules is to cash in on the natural resources now and worry about their protections either later or never. Nowhere is this more evident than for the public trust natural resources called "fish." To date, almost every fish species has been overfished to the point of requiring resource protection and restoration plans at the Federal level, including catch limits that require enforcement.

There are recreational carrying capacity issues and threats of recreational overuse of natural resources from inappropriate and/or unsustainable public access and use. There is a lack of enforcement in the coastal zone that is supposed to be counted on to control inappropriate recreational use on and near the water to protect public trust natural resources from degradation. The new rules are being used as a road map for increased natural resource damages and decreased enforcement by design.

Given the potential devastating and irreversible nature of public trust resource exploitation through recreational overuse in the sensitive coastal zone, and the scientific uncertainty that invariably accompanies any attempt to predict the effects of a proposed public resource use, the Department must more aggressively address the Burden of Proof tenet under the Public Trust Doctrine that today's public trust natural resources will be safeguarded from recreational overuse and protected for future public use under these new rules. The Department should utilize the Precautionary Principle under the Public Trust Doctrine to act in anticipation of environmental harm to public trust resources from excessive public access and use. The allowance of some impacts to the public trust natural resources by this rule is unacceptable under the Public Trust Doctrine and inconsistent with existing environmental protection standards.

Because there is little difference between natural resource protection in the coastal zone and natural resource protection in non-tidal waters, the Department should apply the same protection standards to public access in the coastal zone that it applies to public access in its own State parks. For example, Atsion Lake is gated and the time, frequency and quantity of public access is closely managed and controlled to adequately preserve and sustain the natural resources within the park for future public use. To apply these types of carrying capacity protections to State land within non-tidal waters and then to specifically exclude them in the tidal areas of the coastal zone is not only

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inconsistent and irresponsible, but also imposes a double standard for public development when it comes to protecting public trust natural resources for the public use of future generations. New Jersey's coastal natural resources are just as valuable as non-coastal resources and should benefit from consistent State management policies, actions, and protections. To require any less protection under these public access rules in the coastal zone is an abdication of the Department's responsibility for the protection of the public trust resources under the Public Trust Doctrine.

What does it mean for the "public to fully utilize these lands for a variety of public uses?" What are all the uses, and negative natural resource impacts of all these uses that could be included for this full utilization? Also, given that one of the public rights protected under the Public Trust Doctrine includes environmental protection, the inherent conflict between use and protection needs to be specifically and directly addressed in the new rules in terms of this full utilization, assuming that the Department actually wants to protect the public trust resources for future generations.

In conclusion, the rules are a disappointing disgrace and a sham in terms of protecting the natural resources of the State under the Public Trust Doctrine. The amendments as proposed will institutionalize the abdication of the Department's fiduciary responsibilities to protect the Public Trust Doctrine natural resources and the environment of the coastal zone of New Jersey, under the guise of public access. These rules are designed to protect the coastal economy for the short term and give the public of today a free pass to take the natural resources away from the future, and have little regard for the full value of our natural resources for the long term in the coastal zone. There is a whole lot more to the Public Trust Doctrine than just public access for today. (2)

RESPONSE: Open public access, as opposed to private exclusion, is the Department's governing principle for the management of public natural resources. However, this does not mean that public access will result in destruction or impairment of natural resources. The Coastal Zone Management rules, when taken as a whole, provide for protection of these natural resources. In circumstances such as those referenced by the commenter, other portions of the rules act to protect natural resources. Examples of such rules include special area rules, that protect special resources such as threatened and endangered wildlife and plant species; critical wildlife habitat; wetland buffers; water area rules, such as the Filling rule; and land area rules that restrict impervious coverage and preserve vegetation in more environmentally sensitive areas. These rules, applied in conjunction

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with the public access standards at N.J.A.C. 7:7E-8.11(d) and (f), will enable the Department to protect environmentally sensitive areas. The public access rule does not affect the ability of the Marine Police to institute no wake zones where warranted, nor prevent the establishment of conservation areas in the water such as the Sedge Island Marine Conservation Zone at Island Beach State Park, to protect the environment. With regard to fishing, many species are designated as overfished and, as mandated under Federal law, these species populations must be rebuilt over a specific time period. Management plans for each particular species specify the rebuilding objectives and require implementation of management measures and associated enforcement of those measures to ensure stock recovery. This pertains to both recreational and commercial fishing. This rule will not change those requirements.

31. COMMENT: The rule will likely have a profound impact on land uses in areas with tidal waters, whether or not contemplated by municipalities in their master plans and zoning ordinances. The New Jersey Supreme Court has held, “CAFRA delegates to the DEP the shared power to regulate development in the coastal zone. Although primarily an environmental act, CAFRA requires that DEP use its power to promote the health, safety, and welfare of the public.” *IMO Egg Harbor Assoc.*, 94 NJ 358, 372 (1983). At the same time, “CAFRA does not give the DEP plenary zoning authority... Respect for municipal zoning is expressly contemplated, Section 19 states that CAFRA’s provisions are not to be regarded as ‘in derogation of any powers now existing and shall be regarded as supplemental and in addition to powers conferred by other laws, including municipal zoning.’ N.J.S.A. 13:19-19.” J. Schreiber, *dissent, IMO Egg Harbor Assoc.*, at 376. Moreover, in *Peter Lusardi and June Bruett v. Curtis Point Property Owners Assoc.*, et al, 86 N.J. 217 (1981), the New Jersey Supreme Court discussed the relationship between CAFRA and local zoning in considering whether a zoning ordinance adopted by Brick Township unlawfully prohibited public access to privately owned beaches, and observed, “Although these (CAFRA) regulations do not preempt local zoning authority, they embody carefully considered policies for the use of coastal resources that local officials must take into account in zoning shoreline property within their communities.” *Lusardi* at 229. The proposed rule destroys the delicate balance generally achieved between local zoning and CAFRA regulation, and exceeds the Department’s authority under CAFRA.

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Many industrial facilities that will become subject to the proposed rule are located in areas that are zoned for industrial use and where zoning and planning officials have determined industrial and water-related public uses are not compatible in close proximity to each other. In such cases, the rule will conflict with local zoning requirements. The Hudson River Walkway regulations that were at issue in *National Assoc. of Home Builders et al v NJDEP and Robert Shinn*, 64 F. Supp. 2d 354, 5 (1999), ensured public access to the Hudson River, but applied only at the time existing land uses changed or ceased. *National Home Builders* at 356. If adopted and implemented, the rule would have the same effect as spot zoning and disrupt the local land use plan by inappropriately requiring the placement of water related public uses at or adjacent to industrial commercial uses, possibly in contravention of local zoning. The proposal should be revised to limit its applicability to new development on vacant land or redevelopment when there is a change in land use and a meaningful opportunity for the municipality and the permit applicant and the Department to determine whether integrating water related public use would be compatible with the planned development. In addition, it would be more appropriate for the Department to work with municipal governments to plan where such public uses should be located and revise local zoning ordinances accordingly. (45, 131, 149, 150)

RESPONSE: The rule includes provisions for alternate public access at industrial, port and energy facilities under certain circumstances. Where existing hazardous operations and existing structures are such that perpendicular access and a linear access area along the shore is impracticable, the rule provides for alternate public access. Moreover, the Department applied the Hudson Waterfront Walkway regulations at issue in the *National Assoc. of Home Builders et al v NJDEP, et al*, 64 F. Supp. 2d 354 (1999) at the time a Waterfront Development permit was obtained regardless of whether that permit called for a change in the overall land use at the site. The Department has determined that the requirement for public access is appropriate to preserve the public's rights under the Public Trust Doctrine.

In *Peter Lusardi and June Bruett v. Curtis Point Property Owners Assoc., et al*, 86 N.J. 227 (1981), the Court found that:

Ordinarily municipal officials have wide discretion in determining what uses are suitable for each district, and they need not provide for a particular use in a specified vicinity or for every

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appropriate use within the borders of a municipality. *See, e.g., Fanale v. Borough of Hasbrouck Heights*, 26 N.J. 320, 325 (1958). But this principle must be qualified where land has a unique character and a statewide policy designates what uses are appropriate for such land. Statewide policies are relevant to zoning decisions because municipalities exercise zoning power only through delegation of the State's authority and they must consider the welfare of all the State's citizens, not just the interests of the inhabitants in the particular locality. *See Mt. Laurel, supra*, 67 N.J. at 178. Local planning decisions must be consistent with statewide policies concerning land use and resource allocation.

The State policy regarding public access to tidal waterways and their shores is found throughout the Coastal Zone Management rules. In fact, one of the eight basic coastal policies at N.J.A.C. 7:7E-1.5(a)1v is "promote public access to the waterfront through protection and creation of meaningful public access points and linear walkways and at least one waterfront park in each waterfront municipality." As the public access rule applies to all types of development and all tidal waterways, it would not have the same effect as spot zoning.

32. COMMENT: The rule does not distinguish between existing and proposed facilities and land uses. Therefore, the rule would apply in the same way to the construction of a new 24 unit residential development on vacant land, as it would to the repair of a bulkhead at an existing energy facility that is not changing its use. The latter is not an appropriate time to reconsider a site's use from a zoning perspective, including whether a boat ramp, fishing pier or other water-related public use should be integrated into an industrial or other obviously incompatible use. The rule should be revised to limit its applicability to new development on vacant land or redevelopment where zoning may be changed and there is a meaningful opportunity to determine whether integrating water related public use would be compatible with a new industrial or other type of development. (45, 149, 150, 131)

33. COMMENT: Under the rules every permit application located adjacent to a tidal waterway must provide public access to the tidal waters and shoreline either directly on-site or by providing such access at a nearby off-site location. The rule incorrectly presumes that the Public Trust Doctrine requires that every single property located adjacent to a tidal waterway be made available

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for the public to access and use the tidal waters. This result is not contemplated by the Public Trust Doctrine or any other authority. The Public Trust Doctrine contemplates fairly unlimited public use and enjoyment of the resource, but this does not mean the public must be able to access the resource from every property adjacent to a tidal waterway. No applicable law establishes a right to access tidal waters from every conceivable point on land, nor authorizes the Department to demand permit applications to provide such access. (45, 131, 149, 150)

RESPONSE: The rule would not apply in the same manner to a new 24 unit residential development on vacant land as it would to repair a bulkhead at an existing energy facility site. Although public access would be required in both cases, the Department recognizes that existing industrial properties with developed waterfronts, as well as energy facilities and port uses, may present situations that warrant modification of the public access requirements. Therefore, N.J.A.C. 7:7E-8.11(f)3 provides that the Department may modify the public access requirements where it determines that the risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions make it impracticable to provide perpendicular access and a linear area along the entire shore and that there are no measures that can be taken to avert the situation. In such cases, the Department will instead require alternate public access either on site or at a nearby location. As noted in response to comment 31, the Department has determined public access is necessary to preserve public trust rights.

34. COMMENT: The Federal Standards Analysis concludes that the proposed new rules and amendments do not exceed any Federal standards or requirements. This is false. The requirements greatly exceed any Federal requirements by partially taking property and by the creation of a misleadingly titled "Conservation Easement." The US Army Corps of Engineers is involved in many dredging projects that impact these marinas. Nowhere do they require that the marina owners and operators surrender property to the general public. (34, 35, 16)

RESPONSE: The State of New Jersey is the trustee of public rights to the State's natural resources, including tidal waterways and their shores. Accordingly, it is the duty of the State to protect the

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public's right to use and ensure that there is access to these resources. Requiring public access to and use of the shores of tidal waterways is not an unconstitutional taking of property since these public rights are background principles of New Jersey State law. See *National Association of Home Builders v. State of New Jersey, Department of Environmental Protection*, 64 *F.Supp.2d* 354, 358-359 (D.N.J. 1999)(upholding Hudson Riverfront Walkway rule as a valid exercise of the police power to safeguard public trust rights, as these rights of use and enjoyment cannot be extinguished even with conveyance of title to these tidal waterfront areas). See also, e.g., *Adirondack League Club, Inc. v. Sierra Club*, 92 *N.Y.2d* 591, 604, 706 *N.E.2d* 1192, 1196, 684 *N.Y.S.2d* 168, 171 (N.Y. Court of Appeals 1998)("Having never owned the easement, riparian owners cannot complain that this rule works a taking for public use without compensation."); *Coastal Petroleum v Chiles*, 701 *So.2d* 619 (Fla. Dist. Ct. App. 1997); *Public Access Shoreline Hawaii. v. Hawaii County Planning Comm'n*, 903 *P.2d* 1246 (Haw 2006); Michael C. Blumm and Lucus Ritchie, Article, "Lucas' Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses," 29 *HARV. ENVTL. L. REV.* 321 (2005).

35. COMMENT: The Regulatory Flexibility Analysis states that "under the current rules, small businesses that require a coastal permit and are located on or along a tidal waterway are required to provide public access. While provision of public access imposes a cost on small businesses, these costs are not expected to increase as a result of these proposed amendments." The commenter disagrees with that assessment. There will be added costs in providing walkways, access points, parking, security, and the increase in associated liabilities. There will be added costs for liability insurance and an added cost for working with State and local authorities in an effort to comply with this new mandate. The Department should reconsider this analysis.

The proposed regulations will mandate additional, unnecessary costs to doing business in New Jersey, and create more disincentives for both established companies located in the state, and companies that are contemplating relocation to New Jersey. (16)

RESPONSE: Prior to this adoption, the public access rule also required the provision of public access at small businesses in most cases. The required access varied by site and included walkways, access points, and parking. In the concurrent proposal, the Department is providing

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increased flexibility to marinas, a category of small business commonly affected by the rule, to provide access.

36. COMMENT: The economic impact statement begins by providing economic information on the tourism industry. After discussing these general points, baseless statements are made to imply that this significant expansion of public access to privately owned commercial property will enhance or protect tourism dollars and employment. Those statements are an exercise of imagination rather than empirical research or substantive findings.

The economic impact statement is void of any substantive analysis of the impact on marina owners and operators property rights, on the experience and impact of prospective expenditures by marina customers, or the additional costs and burdens on marina owners and operators. In fact, it is not an economic impact review but a statement made in support of these radical regulations.

A true economic and regulatory flexibility analysis must be performed and submitted to the public. The law and fundamental fairness require it. (34, 35, 12, 16)

37. COMMENT: A thorough investigation of the economic, environmental, safety and maintenance issues on marinas should be performed before the rule is adopted. (67)

RESPONSE TO COMMENTS 36 AND 37: The public has always had the right to access tidal waterways and their shores. The right is not exclusive to marina and boat owners. Accordingly, since their inception in 1978, the Coastal Zone Management rules have required public access at marinas. These amendments add clarity and predictability to the Department's public access requirements. Areas outside of the public access area need not be accessible to the public and the concurrent proposal published elsewhere in this issue of the New Jersey Register would allow reconfiguration of linear access where warranted by site constraints or dangerous operations such as heavy boat moving equipment. Lastly, as detailed in response to comments 108 through 112, a property owner would be afforded immunity from claims that fell within the parameters of the

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general immunity in the Landowner Liability Act. (See response to comments 108 through 112 for a more detailed discussion of liability).

38. COMMENT: The rule does not address industrial sites that have been fully developed and need to be able to continue to safely and efficiently maintain, operate and develop these industrial sites so that they can remain competitive. Areas that have already been developed should be exempted from the public access requirements of this rule, even if a coastal permit is required. The cost and resources involved in retrofitting an existing developed area to allow for public access is prohibitive compared to the benefit the public would receive by having access to these areas. In addition, if a developed area requires a coastal permit for minor repairs and modifications, the property owner should not be required to retrofit the entire site to allow public access to that small portion of the site. (45, 100)

RESPONSE: The Department recognizes that existing industrial properties with developed waterfronts, as well as energy facilities and port uses, may present situations that warrant modification of the public access requirements. Therefore, N.J.A.C. 7:7E-8.11(f)3 provides that the Department may modify the public access requirements where it determines that the risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions make it impracticable to provide perpendicular access and a linear area along the entire shore and that there are no measures that can be taken to avert the situation. In such cases, the Department will instead require alternate public access either on-site or at a nearby location. Alternate public access might take the form of an observation area along the waterfront, public fishing pier or small boat/canoe launch along a tidal waterway, creation of new public parking spaces at another access point, or passive recreational enhancements (seating areas, lighting, trash receptacles, interpretive signs, ADA ramps or stairs) at existing nearby public access areas.

39. COMMENT: While the commenter appreciates the Department's responsibility to act as the public's agent in regards to lands and waterways in the public trust, the Department needs to weigh this responsibility against the responsibility the State has to continue to allow New Jersey to be

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home to industry. The additional costs to industry for these amendments must not become prohibitive. The costs associated with obtaining coastal permits are already significant, particularly if wetland credits must be purchased from a wetlands bank. The additional costs associated with public access may serve to deter industry from expansion and/or remaining in the State. This includes the requirements for the private landowner to both develop parking areas and maintain access provisions in perpetuity. Whereas this provision may make sense for residential and commercial development along beachfront property, it is impracticable and should exempt existing industrial properties with developed waterfronts. (45, 100, 131)

40. COMMENT: The proposal creates an open-ended, and potentially disastrous financial burden on the businesses and industries that in many cases have operated in this State for decades, provided jobs, and provided ratables in the form of property taxes as well as corporate business taxes.

This proposal hinders the Governor's goal of providing incentives to existing and future businesses in order to grow the State's economy. The added costs, which are incalculable, will only provide disincentives to existing businesses to stay in New Jersey, as well as to potential future businesses and industries to locate in New Jersey. (16)

RESPONSE TO 39 AND 40: Since their inception in 1978, the Coastal Zone Management rules have required developments to provide public access. The amendments adopted herein provide more precise standards. Public access generates positive externalities in the context of the tourism industry. Various examples of increased public access to natural resources such as parks, forests and beaches have been shown to provide increased benefits to the greater community. Whereas many natural resources were once only accessible to homeowners, increased access and the recreational and tourist visitation that ensues enhances the economies of local businesses. From souvenir shops to gas and meals at local restaurants, the greater community stands to benefit from the increased public traffic to the State's public resources.

The Department recognizes that existing industrial properties with developed waterfronts, as well as energy facilities and port uses, may present situations that warrant modification of the public access requirements. Therefore, N.J.A.C. 7:7E-8.11(f)3 provides that the Department may modify

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the public access requirements where it determines that the risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions make it impracticable to provide perpendicular access and a linear area along the entire shore and that there are no measures that can be taken to avert the situation. In such cases, the Department will instead require alternate public access either on-site or at a nearby off-site location.

41. COMMENT: The social and economic analysis in the proposal are inadequate and fail to satisfy the Administrative Procedures Act (APA) as the Department has failed to acknowledge readily anticipated social and economic impacts that would result if the proposed rules were adopted.

In order to ensure meaningful public participation in the rulemaking process, the APA requires that, as part of each rule proposal, an agency publish for public review a social and economic analysis of the proposed rule.

The rule would have severe adverse economic impact on coastal municipalities. In the economic impact analysis included in the proposal, the Department contends that, while the proposed rules represent an obligation of the State under the Public Trust Doctrine, the rules would also bolster the State's tourism industry, resulting in increased revenues to both State and local governments.

While presenting the proposed new regulations as an advancement of egalitarian traditions and an impetus to improved economic health, the State fails to address the hardships these proposed regulations place on private property owners, effected municipalities, and taxpayers of the State. Municipalities will suffer hardships through expenses relating to required accesses, parking and restrooms. Additionally, the proposed regulations result in the towns' loss of control of the towns' character, nature and environment, as well as confrontation within increased development pressures.

In proposing these regulations, the Department has given little consideration to the impact of the rules on local property taxes. Municipalities along Long Beach Island illustrate these points. In order to comply with the proposed regulations, coastal municipalities will be saddled with the cost of acquiring easements for public access across private property, the cost of acquiring land for parking, the cost of acquiring land and constructing and maintaining public restrooms, the cost of

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policing beaches that would be open on a 24-hour basis, policing the parking areas, policing the restrooms and the like. Yet municipalities would be precluded from charging use fees to fully defray the costs.

By limiting user fees to operation and maintenance costs, local property taxpayers will be burdened with the capital costs of land acquisition and construction. Further, by limiting user fees to operation and maintenance costs, local property taxpayers must pay for the bulk of these land acquisition and construction costs, citizens throughout the State, as well as out-of-State visitors, will benefit. This would be crippling to the local municipalities and local residents. These increased taxes would be unsustainable. Many retirees or others on fixed incomes would be taxed out of their homes. Municipalities will feel pressure to resort to increasing rates by allowing construction of high-density projects, and consequently destroying the environment that visitors have traditionally valued. Once zoning ordinances are revised, developers will be eager to knock down older single family homes and build condominiums that rely on height and setback variances and complete the cultural transformation of Long Beach Island. This is an example of how the State is burdening selected municipalities and their taxpayers to benefit all the citizens of the State.

Though the Department recognizes that “classic coastal communities...provide hospitality” to shore visitors, the Department is proposing regulations that would have a deleterious effect on the very classic environment that draws vacationers to Long Beach Island.

One of the key tools the Department proposes to rely upon to force municipalities to accept the proposal is the State Aid Agreements for Shore Protection funding. The Department’s logic is that because public funds are used to maintain beaches, all the public has a right to use the beaches. The logical consequence of such an egalitarian approach is that the cost to all sectors of the public should be equal. But the proposed rules would burden coastal municipalities with the expenses of implementing these rules. The Department states that “municipalities may incur costs of obtaining easements to meet the one-quarter mile requirement. However, the Department has determined that this is appropriate since significant public funds are used for shore protection and beach nourishment projects.” This falsely implies that the sole purpose of the current beach replenishment project underway on Long Beach Island is to protect private homes on the Island. It appears that the implicit purpose is to create wide beaches that will accommodate more tourists and bolster the State’s travel and tourism industry.

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In an effort to hoodwink the public, the Department states “the Department plans to assist the municipalities in funding these [restroom] facilities”. The phrase “plans to assist” is carefully chosen as is the Department’s failure to include this in the rule text. There is no regulatory requirement that the Department must follow through on its “plans to assist” coastal municipalities, and the proposed rules allow no relief to those municipalities if the hoped-for aid does not materialize.

Those homeowners who are not having their property taken through the required conservation restrictions, would also have to absorb the costs of land acquisition and construction for parking lots, bathrooms, access points and other infrastructure costs through tax increases that would become unsustainable to many residents.

It is also unfair that, if a municipality takes “any action determined by the Department to be in conflict” with the rules, it “will be required to take corrective action within 30 days” and if not, the Department may “demand immediate repayment to the Shore Protection Fund of all Shore Protection funding” for projects within the municipality. N.J.A.C. 7:7E-8.11(q).

Should the Shore Protection funding cease, mandates for perpetual easements and restrictions to guarantee parking, restrooms, easements, infrastructure and ordinances would all remain in place. As a result, local taxpayers would have to incur incalculable increased beach maintenance costs, worse than in the past, as replenished beaches erode at a faster pace than natural beaches. (138, 38, 121)

42. COMMENT: The social and economic analyses are inadequate and fail to satisfy the Administrative Procedures Act. (177, 140)

RESPONSE TO COMMENTS 41 AND 42: The Department’s social and economic analyses focused on the broad social and economic impacts of the proposed rule changes, including the importance of access to the State’s tidal waterways and shores for tourism, the great demand for access to these areas, the value of the tourism industry and its importance to the economy of the State and the shore area, and the need to manage tidal waterways and their shores to maintain public trust rights to access and use them. Prior to this adoption, the public access rules provided that

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municipalities that do not provide or do not have active plans to provide public access to tidal waterways and their shores would not be eligible for shore protection funding. The requirements imposed on municipalities participating in Shore Protection Program funding are imposed in part due to the use of public funds to conduct these projects and to meet Federal funding requirements, but also because the public has inalienable rights of access to tidal waterways and their shores under the Public Trust Doctrine.

The provisions of N.J.A.C. 7:7E-8.11(p) only apply to municipalities that are entering into a State Aid Agreement with the Department because they are receiving State funds under the Shore Protection Program. For Federal projects, the State and the Federal government assume the vast majority of the project costs, as the local government will pay only nine percent of a Federal project and twenty-five percent of a State project. Nonetheless, local communities derive great benefits from the shore protection offered by the project. The State will provide additional funding of up to five percent of the initial project construction costs to assist municipalities with the cost of complying with the public access requirements of the rule. This funding can be used for any necessary land acquisition to obtain the one-quarter mile perpendicular accessways, restrooms and parking. In addition, parking can be met through additional on street parking and restroom facilities may be made available at existing public buildings or by using portable toilets. For example, the Department has offered the five municipalities affected by the Long Beach Island beach nourishment project up to \$50,000.00 per restroom to meet the public access requirements of the rule. This funding must be equally matched by municipal funds. This funding can only be used for compliance with the public access rule and expenditure of these funds will require prior Department approval. The additional funding may not be used for legal or engineering fees, surveying or other professional services, or sewer connections. This additional funding provided by the Department for compliance with the public access rule requirements will be incorporated into the State Aid Agreement between the State and the municipality. Where a municipality is developing a shore protection project without State or Federal funds, the rule requires access to the water at that development, as it did prior to adoption of these amendments.

A municipality can choose not to participate in State or Federal funded projects if it determines that these requirements are too onerous, but it will still be subject to N.J.S.A. 40:61-22.20 and the

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provisions of this rule that apply to any development. The commenters express concern about limiting user fees. New Jersey Law, N.J.S.A. 40:61-22.20, requires that fees charged be reasonable in order to account for maintenance and safety costs. Accordingly, the Department incorporated such fee limits in the rule. See also, generally *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005). (holding that beach fees must be commensurate with basic beach services provided to the public and approved by the State).

43. COMMENT: The Department has failed to conduct or provide any study analyzing the economic impact of these regulations, or analyzing the relationship, if any, between the costs which will necessarily be incurred by land owners in complying with these regulations against the benefits to the State as a whole. The costs of public access facilities should be borne by State or local government, not by private homeowners. (70)

RESPONSE: Properties along tidal waterways and their shores are subject to the Public Trust Doctrine, and therefore owners of such lands have obligations under the Public Trust Doctrine, which in part, are incorporated into this rule. Much of the economic viability of shore communities is based on tourism. In fact, the New Jersey Supreme Court in *Matthews* held “Beaches are a unique resource and are irreplaceable. The public demand for beaches has increased with the growth of population and improvement of transportation facilities.” 95 N.J. 306, 323 (1984) A primary reason that people go to the Jersey shore is to access the water. Thus, it is important economically to ensure that such access is provided. The State will continue to fund public access through Green Acres and other funding sources.

44. COMMENT: The social and economic analyses are adequate to satisfy the Administrative Procedures Act. (36)

RESPONSE: The Department acknowledges this comment in support of the rule.

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45. COMMENT: The impact of this rule on many municipalities will be detrimental to the public trust. (140)

RESPONSE: The rule will not be detrimental to the public trust. Rather, the rule will uphold public trust rights through measures such as the recording of conservation restrictions, provision of public parking and mandating of reasonable beach fees.

46. COMMENT: The Department's jobs impact analysis offers no analysis whatsoever. The speculative nature of the so-called analysis is revealed by the Department's statement that the proposed rules "may create an opportunity for small amount of job growth in municipalities where public access increases are at a high rate." The Department also concludes without any stated basis, that the proposed rule is not expected to affect the number of developments proposed or associated jobs. To the contrary, the proposed rules will discourage development and redevelopment opportunities in the coastal areas because of the inability of property owners to satisfy the requirements for public access and parking mitigation and because of the lack of flexibility in the proposed rules in the form of the *Raleigh* and *Matthews* mandated case-specific determination of reasonableness. (121)

RESPONSE: Since 1978, the Coastal Zone Management rules have required development to provide public access, including physical and visual access, such as walkways and view corridors. These amendments add clarity and predictability to the existing requirements. The rules prior to this adoption also included requirements to replace public beach parking lost to development. Therefore, the Department does not expect the rules to discourage development or redevelopment. In fact, the area along the Hudson River is an example of thriving active redevelopment enhanced by the public walkway required under the Hudson River Waterfront Area rule, N.J.A.C. 7:7E-3.48.

47. COMMENT: The rules will not minimize the impacts to natural areas and tidal waterways including habitat value and water quality. The rules will lead to a negative environmental impact. One set of rules for all situations is impractical. If the rules are adopted, they must address the unique circumstances that can occur in different parts of the State. (126, 83)

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48. COMMENT: The environmental impact statement is lacking and inadequate. The section discussing the possible effects on the environment is overly optimistic, stating:

“public accessways and public access areas located in a natural area along a tidal waterway shall be designed to minimize the impacts to the natural area and the tidal waterway including habitat value, vegetation and water quality.”

The proposal is overly vague and does not clarify how exactly they expect the public access areas to be designed in order to prevent such damaging effects. Before the proposed regulations become effective, the environmental impacts associated with the rule need to be reevaluated (62)

RESPONSE TO COMMENT 47 AND 48: Open public access as opposed to private exclusion is the Department’s governing principle for the management of public natural resources. However, this does not mean that access itself is unregulated. The rule at N.J.A.C. 7:7E-8.11(d)2 and (f)2 sets forth public access provisions for natural areas and addresses potential impacts of public access on threatened and endangered wildlife and plant species and critical wildlife habitats, respectively. The rule defines natural areas as areas that have retained their natural character as evidenced by woody vegetation such as trees, saplings, and scrub-shrub vegetation, or rare or endangered plants. These areas need not be undisturbed and do not include maintained lawns or landscaped areas with non-native herbaceous plants. In natural areas, the rule requires that public accessways and areas be designed to minimize impacts to the natural area’s habitat values, vegetation and water quality. A pathway through woody vegetation along a tidal creek may satisfy the public access requirement for a particular site where the natural area is adjacent to a tidal waterway throughout the site.

The rule at N.J.A.C. 7:7E-8.11 also recognizes that temporary restrictions on public access may be approved, required or imposed by the Department to protect threatened and endangered wildlife or plant species or critical wildlife species. For example, the Department may close a sandy beach during the nesting season for piping plovers or temporarily close a section of bay beach used as a staging or roosting area for large numbers of shorebirds during their spring or fall migration. In addition, the rules address different circumstances in different parts of the State with specific

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criteria for the Hudson River and different criteria for the State's major waterways where shores are already mostly developed.

49. COMMENT: The rule proposal lacks a meaningful environmental impact statement. The Administrative Procedure Act mandates that a rule proposal describe the environmental impact of the rule. The Department's entire statement of the environmental impact of these rules is limited to the following:

“The proposed new rules and amendments provide that public accessways and public access areas located in a natural area along a tidal waterway shall be designed to minimize the impacts to the natural area and tidal waterway including habitat value, vegetation and water quality. The proposed amendments also allow for temporary closure of an area when necessary to protect endangered and threatened wildlife or vegetation species. Thus, the new rules and amendments are expected to have a positive environmental impact.”

This discussion fails because it does not recognize that the rules provide for much more than “public accessways” and “public access areas.” The rules also mandate an increase in parking facilities and restrooms, as well as 24-hour access to the beach. This in turn, will lead to requirements for additional lighting, pavement and road infrastructure. The 24-hour access, and the parking to facilitate this access, will result in increased noise and diminution in environmental quality. The environmental effects of the proposed rules are not limited to the direct effects on the tidal waterways and natural beach areas themselves. The rules will exacerbate traffic, congestion, and nonpoint source pollution at the New Jersey shore all of which contribute to ever rising property taxes and diminution in the quality of life. This will invariably diminish the quality of life for millions of people and undoubtedly impact adversely the ecological balance of fragile ecosystems. (120, 138)

RESPONSE: The Administrative Procedure Act and rules do not require that a rule proposal include an environmental impact statement. Nonetheless, as an environmental agency, the Department does consider the environmental impact of the rules that it proposes. In many cases, implementation of this rule will be triggered by proposed new development that brings with it additional lighting, traffic, pavement and infrastructure. The public access requirements will not

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add significantly to the impacts generated by the development itself. For municipal shore protection and Green Acres funded projects, the public access provisions will increase the quality of the experience of the residents and visitors rather than diminish the quality of life for millions of people as cited by the commenters. In fact, the State Development and Redevelopment Plan (State Plan) calls for promotion of recreational opportunities and public access and encourages tourism along the oceanfront, bayfront and rivers of the coastal area. It also finds that improved public access to waterfronts is an important aspect of urban revitalization.

50. COMMENT: Executive Order No. 4 (2002) requires that a rule proposal state the impact of the proposed rule on the achievement of smart growth and implementation of the State Development and Redevelopment Plan. The Department's Smart Growth Impact Statement fails to acknowledge that the proposed rule will discourage development and redevelopment activities under the State Development and Redevelopment Plan, because of the onerous physical and economic requirements of the proposed rule. Burdening private property with public access easements and parking mitigation requirements will not promote smart growth. (120)

RESPONSE: The smart growth impact statement is required to discuss the impact of the proposed rule on the achievement of smart growth and implementation of the State Plan. As noted in the proposal at 38 N.J.R. 4587, the rule will further the State Plan policies for coastal resources, urban revitalization, and historic, cultural and scenic resources. Moreover, the Coastal Zone Management rules have always required public access and the Public Trust Doctrine, which mandates public access to tidal waterways and their shores, has existed for centuries. Mitigation for loss of parking due to development has long been required, under both the specific provision for loss of on-street parking and the more general provision discouraging development that limits public access, previously codified at N.J.A.C. 7:7E-8.11(b).

## **Chapter 7. Coastal Permit Program rules**

### **Subchapter 1. General Provisions**

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### **N.J.A.C. 7:7-1.3 Definitions**

51. COMMENT: The proposed definition of “Public Trust Doctrine” is problematic in the context of public rights to utilize “...a reasonable area of shoreline landward of the mean high water line.”

While the proposed definition contains an acknowledgement that the Public Trust Doctrine is a common law principle which may “continue to develop through individual court decisions,” the definition omits recognition of a fundamental reality. The seminal expression of the Public Trust Doctrine was carefully articulated by the New Jersey Supreme Court in *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984) where the court explicitly acknowledged that the determination of precisely what privately-owned upland sand area will be available and required to satisfy the public’s rights under the Public Trust Doctrine will depend upon circumstances and listed factors to be considered

In *Raleigh Ave. Beach Ass’n. v. Atlantic Beach Club, Inc.*, decided in 2005, 21 years following the *Matthews* decision, the New Jersey Supreme Court applied, without modification, the *Matthews* factors to the facts there presented.

The New Jersey Supreme Court has consistently noted that the public’s right to utilize a privately owned dry sand area will depend upon the circumstances and an application of the *Matthews* factors in the context of reasonableness.

The proposed rule and included definition of the Public Trust Doctrine, without any demonstration of consideration of application of the *Matthews* factors or any provision for a case-by-case factual analysis, clearly ignores the current legal reality that “a reasonable area of shoreline landward of the MHWL (Mean High Water Line)” may only be determined by objective application of the *Matthews* factors, in each instance. The proposed rule does not even suggest a means or mechanism for determination of a reasonable area. The Department has in effect proclaimed that all dry sand waterward of the dunes, must be made available to the public under the Department’s vision of what the Public Trust Doctrine may become. Under the regulatory scheme now under consideration, with or without the pendency of beach nourishment projects, an owner is placed under significant onus and forced to either concede their rights or they will not be permitted to develop, restore or maintain their property, even if they will not rely on any governmental funding. The practical impact of the proposed rules is a determination by the Department that public use of

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the entire dry sand area is reasonable, an obvious departure from the governing *Matthews* principles.

With respect to the requirements for dry sand areas, the Department should revise the rule to be at least minimally reflective of an effort to achieve a reasonable balance between public and private interests. As currently presented, a private land owner would cede all of the dry sand area to public use as a condition of any Department permit or under beach replenishment projects. It is possible that considerations of reasonableness may be acceptably addressed by defining a reserved area, east of the dune, a percentage of the distance to the mean high water line, which could be reserved for the exclusive use of the private property owner(s) when present. The inclusion of such recognition of private property rights would, to a significant degree, reduce the present resistance to execution of easements which are perceived as opportunistically demanded and substantively excessive. The most egregious instance is the imposition of a grant of easement requirement as a condition of a permit for a beach project which is privately funded. The latter scenario presents significant constitutional law issues. (121)

RESPONSE: The specific rights and protections recognized under the Public Trust Doctrine continue to develop through individual court decisions. For that reason, the amended regulations do not specify a precise area of privately owned shoreline landward of the mean high water line, or a percentage thereof, that must be subject to public access and use in every case. The Department recognizes that the *Matthews* factors may be applicable to a particular piece of property and that these factors are applied on a case-by-case basis.

52. COMMENT: The proposed amendments to the Coastal Permit Program rules at N.J.A.C. 7:7-1.3 and Coastal Zone Management rules at N.J.A.C. 7:7E-3.50 and 8.11(a) acknowledge that the public's right to use public trust lands and waters extends beyond what are considered to be the traditional uses of navigation and fishing to "recreational uses, such as swimming, sunbathing, fishing, surfing, walking and boating." In addition to those that partake in these uses, there is another constituency that has played a significant and pioneering role in the effort to gain meaningful public access to our Public Trust lands and waters; scuba divers. The proposed rules

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should be amended to incorporate scuba diving as one of the recognized uses for which the public has access to public trust lands and waters and that their needs be considered when the public access requirements are implemented. (80)

RESPONSE: The list of potential recreational uses of public trust lands and waters is not intended to be all-inclusive. N.J.A.C. 7:7-1.3 and N.J.A.C. 7:7E-3.50(e) and 8.11(a) are being amended on adoption to include “sport diving” as one of the recognized uses for which the public has access to public trust lands and waters. Based on comments from the New Jersey Council of Diving Clubs, the Department has determined that the term “sport diving” is a more inclusive term than scuba diving.

53. COMMENT: The commenter suggested that the definition of Public Trust Doctrine should be amended to read as follows, adding the words underlined below:

“Public Trust Doctrine” means a common law principle that recognizes that the public has particular inalienable rights to certain natural resources. These resources include, but are not limited to, tidal waterways, the underlying submerged lands and the shore waterward of the mean high water line, whether owned by a public, quasi-public or private entity. In the absence of a grant from the State, submerged lands under tidal waterways and the shore of tidal waterways waterward of the mean high water line are owned by the State. Regardless of the ownership of these resources, under the Public Trust Doctrine the public has rights for protection of, access to, and use of these resources, as well as a reasonable area of shoreline landward of the mean high water line. Under the Public Trust Doctrine, the State is the trustee of these publicly owned resources and public rights for the common benefit, protection, and use of all people without discrimination. As trustee, the State has a fiduciary obligation to ensure that its ownership, regulation and protection of these natural resources, properties and rights will safeguard them for the enjoyment of present and future generations. The public rights to use these resources extend both to traditional activities such as navigation and fishing, but also to recreational uses such as swimming, sunbathing, fishing, surfing, walking and boating. The specific rights and protections recognized under the Public Trust Doctrine, a common law

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principle, continue to develop through individual court decisions. *See, for example, Arnold v. Mundy, 6 N.J.L. 1 (1821); Borough of Neptune v. Borough of Avon-by-the-Sea, 61 N.J. 296 (1972); Hyland v. Borough of Allenhurst, 78 N.J. 190 (1978); Matthews v. Bay Head Improvement Association, 95 N.J. 306 (1984); Slocum v. Borough of Belmar, 238 N.J. Super. 179 (Law Div. 1989); National Ass'n of Homebuilders v. State, Dept. of Env't'l Protect., 64 F.Supp.2d 354 (D.N.J. 1999); Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 185 N.J. 40 (2005); Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892); Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988).* (2)

RESPONSE: The Department has decided not to change the definition of "Public Trust Doctrine." Open public access as opposed to private exclusion, is the Department's governing principle for the management of public natural resources. However, this does not necessarily mean that said access is unregulated. The Department has the authority to protect natural resources, and implements the Coastal Zone Management rules in the coastal zone to protect these natural resources. The Coastal Zone Management rules contain standards that provide protection of natural resources such as endangered and threatened wildlife and plant species habitats, wetlands, beaches, dunes and critical wildlife habitats. Further, proper enforcement of State and local laws with respect to such issues as trespassing, littering, and protection of quarantined areas of environmental sensitivity, will continue to protect these natural resources. Accordingly, the proposed changes are unnecessary.

54. COMMENT: The Public Trust Doctrine as defined at N.J.A.C. 7:7-1.3, states: "Public Trust Doctrine means a common law principle that recognizes the public has particular inalienable rights to certain natural resources..." The commenter objects to the use of the term "inalienable," as a legal term of art, to describe the nature of the rights that flow to individuals based upon the Public Trust Doctrine. In his dissent in *Van Ness v. Borough of Deal, 78 N.J. 174, 185 (1978)*, Justice Worrell Mountain expressed grave concern that several then-recent decisions of the Supreme Court regarding the Public Trust Doctrine implied the right of the public to access resources is inalienable, absolute and beyond reasonable allocation by the Legislature, observing:

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I submit that in New Jersey today there is a continuing and pervasive uncertainty as to just what the public trust doctrine is and to what properties it applies. Of these uncertainties, one of the most significant has to do with the questions of legislative supervision and control...

Such a rule, purporting to place public trust property beyond legislative reach, is substantially at variance with every decision on the subject handed down in this State during the 150 years separating *Arnold v. Mundy*, 6 N.J.L. 1 (Sup. Ct. 1821) from Avon....

If the trusteeship puts such lands wholly beyond the police power of the state, making them inalienable and unchangeable in use, then the public right is quite an extraordinary one, restraining government in ways neither Roman nor English law seems to have contemplated.

*Van Ness at 185. See also, Borough of Neptune v. Borough of Avon, 61 N.J. 296, 308.*

Since Justice Mountain expressed those concerns in 1978, the “continuing and pervasive uncertainty as to just what the Public Trust Doctrine is and to what properties it applies” has become clearer, but only with respect to ocean beaches. The changing contours of the Public Trust Doctrine as it pertains to upland areas that are not recreational ocean beaches remain as foggy today as for Justice Mountain 29 years ago. More importantly, his concern that the case law explicating the Doctrine was improperly placing it beyond the Legislature’s reach has not been amplified in subsequent decisions, and remains among the continuing and pervasive uncertainties.

The proposed rule reintroduces and codifies the notion that the Public Trust Doctrine is defined solely by plaintiffs, including the Department, who bring suit to enforce a right to access the tidal waters, but may not be regulated by the Legislature. Whether or not the Department intends the outcome Justice Mountain feared, it is the unavoidable result of its choice of the term “inalienable.” The public should retain the Legislature’s full participation in decisions regarding the allocation of rights and burdens under the Doctrine, subject only to the limits imposed by the Constitution, the supreme law of the land, and the Department should therefore delete references to the inalienable nature of the rights held in trust under the Doctrine insofar as it can be argued this has the effect, whether or not intended, of placing these rights beyond the reach of the Legislature. (45, 149, 131)

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RESPONSE: The rule recognizes and provides for judicial clarification of the Public Trust Doctrine over time. The definition of “Public Trust Doctrine” at N.J.A.C. 7:7E-1.3 states “The specific rights recognized under the Public Trust Doctrine, a common law principle, continue to develop through individual court cases.” The Department did not intend, and does not have any authority to, restrict the jurisdiction of the legislative branch. The Department did not intend and does not have any authority to restrict the jurisdiction of the legislative branch.

#### **N.J.A.C. 7:7-1.5 Permits and permit conditions**

55. COMMENT: The amendments to N.J.A.C. 7:7-1.5 are strongly supported because they clarify that the responsible party for the violation may include entities such as the permittee, site operator and contractor and therefore any or all of these entities may receive a penalty assessment as appropriate. Similar language should be added to other Department rules, such as the Freshwater Wetlands Protection Act rules, the Flood Hazard Area Control Act rules and the New Jersey Pollutant Discharge Elimination System (NJPDES) rules. (59)

RESPONSE: The Department acknowledges this comment in support of the rule.

#### **Subchapter 7. General permits and permits-by-rule**

##### **N.J.A.C. 7:7-7.6 Coastal general permit for beach and dune maintenance activities**

56. COMMENT: All municipalities on Long Beach Island have coastal general permits for beach and dune maintenance activities. However, under this rule, for a municipality to receive this general permit, they must comply with the access requirements of the public access rule. This may eventually lead to municipalities not maintaining their beaches. (93)

57. COMMENT: Through the cross-references to N.J.A.C. 7:7E-3.50 and 7:7E-8.11, the addition of the public access requirements to this coastal general permit is contrary to the public interest because it could cause those who would otherwise undertake beach protection activities to forgo those activities. This issue should have been, but was not addressed by the Department in the Environmental Impact Statement. It should not be adopted. (120, 138)

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RESPONSE TO COMMENTS 56 AND 57: The Public Trust Doctrine establishes the right of the public to fully utilize tidal waterways and their shores for activities including swimming, sunbathing, fishing, surfing, sport diving, bird watching, walking and boating. These rules are intended to ensure that those owners of property located along tidal waterways uphold the Public Trust Doctrine by allowing access to these waterways and therefore, adoption is appropriate and in the public interest. Regardless of this rule, the lands are subject to public trust rights and public access. It is up to a municipality to determine how to maintain its beaches. Beach maintenance activities such as trash and debris removal can be conducted manually without a permit.

58. COMMENT: Some private beach associations and homeowners have been able to get around the general permit procedure that triggers Department regulatory control by using a municipality's general permit. By contracting with a town or just performing maintenance under the blanket permit these groups have been able get around access provisions in the current rule. This occurs in Point Pleasant Beach, and in the stretch from Ortley Beach to Brick Township, where municipalities have provided beach maintenance services to private beach associations, who are thereby freed from the need to obtain a CAFRA general permit and to comply with access requirements. The new rules should close that loophole and end the practice. (154)

RESPONSE: The coastal general permit for beach and dune maintenance activities has been amended to clearly state that public access must be provided to beaches availing themselves of the coastal general permit. Thus, any beach including those identified by the commenter, would be required to provide public access if undertaking any activity under the coastal general permit authorization.

**N.J.A.C. 7:7-7.7 Coastal general permit for voluntary reconstruction of certain residential or commercial development**

59. COMMENT: Under this proposal a number of coastal general permits are being amended in order to require public access pursuant to the new Public trust rights rule, specifically, N.J.A.C. 7:7-

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7.7, 7.8, 7.9, 7.10, 7.11, 7.12, 7.14, and 7.18. To the extent that these proposed amendments fail to incorporate analysis pursuant to the *Matthews* factors, as well as the *Dolan* “rough proportionality” test, the amendments are flawed and should not be adopted. This is particularly true in cases where existing single family homes are being reconstructed, or expanded, and existing shore protection devices such as bulkheads, revetments or gabions are being upgraded, maintained or replaced. In such situations, there should rarely be any need for public access; but if there is, it should be based on the *Matthews* factors. There can be no presumption that every upgrade or expansion of existing homes presumptively requires public access. (70)

RESPONSE: The amended rules do not presume that every upgrade or expansion of existing homes requires public access. Unless the single family home is part of a larger development, public access is only required if the single family home includes a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay, or Delaware Bay or beach or dune maintenance activities are proposed. The specific rights and protections recognized under the Public Trust Doctrine continue to develop through individual court decisions. For that reason, the amended regulations do not specify a precise area of privately owned shoreline landward of the mean high water line, or a percentage thereof, that must be subject to public access and use in every case. The Department recognizes that the *Matthews* factors may be applicable to a particular piece of property and that these factors are applied on a case-by-case basis. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) (finding state assertion of a public right is not an unconstitutional taking or exaction if the right asserted is recognized under the public trust doctrine of the law of that state.). *Dolan v. City of Tigard*, 511 U.S. 1016 (1994) is not applicable where land is impressed with public trust rights. See *National Ass’n of Homebuilders v. State, Dept. of Env’tl Protect.*, 64 F. Supp. 2d. 354 (D.N.J. 1999) (rejecting takings challenge to public access regulation).

60. COMMENT: N.J.A.C. 7:7-7.7 authorizes the reconstruction of a legally constructed, currently habitable residential or commercial development within the existing footprint of the development. The amendments to this coastal general permit add a cross-reference to N.J.A.C. 7:7E-8.11 which requires that coastal development adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and Delaware Bay shoreline provide public access on the site. This is inappropriate as it fails to

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consider the presence of existing public access and, by its terms, could be used to require public access even for a development immediately adjacent to or in close proximity to an existing public access point. Also, it is inappropriate because homeowners should have an absolute right to rebuild their homes in the same footprint. Therefore, this amendment should not be adopted. (120, 138)

RESPONSE: The rule does not prevent homeowners from rebuilding within the same footprint. In accordance with N.J.A.C. 7:7-7.2(a)7, the reconstruction of a legally constructed, habitable residential or commercial development within the existing footprint of development is authorized under a permit-by-rule. No amendments to this permit-by-rule were proposed. Tidal shorefront property in New Jersey has been impressed with public trust rights since colonial times, under a doctrine more than 1500 years old. It is unreasonable for homeowners to expect that they will be able to exclude the public from resources impressed with public trust rights, or to expect to appropriate public assets for exclusive private use. See, e.g., *National Ass'n of Homebuilders v. State, Dept. of Env't'l Protect.*, 64 F. Supp. 2d. 354 (D.N.J. 1999) (clarifying that the public trust doctrine is a background common law principle in New Jersey); *Arizona Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 369 (Ariz. Ct. of Appeals 1991) ("That generations of trustees have slept on public trust rights does not foreclose their successors from awakening.").

**N.J.A.C. 7:7-7.8 Coastal general permit for the development of a single family home or duplex**

**N.J.A.C. 7:7-9. Coastal general permit for the expansion or reconstruction (with or without expansion) of a single family home or duplex**

61. COMMENT: The amendments to N.J.A.C. 7:7-7.8 and 7.9 require that public access be provided in accordance with N.J.A.C. 7:7E-8.11. This is inappropriate as this requirement fails to consider the presence of existing public access and could be used to require public access even for a development immediately adjacent or in close proximity to an existing public access point. It is inappropriate to require additional public access for single family homes along the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and their shores. It is also inappropriate to force private property owners to lose the private enjoyment of their property and bear the cost and liabilities associated with the use by the public of that property as an access point. The rules fail to

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fully indemnify and hold harmless private property owners whose properties would fall under the jurisdiction of the rules. (138)

RESPONSE: The rule does not require perpendicular accessways across a property to the water at individual single family homes in accordance with N.J.A.C. 7:7E-8.11(f)6 and 7. Rather the rule requires access along a beach located on the Atlantic Ocean, Sandy Hook Bay, Raritan Bay, and Delaware Bay, or where beach and dune maintenance activities are proposed. This is warranted due to the extent of public access demand along these waterways and to uphold the Public Trust Doctrine. However, Public access may be required as a condition of Shore Protection Program funding in accordance with N.J.A.C. 7:7E-8.11(p). As stated in response to comment 60, tidal shorefront property is impressed with public trust rights. It is unreasonable for homeowners to expect that they will be able to exclude the public from resources impressed with public trust rights, or to expect to appropriate public assets for exclusive private use. Lastly, as detailed in response to comments 108 through 112, a property owner would be afforded immunity for claims that fell within the parameters of the general immunity in the Landowner Liability Act.

**N.J.A.C. 7:7-7.10 Coastal general permit for construction of a bulkhead and placement of associated fill on a man-made lagoon**

62. COMMENT: The proposed amendments to N.J.A.C. 7:7-7.10 require that public access be provided in accordance with N.J.A.C. 7:7E-3.50 and 8.11. This requirement is inappropriate as it fails to consider the presence of existing public access and, by its terms, could be used to require public access even for a development immediately adjacent or in close proximity to an existing public access point. It is inappropriate to require additional public access for single family homes along the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and their shores.

The existing rule at N.J.A.C. 7:7-7.10 does not require compliance with the public access rule. The absence of this requirement in the existing rule is appropriate given that the Department's definition of man-made lagoons at N.J.A.C. 7:7-1.3 acknowledges that such waters are "artificially created linear waterways...for the purpose of creating waterfront lots for residential development adjacent to the lagoon." By definition, man-made lagoons are created for the purpose of promoting

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adjacent residential development. These waters are not created for the purpose of extending public trust rights to waters. Requiring residential property owners adjacent to man-made lagoons to comply with the public access and parking mitigation requirements of proposed N.J.A.C. 7:7E-8.11 will hinder residential development and redevelopment opportunities in contravention of the very purpose of creation of these waters. This requirement should not be adopted. (120, 138)

RESPONSE: The Department is amending the rule on adoption to delete proposed N.J.A.C. 7:7-7.10(a)7i, which referred to public access at single family homes. This provision noted that single family homes are not required to provide public access unless they are located on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay, or are conducting beach and dune maintenance activities. Since none of these conditions apply on a man-made lagoon, the Department is not adopting this provision. However, where commercial or larger scale residential developments are proposed, the public access requirements are appropriate because these lands are impressed with public trust rights.

**N.J.A.C. 7:7-7.11 Coastal general permit for the construction of a revetment at a single family home or duplex lot**

**N.J.A.C. 7:7-7.12 Coastal general permit construction for the of gabions at a single family/duplex lot**

63. COMMENT: The coastal general permits at N.J.A.C. 7:7-7.11 and 7.12 only apply to single family homes that are not located along the Atlantic Ocean, Delaware Bay, Raritan Bay or Sandy Hook Bay. Proposed N.J.A.C. 7:7E-8.11 purportedly does not apply to single family homes unless they are located along the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or the Delaware Bay. Since general permit authorizations under N.J.A.C. 7:7-7.11 and 7.12 cannot be obtained for single family homes that are specifically subject to the proposed public trust rights rule, there is no reason to include the proposed public access requirements in these general permits. Doing so will unnecessarily create confusion for the regulated public concerning applicable requirements to qualify for authorization under these general permits.

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To the extent that the proposed Public Trust rights rule may apply to single family homes that are not located along the Atlantic Ocean, Delaware Bay, Sandy Hook Bay and Delaware Bay, then the proposed rule is misleading and should be withdrawn and re-noticed because it fails to properly identify the true regulatory scope of the proposed rule.

In addition, the proposed amendments are inappropriate as they fail to consider the presence of existing public access and, could be used to require public access even for a development immediately adjacent or in close proximity to an existing public access point. It is inappropriate to require additional public access for single family homes along the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and Delaware Bay and their shores. The proposed application of the public access requirements in the context of this rule demonstrates little or no concern for practical considerations or private property rights. In many instances, it will be impossible to provide on-site public access based on the size and density of the existing development. Moreover, as the general permit applies in the context of properties with an eroding shoreline, property owners will in many cases have no choice but to apply for the authorization to prevent property damage that may occur in connection with such conditions. Alternatively, property owners may allow such conditions to continue for as long as possible to avoid the harsh requirements of the proposed amendments, which could have negative environmental and public health ramifications. This issue should have been, but was not addressed in the Environmental Impact Statement. (120, 138)

RESPONSE: The provisions at N.J.A.C. 7:7-7.11(c) and 7.12(c) are proposed to address those very limited situations where beach and dune maintenance activities are proposed on a waterway other than the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay. If a beach along a waterway other than those specified above is large enough to warrant beach maintenance activities, the beach would be large enough to warrant public access. This is appropriate because these lands are impressed with public trust rights. If the single family home is not located on the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and no beach or dune maintenance activities are proposed, public access is not required under these general permits.

The rule summary at 38 N.J.R. 4573 indicates that these general permits are being amended to require public access in accordance with the Public trust rights rule. The rule summary at 38 N.J.R.

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4578 describes the situations in which public access is required at a single family home. Therefore, the proposal properly identifies the scope of the rule.

The Coastal Zone Management rules at N.J.A.C. 7:7E-7.11(b) state that non-structural solutions to shoreline erosion problems are preferred over structural solutions, and that vegetative shore protection measures are preferred at shoreline sites where feasible. Non-structural measures allow shorelines to continue to function as part of the natural ecosystem, thus have less adverse impact on sand movement and living marine and estuarine resources. Therefore, the amendments to the coastal general permits are not expected to have a negative environmental impact.

**N.J.A.C. 7:7-7.13 Coastal general permit for construction of support facilities at legally existing and operating commercial marinas**

64. COMMENT: The commenter indicated that she supports the public access rules as they apply to marinas. Through amendments to certain Coastal Permit Program and Coastal Zone Management Rules, the proposed public access requirements will be applicable to all marinas. Specifically, the Coastal General Permit for the Construction of Support Facilities at Legally Existing and Operating Commercial Marinas, N.J.A.C. 7:7-7.13, will be amended such that new marina facilities and expansions and renovations of existing marinas shall provide public access in accordance with the Lands and Waters Subject to the Public Trust Rights rule and the Public Trust Rights rule. Accordingly, when a marina constructs or upgrades any existing boat rack systems or support buildings, restroom facilities, pumpout facilities, fences, water lines or sewer lines, gasoline pumps and associated pipes and tanks and boat handling facilities, such as winches, hoists and ramps, the marina will be subjected to the public access requirements. Similar amendments to the Resorts/Recreational Use rule, N.J.A.C. 7:7E-7.3, render new marinas or existing marinas that engage in expansion or renovation, including dredging, bulkhead construction and reconstruction and relocation of docks, subject to the public access requirements. (80)

RESPONSE: The Department acknowledges this comment in support of the rule.

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**N.J.A.C. 7:7-7.14 Coastal general permit for reconstruction of a legally existing functioning bulkhead**

65. COMMENT: The proposed amendments to N.J.A.C. 7:7-7.14 require coastal development adjacent to the Atlantic Ocean, Delaware Bay, Raritan Bay or Sandy Hook Bay shoreline to provide public access on site. This is inappropriate as it fails to consider the presence of existing public access and, by its terms could be used to require public access even for a development immediately adjacent or in close proximity to an existing public access point. It is inappropriate to require additional public access for single family homes along the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and their shores.

The proposed application of the public access requirements in the context of this rule demonstrates little or no concern for practical considerations or private property rights. In many instances, it will be impossible to provide on-site public access based on the size and density of the existing development. Moreover, the rule proposal is particularly harsh in the context of this general permit provision because, unlike some single family home construction or reconstruction activities that may be permissive, bulkhead reconstruction activities are often borne of necessity to address aging or failing bulkhead or to prevent some emergency situation, from a property stability and environmental standpoint. This issue should have been but was not addressed by the environmental impact statement. A property owner may have no choice but to make application for the development triggering the requirement for public access. While the existing rule cross-references existing N.J.A.C. 7:7E-8.11, it exempts single family homes and duplex properties from the public access requirements, appropriately recognizing the limitations associated with such properties in the context of complying with public access requirements. This provision should not be adopted. (120, 138)

RESPONSE: At individual single family homes, public access is required only if the single family lot includes a beach and is located on the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or if located on a waterway other than those listed above, beach and dune maintenance activities are proposed. The extent of public access required is access to and use of the beach. Perpendicular access through these single family lots is not required. Therefore, public access would be provided offshore of the bulkhead, on the beach. Such a requirement is

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appropriate, as these lands are impressed with public trust rights, as described in response to comment 60. In addition, pursuant to N.J.A.C. 7:7-2.3(d)4, a coastal permit is not required for the repair, replacement, renovation or reconstruction in the same location and size of any bulkhead at a residential property or used for pleasure boating, provided that bulkhead was legally existing prior to January 1, 1981, that appears on the applicable Tidelands Map, or that appears on the applicable NJ Coastal Wetlands Maps promulgated by the Department; or that received a Waterfront Development permit subsequent to the date of the photograph on the Tidelands or Wetlands Map.

As described in the response to comment 63, the Department does not expect the amendment to this rule to have an adverse environmental impact.

66. COMMENT: The Department appears to recognize the disproportionate impact N.J.A.C. 7:7E-8.11 will have on existing facilities in its discussion of general permits. Under N.J.A.C. 7:7-7.14, the Department specifically proposes "...the Department shall not require public access for the development under this coastal general permit provided no beach and dune maintenance activities are proposed and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan, Bay or Delaware Bay or their shores..." As written and proposed, the regulations will force facilities into making difficult financial decisions about facility improvements because of the cost of complying with the public access requirements. The public access requirements should be limited to the development of "new" projects and existing facilities should be exempt from the regulations unless the existing facilities are expanded (cumulatively more than 10 percent) beyond the existing boundary of operations, as agreed on with the Department through evaluation of the Department aerial photography and appropriate block and lot designation. (99)

RESPONSE: The Public Trust Doctrine requires that the Department ensure that public access is provided to tidal waterways and their shores, even where existing development is in place. The Department recognizes that existing industrial properties with developed waterfronts, as well as energy facilities and port uses, may present situations that warrant modification of the public access requirements. Therefore, N.J.A.C. 7:7E-8.11(f)3 provides that the Department may modify the public access requirements where it determines that the risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions make it impracticable to

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provide perpendicular access and a linear area along the entire shore and that there are no measures that can be taken to avert the situation. In such cases, the Department will instead require alternate public access either on site or at a nearby location.

**N.J.A.C. 7:7-7.18 Coastal general permit for bulkhead construction and placement of associated fill**

67. COMMENT: Due to the unique nature of bulkhead reconstruction along public highways, N.J.A.C. 7:7-7.18 should be amended to provide that reconstruction of legally functioning bulkheads in conjunction with public highways, provide public access only when consistent with public safety. (59)

RESPONSE: In the concurrent proposal published elsewhere in this issue of the New Jersey Register, the Department is proposing to amend N.J.A.C. 7:7E-8.11(f)3 to incorporate an exception to perpendicular access and linear access along the entire shore of a tidal waterway for development of new, or modification of existing, limited access highways. The amended rule would require alternate public access for superhighway projects where it is demonstrated that such access is not practicable based on risk of injury or substantial existing and permanent obstacles, and no measures could be taken to avert the risks. Thus, where work is proposed along superhighways such as the Atlantic City Expressway, the Garden State Parkway and the New Jersey Turnpike, alternate public access could be provided if such demonstration is made.

68. COMMENT: The reconstruction of bulkheads and docks on areas that already have a Tidelands instrument should not be subject to the public access requirements. (84)

RESPONSE: In New Jersey, tidelands are held in trust by the State for the public unless these lands have been conveyed to other uses. Even when the State conveys tidelands to private ownership, it does not convey the public trust interest in the lands. The upper boundary of tidelands is the mean high water line and all lands seaward of this line are subject to the Public Trust Doctrine and are to

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be administered by the State in the public interest. Furthermore, the Public Trust Doctrine is now recognized as extending beyond these areas, as described in the response to comments 73 and 74.

69. COMMENT: The proposed amendments to this coastal general permit that require coastal development adjacent to the Atlantic Ocean, Delaware Bay, Raritan Bay or Sandy Hook Bay shoreline to provide public access on site should not be adopted. This is inappropriate as it fails to consider the presence of existing public access and, by its terms could be used to require public access even for a development immediately adjacent or in close proximity to an existing public access point. It is inappropriate to require additional public access for single family homes along the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and their shores, or single family homes that contain beaches or where beach or dune maintenance activities are proposed. The proposed application of the public access requirements in the context of this rule demonstrates little or no concern for practical considerations or private property rights. In many instances, it will be impossible to provide on-site public access based on the size and density of the development.

(120)

RESPONSE: At individual single family homes, public access is required only if the single family lot includes a beach and is located on the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or if located on a waterway other than those listed above, beach and dune maintenance activities are proposed. Public access requirements may be imposed as a condition of Shore Protection Program funding pursuant to N.J.A.C. 7:7E-8.11(p). Perpendicular access through single family lots is not required. Rather, one must be able to use and pass along the beach, when accessed by other perpendicular public access points. Public access would be provided outshore of the proposed bulkhead, on the beach, so existing development would not preclude it. The Department has determined this provision is warranted given the demand for beach use, and the fact that tidal shorefront properties are impressed with public trust rights, as discussed in response to comment 60 above.

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**N.J.A.C. 7:7-7.24 Coastal general permit for legalization of the filling of tidelands**

70. COMMENT: The proposed amendments to N.J.A.C. 7:7-7.24 require coastal development adjacent to the Atlantic Ocean, Delaware Bay, Raritan Bay or Sandy Hook Bay shoreline to provide public access on site. This is inappropriate as it fails to consider the presence of existing public access and, by its terms, could be used to require public access even for a development immediately adjacent or in close proximity to an existing public access point. It is inappropriate to require additional public access for single family homes along the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and their shores. The proposed application of the public access requirements in the context of this rule demonstrates little or no concern for the practical implications on private property rights. Applications for coastal general permits to legalize the fill of tidelands are typically submitted in the context of real estate transactions where a bank or prospective purchaser discovers a pre-existing tidelands claim on a parcel and the Bureau of Tidelands demands that the applicant for a tidelands conveyance obtain an authorization from the Division of Land Use Regulation for legalization of historic fill. In this scenario, it is often the case that no development is proposed and the application is filed merely to legalize pre-existing fill associated with an existing structure. In many instances, it would be impossible to provide on-site public access based on the size and density of the existing development. This proposed provision should not be adopted. (120)

RESPONSE: The changes to the coastal general permit standards at N.J.A.C. 7:7-7.24 do not change the requirement of the prior rule to provide public access. They replace the name of the cross-reference to N.J.A.C. 7:7E-8.11, which contains the standards for public access, to reflect the new title of the rule and add the requirement to comply with N.J.A.C. 7:7E-3.50, which recognizes that tidal waterways and their shores are subject to the Public Trust Doctrine. Further, this general permit states at N.J.A.C. 7:7-7.24(b), that the legalization of the filling of any lands formerly flowed by the tide associated with a single family home that is not part of a larger development, is eligible for a permit-by-rule. See N.J.A.C. 7:7-7.2(a)9.

As stated in response to comment 68, in New Jersey, tidelands are held in trust by the State for the public unless these lands have been conveyed to other uses. The upper boundary of tidelands is the mean high water line and all lands seaward of this line are subject to the Public Trust Doctrine

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and are to be administered by the State in the public interest. This rule applies to lands that were formerly tidal waters. These lands are impressed with public trust rights. Even when the State conveys tidelands to private ownership, it does not convey the public trust interest in the lands. Public access is appropriate and it is unreasonable for private property owners to expect that they will be able to exclude the public from resources impressed with public trust rights, or to expect to appropriate public assets for exclusive private use.

### **N.J.A.C. 7:7-7.29 Coastal general permit for habitat creation and enhancement activities**

71. COMMENT: To impose a mandatory public access requirement to habitat creation and enhancement activities will only provide a disincentive to prospective habitat creators and a threat of degradation to newly created and enhanced natural habitat due to the potentially conflicting goals of providing public access and the need to protect natural resources. This is a very bad policy for the overall public trust protection of natural resources for future generations, and will serve as a condemnation of natural habitat values for anyone ambitious or wealthy enough to actually try to create new habitat. As the Public Trust Doctrine trustee for the protection of the State's natural resources, the Department should be ashamed to require this condemnation by rule, and this is another clear example of where the Department is abdicating its environmental protection responsibilities under the Public Trust Doctrine in favor of public access. The Department must eliminate this amendment, and provide specifically limited public access as part of a specific management plan for any newly created or enhanced natural habitat. (2)

RESPONSE: The rule contains provisions at N.J.A.C. 7:7E-8.11(f) to restrict public access as necessary to protect endangered and threatened wildlife and plant species and other critical wildlife resources. The protection of critical wildlife resources and the provision of public access to tidal waterways and their shores can both be accommodated.

## **Chapter 7E. Coastal Zone Management rules**

### **Subchapter 1. Introduction**

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**N.J.A.C. 7:7E-3.23 Filled water's edge**

72. COMMENT: The Department appears to have confused filled water's edge areas with lands and waters subject to the Public Trust Doctrine. While it is true that filled water's edge properties may include tidal waters and adjoining accessways, in most cases, filled water's edge areas include lands well beyond the reach of the mean high water line. This is particularly the case for existing energy facilities built along tidal water bodies. In most cases, the majority of these facilities are built on filled water's edge areas that are above the mean high water line. By requiring that any project that impacts filled water's edge areas comply with the Public trust rights rule at N.J.A.C. 7:7E-8.11, an unreasonable burden has been placed on existing facilities to retrofit, in a disproportionately unfavorable way, for public access. (99)

RESPONSE: Filled water's edge areas as defined at N.J.A.C. 7:7E-3.23 are existing filled areas lying between wetlands or water areas, and either the upland limit of fill, or the first paved public road or railroad landward of the adjacent water area, whichever is closer. Prior to this adoption, the rule at N.J.A.C. 7:7E-3.23(i) required development on filled water's edge sites to comply with the public access rule, except for single family home or duplex residential lots that are not part of a larger development. As such, activities at a site of an existing development that required a coastal permit were also required to comply with the public access rule. The Department recognizes that existing industrial properties with developed waterfronts, as well as energy facilities and port uses, may present situations that warrant modification of the public access requirements. Therefore, N.J.A.C. 7:7E-8.11(f)3 provides that the Department may modify the public access requirements where it determines that the risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions make it impracticable to provide perpendicular access and a linear area along the entire shore and that there are no measures that can be taken to avert the situation. In such cases, the Department will instead require alternate public access either on site or at a nearby location.

73. COMMENT: The following exception language should be added to the Filled water's edge rule at N.J.A.C. 7:7E-3.23(i), Lands and waters subject to the public trust rights rule at N.J.A.C. 7:7E-

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3.50(d), Energy use rule at N.J.A.C. 7:7E-7.4(b), and Public trust rights rule at N.J.A.C. 7:7E-8.11(d):

The Department shall not require public access for development provided no beach or dune maintenance activities are proposed and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or their shores. In the case of an existing facility, public access requirements will not be required for any regulated activities that are consistent with the existing use of the facility, are located within the existing perimeter or an area not to exceed 10 percent of existing operations, and do not require a new grant, lease or license of areas regulated under the Tidelands Resource Council (exclusive of any extensions to existing leases or license). (99)

RESPONSE: The Department has determined that the rule should not be modified to require public access only when a proposed development does not exceed 10 percent of existing operations and no tidelands instrument is required. The Public Trust Doctrine requires that the Department ensure that public access is provided to tidal waterways and their shores, even where existing development is in place. However, the Department recognizes that existing industrial properties with developed waterfronts, as well as energy facilities and port uses, may present situations that warrant modification of the public access requirements. Therefore, N.J.A.C. 7:7E-8.11(f)3 provides that the Department may modify the public access requirements where it determines that the risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions make it impracticable to provide perpendicular access and a linear area along the entire shore and that there are no measures that can be taken to avert the situation. In such cases, the Department will instead require alternate public access either on site or at a nearby location.

**N.J.A.C. 7:7E-3.50 Lands and waters subject to public trust rights**

74. COMMENT: Proposed N.J.A.C. 7:7E-3.50 vastly overstates the scope and extent of the lands which are subject to the public trust doctrine. The proposed regulation states that “lands and waters subject to public trust rights are tidal waterways and their shores, including both lands now or

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formerly below the mean high water line, and shores above the mean high water line.” This definition is too broad and is not supported by law.

In *Matthews v. Bay Head Improvement Association*, 95 N.J. 306, 312 (1984), the Supreme Court reaffirmed that “the public trust doctrine acknowledges that the ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for people.” This doctrine dates back to *Arnold v. Mundy*, 6 N.J.L. 1, 93 (Sup. T. 1821), in which Chief Justice Kirkpatrick concluded that all navigable rivers in which the tide ebbs and flows and the coasts of the sea, including the water and land under water, are common to all citizens, and that each citizen has the right to use them. In *Borough of Neptune City v. Borough of Avon by the Sea*, 61 N.J. 296 (1972), Justice Hall reaffirmed the public’s right to use the waterfront as announced in *Arnold v. Mundy*, observing that the public has a right to use the land below the mean average high water mark where the tide ebbs and flows. 61 N.J. at 309.

Thus, it is only the land beneath tidal waters, below the mean high water line, which is owned by the State of New Jersey and which is directly subject to the public trust doctrine. The proposed regulatory definition of N.J.A.C. 7:7E-3.50(a) which refers to tidal waterways and their shores, including land previously filled with State approval which was formerly below the mean high water line, and also including shores above the mean high water line, are simply not directly covered by the public trust doctrine, and therefore should not be included in this blanket definition.

The Supreme Court has never held that all land adjacent to and upland of land below the high water line (i.e. “shores above the mean high water line”) are automatically subject to public trust rights. To the contrary, the Supreme Court has only held, in narrow circumstances pertaining only to beaches fronting on the Atlantic Ocean, that the dry sand immediately above the mean high water line may, in certain circumstances, be indirectly subject to the public trust doctrine. For example, in *Avon*, the court found that the public trust applied to the municipally-owned dry sand beach immediately landward of the high water mark. In *Matthews*, the “major issue” was “whether, ancillary to the public’s right to enjoy the tidal lands [i.e. the Atlantic Ocean], the public has a right to gain access through and to use the dry sand area not owned by a municipality but by a quasi-public body.” 95 N.J. at 312. The Supreme Court found that in order to exercise the rights guaranteed by the public trust doctrine, i.e., the right to utilize the Atlantic Ocean for recreational

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purposes, “the public must have access to municipally owned dry sand areas as well as the foreshore.” 95 N.J. at 321-322. The foreshore is the wet sand area between the mean high and low water lines. The court noted that in *Avalon* and *Van Ness v. Borough of Deal*, 78 N.J. 174 (1078), its “finding of public rights in dry sand areas was specifically and appropriately limited to those beaches owned by a municipality.” 95 N.J. at 322. In *Matthews*, the court addressed the extent of the public’s interest in privately owned dry sand beaches, analyzing whether the public may have a right to cross privately owned dry sand beaches in order to gain access to the foreshore, and whether that interest may be of the sort enjoyed by the public in municipal beaches under *Avon* and *Deal*, namely the right to sunbathe and generally enjoy recreational activities. *Id.* at 322-323.

Underlying the court’s decision in *Matthews* was the concern “reflected in a statewide policy of encouraging, consonant with environmental demands,” greater access to ocean beaches for recreational purposes.” 95 N.J. at 323. Because the dry sand beach in *Matthews* was owned by a quasi-public agency, the court had no difficulty finding that the public should have access to the dry sand in order to fully utilize the ocean. In the words of the Supreme Court,

We see no reason why rights under the public trust doctrine to use of the upland dry sand area should be limited to municipally owned property. It is true that the private property owner’s interest in the upland dry sand areas is not identical to that of a municipality. Nonetheless, where use of dry sand is essential or reasonably necessary for enjoyment of the ocean the doctrine warrants the public’s use of the upland dry sand area subject to an accommodation of the interests of the owner. [95 N.J. at 325.]

The court cautioned, however, that its decision in *Matthews* was limited: “This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea.” *Id.* at 324. Critical to the court’s holding in *Matthews* was that reasonable enjoyment of the foreshore and the ocean could not be realized unless some enjoyment of the dry sand areas was also allowed. *Id.* at 325.

The *Matthews* case therefore stands for the proposition that in order to utilize the ocean and the foreshore (i.e. that area of wet sand below the mean high water line), the public certainly has the

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right to utilize municipally owned dry sand beaches, as well as dry sand beaches owned by quasi-public entities, for the purposes of access and for the purposes of recreation. It is important to understand that *Matthews* dealt only with the dry sand beach fronting on the Atlantic Ocean; it did not deal with access to, or through, privately owned land adjacent to every tidal water body in the State of New Jersey.

No such blanket right has ever been recognized by the Supreme Court. Even in the oceanfront context, however, the Supreme Court did not hold that the public has the right to pass through, and to actually utilize all dry sand beaches adjacent to the ocean. Rather, the public right to access adjacent dry sand areas is to be determined on a case-by-case basis considering what type of access and use is reasonably necessary. The *Matthews* factors to be utilized in such an analysis were determined by the court as follows:

Precisely what privately owned upland sand area will be available and required to satisfy the public's rights under the public trust doctrine will depend on the circumstances. Location of the dry sand area in relation to the foreshore, extent and availability of publicly owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner are all factors to be weighed and considered in fixing the contours of the usage of the upper sand. [95 N.J. at 326].

It should be noted that in *Matthews*, the Public Advocate urged that "All the privately owned beachfront property likewise must be opened to the public." 95 N.J. at 333. The Supreme Court rejected this broad proposition: "Nothing has been developed on this record to justify that conclusion." *Id.* Thus, the *Matthews* decision is limited:

All we decide here is that private land is not immune from a possible right of access to the foreshore for swimming or bathing purposes, nor is it immune from the possibility that some of the dry sand may be used by the public incidental to the right of bathing and swimming. [95 N.J. at 333-334].

The Supreme Court's most recent decision on the public trust doctrine, *Raleigh Avenue Beach Association v. Atlantic Beach Club*, 185 N.J. 40 (2005) reaffirms that "the factual context in which *Matthews* was decided was critical to the court's holding." 185 N.J. at 54. The court noted that the

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“symbiotic relationship” between the quasi-public activities conducted by the Improvement Association, led the court to conclude that the Improvement Association was in reality a quasi-public body. *Id.* at 54. The court indicated that “although decided on narrow grounds, *Matthews* established the framework for application of the public trust doctrine to privately owned upland sand beaches.” *Id.* The Supreme Court declared that:

Precisely what privately owned upland sand area will be available and required to satisfy the public’s rights under the Public Trust Doctrine will depend on the circumstances. Location of the dry sand area in relation to the foreshore, extent and availability of publicly owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner are all factors to be weighed and considered in fixing the contours of the usage of the upper sand. [*Id.* at 55].

Thus the *Raleigh* court reaffirmed the site specific factors of *Matthews*, and further reaffirmed that *Matthews* was decided on narrow grounds. In *Raleigh*, after analyzing the facts in light of the *Matthew* factors, the Supreme Court found that the public must be given both access to and use of privately owned dry sand areas “as reasonably necessary.” *Id.* at 55. Most importantly, the *Raleigh* court found that

While the public’s rights in private beaches are not coextensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand.” [*Id.*]

As demonstrated above, the public does not have broad public trust doctrine rights to all dry sand areas adjacent to the ocean. The court confirmed that in some instances private landowners may prevent the public from exercising their public trust doctrine rights in appropriate circumstances. (70)

74. COMMENT: In light of Supreme Court precedents, proposed N.J.A.C. 7:7E-3.50 is unduly broad and overstates the scope and extent of the Department’s jurisdiction over public trust land. While tide flowed land beneath the mean high water line is always subject to the Public Trust

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Doctrine, “shores above the mean high water line” have only been determined to be subject to the public trust doctrine where they consist of dry sand beach, and when the *Matthews* factors are first analyzed and determined to apply on a case-by-case basis. No other shores have ever been held subject to the public trust. The burden is upon the Department to demonstrate compliance with the *Matthews* factors before any such “shores” are subjected to the public trust. It is also clear that the *Matthews* factors only apply as per the *Matthew* and *Raleigh* decisions, to dry sand beaches adjacent to the Atlantic Ocean. There is nothing in those cases, or any other precedents referred to in the rulemaking proposal by the Department, which would subject privately owned upland to the public access or use requirements of the public trust doctrine in a non-dry sand beach situation. For example, privately owned upland adjacent to a tidal river, creek or stream is not necessarily the functional equivalent of a dry sand beach area adjacent to the Atlantic Ocean. The Department may not legally presume as it does under this rulemaking, that all such privately owned areas above the mean high water line, and adjacent to navigable tidal water bodies, are subject to the public trust doctrine, especially absent consideration of the *Matthews* factors. (70)

RESPONSE TO COMMENTS 73 AND 74: The rule preserves and protects the common law rights under the Public Trust Doctrine. Traditionally, the Public Trust Doctrine addressed the public's interest in the beds of tidal and commercially navigable waterways. See *Arnold v Mundy*, 6 N.J.L. 1, 3 (*Sup. Ct.* 1821); *Bell v. Gough*, 23 N.J.L. 624 (*E. & A.* 1852); *Barney v. Keokuk*, 94 U.S. 324 (1877); *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Utah v. U.S.*, 403 U.S. 9 (1971); *etc.* However, the Public Trust Doctrine is now recognized as extending beyond those areas. In 1988, the U.S. Supreme Court recognized public trust interests beyond commerce, navigation and fisheries. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) (finding state assertion of a public right is not an unconstitutional taking or exaction if the right asserted is recognized under the public trust doctrine of the law of that state.). In addition, other courts have applied the public trust doctrine to: 1) periodically navigable waters, (e.g., *Wilbour v. Gallagher*, 462 P.2d 232 (*Wa.* 1969); *Forestier v Johnson*, 164 Cal. 24, 127 P. 156 (1912)); 2) tributaries of navigable waters (*National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983)); 3) artificial reservoirs and lands covered by water caused by dams (*Pacific Gas & Electric Co. v. Superior Court*, 145

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*Cal.App.3d 225 (1981); Fogerty v. State of California, 187 Cal.App.3d 224 (1986); State v. Sorensen, 271 N.W. 234 (Ia. 1937); State v. Parker, 200 S.W. 1014 (Ark. 1918); cf. Golden Feather Community Assn'n. v. Thermalitos Irrign. Dist., 269 Cal.App.3d 1276 (1979)); 4) flooded lands (Bohn v Albertson, 107 Cal.App.2d 738, hearing denied 238 P.2d 128 (1951); Arkansas River Com'n v. Echubby Lake Hunting Club, 126 S.W.3d. 738 (Ark. 2003)); 5) recreationally navigable streams (National Audubon v. Superior Court,, 33 Cal.3d at 435, n. 17; Adirondack League Inc. v. Sierra Club, 706 N.E.2d 1192 (N.Y. 1998); Ryalls v. Pigott, 580 So.2d 1140 (Miss. 1990); People ex rel Baker v Mack, 19 Cal.App.3d 1040, 97 (1971); Day v. Armstrong, 363 P.2d 137 (Wyo. 1961); Lamprey v. State, 153 N.W. 1139 (Minn. 1893)); and 6) adjacent wetlands (Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972); Graham v. Estuary Properties, Inc., 399 So.2d 1281, 1374 (Fla. 1981)). See also, generally, In re Adjudication of the Existing Right to the Use of All the Water, 55 P.3d 396 (Mt. 2002); In re Water Use Permit Applications, 9 P.3d 403, 445-47 (Hawaii. 2000); United Plainsmen v. North Dakota Water Conservation Comm'n, 247 N.W.2d 57 (N.D. 1976).*

In New Jersey, the public trust doctrine applies to tidally flowed areas and is not limited to the Atlantic Ocean. Further, because public rights under the Public Trust Doctrine are evolving, the amended regulations do not specify a precise area of privately owned shoreline landward of the mean high water line, or a percentage thereof, that must be subject to public access and use. The Department recognizes that the *Matthews* factors may be applicable to a particular piece of property. As stated in *Raleigh Avenue*, “Precisely what privately-owned upland sand area will be available and required to satisfy the public’s rights under the public trust doctrine will depend on the circumstances.” 185 N.J. 40, 55 (2005). See also, generally, *National Ass’n of Homebuilders v. State, Dept. of Env’tl Protect.*, 64 F. Supp. 2d. 354 (D.N.J. 1999) (upholding regulation requiring specified walkway dimension along entire waterfront).

75. COMMENT: The proposed rules are inconsistent with the Public Trust Doctrine. The Supreme Court of New Jersey decided that there must be a “case-by-case” consideration to determine what is needed for reasonable access in each of the varying situations along New Jersey’s coastline. See *Raleigh Avenue Beach Ass’n v Atlantis Beach Club, Inc.*, 185 N.J. 40, 55 (2005); and *Matthews v.*

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*Bay Head Improvement Association*, 95 N.J. 306, 326 (1984). These rules should not be adopted as they are based on a misrepresentation of the Public Trust Doctrine. (61, 151, 21, 97, 138, 176, 60)

RESPONSE: Tidal shorefront property in New Jersey has long been impressed with public trust rights. The rule is intended to preserve and protect the common law rights under the Public Trust Doctrine. The specific rights and protections recognized under the Public Trust Doctrine continue to develop through individual court decisions. For that reason, the amended regulations do not specify a precise area of privately owned shoreline landward of the mean high water line, or a percentage thereof, that must be subject to public access and use in every case. The Department recognizes that the *Matthews* factors may be applicable to a particular piece of property and that these factors are applied in a case-by-case basis.

76. COMMENT: N.J.A.C. 7:7E-3.50(b) provides that “development that adversely affects lands and waters subject to the public trust rights is discouraged.” This provision is unduly vague, because it gives no indication as to what types of “adverse effects” the Department is referring to and thus needs further clarification. (70)

77. COMMENT: The APA and its implementing regulations, require proposed rules to be adequate to permit the public to accurately and plainly understand the rules and the expected consequences of adoption of a proposed rule. See e.g. N.J.A.C. 1:30-2.1. Further, a notice of a proposed rule must include a summary statement that describes, details and identifies who and what would be affected by the proposal: how, when and where the effect will occur, what the proposal prescribes, proscribes or otherwise mandates, and what enforcement mechanism and sanctions may be involved. N.J.A.C. 1:30-5.1(c)1. The rule proposal is deficient in this respect. For example:

(1) The rule states that development adjacent to public trust lands may continue, “provided there is no adverse impact.” 38 N.J.R. at 4585. There is no definition of “adverse impact,” although in the context of these rules, it is implied that it means hindering public access to the lands or casting shade on the flat beach.

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(2) The proposed Lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, states that development is “discouraged” if it “adversely affects lands and waters subject to public trust rights.” Additionally, development is “prohibited” if it “adversely affects or limits public access to lands and waters subject to public trust rights.” As noted above, the proposed rules lack a definition of “adversely affects.” Additionally, there is no criteria provided specifying what is meant by the statement that development is “discouraged.” (120, 138)

RESPONSE TO COMMENTS 76 AND 77: The term “discouraged” is defined at N.J.A.C. 7:7E-1.8 and means that a proposed use of coastal resources is likely to be rejected or denied as the Department has determined that such uses of coastal resources should be deterred. In cases where the Department considers the proposed use to be in the public interest despite its discouraged status, the Department may permit the use provided that mitigating or compensating measures can be taken so that there is a net gain in quality and quantity of the coastal resource of concern.

An example of adversely affecting tidal waterways and their shores that may be discouraged under N.J.A.C. 7:7E-3.50(b) is the development of a building that shadows a public beach. The proximity of the building serves to diminish the quality of the experience of the beachgoer, encouraging them to go elsewhere.

Although the Department does not agree that the term “adversely affects” is vague and ambiguous, the Department has determined that N.J.A.C. 7:7E-3.50(c) is unnecessary since the rule at N.J.A.C. 7:7E-3.50(d) requires that public access be provided in accordance with the public trust rights rule, N.J.A.C. 7:7E-8.11, which contains predictable and specific standards to ensure that public access is provided to tidal waterways and their shores. Accordingly, the Department is not adopting N.J.A.C. 7:7E-3.50(c).

78. COMMENT: The case law contemplates a unique, case-by-case, location and situation specific determination as to what access is needed and what is required. Courts have expressly made clear that the public right to use private property requires analysis on a case-by-case basis. This rule

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effectively precludes a circumstance-specific, case-by-case analysis of the facts of each situation, and therefore should not be adopted. (120)

RESPONSE: Tidal shorefront property in New Jersey has been impressed with public trust rights since colonial times, under a doctrine more than 1500 years old. The rule is intended to preserve and protect the common law rights under the Public Trust Doctrine. The specific rights and protections recognized under the Public Trust Doctrine continue to develop through individual court decisions. For that reason, the amended regulations do not specify a precise area of privately owned shoreline landward of the mean high water line, or a percentage thereof, that must be subject to public access and use in every case. The Department recognizes that the *Matthews* factors may be applicable to a particular piece of property and that these factors are applied in a case-by-case basis.

79. COMMENT: N.J.A.C. 7:7E-3.50 and 8.11(a) which describe traditional uses of the ocean and beaches in public trust areas should be amended to include sport diving. Sport diving has existed for at least 50 years in New Jersey along the beach, inlets and jetties. (52)

RESPONSE: As stated in response to comment 52 the Department is amending N.J.A.C. 7:7-1.3 and N.J.A.C. 7:7E-3.50(e) and 8.11(a) to include “sport diving.”

80. COMMENT: N.J.A.C. 7:7E-3.50 should be revised as follows to strengthen the goal of natural resource protection. The suggested revisions are shown in boldface **thus** and deletions in brackets [thus].

(a) Lands and waters subject to public trust rights are tidal waterways and their shores, including both lands now or formerly below the mean high water line, and shores above the mean high water line. Tidal waterways and their shores are subject to the Public Trust

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Doctrine and are held in trust by the State for the benefit of all the people, allowing the public to fully **protect and** enjoy these lands and waters for a variety of public uses.

(b) Development that adversely affects lands and waters subject to public trust rights is [discouraged] **prohibited**.

(c) Development that adversely affects **public protection and** [or] limits public access to lands and waters subject to public trust rights is prohibited, except as provided at N.J.A.C. 7:7E-8.11.

(e) Rationale: The public's rights of access to and use of tidal waterways and their shores, including the ocean, bays, and tidal rivers, in the United States predate the founding of this country. These rights are based in the common law rule of the Public Trust Doctrine. First codified by the Roman Emperor Justinian around 500 AD as part of Roman civil law, the Public Trust Doctrine establishes the public's right to full use of the seashore as declared in the following quotation from Book II of the Institutes of Justinian:

“By the law of nature these things are common to all mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations.”

Influenced by Roman civil law, the tenets of public trust were maintained through English Common Law and adopted by the original 13 colonies, each in their own form. The grants that form the basis of the titles to private property in New Jersey never conveyed those public trust rights, which were reserved to the Crown. Following the American Revolution, the royal rights to tidal waterways and their shores were vested in the thirteen new states, then each subsequent state, and have remained a part of law and public policy into the present time. Tidal waterways and their shores always were, and remain, subject to and impressed with these public trust rights. *See Arnold v. Mundy, 6 N.J.L. 1 (1821)*;

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*Borough of Neptune v. Borough of Avon-by-the-Sea*, 61 N.J. 296 (1972); *Hyland v. Borough of Allenhurst*, 78 N.J. 190 (1978); *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984); *Slocum v. Borough of Belmar*, 238 N.J.Super. 179 (Law Div. 1989); *National Ass'n of Homebuilders v. State, Dept. of Env't'l Protect.*, 64 F.Supp.2d 354 (D.N.J. 1999); *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005).

The Public Trust Doctrine serves as an extremely important legal principle that helps to **protect natural resources and** maintain public access to and use of tidal waterways and their shores in New Jersey for the benefit of all the people. Further, it establishes the right of the public to fully **protect and** utilize these lands and waters for a variety of public uses. While the original purpose of the Public Trust Doctrine was to assure public access for navigation, commerce and fishing, in the past two centuries, State and Federal courts recognized that modern uses of tidal waterways and their shores are also protected by the Public Trust Doctrine. In New Jersey, the Public Trust Doctrine expressly recognizes and protects natural resources as well as public recreational uses such as swimming, sunbathing, fishing, surfing, walking and boating along the various tidal waterways and their shores.

The Public Trust Doctrine is an example of common law authority that is continually developing through individual court cases. The first published court case in New Jersey to discuss the Public Trust Doctrine was in 1821. See *Arnold v. Mundy*, 6 N.J.L. 1 (1821). Within the past three decades, several New Jersey court decisions have clarified the public rights of access to and use of areas above the mean high water line as needed for access to and use of tidal waterways and their shores, under the Public Trust Doctrine. See for example, *Arnold v. Mundy*, 6 N.J.L. 1 (1821); *Borough of Neptune v. Borough of Avon-by-the-Sea*, 61 N.J. 296 (1972); *Hyland v. Borough of Allenhurst*, 78 N.J. 190 (1978); *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984); *Slocum v. Borough of Belmar*, 238 N.J.Super. 179 (Law Div. 1989); *National Ass'n of Homebuilders v. State, Dept. of Env't'l Protect.*, 64 F.Supp.2d 354 (D.N.J. 1999); *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005).

As the trustee of the public rights to natural resources, including tidal waterways and their shores, it is the duty of the State not only to allow and protect natural resources and the

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public's right to use them, but also to ensure that there is adequate access to and protection of these natural resources. As the State entity managing public access and protection along the shore, the Department has an obligation to ensure that this occurs.

Development and other measures can adversely affect tidal waterways and their shores and natural resources as well as access to and use of those lands. One example of adversely affecting tidal waterways and their shores would be the development of a building that "shadows" a public beach. The proximity of the building serves to diminish the quality of the experience of the beachgoer, encouraging them to go elsewhere. Development that adversely affects or limits public access to tidal waterways and their shores includes building over traditional accessways, putting up threatening signs, eliminating public parking, and physically blocking access with fences or equipment.

In addition to cases involving physical barriers to access, there have been instances where municipalities and local property owner associations have attempted to limit use of recreational beaches to their residents and members through methods designed to exclude outsiders. In the majority of these cases, New Jersey courts have ruled that these actions violate the Public Trust Doctrine because lands that should be available for the general public's recreational use were being appropriated for the benefit of a select few. The decision in *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984) recognized that, under the Public Trust Doctrine, not only does the public have the right to use the land below the mean high water mark, but also they have a right to use a portion of the upland dry sand area on quasi-public beaches. "...where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner." *Id.* at 325. The New Jersey Supreme Court recognized that this principle also applies to private beaches, in *Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc. et al.*, 185 N.J. 40 (2005). (2)

RESPONSE: The Department has decided not to change N.J.A.C. 7:7E-3.50(b) as suggested by the commenter. The term "discouraged" means that a proposed use of coastal resources is likely to be rejected or denied as the Department has determined that such uses of coastal resources should be

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deterred. However, in cases where the Department considers the proposed use to be in the public interest despite its discouraged status, the Department may permit the use provided that mitigating or compensating measures can be taken so that there is a net gain in quality and quantity of the coastal resource of concern.

Open public access as opposed to private exclusion is the Department's governing principle for the management of public natural resources. However, this does not necessarily mean that said access itself is unregulated. Further, it is the Department that has the authority to protect natural resources. As stated in response to comment 30, when taken as a whole, the Coastal Zone Management rules provide for protection of natural resources. The Coastal Zone Management rules contain other rules that protect special areas such as endangered and threatened wildlife and plant species, water area rules that address activities such as filling and land area rules that address impervious cover in environmentally sensitive areas. Further, proper enforcement of State and local laws with respect to such issues as trespassing, littering, protection of quarantined areas of environmental sensitivity, will continue to protect these natural resources, as evidenced in towns with large summer populations and numerous public access points and use availability. Therefore N.J.A.C. 7:7E-3.50(b) adequately protects the natural resources of the coastal zone while allowing development that is in the public interest to proceed where mitigating or compensating measures are provided.

81. COMMENT: The proposed rule provides that "lands and waters subject to public trust rights are tidal waterways and their shores, including both lands now and formerly below the mean high water line, and shores above the mean high water line." The assertion that shores above the mean high water line are subject to public trust rights is not an accurate statement of the law, and is a gross overstatement of the Public Trust Doctrine insofar as the New Jersey Supreme Court has defined its contours to date. Recently-retired Chief Justice Poritz wrote in the Court's latest decision on the Public Trust Doctrine, *Raleigh Avenue Beach Ass'n. v. Atlantic Beach Club*, 185 N.J. 40, 54 (2005):

Although decided on narrow grounds, *Matthews* established the framework for application of the public trust doctrine to privately owned upland sand beaches. ...Precisely what privately-

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owned upland sand area will be available and required to satisfy the public's rights under the public trust doctrine will depend on the circumstances. *Raleigh* at 54 citing *Matthews v. Bay Head Improvement Association*, 95 N.J. 306. (1984)

*Raleigh*, *Matthews*, *Neptune*, *Van Ness*, and all the other cases cited in the proposal deal solely with recreational sand beaches on the ocean, both publicly and privately owned. The New Jersey Supreme Court has not yet defined the contours of the Public Trust Doctrine with respect to the rights enjoyed by the public to upland areas adjoining tidal waters that are not sandy recreational beaches. Moreover, the Court has not held that upland sand area on every public or private beach is necessarily subordinate to the rights of the general public to use it to access tidal waters and shorelines. Rather, the *Raleigh* court held, "precisely what privately-owned upland sand area will be available and required to satisfy the public's rights under the public trust doctrine will depend on the circumstances." *Raleigh* at 54. Accordingly, the broad, unqualified assertion that "shores above the mean high water line are subject to public rights" is plainly in error and a gross overstatement of the scope of the Doctrine. (45, 131, 149)

82. COMMENT: N.J.A.C. 7:7E-3.50(a) defines lands and waters subject to public trust rights as tidal waterways and their shores, including both lands now or formerly below the mean high water line, and shores above the mean high water line. Clarification is needed regarding the term "shore" as it relates to these rules since some of the court cases cited at N.J.A.C. 7:7E-3.50(e) refer to the public's right to use a portion of the dry sand area. Are there circumstances where the proposed rules would apply to only a portion of the shore versus the entire shore? (59)

RESPONSE TO COMMENTS 81 AND 82: The specific rights and protections recognized under the Public Trust Doctrine continue to develop through individual court decisions. For that reason, the amended regulations do not specify a precise area of privately owned shoreline landward of the mean high water line, or a percentage thereof, that must be subject to public access and use in every case. The Department recognizes that the *Matthews* factors may be applicable to a particular piece of property and that these factors are applied on a case-by-case basis.

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83. COMMENT: N.J.A.C. 7:7E-3.50(a) states that lands and waters subject to public trust rights are tidal waterways and their shores, including both lands now and formerly below the mean high water line, and shores above the mean high water line. This definition should be revised to exclude tidally influenced waterways and lands upstream of a private dam. In addition, it should be clarified that drainage ditches are not waters of the State, even if they are tidally influenced, and therefore are not waters subject to the rule. (45, 100)

RESPONSE: The rule preserves and protects the common law rights under the Public Trust Doctrine. Traditionally, the Public Trust Doctrine addressed the public's interest in the beds of tidal and commercially navigable waterways. However, the Public Trust Doctrine is now recognized as extending beyond those areas, as described in response to Comments 73 and 74. In 1988, the U.S. Supreme Court recognized public trust interests beyond commerce, navigation and fisheries. In addition, other courts have applied the public trust doctrine to periodically navigable waters, tributaries of navigable waters, artificial reservoirs and lands covered by water caused by dams; flooded lands; recreationally navigable streams; and adjacent wetlands.

It is a logical extension of the evolution of the public trust doctrine noted in *Matthews* and *Raleigh* to protect public access to and use of a portion of the shores of tidal waterways other than those of the Atlantic Ocean because it facilitates use of those waterways. Moreover, there are dams throughout the State, upstream of which are formerly flowed tidelands that are subject to the Public Trust Doctrine. Examples are lakes, such as Wreck Pond discharging into the Atlantic Ocean, and areas bermed and farmed for salt hay in the southern portions of the State. Therefore, the Department has determined that these changes are not warranted.

84. COMMENT: N.J.A.C. 7:7E-3.50 provides that public trust rights include the use of public trust lands for various activities. N.J.A.C. 7:7E-3.50 and 8.11 should be amended to include "surfing." (166, 43)

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RESPONSE: The list of recognized uses of public trust lands and waters in the rules is not intended to be exhaustive. However, N.J.A.C. 8.11(a) has been amended on adoption to include “surfing” as one of the recognized uses for which the public has access to public trust lands and waters. This will make the list of uses consistent throughout the rules as surfing is already listed in the definition of “Public Trust Doctrine” at N.J.A.C. 7:7E-1.3.

#### **N.J.A.C. 7:7E-7.2 Housing use rule**

85. COMMENT: The amendments to the Housing use rules at N.J.A.C. 7:7E-7.2 require new housing to comply with N.J.A.C. 7:7E-3.50 and 8.11. As a result, coastal development adjacent to the Atlantic Ocean shoreline must provide public access to the site. This is inappropriate as it fails to consider the presence of existing public access and by its terms, could be used to require public access even for a development immediately adjacent or in close proximity to an existing public access point and therefore should not be adopted. (120, 138)

RESPONSE: The amendments to the housing use rule replace the name of the cross-reference to N.J.A.C. 7:7E-8.11, which contains the standards for public access, to reflect the new title of the rule and add the requirement to comply with N.J.A.C. 7:7E-3.50, which recognizes that tidal waterways and their shores are subject to the Public Trust Doctrine. The requirements for public access along the oceanfront have been extended to single family homes in this rulemaking, given the demand for beach use and the public trust rights to access and use tidal waterways and their shores. However, at individual single family homes the rule does not require perpendicular access. Rather, access to and use of the beach is required.

#### **N.J.A.C. 7:7E-7.11 Coastal Engineering**

86. COMMENT: N.J.A.C. 7:7E-7.11 provides that “beach nourishment projects, such as non-structural shore protection measures, are encouraged...” and requires public access to the nourished beach in cases where public funds are used to complete the project. As amended, the rule would require public access for all beach nourishment projects regardless of whether public funds are involved. The practical effect of these amendments is to discourage, not encourage these activities on public land. Therefore these amendments should not be adopted. (120)

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RESPONSE: Although N.J.A.C. 7:7E-7.11 does not specify that public access is required for beach nourishment projects that do not use public funds, N.J.A.C. 7:7E-8.11 has long required public access at any beach nourishment project, as such projects constitute development. The public access requirement for beach nourishment projects on public lands reflects both the expenditure of public funds and the fact that beach nourishment projects are constructed in areas subject to the Public Trust Doctrine.

### **N.J.A.C. 7:7E-8.11 Public trust rights**

87. COMMENT: The commenter submitted Resolution 230-2006 from the Borough of Avalon opposing the amendments to the regulations concerning public access to beaches. Through this resolution, the Borough indicated that it is concerned with the impact of these regulations on the environment. The Borough indicated that, because it is dependent on State and Federal funds for beach maintenance, these regulations could have a far-reaching effect on the Borough's ability to obtain such funding in the future. The Resolution urges the Department to reconsider the adoption of these rules.

The Resolution also stated that there may be conflicts between the new regulations and the Borough's contractual obligations under their State Aid Agreement dated July 13, 1994 and the Beach Nesting Bird Management Plan adopted April 26, 2000 and amended April 1, 2005.

(83)

RESPONSE: The Department has reviewed the 1994 State Aid Agreement between the Department and Borough of Avalon and determined that there is no conflict with the new rule. Among other things, the 1994 State Aid Agreement required the Borough to comply with the Coastal Zone Management rules' Public access rule at N.J.A.C. 7:7E-8.11 and to continue "its current public access practices." The standards of the new Public trust rights rule, specifically N.J.A.C. 7:7E-8.11(p) would apply to future State Aid Agreements between the Department and Borough. The Department has also reviewed the Beach Nesting Plan and determined that the rule is not in conflict with the plan and that the provisions of the rule at N.J.A.C. 7:7E-8.11(f) will protect these endangered species.

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Open public access as opposed to private exclusion, is the Department's governing principle for the management of public natural resources. However, this does not necessarily mean that said access itself is unregulated. The Public trust rights rule at N.J.A.C. 7:7E-8.11(f)2 contains provisions that protect the environment, and specifically endangered or threatened wildlife or plant species habitat and other critical wildlife resources. The rule is applied in addition to other Coastal Zone Management rules that protect the environment.

The rule is not expected to have an adverse effect on the Borough's ability to obtain State or Federal funds for beach maintenance. Rather, the standards for municipalities to participate in Shore Protection Program funding at N.J.A.C. 7:7E-8.11(p) ensure that municipalities using such public funds to enhance their beaches in turn make those beaches accessible to the public who provide such funding through taxes and have a right to access tidal waterways and their shores under the Public Trust Doctrine.

88. COMMENT: The rule requirements pertaining to parking and restrooms will have a universal application. This would appear to be arbitrary and unreasonable in the context of existing communities. It is presented as a "one size fits all." The rule should provide for recognition of existing development, available land, the nature of the community, density (entirely residential, commercial or mixed), and the historical use of the beach, along with other relevant factors. (121)

89. COMMENT: Although the proposed regulations have a just cause in hoping to increase accessibility for all New Jersey residents to all New Jersey beaches, a "one-size-fits-all" approach should be reconsidered. A new draft rule accounting for the diversity of the New Jersey shore communities, clarifying various provisions and re-evaluating the rule's likely deleterious impacts on smaller coastal beach communities and the environment would be more accepted by the public. (62)

90. COMMENT: It is impossible for one set of rules to cover the State's 1,000 miles of coastline. (175, 117, 109)

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91. COMMENT: Rules and regulations are important and essential, but to have one set of rules that applies to 127 miles of coastline is unrealistic, impracticable and unreasonable. The rules are written in such a narrow manner that they exclude any alternative other than the most burdensome and costly. (56)

92. COMMENT: The proposed rules do not provide for case-by-case determinations, and do not fully accommodate the legitimate interests of residents and property owners in New Jersey's many and diverse coastal communities. The proposed rules rely largely on a one-size fits-all cookie cutter approach that amounts to little more than a master plan for the homogenization of the New Jersey shore. (61, 151, 21, 97, 138, 176, 60)

93. COMMENT: The rules take a cookie cutter approach. There needs to be a mechanism in place that takes into account the differences in the coastal communities along New Jersey's oceanfront. (119)

94. COMMENT: Contrary to the Public Trust Doctrine as recited in the court decisions cited in the proposal, the proposed rules fail to provide for a case-by-case analysis of the varying situations and circumstances along New Jersey's lengthy coast line. The proposed rules fail to accommodate the diverse nature of New Jersey's many coastal communities. Instead, the proposed rules would adopt a "one-size fits all" approach. As a result, the proposed rules would effectively destroy the character of established residential neighborhoods that happen to be located in coastal communities. (120)

95. COMMENT: The commenter shares the proposed rule's stated objective of enhancing the public's ability to access and use tidal waterways and shores in New Jersey consistent with the Public Trust Doctrine, and strengthening New Jersey's economy by bolstering the State's tourism industry and increasing revenues to both State and local governments.

However, the proposed rules are inconsistent with these objectives. Contrary to the Public Trust Doctrine as reflected in Court decisions cited in the rule proposal, the proposed rules fail to provide

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for a case-by-case analysis of the varying situations and circumstances along New Jersey's coastline. Contrary to the court decisions, the proposed rules fail to accommodate the diverse nature of New Jersey's many coastal communities, and fail to recognize the legitimate interests of the residents and property owners in coastal communities. Instead, the proposed rules would adopt a "one size fits all" approach. (138, 116 )

RESPONSE TO COMMENTS 88 THROUGH 95: The rules adopted herein take into account different types of development, including varying standards for urban waterfronts, working waterfronts, and small residential developments (See for example, N.J.A.C. 3.48 and 8.11(d), (e) and (f)). The standards of the rule at N.J.A.C. 7:7E-8.11(p)7 and 8 also differ for municipalities conducting shore protection projects on the oceanfront, Sandy Hook Bay, Raritan Bay, or the Delaware Bay as compared to other tidal waters and will ensure that municipalities using public funds to enhance their beaches in turn make those beaches accessible to the public who provides such funding through taxes and has a right to access tidal waterways and their shores under the Public Trust Doctrine. The rules at N.J.A.C. 7:7E-8.11(e)3 and (f)2 also contain provisions to protect endangered and threatened wildlife and plant species and other critical wildlife resources.

96. COMMENT: The Department should amend the proposal in a manner that strikes a balance between a strict interpretation of the Public Trust Doctrine, adequate public access to waterways and the current uses of land along those waterways. A one-size-fits-all approach toward providing access disregards the role waterfront businesses play in New Jersey's economy and in the overall quality of life of its citizens. A balance can be forged that allows adequate public access without burdening businesses and industries with unnecessary costs. (16)

RESPONSE: As stated in the response to comment 88 through 95, the rule takes into account different types of waterfronts and uses. For example, the Department recognizes that existing industrial properties with developed waterfronts, as well as energy facilities and port uses, may present situations that warrant modification of the public access requirements. Therefore, N.J.A.C. 7:7E-8.11(f)3 provides that the Department may modify the public access requirements where it

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determines that the risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions make it impracticable to provide perpendicular access and a linear area along the entire shore and that there are no measures that can be taken to avert the situation. In such cases, the Department will instead require alternate public access either on site or at a nearby location. In addition, the concurrent proposal published elsewhere in this issue of the New Jersey Register would provide for reconfiguration of public access at marinas to accommodate existing site constraints and heavy boat handling equipment.

97. COMMENT: The commenter appreciates the Department's acknowledgement of the importance of boating and navigable waterways to the general public. These proposed regulations, however, will undermine the very industry, which affords much of the boating public access to marine waters. For some marinas, the proposed regulations will make it impracticable to continue the marina business. (34, 35, 16, 12)

98. COMMENT: The proposed rules are a blanket "one-size fits all" approach to regulating antipodal publicly accessed waterfront property. These rules are extremely excessive and difficult in many cases for marinas to comply with. Every marina property is different in size and operation. Many properties have physical limitations and restrictions and cannot provide the amount of access being required.

In its discussion of N.J.A.C. 7:7E-8.11(f)6, which deals with single family homes or duplexes, the Department acknowledges that "the size of the property and density of development do not lend themselves to providing public access on-site." This same situation applies to many marinas, particularly smaller ones. Yet the Department proposed to uniformly impose these onerous access obligations on these marinas. The rules need to be flexible enough to work with the property and allow the property owners to be creative when the space with which to work is limited. (130, 103, 65, 127, 90, 55, 164, 39, 87, 141, 106, 98, 152, 50, 68, 89, 41, 10, 34, 35, 12, 16, 46, 129, 72, 167, 48, 174, 143, 107, 67, 94, 29)

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99. COMMENT: The Department should take time to discuss changes to the rules with marina owners and construct a plan that works for and benefits everyone and not a broad sweeping regulation that does not realistically work for anyone in the marina industry. (22, 34, 35, 12, 16, 46, 28)

100. COMMENT: The prospective reconfiguration of work and storage areas at marinas as a result of these new regulations and requirements will cause many marinas to lose space from which they derive essential revenues. (34, 35, 16, 46)

101. COMMENT: The proposed rules refer to certain situations in which public access may not be practicable on-site or for the entire shore and that an alternative route or area may be necessary. None of these situations take into account the unique nature of a marina and the services that it provides. *It seems ridiculous to force a marina, a business that is already providing access, to provide access when a reasonable alternative that provides a more quality and meaningful experience is nearby and available to the public. Many marinas are located on man-made lagoons surrounded by residential communities that already offer beaches, parks, fishing piers and more to the general public.* (34, 35, 16)

RESPONSE TO COMMENTS 97 THROUGH 101: Tidal waterways and their shores, including those at marinas, are impressed with the Public Trust Doctrine, which provides that tidal waterways and their shores are accessible to all. Therefore, public access along the waterfront has always been and continues to be required at marina sites. However, the Department has considered the comments received from marina owners and the Marine Trades Association at public hearings, in writing, and in meetings, and in response, is proposing changes to the rule published elsewhere in this issue of the New Jersey Register. The proposed changes would take into account the physical limitations and operational differences at existing commercial marinas, and provide for greater flexibility through alternative routing of linear access and alternatives to public access along the entire waterway. Specifically, the Department is proposing to allow the reconfiguration and

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enhancement of public access to accommodate existing site constraints rather than require a linear accessway along the entire shore at existing commercial marinas. The proposal also provides for an alternate public access route around certain marina operations in some circumstances.

102. COMMENT: One of the rationales for these regulations is that they would make access circumstances uniform. If the underlying premise of unfettered marina access was reasonable, which it is not, this goal is misguided and fails completely to acknowledge the unique characteristics of many of these marinas. Some of these family-owned marinas have been in existence for decades. Many marinas provide onsite dry storage. A bailment is usually created for that paid for service and use of land, which imposes a legal responsibility on the marina owner and operator. Unfettered access by the public undermines the ability of the marina owner and operator to abide by its bailment requirements. The proposed changes and related requirements will result in, for many of these marinas, a reconfiguration and immediate reduction in available land for boating related support activities in order to obtain necessary permits. In many instances, parking, which is already at a premium and constitutes part of the incentive for marina customers to support these marina businesses, would be further reduced by providing compelled parking for general public use. An unrealistic and unaffordable alternative is the provision of off-site parking. (34, 35, 16, 46)

RESPONSE: The Public trust rights rule requires perpendicular public access to reach the water and access along the waterfront as well as a limited number of parking spaces for the public. Public access areas can be identified by the posting of signs. Piers intended for mooring vessels can be gated to prevent the general public from accessing them. As described in the response to comments 97 through 101, the Department is proposing amendments to the rule that will provide marinas greater flexibility to accommodate the unique characteristics of marinas.

103. COMMENT: Ensuring a safe environment for the general public now becomes an extremely difficult task. The marina owner will need to provide additional infrastructure and security to

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control where the public goes when on site beyond the access area. The number of people is finite when accommodating customers and their guests. These regulations, however, provide no restrictions on the amount of people who will gain access. At many marinas and boat yards, it is logistically impossible to secure or restrict access to dangerous areas while still providing a walkway along the entire length of the waterfront. Due to the nature of marinas and the services they provide, travel lifts and forklifts must access the water to transport boats, and therefore can not be relocated. Many dry docks are on the water's edge. This heavy machinery and equipment poses a significant risk of injury when both in use and not in use. (34, 35, 12, 16)

104. COMMENT: The Twin Lights Marina has a walkway across a large portion of the waterfront, however it is interrupted by a boat launch area. This area is traversed by a 20,000 pound forklift and it would be very dangerous for the public to have access to this area. Demanding that a marina allow public access to this area would be unwise. (11)

105. COMMENT: The requirement to include a walkway across the entire waterfront portion of a marina is ridiculous. Marina owners can only use that portion of their property for activities specified in their grant, such as travel lift piers and docks. (17)

106. COMMENT: Potential contact with forklifts, travel lifts and other heavy boat moving equipment is another source of injury. (169)

107. COMMENT: The care, custody and control of the marina, vessels, slip holder property and attendant infrastructure is the full responsibility of the marina owner. There is significant risk of injury in certain areas of a marina facility that must be recognized. The proposed rules acknowledge the potential for risk of injury and include "such activities at energy facilities, industrial uses, port uses, airports, railroads and military facilities." Additionally, the rules state "portions of jetties and groins pose an extraordinary risk of injury." However, the proposed rules

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fail to acknowledge and appreciate the hazards at a marina or boatyard. Hazardous areas include travel lifts, forklifts, service areas with heavy machinery and fuel areas. People who own boats are aware of the dangers a marina and the water present. Marina rules can control access to these areas and related safety. Even if the Department allowed a marina to restrict these areas, these regulations would render such rules ineffective. People who are unfamiliar with marinas and the water have less or no fear of the potential for bodily harm, or worse, that can result from a careless step or deliberate foolish act. (16, 20, 28, 29, 33, 34, 35, 40, 51, 65, 67, 68, 87, 89, 90, 94, 98, 103, 106, 122, 130, 132, 141, 143, 152, 155, 171, 174)

RESPONSE TO COMMENTS 102 THROUGH 107: The Department agrees that heavy boat moving equipment can provide a safety hazard. Accordingly, in the concurrent proposal published elsewhere in this issue of the New Jersey Register, the Department is making it clear that an alternative route can be provided where a fork lift, travel lift and other heavy boat moving equipment preclude linear access along the entire waterway.

108. COMMENT: Under the New Jersey Landowner Liability Act, landowners who are required to make a portion of their property available for public access and use are offered only limited protection from the liability they would normally face under common law in the event of injury to someone using the public access facilities. Thus a private homeowner who is required by the Department to provide public access may face lawsuits and liability from individuals who may be injured while utilizing that public access. There is no reason why private landowners who are compelled to provide public access should face any liability. The regulations should be revised in order to require the State to fully indemnify private landowners, defend them against any potential claims of personal injury, and bear the cost of any damages awarded. Without indemnification for private property owners, New Jersey insurance companies may use this potential exposure as another disincentive for writing homeowner's policies along New Jersey's coastal areas. It is the State's obligation to be responsible for personal injury claims in connection with public trust land which is owned by the State. (70)

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109. COMMENT: Although the Department acknowledges that landowners who comply with these regulations have only “limited protection” from liability under the New Jersey Landowner Liability Act, the Department has completely ignored this issue and has made no provision to indemnify private landowners who find themselves at risk due to compelled compliance with the public access requirements. (70)

110. COMMENT: The Department rationalizes that marina owners are somehow afforded protection under the Landowner Liability Act, N.J.S.A. 2A-42A-2 et seq. In fact, these proposed regulations and requirements will greatly expand the liability to which marina owners and operators are exposed. The Landowner Liability Act affords limited protection. There are many cases in which liability has been found against landowners who thought they might be protected by this Act, such as a child who hurt herself rollerblading when she slipped and fell due to an accumulation of sand on a roadway surface (*Toogood v St. Andrews at Valley Brook Condominium Association*, 313 Super 418 (App. Div. 1998), a man who tragically drowned while attempting to rescue two children who had fallen through an ice covered lake located on the Defendant’s property (*Harrison v. Middlesex Water Company*, 80 NJ 391 (1979), a young boy injuring himself on a golf course (*O’Connell v. Forest Hill Field Club*, 119 NJ Super 317 (App. Div. 1972), and numerous other cases. Moreover, many of these marinas are located within or near residential neighborhoods or fully developed areas, which further reduces protection under the Act. A new liability is being imposed by these regulations which will require additional exposure to liability; potentially increased employment costs associated with supervision, and increased insurance costs. (34, 35, 9, 132, 16)

111. COMMENT: As a property owner with bayfront access, the commenter is seriously concerned with personal liability, nuisance, and vandalism. (81)

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112. COMMENT: The rules will greatly increase the general liability exposure inherent in marina properties, such as slip and fall hazards to the casual public. Whether or not the marina owner is found liable, the costs of litigation in New Jersey are significant. If these rules are adopted, the commenter indicated that he would be forced to reevaluate the rating structure and/or restrict underwriting in New Jersey. (169)

RESPONSE TO COMMENTS 108 THROUGH 112: N.J.S.A. 2A:42A-3(a) of the Landowner Liability Act provides that an owner, lessee or occupant of premises, whether improved or maintained in a natural condition, owes no duty to keep the premises safe for use by others for sport or recreational activities, or to warn of "hazardous conditions of the land or in connection with the use of any structure or by reason of any activity to persons entering for such purpose." By giving permission to a person to enter the land for a recreational purpose, the owner, lessee or occupant does not (1) extend an assurance that the premises are safe for the purpose; (2) bestow the status of invitee on the person; or (3) assume responsibility for injury to the person given permission to enter the land. N.J.S.A. 2A:42A-3(b). This immunity is available to both the private owner of the property and the public entities, such as the State or municipality that hold the easement. See N.J.S.A. 59:2-1(b) and N.J.S.A. 59:3-1(b) (preserving for public entities and employees defenses available to private parties). Thus, a property owner would be afforded immunity from claims that fell within the parameters of the general immunity in the Landowner Liability Act.

The Landowner Liability Act was amended in 1989 and then again in 2001 to extend the protections of the Act to an "owner, lessee or occupant of premises upon which public access has been required as a condition of regulatory approval of, or by agreement with, the Department of Environmental Protection" and to an "owner, lessee, or occupant of premises on which a conservation restriction is held by the State, a local unit, or charitable conservancy and upon which premises subject to the conservation restriction public access is allowed, or of premises upon which public access is allowed, or of premises upon which public access is allowed pursuant to a public pathway or trail easement held by the State, a local unit, or a charitable conservancy." (See N.J.S.A. 2A-42A-8.0 and 8.1) Under the Act, such owners, lessees or occupants are liable only for the:

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- (1) Willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity; or
- (2) Injury caused by acts of negligence on the part of the owner, lessee or occupant of the premises to any person where permission to engage in sport or recreational activity on the premises was granted for a consideration other than the consideration, if any, paid to the landowner by the State; or
- (3) Injury caused by acts of gross negligence on the part of the owner, lessee, or occupant of the premises to any person entering or using the land for a use or purpose unrelated to public access purposes.

113. COMMENT: The Department's rule proposal for complete public access to private bay, harbor, and lagoon front lands is purely social engineering on a vast scale; it has nothing to do with environmental protection. The statutes that the Department relies upon do not authorize such regulations. The New Jersey courts in the Last Chance litigation (119 *N.J.* 425 (1990) have already chastened the Department for exceeding the scope of the Waterfront Development Law in a prior rule proposal and directed the Department to regulate only commerce and navigation under that statute. Yet this rule proposal would regulate any activities in much of the State under the Waterfront Development Law for the purpose of seizing private property and redistributing it to the public not for the purpose of regulating commerce and navigation. Even under CAFRA, it is extremely unlikely that the Legislature intended for the Department to engage in such broad scale social engineering without the clearest of legislative directions. (160)

RESPONSE: The Department's authority to adopt these rules is discussed in the response to comments 20 through 22. The Public Trust Doctrine establishes the right of the public to fully utilize these lands and waters for a variety of public uses. While the original purpose of the Public Trust Doctrine was to assure public access for navigation, commerce and fishing, in the past two centuries, State and Federal courts recognized that modern uses of tidal waterways and their shores are also protected by the Public Trust Doctrine. In New Jersey, the Public Trust Doctrine expressly recognizes and protects natural resources as well as public recreational uses such as swimming,

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sunbathing, fishing, surfing, walking and boating along the various tidal waterways and their shores. For the reasons stated in response to comment 34, the Department does not agree that these rules constitute seizure or taking of private lands.

114. COMMENT: What the public needs by way of access to bays, harbors and rivers is not the private property destroying access that the Department is proposing but instead, points of access for boat launching and fishing (for example, in areas such as channels where fishing would be productive). The portion of this rule proposal that requires municipalities to provide public access to beaches in return for public funding is where public access points for boat launching and fishing should also be addressed. (160)

RESPONSE: The Department does encourage boat launching and fishing, and access to tidal waterways for fishing and boating are specifically mentioned in the rule as uses under the Public Trust Doctrine, with standards for fishing at N.J.A.C. 7:7E-8.11(l). The portion of the rule that requires municipalities participating in Shore Protection Program funding to provide public access does require at N.J.A.C. 7:7E-8.11(p)2 that municipalities comply with N.J.A.C. 7:7E-8.11(c) through (m), which includes provision of fishing access. However, these provisions address only a portion of the public's rights under the Public Trust Doctrine. The other portions of the adopted amendments and new rules address other aspects of the Public Trust Doctrine and are necessary and appropriate to assure that the public's rights to public trust areas are fully protected.

115. COMMENT: The commenter indicated that she had attended the three public hearings held on the proposal and that many of the objections raised were based on misinterpretations of the rule requirements. The following were cited by the commenter as misinterpretations of the rule:

- (1) Private homeowners or lot owners who want to expand their existing homes or build on these lots will be expected to pay for restroom facilities and parking spaces
- (2) The public access requirements will result in the "big boxing" or "Walmarting" of our beaches by imposing rigid, cookie-cutter requirements across the State without taking into account the differences in each community;
- (3) The minimum of one-quarter mile between each restroom is excessive and unnecessary;

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(4) The rules do not take into account the fact that our own town already provides public accessways, parking and restrooms;

(5) The rules prohibit towns from including the cost of the public access requirements in their beach fees. (80)

RESPONSE: To assist the public in understanding the rule proposal and Public Trust Doctrine, the Department, in November 2006, developed a new public access web page. This web page includes a link to the rule proposal, a guide to the Public Trust Doctrine and a guide to the November 6, 2006 rule proposal.

As the New Jersey coastline continues to be developed and redeveloped, it is essential that development be conducted in a way that protects the public's access to, and use of tidal waterways and their shores. The New Jersey Supreme Court in *Matthews* held "Beaches are a unique resource and are irreplaceable. The public demand for beaches has increased with the growth of population and improvement of transportation facilities." 95 N.J. 306, 323 (1984). This rule and associated amendments are intended to ensure that the public's rights continue to be protected and that improvements are accomplished to provide families and others a realistic and meaningful opportunity to enjoy the public's resources. The following addresses the misrepresentations identified by the commenter.

The rule does not require single family homes that are not part of a larger development to provide restrooms or parking for the public. The rule does require public access along the shore where a single family home lot includes a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or the Delaware Bay. The rule does take into account the differences in the types of waterfront communities throughout the State. As discussed in response to comments 88 through 95, the rule provides varying standards for urban waterfronts, working waterfronts and small residential communities. The rule does not require restrooms be located at one-quarter mile intervals. The rule requires that municipalities participating in shore protection or beach nourishment projects on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay under the State's Shore Protection Program through a State Aid Agreement provide restrooms to accommodate beach goers during the active beach season. Restrooms are required to be located within one-half mile of one another, measuring the distance generally parallel to the

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beach or shore and be located within one-quarter mile of the edge of the beach. The rule does take into account existing public accessways, restrooms and parking. The rules do not prohibit municipalities from including the cost of public access requirements in their beach fees. The rules provide that a fee may be charged for the use of bathing and recreational facilities and safeguards such as lifeguards, toilets, showers and parking. However, the fee charged shall be no greater than that which is required to operate and maintain the facility, taking into account support amenities provided, such as lifeguards, restrooms/showers and trash pick-up.

116. COMMENT: For the rules to succeed, the Department must educate the public about the Public Trust Doctrine. This effort should focus, in the first instance, on developers, real estate agents and municipalities. All too often, potential owners are promised that shorefront homes have a “private” beach, and this becomes a flawed expectation on their part. From a takings point of view, that expectation carries no weight because it is not a reasonable investment-backed expectation. Nevertheless, it is understandable that homeowners who relied upon such representations would be upset about the prospect that their “private” beach is actually public. Any education efforts to realtors and developers should include a strong warning that any claims that properties have access to a "private beach" may be false representations if the properties are impressed with public trust rights. (154)

RESPONSE: Educating the public about the Public Trust Doctrine is important and, therefore, the Department has taken the following steps toward educating the public on public access in New Jersey. As stated in response to comment 15, coinciding with this proposal, the Department posted a public access web page that includes a link to the rule and summary of the proposal, and a guide to the Public Trust Doctrine. The guide, entitled “Public Access in New Jersey: The Public Trust Doctrine and Practical Steps to Enhance Public Access,” prepared by the Department, explains the Public Trust Doctrine and how municipalities play a key role in conserving and enhancing public access to and use of tidal waterways and their shores.

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In 2005, public access workshops were developed and delivered to county and municipal officials. These workshops were open to the public and provided a forum to share public access knowledge and concerns between government officials, advocacy groups and the general public.

In addition, the Department intends to develop a guide for municipalities to assist them with compliance with the rule and development of their Public Access Plans. The Department will also be updating the guidance document “Single Family Homes and Duplexes: A Guide to CAFRA” to reflect the public access rule changes relating to single family homes.

117. COMMENT: While the commenter indicated that he supports the rules, he indicated that he is concerned that, without appropriate enforcement of the standards, there will continue to be rapid and unnecessary development that will result in the loss of public access. (170)

RESPONSE: The adopted rules set forth more specific standards for proposed developments along tidal waterways and their shores, including the provisions at N.J.A.C. 7:7E-8.11(e) for public accessways along the major waterways in developed portions of the State, the exceptions to the standards at N.J.A.C. 7:7E-8.11(f), and the specification for recording conservation restrictions. This additional specificity is anticipated to make it easier for applicants to comply with the rules, and for the Department to enforce the standards when evaluating permit applications.

118. COMMENT: Any discussion of tidal areas must consider global warming. A recent report noted that global warming may submerge sections of New Jersey’s highly developed coastline by the end of the century; melting ice caps may cause the Atlantic Ocean to rise by up to four feet by the year 2100, moving the coastline 480 feet inland in a worst-case scenario. See Future Sea Level Rise and the New Jersey Coast (co-authored by Michael Oppenheimer, a professor of geosciences and international affairs at Princeton’s Woodrow Wilson School of Public and International Affairs). The public access rules do not fully account for this expected change, and should be modified to allow for the expected shift of tidal, public trust areas inland. (154)

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RESPONSE: As sea level rises and the mean high water line moves landward, the State's Tidelands interest moves landward unless such movement is the result of avulsion. Public trust rights to the tidal waterways and their shores remain.

119. COMMENT: The Department repeatedly asserts its status as the "trustee of the public rights to natural resources" in its explanations and justification of the proposed rules. But, in the proposed rules, the Department shifts its responsibilities as a steward onto the shoulders of private property owners. Many of the proposed revisions are akin to the State creating public parks, by requiring private property owners to maintain the amenities and facilities associated with those parks and to construct the parks on their private property. (120)

RESPONSE: The rules do not require public parks on private properties. Rather they ensure that owners of private property on land subject to public trust rights allow the public to exercise those rights, through access along and use of tidal waterways and their shores.

120. COMMENT: The Department should implement methods to ensure that it consistently includes public access conditions in all its permits for regulated activities in waterfront areas, as required by this regulation. This includes following the Department's emergency permit authorization rule, N.J.A.C. 7:7-1.7, to ensure that public access is provided to all beaches that were replenished on an "emergency" basis. (25)

RESPONSE: The Public trust rights rule sets forth consistent standards that are applied throughout the coastal zone. The Department recognizes that, at times, shore protection or beach nourishment projects must be carried out immediately in response to an emergency situation such as beach erosion caused by a severe storm. In cases where the municipality has entered into a State Aid Agreement, the rule at N.J.A.C. 7:7E-8.11(p)9 requires that, within 180 days of completion of an emergency shore protection or beach nourishment project, a municipality comply with the standards relating to participation in Shore Protection funding at N.J.A.C. 7:7E-8.11(p)1 through 8. This provision allows the necessary emergency action to occur, provides the municipality time to take

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the steps needed to comply with the standards of the public access rule and protects the public trust rights.

121. COMMENT: The proposal seems to provide no process by which the type or scope of the access point can be negotiated. Furthermore, there is no stipulated right of appeal if there is a disagreement on the type and scope of public access deemed to be appropriate by the Department. Do the facility owner and/or operator have a right to appeal the determination of the Department as it pertains to public access or an equivalent public access? (16)

RESPONSE: The rule at N.J.A.C. 7:7E-8.11(d) requires that development on or adjacent to tidal waterways and their shores provide onsite, permanent, unobstructed access to tidal waterways and their shores at all times, including both physical and visual access. Prior to this adoption, the rule at N.J.A.C. 7:7E-8.11(b)1 recognized that linear access may not always be practicable on site or for the entire shore and that an alternative route may be necessary. The Department evaluated this standard and determined that additional circumstances may exist that warrant modification of the public access requirements. As a result, the rule at N.J.A.C. 7:7E-8.11(f) sets forth the situations in which modification of the location, scope or timing of the public access provisions of the rule may be allowed. These include situations where: a unique risk associated with late night access is documented; circumstances exist that warrant temporary restrictions to public access, including closure of public access areas for a limited time; and certain hazardous operations occur and risk of injury is present, including energy facilities, industrial uses, port uses, airports, railroads and military facilities. The Department may also modify the public access requirements at proposed residential developments consisting of one, two and three units depending upon the location of the proposed development and whether beach and dune maintenance activities are proposed at N.J.A.C. 7:7E-8.11(f)4 and 5. Finally, in the concurrent proposal published elsewhere in this issue of the New Jersey Register, the Department is proposing to allow modification of public access at marinas, along superhighways and for homeland security purposes.

A person who considers themselves aggrieved by a coastal permit decision, may request an adjudicatory hearing in accordance with the Coastal Permit Program rules, N.J.A.C. 7:7-5

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Procedures to Request an Adjudicatory Hearing to Contest a Permit Decision. In addition, mediation is available through the Department's Office of Dispute Resolution.

122. COMMENT: These regulations and the Department's handbook of the Public Trust Doctrine are arbitrary and unsupported decrees of an unknown author(s) without supporting documentation.

(84)

RESPONSE: The document "Public Access in New Jersey: The Public Trust Doctrine and Practical Steps to Enhance Public Access" was prepared by the Department's Coastal Management Office and the principal investigator was Robert Freudenberg a NOAA Coastal Management Fellow (2004-2006). Financial support for the preparation of this document was provided through the Coastal Zone Management Act of 1972, as amended, administered by the Office of Ocean and Coastal Resource Management, National Oceanic and Atmospheric Administration. CZM Grant Award to NJ - NA04NOS4190092.

As stated previously in these responses, these regulations were the result of a Department-wide effort involving staff of the Coastal Management Office, Division of Land Use Regulation, Bureau of Coastal and Land Use Enforcement, Office of Engineering and Construction, Division of Parks and Forestry, Division of Fish and Wildlife, and Green Acres Program. The regulations are in part a result of the Department's experience with requiring public access through coastal permits for development along tidal waterways and their shores and through implementation of the Shore Protection Program and Green Acres Program. The rules reflect existing case law that has set legal precedents for establishing and maintaining public access to tidal waterways and their shores throughout the State. As detailed in the proposal, these include: *Arnold v. Mundy*, 6 N.J.L., 95 (1821); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296 (1972); *Van Ness v. Borough of Deal*, 78 N.J. 174 (1978); *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984); *National Association of Home Builders v. NJDEP*, 64F. Supp. 2d 354 (D.NJ 1999); and, *Raleigh Ave. Beach Association v. Atlantis Beach Club, Inc. et al.*, 185 N.J. 40 (2005).

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123. COMMENT: Did the Department study any other state coastal requirements? Did the State examine Florida State requirements? If so, what are they and where are they? (24)

RESPONSE: In Florida, and many other states, a beach management and erosion control project, in order to receive state funds, must provide for adequate public access. See, e.g., Fla. Stat. 161.101(12). Development projects in Florida's coastal building zone must not interfere with public accessways, unless, in certain circumstances, a comparable alternative accessway is provided. See Fla. Stat. 161.55.

As noted, New Jersey has the highest population density in the United States, at 1138 people per square mile in the 2000 census. This is more than the double the population density of all other states except Rhode Island, Massachusetts and Connecticut. Accordingly, demand for public access is high, and the Department has established regulations requiring public access provisions in development projects along tidal waterways and their shores, and for Shore Protection and Green Acres Program funding.

124. COMMENT: In recent years, it has been almost impossible to find enough space on the beach for a family unless you get there before 10 AM. How will the proposed rules be of any value when there is no room for the people you hope to attract? (146)

RESPONSE: Through the implementation of the Public trust rights rule and associated public access amendments over time, the Department anticipates that more beaches will be open to the public and will provide the amenities such as restrooms and parking facilities necessary for the beach area to be used by all members of the public.

125. COMMENT: Real public access in New Jersey must be inclusive, be reasonable for the public, include parking and restrooms and must not be able to be manipulated either openly or covertly. (19)

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RESPONSE: The Department agrees with this comment. In light of the importance of the rights protected by the Public Trust Doctrine and the constant development pressure threatening public access, these rules are intended to ensure that the public's rights continue to be protected and that improvements are accomplished, such as assuring that parking and restroom facilities are available, to provide the public a realistic and meaningful opportunity to enjoy its resources. The rule also requires that public access be made available on a non-discriminatory basis and sets specific standards for fees for use of bathing and recreation facilities.

126. COMMENT: Designation of public access areas is pointless if the public cannot access them. (161)

127. COMMENT: The State has spent millions of dollars to replenish its beaches. The public must not only have access to these beaches but also access to parking. The current economic pressure on municipalities is to not provide parking because the land is more valuable to them if it is developed and because the local officials do not want their residents complaining about the tourists on their beaches. (112)

RESPONSE TO COMMENTS 126 AND 127: The Public trust rights rule is intended to ensure that the public's rights continue to be protected and that improvements are accomplished, such as assuring that parking and restroom facilities are available, and to provide families and others a realistic opportunity to enjoy the public's resources. To this end, the rule includes provisions for on-site, permanent, unobstructed access, signs, parking and restrooms, and barrier free access, depending on the type and scope of the project.

128. COMMENT: Under the existing rule, when engaged in activities such as expansion and renovations of existing marinas or construction or upgrades of existing marina support facilities, marinas, like any other development subject to the public access requirements, "shall provide permanent perpendicular and linear access to the waterfront" but only "to the maximum extent practicable." The phrase "maximum extent practicable" would seem to indicate that, under certain

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conditions not articulated, under the existing rule, a marina would be exempt from the public access requirements. In addition, under the existing rule, as with any other development subject to the public access requirements, such development at marinas that limits public access to the waterfront is “discouraged.” Under the proposed rules, there is no exemption from the public access requirements and development that limits public access to the waterfront is “prohibited.” The proposed rules delete the provision at N.J.A.C. 7:7E-8.11(b)4 that allows municipalities to set a fee schedule that charges up to twice as much for non-residents for use of marinas and boat launching facilities for which local funds provided 50 percent or more of the costs. The commenter indicated that she supports these rules. (80)

RESPONSE: The Department acknowledges this comment in support of the rule.

129. COMMENT: With regard to how the public access requirements must be met, under the existing rule, other than the reference to perpendicular access and “a linear waterfront strip accessible to the public”, and with the exception of marinas built in the Hudson River Waterfront Area, the existing rule provides no specific requirements or guidance for how such access must be constructed. Similarly, the proposed rules do not provide details, specific requirements or guidance as to how such public access will be provided, other than the general requirement that it “must include perpendicular access and a linear area along the tidal waterway and its entire shore”, N.J.A.C. 7:7E-8.11(d)(1) and that it “shall incorporate fishing access and associated amenities to the maximum extent practicable within the area provided for public access.” The parking requirements are the same under the proposed Rules as in the old one, and are triggered only when the development reduces existing parking that is currently used by the public for access to the waterfront, requiring mitigation for this parking at a 1:1 creation to loss ratio. Again, it should be noted that these requirements do not apply solely to marinas, but to any “development” along public trust lands and waters.

At the public hearings held on the proposed rules, numerous marina owners and operators testified against the rules alleging they would cause a serious hardship to their businesses. After subsequent conversations with marina owners and operators as well as residents that house their boats at marinas, it appears that many of their concerns are based on the manner in which the

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Department has been requiring compliance with the existing rule, and the uncertainty regarding the manner in which the Department will require compliance with the proposed rules. As discussed above, the proposed Rules do not contain any specific standards or guidance on how the access requirements are to be met. The language of the proposed rules allows for some measure of flexibility in the way they are applied and gives the Department the opportunity to apply the Rule in a manner that strikes an appropriate balance between marinas and private boat owners and the public's right to access the lands and waters they occupy. The Department should rely on that flexibility to apply the rules in a manner that provides the public with the greatest access to and enjoyment of Public Trust resources while taking into account the unique property features, size, location and configuration of the marinas. (80)

130. COMMENT: Marinas should provide public access to the waterfront; many of them already do. However, the restrictions and regulations proposed by the Department in some instances will be overbearing and will create potential liability issues. (174)

RESPONSE TO COMMENT 129 AND 130: In order to ensure the flexibility to apply the rules in a manner that provides the public with the greatest access to and enjoyment of public trust resources while taking into account the unique property features, size, location and configuration of marinas, the Department is proposing elsewhere in this issue of the New Jersey Register to allow the required linear public accessway to be reconfigured and enhanced to accommodate site constraints.

131. COMMENT: Requiring public access at marinas will result in the marina owner losing control of their private property and the ability to provide security for their customers. (163)

132. COMMENT: New Jersey is blessed with some of the finest beaches and waterways in the country and the State has done a tremendous job providing access to those natural wonders. New Jersey has public boardwalks and sea walls stretching up and down the coast. It has a wonderful park system and over a dozen lighthouses that have been preserved, plus five State-owned marinas.

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Throughout the State, communities have also taken advantage of the Green Acres Program to preserve open space for public use. Why is the State now imposing regulations placing an obligation on small family owned businesses to provide public access to the water when the State has such a fine record of maintaining beautiful facilities, parks and beaches? (77)

133. COMMENT: Public access to the waterfront should be provided through public lands such as municipal marinas and parks as opposed to private property such as marinas. It is not the responsibility of the private sector to provide a place for the public to access the waterfront. (147, 66, 67)

134. COMMENT: Several commenters oppose the proposed public access rules as they relate to marinas. (33, 122, 148, 123, 134, 55, 82, 141, 106, 159, 162, 28, 103, 95, 72)

135. COMMENT: The commenter opposes the rules as they will cause undue hardship to marinas that provide an essential part of the infrastructure to the recreational industry in New Jersey. (155)

136. COMMENT: Marinas in New Jersey are a unique and essential part of New Jersey's waterfront communities and by definition already provide and preserve public access. Marinas provide slips, boat ramps, fuel services, supplies, fishing access and more. They all provide important boating infrastructure and services that allow people seeking recreation on or near the water to safely begin and end their excursions. Marinas provide greatly different forms of access than beaches and amusement parks. (33, 122, 103, 65, 104, 164, 40, 87, 106, 141, 98, 152, 50, 68, 69, 89, 20, 9, 147, 10, 34, 35, 16, 12, 108, 26, 77, 72, 155, 67, 86, 29)

137. COMMENT: Many marinas provide public access without these additional onerous restrictions. Marinas provide slips, boat ramps, fuel services, supplies, fishing access and more. Yes, marinas charge fees, but so does the State at their marinas and public parks. (174)

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RESPONSE TO COMMENTS 131 THROUGH 137: Since their inception in 1978, the Coastal Zone Management rules have contained standards for public access that pertain to both public and private landowners, including marinas. The Public Trust Doctrine maintains public access to and use of tidal waterways and their shores for the benefit of all the people, marina owners, boaters and the general public alike. The Department has determined that the rules adopted herein are necessary for the Department to fulfill its role as trustee of the public's rights to tidal waters.

However, in recognition that existing commercial marinas are water dependent uses that are an important element of the State's tourism industry and that existing marinas may have site constraints that make linear public access along the entire waterfront impracticable, the Department is proposing in the concurrent proposal published elsewhere in this issue of the New Jersey Register an exception for these marinas to accommodate site constraints.

138. COMMENT: The proposed regulations constitute a diminution of the rights of the marinas owners, operators and customers and an expansion of the general public's rights. This proposed action constitutionally exceeds the authority afforded the executive branch. There is no constitutional or legislative sanction for these proposed regulations. (34, 35, 12, 16)

RESPONSE: The rule preserves and protects the common law rights under the Public Trust Doctrine. Traditionally, the Public Trust Doctrine addressed the public's interest in the beds of tidal and commercially navigable waterways. See, for example, *Arnold v Mundy*, 6 N.J.L. 1, 3 (*Sup. Ct. 1821*); *Bell v. Gough*, 23 N.J.L. 624 (E. & A. 1852); *Barney v. Keokuk*, 94 U.S. 324 (1877); *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Utah v. U.S.*, 403 U.S. 9 (1971).. However, the Public Trust Doctrine is now recognized as extending beyond those areas. In 1988, the U.S. Supreme Court recognized public trust interests beyond commerce, navigation and fisheries. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) (finding state assertion of a public right is not an unconstitutional taking or exaction if the right asserted is recognized under the public trust doctrine of the law of that state.). In addition, other courts have applied the public trust doctrine to:

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1) periodically navigable waters, (e.g., *Wilbour v. Gallagher*, 462 P.2d 232 (Wa. 1969); *Forestier v Johnson*, 164 Cal. 24, 127 P. 156 (1912)); 2) tributaries of navigable waters (*National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983)); 3) artificial reservoirs and lands covered by water caused by dams (*Pacific Gas & Electric Co. v. Superior Court*, 145 Cal.App.3d 225 (1981); *Fogerty v. State of California*, 187 Cal.App.3d 224 (1986); *State v. Sorensen*, 271 N.W. 234 (Ia. 1937); *State v. Parker*, 200 S.W. 1014 (Ark. 1918); cf. *Golden Feather Community Ass'n. v. Thermalitos Irrign. Dist.*, 269 Cal.App.3d 1276 (1979)); 4) flooded lands (*Bohn v Albertson*, 107 Cal.App.2d 738, hearing denied 238 P.2d 128 (1951); *Arkansas River Com'n v. Echubby Lake Hunting Club*, 126 S.W.3d 738 (Ark. 2003)); 5) recreationally navigable streams (*National Audubon v. Superior Court*, 33 Cal.3d at 435, n. 17; *Adirondack League Inc. v. Sierra Club*, 706 N.E.2d 1192 (N.Y. 1998); *Ryalls v. Pigott*, 580 So.2d 1140 (Miss. 1990); *People ex rel Baker v Mack*, 19 Cal.App.3d 1040, 97 (1971); *Day v. Armstrong*, 363 P.2d 137 (Wyo. 1961); *Lamprey v. State*, 153 N.W. 1139 (Minn. 1893)); and 6) adjacent wetlands (*Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972); *Graham v. Estuary Properties, Inc.*, 399 So.2d 1281, 1374 (Fla. 1981)). See also, generally, *In re Adjudication of the Existing Right to the Use of All the Water*, 55 P.3d 396 (Mt. 2002); *In re Water Use Permit Applications*, 9 P.3d 403, 445-47 (Hawaii. 2000); *United Plainsmen v. North Dakota Water Conservation Comm'n*, 247 N.W.2d 57 (N.D. 1976).

In New Jersey, the public trust doctrine applies to tidally flowed areas and is not limited to the Atlantic Ocean. Further, because public rights under the Public Trust Doctrine are evolving, the amended regulations do not specify a precise area of privately owned shoreline landward of the mean high water line, or a percentage thereof, that must be subject to public access and use. The Department recognizes that the *Matthews* factors may be applicable to a particular piece of property. As stated in *Raleigh Avenue*, “Precisely what privately-owned upland sand area will be available and required to satisfy the public’s rights under the public trust doctrine will depend on the circumstances.” 185 N.J. 40, 55 (2005). See also, generally, *National Ass’n of Homebuilders v. State, Dept. of Env’tl Protect.*, 64 F. Supp. 2d 354 (D.N.J. 1999) (upholding regulation requiring specified walkway dimension along entire waterfront). These common law rights are not expanded by the rules; instead they are pre-existing rights which the rules seek to protect. The Public Trust Doctrine, as well as the statutory authority cited in the proposal, provide the basis for the rules adopted at this time.

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139. COMMENT: The recreational marine industry has been working hard in partnership with government to protect our environment and New Jersey's coastal resources. Proof of these efforts can be found in such programs as the Clean Vessel Act Program, the Shrink Wrap Recycling Program and the Clean Marina Program. Through the Department sponsored Clean Marina Program, marinas go above and beyond what is already required of them by implementing best management practices targeted at reducing pollution. These businesses realize that the success of their industry relies on the health and beauty of their surroundings. This program clearly demonstrates that the marine industry and government can work together towards the same goal. The Marine Trades Association of New Jersey and New Jersey Department of Transportation have been working together in partnership through the I BOAT NJ Program to fund hundreds of thousands of dollars in public access improvements in New Jersey's marinas. These are much needed improvements that could be jeopardized by the proposed public access rules. (34, 35)

RESPONSE: The Department does not anticipate that the public access rule will jeopardize the Clean Vessel Act Program, the Shrink Wrap Recycling Program or the Clean Marina Program. Marina development has been required to provide public access since 1978. As stated in response to comment 129 and 130, the Department recognizes that marinas may have site constraints that preclude public access along the entire shore and therefore, the Department is proposing amendments in the concurrent proposal published elsewhere in this issue of the New Jersey Register that would accommodate such constraints at existing commercial marinas.

140. COMMENT: If public access is required at marinas, will the State absorb an existing Tidelands license? (163)

RESPONSE: In New Jersey, tidelands are held in trust by the State for the public unless these lands have been conveyed to other uses. Even when the State conveys tidelands to private ownership, the

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transfer does not convey the public trust interest in the lands. Tidelands instrument is required for the occupation of State owned tidelands; these amendments do not change that requirement.

141. COMMENT: The commenter indicated that he was required by other Department permits to afford the public access to the waterfront at his marina, and that he has complied with such requirements. As a result of this requirement for provision of public access, there has been an increase in petty theft from boats at the marina. People have visited the marina and used the facilities, caused disruption on the dock by way of blocking walking traffic and stolen various items from marina patron's boats. This will only continue to get worse with the proposed changes. (108)

142. COMMENT: As a boat owner and marina patron, the commenter is concerned with the effects of the rule on his privacy and the security of his boat. The commenter is concerned with the possibility of having the public access the area near and around his boat. It is easier to steal a boat than a car; there is no locking steering wheel and the ignition keys do not have a computer chip built into them to prevent theft. Boats are easily hot-wired. (111)

RESPONSE TO COMMENTS 141 AND 142: Tidal waterways and their shores, including marinas, are impressed with the Public Trust Doctrine, which provides that tidal waterways and their shores are accessible to all, including boat owners and the general public. Therefore, public access along the waterfront has always been required at marina sites. Piers intended for mooring vessels can be gated to prevent the general public from accessing them. Some marinas currently provide this type of security. Boats, like motor vehicles, can be equipped with security systems to provide additional security should boat owners, like motor vehicle owners, choose to install them.

143. COMMENT: Marinas serve the public interest but are not public property. (95)

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144. COMMENT: It is unreasonable to require marina owners to grant public access to marinas. This defeats the purpose of “private property” for which marina owners pay thousands of dollars. Does this mean that marinas would be tax exempt? (156)

RESPONSE TO COMMENTS 143 AND 144: The Department acknowledges that marinas are not public property. However, they are subject to the Public Trust Doctrine as are all properties along a tidal waterway. The requirement of public access does not exempt marinas from paying taxes.

145. COMMENT: Marina owners and operators pay taxes on the land that will be impacted by these proposed regulations. Despite the increased costs and obligations imposed on these taxpayers, nowhere does the Department suggest that there will be effort on its part to reduce the tax burden to these property owners. (34, 35, 12, 16, 95)

RESPONSE: Tax rates are not established by the Department, rather by the Legislature and local government.

146. COMMENT: Marina boat ramps and vessel launching services are available to the public at a very reasonable rate. What is the benefit to allowing access to docks and slips at marinas? How does a marina provide security to their customer’s vessels and marina equipment? How can this be forced on private marinas when the State-owned and operated marinas prohibit the public from using their docks? (148, 54, 162, 158)

147. COMMENT: The commenter’s marina does not allow crabbing or fishing on their docks; if the general public has access this will not be able to be controlled. (143)

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148. COMMENT: An untitled article in the Boat U.S. magazine, January 2007 issue, states that marinas should have fencing and locked gates to both pedestrian and vehicle traffic, to ensure the safety of their customer's boats. Further, access to boats should be limited to owners and authorized persons. A boat is an investment for most individuals. Unlimited public access will add liability issues concerning theft, vandalism and pollution. (124)

149. COMMENT: The commenter submitted comments from an unnamed boat owner which are as follows:

“Allowing public access to marinas will greatly take away the secured areas of the marina. People without boats show a great interest in boarding boats in the marina, taking their children on unauthorized tours of boat owner's boats and trying out their equipment such as radios. These people also show no regard for the rules that the boat owners must follow in order to keep their boats at the marina. They feel they can do whatever they please without any consequences. Posted signs that prohibit admission to a dock without being a boat owner are often ignored and people have been found picnicking on boats at the marina. These people have no problem discarding their garbage all over the property and park wherever they find a spot-whether or not they are blocking direct access to a valuable area of the marina. They should not be allowed access to a marina unless they have a boat docked at that marina. Wannabe boat owners need to purchase a boat in order to enjoy all the benefits of boating. Marinas are not free to boat owners, nor should they be free to people wanting to spend a day by the water.” (104)

RESPONSE TO COMMENTS 146 THROUGH 149: The rule does not require public access to piers intended for mooring vessels nor access to the boats. Rather, the rule at N.J.A.C. 7:7E-8.11(d)1 requires public access along the waterway and its shore. A property owner can place gates at the landward end of piers intended for mooring vessels to limit access to the vessel slips to marina patrons. The Commissioner will issue an Administrative Order to increase public access and use opportunities at Department facilities, through development and implementation of public

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access plans for lands the Department manages that are located along tidal waterways and their shores. The Administrative Order will set forth a plan to increase public access and use opportunities for State parks, State marinas and State wildlife management areas.

150. COMMENT: The proposed rules state that “the new rule will enable better consistency in how public access is managed by different agencies within the Department.” “By providing one set of requirements to demonstrate compliance with the rule, the process by which public access is planned becomes more uniform and streamlined, which will help both the Department and those who apply for permits and funding.” That statement has no basis whatsoever and is completely untrue. Department staff consistently interpret the rules differently and make permit decisions accordingly. There are those programs within the Department that even believe that these rules only applied to certain development projects and that they did not apply to marinas applying for coastal permits. There is nothing outlined in the proposed rules to offer any assurance to the marina industry that there will be better consistency with a uniform and streamlined process. Moreover, it is impossible for that to occur when so much diversity exists within the industry.

Many family-owned marinas are trying to maintain, improve or expand their facilities so that they remain economically viable businesses. Yet, they only continue to get caught up in an already time consuming, complicated and expensive permitting process. They are told over and over that assistance is available from the Department and a staff person is available to help, only to find telephone calls unanswered, meetings and permits denied. The new regulations add injury to insult. Now the complicated regulatory process will not only be time consuming and expensive, but will result in a loss of property rights. (34, 35, 12, 16, 68, 89, 142)

RESPONSE: In order to assist the marina industry in navigating the regulatory process, the Division of Land Use Regulation has identified certain staff as liaisons for marina permit applications. In addition, recognizing the diverse nature of existing marinas, the concurrent proposal published elsewhere in this issue of the New Jersey Register would allow for the reconfiguration of the required linear access in certain circumstances.

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Tidal shorefront property in New Jersey has long been impressed with public trust rights, and it is unreasonable for private investors to appropriate resources impressed with public rights for exclusive private use. Requiring public access to and use of the shores of tidal waterways is not an unconstitutional taking of property since these public rights are background principles of New Jersey State law. See, e.g., *National Ass'n of Homebuilders v. State, Dept. of Env't'l Protect.*, 64 F. Supp. 2d. 354 (D.N.J. 1999) (clarifying that the public trust doctrine is a background common law principle in New Jersey).

151. COMMENT: The rules will ultimately increase the number of private waterfront homes and severely reduce the number of marinas, thereby reducing existing public access to the water. The loss of these waterfront enterprises is another blow not only to the small family businesses that our country's economic infrastructure is built on, but also the culture of the "Jersey Shore." (130, 68, 148, 132, 162)

RESPONSE: The Department does not expect the rule adoption to result in the additional loss of marinas in New Jersey. Marinas make the water accessible to boat owners and are an important component of the State's tourism industry. The rule ensures that tidal waters are also accessible to other members of the public. In order to provide flexibility to apply the rules in a manner that provides the public with the greatest access to and enjoyment of public trust resources, the Department is proposing in a concurrent proposal published elsewhere in this issue of the New Jersey Register, to allow the reconfiguration of the required linear public accessway to accommodate site constraints at existing commercial marinas. In addition, acquisition of development rights through the Green Acres Program described in response to comments 258 and 259 is one way to preserve these water dependent recreational facilities while enabling the owner to own the land and operate the marina.

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152. COMMENT: Who will pay for the additional costs that will be incurred to ensure the safety of those accessing the marina at night with limited visibility and present hazards? These regulations will force marina owners, operators and patrons to incur these costs. (34, 35, 12, 16, 33, 122, 46)

153. COMMENT: Who will pay for the loss of business operating space, security and upgrades to marinas? Are there any benefits to these proposed regulations? (148)

154. COMMENT: Who is going to provide the security, insurance, maintenance and permits needed to implement these rules? (163)

155. COMMENT: Who will pay for, maintain and insure the walkway at marinas? (17)

156. COMMENT: Who will pay for the increased cost of a marina owner's liability insurance? (171, 142)

157. COMMENT: How does a marina owner pay for the walkways, extra garbage, extra lighting and extra security the new regulations require? (55)

158. COMMENT: Marina insurance costs are based on exposure; simply put, it is the gross money taken in by the marina for the services it provides. How will the insurance companies address the situation where there will be no income from the public access provided but there will be added risk? (48)

159. COMMENT: To allow unlimited public access and force on marina owners the added responsibility, liability and cost that this will cause is unfair and inequitable. (94)

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160. COMMENT: Accidents and vandalism happen and it is unreasonable to force a marina to forego security measures to offer the general public access at all times. (86)

161. COMMENT: According to the proposal, limited liability will be provided. However, there is no provision covering the additional costs for labor, maintenance, insurance, security or police protection. Marina's contracted vessel owners should be provided the standards or expected security levels and amenities they've grown accustomed to and should be afforded as clients of a facility, without additional remuneration. (90, 9, 173, 72, 155, 171)

162. COMMENT: What boat owner would entrust their boat to a marina that cannot provide any level of security to their vessel or contents? The commenter stated that their marina provides a fenced in area for winter boat storage with security cameras, thereby providing the boat owners with a level of security. Under these rules, the fence and cameras would have to be removed along with the income that winter storage provides to the marina. (69)

163. COMMENT: Open public access to marinas will place an undue hardship upon the owners of the vessels being kept at a particular facility. Unless a full time security force is employed, the vessels could be subject to theft or vandalism. The logical next step would be an increase in insurance costs for those boat owners possibly forcing them to seek other states in which security would be better. New York and Delaware are two very close states with ocean access that rivals New Jersey. (132)

164. COMMENT: The commenter stated that his marina could not sustain the increased level of insurance that would be required to protect the private marina owner from the inevitable lawsuits that will arise as a result of the rules. (69)

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165. COMMENT: The new rules will make it impossible for marinas to provide a safe, clean and secure environment for their boating customers. (9, 108)

166. COMMENT: The commenter asks how they can pay for extra security guards to comply with these rules. The commenter stated that the Forked River State Marina has three security guards for a 225-slip marina and estimates that they would need five security guards for their marina. Where will the money come from to pay five new full-time employees to comply with these rules? (55)

167. COMMENT: The rules will have a huge impact on the configuration of the Atlantic Highlands Municipal Marina. Any changes to the marina will have considerable costs associated with them which may cause a hardship on the people who use and enjoy the marina. It may not be possible to continue to upgrade the facility due to economics. At a time when the State and Federal governments are trying to bolster the use of marinas and encouraging expansion of transient slips, these rules do not support such a position. (51)

168. COMMENT: If these rules are adopted, will the State be responsible for the actions of the public? Will the State be liable for law suits, vandalism, and general misuse of marina property? Does the Department have the ability to post a bond or have insurance to guarantee this? (162, 9, 173, 48)

169. COMMENT: The Landowner Liability Act does not mitigate for the nuisance and expense caused by vandalism and general misuse of marina property. An operator may not be liable for the actions or injury of the public on their property, but in the end it becomes their job to deal with it and mitigate for it. (16, 20, 28, 33, 34, 35, 40, 51, 65, 68, 87, 89, 90, 98, 103, 106, 122, 130, 141, 143, 152, 174,)

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170. COMMENT: It is too much to ask marina owners to be responsible for the liability of the general public and have no control over their property (28)

171. COMMENT: To force additional access upon marinas increases financial burdens and reduces many of their property rights and value. The proposed rules offer no compensation for the loss of private property, the management of access, additional security and staff, and everything else that will be needed to ensure the safety and protection of all those entering the property. (34, 35, 12, 16)

172. COMMENT: The Regulatory Flexibility Analysis states that there will be minimal impacts to small businesses. There is no substantive basis for the conclusions outlined in this section. There has been no study conducted, or evidence produced, to justify this analysis, which is unfounded and presumptuous. Marina owners will face significant increases in their costs to comply with the new rules and maintain and operate their properties for the use of the general public. Insurance costs will increase. Some marinas will need to reconfigure their operations in order to comply; capital investments that will never be recouped. Engineering costs will increase for compliance. None of these additional burdens and additional costs are adequately explored or acknowledged. Perpetual and constant access creates undue economic hardship on an already stressed and over-regulated industry thereby significantly impacting small businesses. (34, 35, 12, 16, 95)

173. COMMENT: The cost and potential risks of requiring businesses such as marinas and such to allow 24/7 access throughout their property, and by extension, to the expensive boats (owned by others) that are docked in their care and to their liability, is unconscionable. Is the State willing to take on this liability? (53)

RESPONSE TO COMMENTS 152 THROUGH 173: The public has always had the right to access tidal waterways and their shores in New Jersey. The right is not exclusive to marina and boat owners. Accordingly, since their inception in 1978, the Coastal Zone Management rules have required public access, and site plans have been required as a component of a coastal permit

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application. These requirements have included the provision of public access, recording of conservation restrictions for the public access areas, provision of parking for public access, and designation of these areas on site plans submitted with the permit application. These requirements were included in the Public access to the waterfront rule at N.J.A.C. 7:7E-8.11 prior to these amendments, and in the Coastal General Permit for marina support facilities at N.J.A.C. 7:7-7.13. Since these requirements were imposed under the previous rules on the majority of marina permit applications, the Department does not anticipate any significant increase in costs due to these amendments, or that insurance companies will refuse to write insurance policies for marinas.

As noted previously, areas outside of the public access area need not be accessible to the public and the concurrent proposal published elsewhere in this issue of the New Jersey Register would allow reconfiguration of linear access where warranted by site constraints or dangerous operations such as heavy boat moving equipment. Further, as detailed in the response to Comments 108 through 112, a property owner would be afforded immunity from claims that fell within the parameters of the general immunity in the Landowner Liability Act.

174. COMMENT: The proposed public access rule will result in an increase in costs to the marina owner. These expenses include the costs of: hiring a surveyor or engineer to design the public access area and add it to the marina site plan; applying for a Waterfront Development or CAFRA permit; applying for the municipal building permit; the expense of adding ADA accessible sidewalks and secure fencing; additional parking for those exercising their public trust rights; and additional restroom facilities which are also ADA compliant. (173)

RESPONSE: As described in the response to comments 152 through 173, marinas have been required to provide public access under the Coastal Zone Management rules since 1978 and the Department does not anticipate any significant increase in costs due to these amendments. The rule does not require marinas to provide restrooms for the public.

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175. COMMENT: The commenters indicated that it is their understanding that the public access rules emanated from a court case involving the actions of hotels along the shore in North Jersey charging unreasonable amounts for people to access the beaches in front of their property. The rules go beyond the intentions of the court case which directed the Department to issue rules to preclude hotels along New Jersey's beaches from effectively barring the public from the beaches. Therefore, the public access rules should not apply to marinas. (134, 123)

176. COMMENT: The proposed rules are inconsistent with a 2005 Supreme Court decision and should be withdrawn. (37)

RESPONSE TO COMMENTS 175 AND 176: Lands and waters subject to public trust rights include tidal waterways and their shores. The shores include lands both now or formerly below the mean high water line and certain portions of the shores above the mean high water line. See *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984); *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005). Tidal waterways and their shores are subject to the Public Trust Doctrine and are held in trust by the State for the benefit of all the people, allowing the public to fully enjoy these lands and waters for a variety of uses. As the Public Trust Doctrine has evolved over the years, courts have ruled that the dry sand and filled areas landward of the mean high water line are also subject to certain public rights under the Public Trust Doctrine. See *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984); *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005). New Jersey Supreme Court cases have held that a portion of dry sand and filled areas above the mean high water line are subject to certain rights of access to and use by the public, in order to fully enjoy lands subject to public trust rights.

The Department is not sure what cases the commenters are referring to. However, these rules are consistent with reported case law in this area. As the trustee of the public rights to natural resources, including tidal waterways and their shores, it is the duty of the State not only to allow and protect the public's right to use them, but also to ensure that there is adequate access to these natural resources. As the State entity managing public access along the shore, the Department has an obligation to ensure that this occurs. The adoption of these rules will ensure that meaningful

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opportunities to enjoy the tidal waterways and their shores subject to public trust rights are provided to the public.

177. COMMENT: How does a marina owner explain to their paying customers that they have to pay for access to the waterfront, but others who want access through these rules do not have to pay? (48)

178. COMMENT: As a marina owner, how do I address the public using the bathrooms and picnic areas at the marina? These facilities were constructed and are maintained for marina patrons. Will these paying customers have to compete with the public for use of these facilities? (55, 23)

RESPONSE TO COMMENTS 177 AND 178: Marina patrons are paying for the boat slips as well as other amenities provided by the marina. The rule does not require that marinas provide access to the boat slips or provide access to amenities such as restrooms, showers and swimming pools. The rule requires access be provided to and along the tidal waterway and its shore.

179. COMMENT: The State already has set aside many wetland reserves and beachfront areas. Why can't these areas become public access areas? The State could create fishing piers and boat launch ramps throughout the State. Florida already does this very successfully. Perhaps a State fishing license could help fund this project with the revenue being applied to build such structures. (98)

RESPONSE: State wetland reserves and beachfront areas are available for public access. Although the rule does not require fishing piers and boats ramps, these facilities would generally be encouraged as a means to provide public access. The State has and will continue to fund the construction of boat ramps. However, these facilities do not serve as a substitute for the public's right to access under the Public Trust Doctrine.

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180. COMMENT: The commenter's marina is situated about a half mile from the open bay on a man-made lagoon as part of a residential development. Public access will not offer anyone a desirable view and will certainly annoy the lagoonfront neighbors across from a public access site. In addition, all the people in the development have their own backyard on the lagoon and do not need any additional access. People from out of the area would find a public park with picnic areas far more pleasurable than some area on a bulkhead looking at someone's backyard. (67)

RESPONSE: Lands along tidal waterways and their shores are subject to the Public Trust Doctrine. In recognition of this Doctrine, the rule requires access to and along the waterfront.

181. COMMENT: Recent news articles have discussed the issue between Surf City oceanfront homeowners and the State regarding access to their properties to replenish beaches which will protect their homes. Public access is supposed to be available below the mean high water line. Should marinas be required to provide public access, will the State maintain the marina's docks and bulkheads? (67)

RESPONSE: In addition to their obligation under the Public Trust Doctrine, since 1978 marinas obtaining a coastal permit have been required to provide public access. This rule continues this requirement, adding clarity and predictability. It is not now, nor will it be under the amendments, the responsibility of the State to maintain bulkheads and docks at private marinas.

182. COMMENT: Where can a marina owner preclude access? (171)

183. COMMENT: The rules will turn marinas into playgrounds for children. Boat owners are entitled to quiet enjoyment. (72)

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184. COMMENT: Under this rule, liability would be increased for marina owners because of the additional possibility of damage to vessels moored at the marina; marinas are not playgrounds for children. (126, 83)

RESPONSE TO COMMENTS 182 THROUGH 184: The Public trust rights rule requires perpendicular public access to reach the water and access along the waterfront as well as a limited number of parking spaces for the public. Marina owners are not required to provide public access to the entire facility. Public access areas can be identified by the posting of signs. Access to marina piers intended for mooring vessels and slips can be limited to marina patrons only. The concurrent proposal published elsewhere in this issue of the New Jersey Register contains amendments that recognize there are site constraints at existing commercial marinas that may preclude access along the entire waterfront and allows for reconfiguration of public access at such sites.

185. COMMENT: To create a rule in which a property owner must give a portion of their property to provide unlimited public access while these property owners do not have unlimited access to State parks or recreational areas is discriminatory. Most public parks have signs posted stating they are open from dawn to dusk. Gateway National Park, Sandy Hook and Cheesequake Park, Old Bridge charge fees for access during certain months of the year. Also, the State owned Forked River Marina does not allow access on a 24 hour/seven day a week basis as the roadway into the marina is blocked each night. (124, 82, 17, 148, 104, 40, 41, 95, 72, 48, 94)

RESPONSE: The Commissioner will issue an Administrative Order to increase public access and use opportunities at Department facilities, through development and implementation of public access plans for lands the Department manages that are located along tidal waterways and their shores. The Administrative Order will set forth a plan to increase public access and use opportunities for State parks, State marinas and State wildlife management areas.

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186. COMMENT: The commenter indicated that they run a small marina which last year made \$7,160.00. The commenter stated that they pay property taxes and hold a mortgage and that by having the State dictate what they can do with their small marina which makes little money will leave them no choice but to close their marina. (127)

RESPONSE: Tidal waterways and their shores are impressed with public trust rights. The rule requires linear access along the shore. The concurrent proposal published elsewhere in this issue of the New Jersey Register would allow reconfiguration of this linear access where site constraints such as those that may be present at a small marina warrant it.

The Department is concerned with the potential loss of marinas and other water dependent uses throughout the State. The purchase of development rights through the Green Acres Program described in response to comments 258 and 259, is one way to preserve these water dependent recreational facilities while enabling the owner to own the land and operate the site.

187. COMMENT: The commenter's marina is located adjacent to the Forked River State Marina which has over 14 acres of public access. The State of New Jersey pays for all their marina improvements, security guards and maintenance from a State park budget, charges its slip holders the lowest fees on the river, and pays no property taxes. According to the commenter, this gives the State owned and operated marina a competitive advantage over other private marinas on the river. (55)

RESPONSE: One of the missions of the Department's Division of Parks and Forestry is to provide reasonably-priced recreational opportunities for the general public. Forked River State Marina does not offer the same amenities that many private marinas offer, such as on-site repair services, fuel, a marine supply store or a food/beverage concession, all of which are factored into determining the slip rental fee.

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188. COMMENT: The marine recreational trade is big business in New Jersey and will only grow if marinas and boat yards are able to exist. Marinas exist because they make money. This business supports the land by offering customers a safe, clean, friendly environment. Many marinas offer transient docking and many patrons who rent slips stay over night in their boats. Creating greater traffic at marinas makes them less appealing to customers. (77)

189. COMMENT: Will marina owner's property taxes decrease since the Department is imposing restrictions and devaluing their property? (162, 9, 173, 48)

RESPONSE TO COMMENTS 188 AND 189: The rules do not create a new right to access; they merely reflect the rights held under the Public Trust Doctrine which have always been applicable. Provision of public access at marinas does not make them less appealing. To the contrary, well designed public access can enhance a marina for the public and marina patrons alike. Property taxes are controlled at the local level rather than by the Department.

190. COMMENT: The Public Trust Doctrine establishes the public's right to full use of the seashore. Marinas are not beaches; they are businesses where work such as boat hauling is conducted on a routine basis. Bulkheaded land at marinas is not flowed by the tide. Where in the Public Trust Doctrine does it require access to be in the form of a 10-foot wide walkway with signs, and a deeded easement. Who pays for the bulkheading and dock repairs to this deeded easement along the water? Marinas have the right and obligation to protect their property and their customer's property, also to deny access to vandals or disorderly persons. (162)

191. COMMENT: To force marinas to provide deed restricted access across all waterfront property would severely lessen the value of the property with no recourse. (69)

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RESPONSE TO COMMENTS 190 AND 191: Tidal shorefront property in New Jersey has long been impressed with public trust rights, and it is unreasonable for private investors to appropriate resources impressed with public rights for exclusive private use. See, e.g., *National Ass'n of Homebuilders v. State, Dept. of Env'tl Protect.*, 64 F. Supp. 2d. 354 (D.N.J. 1999) (clarifying that the public trust doctrine is a background common law principle in New Jersey).

The public access rule does not require a 10-foot wide walkway nor does it authorize vandalism or disorderly conduct, both of which are subject to local law enforcement. Easements are required to ensure that public access is maintained over time and that future property owners are aware of the public access provisions at a site. Implementation of the Public Trust Doctrine through these rules does not change who would pay for bulkheading or dock repairs.

192. COMMENT: There are a number of examples and documents from Department staff which clearly outline the amount of public access that was being required for marinas applying for coastal permits prior to the posting of these rules. Despite not having legislative or judicial sanction to do so, the Department created a new proposed rule, which has to some extent already been enforced. To the extent the Department has imposed certain of these proposed conditions on permit applicants, the Department has retrospectively implemented this new rule without going through the appropriate administrative process.

The Department has improperly and unlawfully been applying the proposed rules without being considered by the public. For example, Department staff has been improperly applying these rules by requiring a 10-foot wide walkway/path that must also be subject to a conservation restriction. (34, 35)

193.COMMENT: Requiring a marina to provide unlimited public access essentially strips away land whose purpose is providing space for the storage of boats, space that is already in short supply. Building a boardwalk in front of a new waterfront housing development where a beach once existed is not difficult to do, nor is it unreasonable. Building such a structure in an already existing boatyard where boats are stored for the winter is unreasonable. (164)

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RESPONSE TO COMMENTS 192 AND 193: The rule prior to this adoption required permanent perpendicular and linear access to the waterfront to the maximum extent practicable. It additionally required that all development adjacent to the water provide, to the maximum extent practicable, a linear waterfront strip accessible to the public. It also included provisions for conservation restrictions at N.J.A.C. 7:7E-8.11(b)11. These requirements are carried through in the adopted rule at N.J.A.C. 7:7E-8.11(d) and (n). The Department has worked with applicants to design public access in compliance with these requirements. A 10-foot wide accessway was and is one predictable means to comply with this requirement at many sites. However, except on certain waterways identified at N.J.A.C. 7:7E-8.11(e), the rule does not specify the width of the linear access area.

The Department recognizes that there are site constraints at existing marinas which may not allow a linear access area along the entire tidal waterway. Therefore, the Department in the concurrent proposal published elsewhere in this issue of the New Jersey Register, is proposing to amend the public trust rights rule to allow reconfiguration of the linear access area where such constraints are present.

194. COMMENT: Marinas should not have to give a portion of their property to the State for public access, which marinas already provide to obtain a coastal permit. These amendments will only deter marina owners from attempting to repair or upgrade their facilities. (124, 104, 164, 17, 28, 87, 173)

195. COMMENT: The proposed rules impose financial and operating burdens, additional responsibilities and regulations, as well as the invasion of the privacy of marina patrons, all of which discourage marina owners from making applications for the necessary permits to enable them to continue to operate their marina. (134, 123, 156, 89, 41, 72)

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196. COMMENT: The rules will prevent marina owners from upgrading their facilities in the future as it requires access which would be economically unfeasible to provide. This is due to the layouts of some marina basins and the access required to floating docks, which would require excessive security measures and fencing. Further, these rules prevent marina owners from acquiring a permit for dredging that can only be accomplished when the State has funds available to dredge navigation channels. This could prevent marinas from having a secure financial future. (90, 147, 12, 26)

197. COMMENT: Marinas provide a necessary service to New Jersey's waterfront communities, but are becoming fewer each year due to the extremely high costs associated with the construction and operation of a marina. Existing marinas are aging and will need to make improvements to keep them safe and functioning. By adopting more stringent rules, New Jersey is going to find a continuing drop in available slips and marine services. (108)

198. COMMENT: Based on the dwindling number of privately owned marinas, the difficulty that already exists to care for and maintain existing marinas, and the fact that the new regulations are going to have negative cost effects on marinas and their owners, the proposed rule changes should not be adopted. The Department, Marine Trades Association of New Jersey and marina owners need to work within the existing framework of the Coastal Zone Management rules to provide access. (108)

RESPONSE TO COMMENTS 194 THROUGH 198: Although these rules provide additional specificity to public access requirements, under the public access rule prior to this adoption, marinas were also required to provide linear access. Public access at a marina can be as simple as a path along the waterway and this is not economically infeasible to provide. The concurrent proposal published elsewhere in this issue of the New Jersey Register allowing the reconfiguration of this linear accessway where warranted by site constraints will provide marinas with more flexibility in design of public access. Moreover, many repairs at marinas, such as replacing legally existing

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bulkheading and docks in place, do not require coastal permits. Therefore, the rule is not expected to deter property repairs or upgrades.

199. COMMENT: Because the marina cannot physically accommodate a public access walkway due to the close proximity of the marina structures to the bulkhead, the commenter stated that he will not be able to apply for any coastal permits. (107)

RESPONSE: The rule requires public access be provided to and along the entire tidal waterway and does not require access to the piers intended for mooring vessels nor boats. The Department recognizes that existing marina facilities may have site constraints which may not allow for the provision of a linear accessway along the entire tidal waterway. Therefore, the Department is proposing in the concurrent proposal published elsewhere in this issue of the New Jersey Register, to amend the linear access requirement to allow for reconfiguration of the access to accommodate such constraints.

200. COMMENT: Marinas make the water both accessible and tangible. The proposed changes to the public access rule would remove the tangibility from the equation. A look, but don't touch approach on the very banks of marina owner livelihoods and their property could only lead to a marina's demise. Working marinas that are trying to improve their facilities and apply for permits to do so should be helped through the process, not have to give up their equity or their business. (28)

RESPONSE: The Department agrees that marinas make the water accessible to boat owners and are an important component of the State's tourism industry. The rule ensures that tidal waters are also accessible to other members of the public. The Department's Division of Land Use Regulation has identified liaisons for marina owners to assist them through the permitting process.

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201. COMMENT: The recent rise in the development of waterfront property for residential purposes has led to a dramatic decrease in the quality and quantity of marinas in New Jersey. The proposed public access rules will only deter marina owners from attempting to maintain and/or upgrade their facilities which are already struggling to survive. It may well become a choice of not upgrading or selling altogether resulting in even less access to the water for recreation. (94)

RESPONSE: The Department is concerned with the potential loss of marinas and other water dependent uses as they are an important component of the State's tourism industry. The purchase of development rights through the Green Acres Program described in response to comments 258 and 259 is one way to preserve these water dependent recreational facilities while enabling the owner to continue to own the land and operate the site.

Although these rules provide additional specificity to public access requirements, under the public access rule prior to this adoption, marinas were also required to provide linear access. Public access at a marina can be as simple as a path along the waterway and this is not economically infeasible to provide. The concurrent proposal published elsewhere in this issue of the New Jersey Register allowing the reconfiguration of this linear accessway where warranted by site constraints would provide marinas with more flexibility in design of public access. Moreover, many repairs at marinas, such as replacing legally existing bulkheading and docks, do not require coastal permits. Therefore, the rule is not expected to deter property repair or upgrade.

202. COMMENT: Several commenters oppose the public access requirement because their residence is also located on the marina property. They indicate that the new regulations infringe on their privacy and are a safety issue for their private property and family. (55, 128, 127, 87, 129, 48, 77)

RESPONSE: The rule requires that public access be provided to and along the tidal waterway and does not require that the public have access to the marina owner's residence. In recognition that there may be situations where public access along the tidal waterway can not be provided due to site

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constraints, the Department in the concurrent proposal published elsewhere in this issue of the New Jersey Register is proposing to amend the rule to allow the reconfiguration of the linear public access area where such constraints exist.

203. COMMENT: N.J.A.C. 7:7E-8.11 suffers from the same deficiencies as N.J.A.C. 7:7E-3.50 to the extent that it purports to include all “shores” as presumptively within the scope of the Public Trust Doctrine. (70)

RESPONSE: The rule preserves and protects the common law rights under the Public Trust Doctrine. Traditionally, the Public Trust Doctrine addressed the public's interest in the beds of tidal and commercially navigable waterways. As discussed in response to comments 73 and 74 with reference to N.J.A.C. 7:7E-3.50, this rule preserves and protects the common law rights under the Public Trust Doctrine. The Department believes it is an appropriate regulation consistent with the case law referenced in that response.

204. COMMENT: The regulations should be fully inclusive. The definition of “Public Trust Doctrine” at N.J.A.C. 7:7-1.3 provides that public rights to use certain natural resources include both traditional and recreational activities. The definition provides that recreational activities include swimming, sunbathing, fishing, surfing, walking and boating. However, the list of activities cited at N.J.A.C. 7:7E-8.11(a) includes swimming, sunbathing, bird watching, walking and boating. The commenter suggests that these provisions be revised to “recreational activities including, but not limited to, swimming, sunbathing, bird watching, fishing, surfing, walking and boating.”

The intent of adding this language is to allow for all types of recreational activities including those not yet mainstreamed or developed. Adding this language will block municipalities from banning activities not specifically mentioned in the proposed regulations. As a case in point, in the mid 1990's, the Township of Berkeley imposed a parking ban on bayside streets in the South Seaside Park section of the Township in order to restrict access for windsurfing in that portion of Barnegat Bay. (19, 43)

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RESPONSE: The Department uses the word “including” in the regulations to provide examples of activities. The term “including” by definition is not an exhaustive listing but rather parts of a whole. The use of the term “including” does not exclude any unlisted recreational activities and there the Department has determined not to make the suggested change on adoption.

205. COMMENT: The proposed definition of “natural area” should be modified to incorporate the underlined text as follows:

“Natural area” means an area that has retained its natural character, as evidenced by the presence of woody vegetation (trees, saplings, scrub-shrub vegetation) or rare or endangered plants. “Natural areas” would include, but not be limited to: wetlands, Natural Heritage Priority Sites, Coastal Environmental Sites, Landscape Project Habitat patches, Category-One Waters, State Parks and Wildlife Management Areas and other critical natural habitat areas identified by the Department approved management plans and rules. A disturbed area may be considered a natural area if such vegetation is present. A natural area does not include maintained lawns or areas landscaped with non-native herbaceous plants.

The provision of the new rules requiring public access in natural area to be designed to minimize the impacts to the natural area and tidal waterway, including habitat value, is dangerously non-specific and vague. This includes a very vague definition of a “natural area,” no definition or discussion of public access use impacts, and no reference to any best management practices designed to minimize all possible degrading impacts.

Given all the public funding, time, science and effort spent by the Department on the Endangered and Nongame Species Program, the Natural Heritage Program, the Landscape Project, the Wildlife Action Plan, Category One waters, the Integrated list, and other public conservation efforts to identify, map and protect natural resources, wildlife and critical habitat for future Public Trust Doctrine beneficiaries in the coastal zone, the “natural area” criteria in the new rules should be more defined and connected to these mapping and conservation efforts. This will minimize public access impacts in sensitive natural areas. Since the impacts of public access in “natural

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areas” could go well beyond the footprint of any specific permitted development, some extended level of environmental impact statement should be required to identify the presence of additional natural resources that may be present. (2)

RESPONSE: The Coastal Zone Management rules for wetlands and endangered and threatened wildlife and plant species habitat, critical wildlife habitat, and public open space (including state parks and wildlife management areas) will apply in such areas and therefore need not be included in the definition of natural area. In addition, buffers to Category-One waters will continue to apply. The rule at N.J.A.C. 7:7E-8.11(e)3 allows modification of the walkway to protect endangered and threatened wildlife and vegetation species and critical wildlife habitat. Critical environmental sites identified in the current State Development and Redevelopment Plan are areas less than one square mile in area and are often comprised of wetlands or endangered or threatened wildlife or plant species habitat, in which case they are independently identified in the Coastal Zone Management rules. Accordingly, the Department has determined not to amend the definition.

206. COMMENT: N.J.A.C. 7:7E-8.11(c) which prohibits development that adversely affects or limits public trust rights to tidal waterways and their shores is vague. There is no indication as to the types of adverse effects to which this provision applies. (70)

207. COMMENT: The proposed rules use similarly vague and ambiguous language in the context of the proposed Public trust rights rule, N.J.A.C. 7:7E-8.11, in stating that development is prohibited if it “adversely affects or limits public trust rights to tidal waterways and their shores.” What constitutes an adverse effect or limitation on public trust rights that would prohibit development? To the extent that all development is considered to have an adverse affect or limitation of public trust rights, the proposed rules are overly broad. (120, 138)

RESPONSE TO COMMENTS 206 AND 207: The Public trust rights rule at N.J.A.C. 7:7E-8.11 provides specific standards that must be satisfied in order to protect the public’s public trust rights. As with other sections of the Coastal Zone Management rules, failure to satisfy those requirements

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will result in denial of the proposed activity. While the Department does not agree that the term adversely affect is vague or ambiguous, as failure to satisfy the specific standards contained in any section will result in denial of the proposed activity, the Department is not adopting N.J.A.C. 7:7E-8.11(c). This statement summarizing the effect of the specific standards of the Public trust rights rule is unnecessary.

208. COMMENT: Proposed N.J.A.C. 7:7E-8.11(d)2 requires that public accessways and public access areas minimize impacts to “natural areas” including impacts to “habitat value.” There is no definition of “habitat value” nor any indication of how habitat value will be determined. The proposed rules’ explanatory statement at 38 N.J.R. 4076-4077, suggests that the language allowing minimization of impacts is intended to be permissive to allow some impacts to natural areas to occur. However, there is nothing in the rules that incorporates this language, and the proposed rule has the potential to be interpreted to prohibit activities where any impacts to the natural area and tidal waterway will occur. (120, 138)

RESPONSE: Some impacts to natural resources could occur as a result of providing public access. N.J.A.C. 7:7E-8.11(d)1 requires public access along the tidal waterway and its entire shore. N.J.A.C. 7:7E-8.11(d)2 specifies design limitations where that access is provided in a natural area, and cannot be interpreted to prohibit access in natural areas.

209. COMMENT: N.J.A.C. 7:7E-8.11(a)2, (d), (d)1, (f)1, (k), (k)1 and (m), taken as a whole, impose upon private landowners, including single family homeowners, costly development projects designed to benefit the public. The rules do so without any reference to the *Matthews* factors, including the location of the privately owned upland in relation to the tidal water body; the extent and availability of publicly owned upland areas in the vicinity; the nature and extent of public demand for such facilities; and the present usage of the upland area by the private owner. In order to comply with *Matthews* and *Raleigh*, this rule must be amended to require that the Department analyze and consider each of the *Matthews* factors as a prerequisite to determining whether public

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access through privately owned upland is necessary and appropriate. Under *Matthews* and *Raleigh*, the burden is upon the Department to demonstrate that public access through privately owned upland is warranted under the *Matthews* factors. (70)

RESPONSE: The requirement for public access at coastal development has been a component of the Coastal Zone Management rules since their inception in 1978. The commenter indicates that the rule requires costly development projects designed to benefit the public at a single family home that is not part of a larger development. No such development project is required by the rule. Rather the rule requires that access along and use of the beach and shore be provided along beaches on the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and Delaware Bay or beaches where beach and dune maintenance activities are proposed. As noted in the response to Comments 24 through 26, the rule is intended to preserve and protect the common law rights under the Public Trust Doctrine. The specific rights and protections recognized under the Public Trust Doctrine continue to develop through individual court decisions. The definition of “Public Trust Doctrine” at N.J.A.C. 7:7E-1.3 recognizes this, stating “The specific rights recognized under the Public Trust Doctrine, a common law principle, continue to develop through individual court cases.” For that reason, the amended regulations do not specify a precise area of privately owned shoreline landward of the mean high water line, or a percentage thereof, that must be subject to public access and use in every case. The Department recognizes that the *Matthews* factors may be applicable to a particular piece of property and that these factors are applied on a case-by-case basis.

210. COMMENT: N.J.A.C. 7:7E-8.11(d)2 which speaks in terms of minimizing the impacts to natural areas and the tidal waterway of a public access project, is potentially inconsistent with the Wetlands Act, N.J.A.C. 13:9A-1 et seq. and the Freshwater Wetlands Protection Act N.J.S.A. 13:9B-1 et seq. Often tidal water bodies do not have clearly defined shores or banks, but rather are bounded by either freshwater or coastal wetlands. It may be that construction of a public access project may necessitate a permit under either of these Acts. It may be that under the law a permit cannot be issued for such a public access project consistent with the coastal wetlands, or freshwater wetlands, statutes and regulations. Accordingly, “minimization of impact” is not sufficient. The regulation must specify that no public access project can be constructed unless it satisfies all

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environmental regulations and statutes, including the Wetlands Act of 1970 and the Freshwater Wetlands Protection Act. (70)

RESPONSE: Compliance with this rule or any other of the Coastal Zone Management rules does not obviate the need to comply with any other State, Federal or local regulations or statutes. With respect to the construction of public accessways in freshwater wetlands, the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-5.17 contain a general permit for trails and boardwalks that meet specific criteria.

211. COMMENT: In addition to public access corridors, the beach above the mean high water line should be public for 25 to 50 feet to allow the public to walk along the beach. This is especially true in beach replenishment areas where State and Federal funds have paid for rebuilding the beach, but should also be true along any stretch of ocean beach, regardless of whether such funds were used. The amount of dry land on the beach that the public can access needs to be spelled out and no fences should be allowed to separate beaches in this public trust area. (52)

RESPONSE: Where a municipality enters into a State Aid Agreement to conduct a shore protection project with State and/or Federal funds, public access to the entire beach is required under this rule at N.J.A.C. 7:7E-8.11-(p)7i(3). This is also true for a development project other than one conducted by a municipality through a State Aid Agreement along a beach.

The rule is intended to preserve and protect the common law rights under the Public Trust Doctrine. The specific rights and protections recognized under the Public Trust Doctrine continue to develop through individual court decisions. The definition of "Public Trust Doctrine" at N.J.A.C. 7:7E-1.3 recognizes this, stating "The specific rights recognized under the Public Trust Doctrine, a common law principle, continue to develop through individual court cases." For that reason, the amended regulations do not specify a precise area of privately owned shoreline landward of the mean high water line, or a percentage thereof, that must be subject to public access and use in every case.

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212. COMMENT: The Department, through this rule will require vastly increased fishing access and fishing time opportunities with day and night fishing on a 24-hour basis. How will this increased fishing be managed and enforced? Will the Department pay the additional cost of a night shift of the New Jersey Fish and Wildlife officers to adequately protect the public trust fishing resources for future generations? How will all the increased fishing opportunities enabled by these rules impact natural areas? Will the Department pay to clean up all the trash traditionally dropped by fishermen, or will this just be another unenforced and unfunded regulatory boondoggle that will degrade our public trust resources? (2)

RESPONSE: The appropriate means to manage fisheries is through management plans for each particular species that specify the rebuilding objectives and require implementation of management measures and associated enforcement of those measures to ensure stock recovery. Fisheries management is not appropriately accomplished by limiting public access to tidal waters. The Department's experience is that the vast majority of fishermen abide by these regulations and limits, and adoption of this rule is not expected to change compliance.

213. COMMENT: N.J.A.C. 7:7E-1.8 defines the mean high water line by referring to "tidal datum that is the arithmetic mean of the high water heights observed over a specific 19-year Metonic cycle." That definition is impractical, as it cannot be determined in the field or by members of the general public. The current rules recognize that a more practical definition is required, and provide that:

for practical purposes, the mean high water line is often referred to as the "ordinary" high water line, which is typically identified in the field as the limit of wet sand or the debris line on a beach, or by a stain line on a bulkhead or piling. However, for the purpose of establishing regulatory jurisdiction pursuant to the Coastal Area Facility Review Act (CAFRA) and the Waterfront Development Act, the surveyed mean high water elevation will be utilized. *Id.* For purposes of defining parallel access rights along the shore in the upland area tidally-flowed lands, the Department should change the definition of "mean high water line" to include the practical field usage. In defining ancillary public trust rights in adjacent upland areas, the

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Department has some leeway to determine how far upland to extend parallel access. Nor is such precision required for CAFRA jurisdiction either by statute or as a practical matter, because it is without question that the areas discussed are above water and within CAFRA jurisdiction. The Department should build in a margin of error by starting the public access area at the wrack line, which is readily apparent to beachgoers and property owners alike. Use of the tidal datum line as the starting point will only mire the Department in many small disputes about the location of the public access areas and will tie up the agency's technical GIS resources. Moreover, use of the tidal datum point will in many cases fail to provide for sufficient parallel access, as the average is, by definition, under water for significant periods of time. (154)

RESPONSE: Although the definition of mean high water line may be difficult to understand and determine by the general public, it is the term used to establish jurisdiction under both CAFRA and the Waterfront Development Law, and can be consistently reproduced by survey. In contrast, the wrack line changes with water conditions, such as waves, tides and storms. Utilizing the adopted definition, conservation restrictions established under this rule will clearly identify the location of public access areas.

214. COMMENT: N.J.A.C. 7:7E-8.11(d)1 provides that coastal development provide "a linear area along the tidal waterways and its entire shore." The generality of this statement will create more disputes than it resolves, and is no better than the case-by-case adjudication available now. The Department should amend this section to provide for a certain, minimum width of access rights. For example, N.J.A.C. 7:7E-8.11(e) requires a strip of land for parallel access to public trust lands of between 10 and 16 feet. That range is patently insufficient for the exercise of public trust rights along certain developed waterways. In *Matthews*, supra, and *Avon*, supra, the Court forced the entire beach open for the public. In *Deal*, the Court imposed public trust rights on private land that was located more than 50 feet from the water. *Deal*, 78 N.J. at 176, 180. And in *Nat'l Ass'n of Home Builders v. New Jersey Dep't of Env'tl. Protection*, 64 F. Supp.2d 354, 359-60 (D.N.J. 1999), a Federal court held that a 30-foot wide public walkway was reasonably necessary to protect the public's right to access tidelands and was fully justified under New Jersey's public trust doctrine.

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Ten feet is barely wide enough to spread out a beach blanket or a long surf-board, and is certainly insufficient to accommodate the back-cast from a surf-fishing rod. At high tide, a 10-foot strip would be completely inundated. These effects will certainly be worse with global warming, which will erode the coast. Accordingly, the Department should amend the rules to clarify that it has the ability to increase the width of parallel access if it becomes necessary for the full enjoyment of public trust rights. In addition, the default rule should be at least 30 feet wide. (154)

RESPONSE: The standards at N.J.A.C. 7:7E-8.11(e) pertain to the development on the specified waterways only. The requirement is for a 16-foot unobstructed walkway parallel to the shore with a 30-foot easement. This is the same as the standard for the Hudson River Waterfront Walkway which is a very successful, highly utilized public access walkway. The 10-foot standard applies to perpendicular access to these waterways, not parallel access. The rule does not specify the width of public access along tidal waterways and their shores for all waterways. However, where a development is on a beach or State or Federal funds are used, the entire beach at the site will be open to the public.

215. COMMENT: N.J.A.C. 7:7E-8.11(d)1 requires that development on or adjacent to all tidal waterways and their shores provide perpendicular access and a linear area along the tidal waterway and its entire shore. Providing access along a tidal waterway's entire shore may not be practical for NJ Department of Transportation's public roadway projects. A roadway project may occur near a tidal waterway, but the waterway could extend well beyond the project area and through several municipalities and/or counties. Further clarification on this requirement as it relates to public roadway projects is needed. (59)

RESPONSE: The standards at (d) require permanent, unobstructed public access to a tidal waterway and its shore on-site. A road project would be required to provide public access at or in the vicinity of the project site, such as at a bridge crossing a tidal waterway. The concurrent proposal published elsewhere in this issue of the New Jersey Register, includes an amendment to

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N.J.A.C. 7:7E-8.11(f)3 that would allow for the modification of the perpendicular accessway along a tidal waterway along superhighways.

216. COMMENT: The commenter is concerned with the requirements of the rules on an existing condominium development as it is located directly on the bay with some units within eight feet from the existing bulkhead. Because of the proximity of the homes to the waterfront, it would be impossible to provide or supervise public access particularly with respect to children around the bulkheads. The proposed rules which purport to grant unfettered access to the waterfront would completely eliminated the association's ability to provide safe access and supervision. Further, because of the unique nature of the property, public access would lead to vandalism, nuisance and expense as a result of the misuse of the waterfront area. Moreover, the value of the marina associated with the condominium development will decrease should the rules be adopted. This is an unnecessary taking of substantial private homeowner value. (4)

RESPONSE: The State of New Jersey is the trustee of public rights to the State's natural resources, including tidal waterways and their shores. Accordingly, it is the duty of the State to protect the public's right of use and to ensure that there is access to these resources. Requiring public access to and use of the shores of tidal waterways is not an unconstitutional taking of property since these public rights are background principles of New Jersey State law. See *National Association of Home Builders v. State of New Jersey, Department of Environmental Protection*, 64 F.Supp.2d 354, 358-359 (D.N.J. 1999)(upholding Hudson Riverfront Walkway rule as a valid exercise of the police power to safeguard public trust rights, as these rights of use and enjoyment cannot be extinguished even with conveyance of title to these tidal waterfront areas). See also, e.g., *Adirondack League Club, Inc. v. Sierra Club*, 92 N.Y.2d 591, 604, 706 N.E.2d 1192, 1196, 684 N.Y.S.2d 168, 171 (N.Y. Court of Appeals 1998)("Having never owned the easement, riparian owners cannot complain that this rule works a taking for public use without compensation."); *Coastal Petroleum v Chiles*, 701 So.2d 619 (Fla. Dist. Ct. App. 1997); *Public Access Shoreline Hawaii. v. Hawaii County Planning Comm'n*, 903 P.2d 1246 (Haw 2006); Michael C. Blumm and Lucas Ritchie, Article, "Lucas'

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Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses," 29 HARV. ENVTL. L. REV. 321 (2005).

217. COMMENT: As proposed, the Public Trust Rights rule provides three different sets of public access requirements; one for development, another for shore protection and beach nourishment projects and a third for Green Acres projects. With respect to the shore protection and beach nourishment projects, the Public Trust Rights rule requires at N.J.A.C. 7:7E-8.11(p)(3) that public access to all tidal waterways and their shores on or adjacent to lands held by the municipality be provided "prior to the commencement of construction". In addition, N.J.A.C. 7:7E-8.11(p)(7)(ii) requires that "immediately upon completion of construction" the municipality provide public accessways to the project and to all beaches within the municipality along the waterway on which the project occurs. Similarly, for Green Acres projects, the rule at N.J.A.C. 7:7E-8.11(q)(7) requires that "immediately upon disbursement of Green Acres funding," the recipient provide public access along the tidal waterway and its entire shore at the Green Acres project site. At the same time, in accordance with N.J.A.C. 7:7E-8.11(q)(8), the recipient must also provide at least one accessway to the tidal waterway, its shore and the project site across land held by the recipient, with additional accessways to be provided as necessary given the size, location and proposed use of the site. However, for development projects, meaning all projects to which this rule would apply other than shore protection/beach nourishment or Green Acres projects, the proposed rule is silent as to when the access and accessways must be provided. For example, the proposed rule at N.J.A.C. 7:7E-8.11(d) states that "development on or adjacent to all tidal waterways and their shores shall provide on-site, permanent, unobstructed public access to the tidal waterway and its shores at all times, including both physical and visual access." The proposed rule further states that the public accessways must include perpendicular access and a linear area along the tidal waterway and its entire shore. Neither of these provisions makes any mention of when this requirement must be met.

The proposed changes to the Coastal Permit Program Rules and Coastal Zone Management Rules that reference the proposed public access rules provide no further clarity on this issue. Although those proposed changes require a permit applicant to identify on its site plan and/or in a compliance statement all existing and proposed public access areas and public accessways to

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demonstrate how the applicant intends to comply with both the Lands and Waters Subject to Public Trust Rights and the Public Trust Rights Rules, again, there is no mention of when the applicant must actually provide the public access areas and accessways identified in the plans.

Based on past experience with this very situation, it is extremely important for the Department to require coastal permit applicants to provide the public access areas and accessways prior to the commencement of project construction. Over the past several decades, numerous development projects along the Atlantic Ocean and the Hudson River Waterfront Area were permitted based on the promise of public access. Although these projects have been constructed and occupied, the public access components have never materialized. Instead, it has been left to citizens and public interest groups to utilize their own limited resources in attempts to enforce these project requirements through litigation on a case-by-case basis. It is acknowledged that the proposed public access rules at N.J.A.C. 7:7E-8A.4, require a development permit applicant to record a public access instrument detailing the public access areas and accessways on a project site and to submit proof of the proper recording of the instrument to the Department “prior to commencement of site preparation or construction, or permit effectiveness.” However, while this provides a stronger mechanism for parties to attempt to enforce the public access aspects of a project in the event the permittee does not comply, this does not ensure that the public access will actually be constructed without resorting to litigation, the very circumstance the proposed Public Access Rules should expressly avoid. Accordingly, the language of proposed N.J.A.C. 7:7E-8.11(d) should be amended to include a new subparagraph 3 that states:

Subsection (p) below contains additional public accessway and public access area requirements for municipalities that participate in Shore Protection Program funding. Subsection (q) below contains additional public accessway and public access area requirements for municipalities, counties and nonprofits that receive Green Acres funding. All other development shall provide the public accessways and public access areas prior to the commencement of project construction. (80)

**RESPONSE:** The Department acknowledges that there is concern regarding implementation of the public accessways required for development. This concern is a major reason behind the rule

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amendments at N.J.A.C. 7:7E-8A. 4 noted by the commenter, requiring proof that a conservation restriction has been recorded prior to commencement of site preparation or construction, or permit effectiveness. In addition, the Department has modified its permit tracking database to identify coastal permits with public access conditions to aid in enforcement of public access permit conditions. Due to the activities associated with construction at a development site, the Department does not typically require that public accessways and access areas be provided prior to project construction. The Department believes the adopted amendments in conjunction with the database will adequately address this concern

218. COMMENT: N.J.A.C. 7:7E-8.11(e) requires that development adjacent to all tidal waterways and their shores shall provide on-site, permanent, unobstructed public access to the waterway and its shores at all times, including both visual and physical access. Through cross-references in other sections of the rules, this requirement would apply to coastal general permits for the construction or reconstruction of single family homes, bulkheads and other shore protection structures at single family homes and other small-scale residential development along the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and Delaware Bay. Thus, someone constructing or enlarging an existing single family oceanfront home would be required to provide on site access, regardless of the proximity to public beaches or public access points, even if it were located immediately adjacent to an existing public access point. This contravenes the mandate for case-by-case circumstance-specific determinations mandated by *Raleigh* and *Matthews*. (138)

RESPONSE: The rule does not require perpendicular accessways across a property to the water at individual single family homes in accordance with N.J.A.C. 7:7E-8.11(f) 6 and 7. Rather the rule requires access along a beach located on the Atlantic Ocean, Sandy Hook Bay, Raritan Bay, and Delaware Bay, or where beach and dune maintenance activities are proposed. This is warranted due to the extent of public access demand along these waterways and to uphold the Public Trust Doctrine. The New Jersey Supreme Court in *Matthews* held “Beaches are a unique resource and are irreplaceable. The public demand for beaches has increased with the growth of population and

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improvement of transportation facilities.” 95 N.J. 306, 323 (1984). The Department recognizes that the *Matthews* factors may be applicable to a particular piece of property and that these factors are applied on a case-by-case basis.

219. COMMENT: The commenter stated that he supports the requirements of N.J.A.C. 7:7E-8.11(e). (170)

RESPONSE: The Department acknowledges this comment in support of the rule.

220. COMMENT: The State should work with municipalities to create a greenway along the coast of the Arthur Kill before the housing market begins to rise again and available properties are converted to residential developments. (170)

RESPONSE: Due to its past industrial utilization and long history of development, developed waterfronts such as the Arthur Kill have been largely closed to the public, limiting the public’s ability to exercise their public trust rights. The Department’s goal through the requirements imposed upon Green Acres and Shore Protection Program funding as well as developments along tidal waterways is to assemble a system through acquisitions and easements, that will provide continuous linkages and access along the waterfront, enabling the State to adhere to its responsibilities of safeguarding the public’s right of access to and use of tidal waterways and their shores in New Jersey.

221. COMMENT: When access to the Hudson River Waterfront Area and for sites along the Arthur Kill, Kill Van Kull \west of Bayonne Bridge, Newark Bay, Delaware River from the Trenton Makes Bridge to the CAFRA boundary, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, Cohansey River in Bridgeton City, and Maurice River in Millville City is

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required pursuant to N.J.A.C. 7:7E-8.11(d) and (e), the Department should ensure that access to redeveloped brownfield sites, greenfield sites and remediated sites is provided as well. (101)

RESPONSE: Where the above cited rivers have brownfield sites, greenfield sites and remediated sites, the specific public accessway requirements at N.J.A.C. 7:7E-8.11(e) will apply. On waterways other than those cited above, public access will be required, but the specifics of such access will be determined on a case-by-case basis.

222. COMMENT: N.J.A.C. 7:7E-8.11(e)1i addresses the additional linear and perpendicular access requirements for specific major waterways. The rule requires that the minimum width of a walkway for linear access be 16 feet. An allowance should be made for applicants who are trying to comply with the public pedestrian access exemption in the Stormwater Management rules, N.J.A.C. 7:8-5.2(d)3, which allows for a maximum sidewalk width of 14 feet provided that permeable material is used. In addition, an exception should be added to N.J.A.C. 7:7E-8.11(e)3, which discusses other circumstances where the Department could reduce the walkway width requirements. (59)

RESPONSE: The Stormwater Management rules, N.J.A.C. 7:8-1 et seq. apply only when a proposed project is classified as a major development, wherein the proposed land disturbance will be 1 acre or more or the proposed increase in impervious coverage will be one-quarter acre or more. N.J.A.C. 7:8-5.2(d)3 specifically exempts certain linear development projects, including public pedestrian accessways that are no wider than 14 feet, provided that the accessway is made of permeable materials. If a project is classified as a major development, but does not qualify for this exemption, then the standards of N.J.A.C. 7:8 must be addressed. However, with respect to walkways restricted to pedestrian and bicycle traffic, the Department would consider the runoff clean and would not require implementation of water quality best management practices. This is consistent with Frequently Asked Question 7.5 as found on [www.njstormwater.org](http://www.njstormwater.org), which is a website established by the Department for clarification of N.J.A.C. 7:8. With regards to water

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quantity, in accordance with N.J.A.C. 7:8-5.4(a)3iv, where the walkway is located along a tidal waterway, water quantity controls are not required where it can be shown that the increase in runoff volume will not cause an increase in off-site flood damages. In many tidal areas, there may be a high groundwater table. If recharging runoff would cause an adverse impact on the groundwater table, then N.J.A.C. 7:8-5.4(a)2iv would not allow for recharge. Where the walkway is located adjacent to a watercourse controlled by fluvial flooding, water quantity and recharge best management practices would be required in accordance with N.J.A.C. 7:8-5.4. In such a case, provision of an infiltration trench adjacent to the walkway could satisfy the low impact requirement. Based on the above, the Department has determined that the 16-foot wide walkway requirement is appropriate

223. COMMENT: The requirements for a linear 30-foot wide walkway area with a 16-foot wide walkway and a 20-foot wide perpendicular access area with a 10-foot wide walkway contravenes the requirement for a case-by-case, circumstance-specific determinations mandated by *Raleigh* and *Matthews*. The Department limits its ability to reduce the walkway width requirements to those instances necessary to protect endangered or threatened wildlife or vegetation species habitat, critical habitat, natural areas or existing infrastructure. While the Department should have the discretion to reduce walkway width requirements, reduction should also be allowed as necessary to protect and promote public health, safety and welfare, and as is necessary consistent with the mandate under *Raleigh* and *Matthews* for a case-by-case, circumstance-specific determination.  
(120)

RESPONSE: The Department recognizes that existing industrial properties with developed waterfronts, as well as energy facilities and port uses, may present situations that warrant modification of the public access requirements. Therefore, N.J.A.C. 7:7E-8.11(f)3 provides that the Department may modify the public access requirements where it determines that the risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions make it impracticable to provide perpendicular access and a linear area along the entire shore and that there are no measures that can be taken to avert the situation. In such cases, the Department

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will instead require alternate public access either on site or at a nearby location. The concurrent proposal published elsewhere in this issue of the New Jersey Register would allow modification of linear access at marinas in areas where heavy boat handling equipment is used.

As noted in the response to comments 19, the rule is intended to preserve and protect the common law rights under the Public Trust Doctrine. The specific rights and protections recognized under the Public Trust Doctrine continue to develop through individual court decisions. The definition of “Public Trust Doctrine” at N.J.A.C. 7:7E-1.3 recognizes this, stating “The specific rights recognized under the Public Trust Doctrine, a common law principle, continue to develop through individual court cases.” For that reason, the amended regulations do not specify a precise area of privately owned shoreline landward of the mean high water line, or a percentage thereof, that must be subject to public access and use in every case. The Department recognizes that the *Matthews* factors may be applicable to a particular piece of property and that these factors are applied on a case-by-case basis. The court upheld regulations specifying walkway dimensions along entire Hudson River waterfront in *National Ass'n of Homebuilders v. State, Dept. of Env't'l Protect.*, 64 F. Supp. 2d. 354 (D.N.J. 1999).

224. COMMENT: The rules require that public access be available at all times, which presumably means 24 hours per day 365 days per year. This is unreasonable, is not required by existing regulation, and is not required by any of the Supreme Court cases set forth in the basis and background of the rulemaking proposal. Especially where public access is in close proximity to residential development, for security purposes overnight access is unnecessary and inappropriate; no resident should be subjected to intruders during evening or early morning hours. Access from dawn to dusk should be sufficient. Only in rare exceptions should 24 hour access be required. While the proposed regulation purports to provide for exceptions to the “available at all times” provision, its attempt to do so is vague. The proposal specifies that public access may be denied by the Department “during specified late night hours upon documentation of unique circumstances...” There is no indication what the phrase “unique circumstances” means and therefore there is no assurance that the regulations will be applied in a reasonable manner. (70)

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RESPONSE: The Public Trust Doctrine provides that the public has the right to utilize tidal waterways and their shores for activities such as fishing and walking, regardless of the time. The Hudson River Waterfront Area rule at N.J.A.C. 7:7E-3.48(e)1 requires that public access to and along the main route of the Hudson River Waterfront walkway be provided on a 24-hour basis. This walkway, which is located adjacent to residential developments, is extremely successful and well utilized. Further, it is the current practice of the Division of Land Use Regulation that where public access is required, it be provided on a 24-hour basis, with limited exceptions as provided at N.J.A.C. 7:7E-8.11(f). For example, a unique circumstance that may warrant closure during late night hours is documented evidence of a high rate of violent crime in a specific waterfront area. This is appropriate to assure public trust rights are protected.

225. COMMENT: Ports are a water-dependent use. They are created to serve a public purpose; thus their unique status in statute and regulation. The United States Congress recognized this when it drafted the bi-state compact creating the port district of New York, specifically identifying the public purpose of encouraging and supporting the maritime commerce of both states as in the public interest. Since September 11, 2001, protecting the public from terror attacks has also become one of the Port's most important duties under Federal Law. No one is allowed unescorted on port facilities, no matter where they are located, without required background checks and other special clearances. These twin duties, by necessity and statute, preclude general access by the public to port facilities. (45, 102)

RESPONSE: New Jersey's port areas are a regional, national and international resource. The Department recognizes the importance of ports to the economy of the State. The public access rule has always applied to ports and the Port use rule at N.J.A.C. 7:7E-7.9(d) requires that new or expanded ports provide public access. The Port use rule recognizes the value of the waterfront to the public, and requires port facilities to provide for the maximum public visual and physical access to the waterfront consistent with safety and security concerns. The Department recognizes the nature of port operations and therefore, N.J.A.C. 7:7E-8.11(f)3 allows the Department to modify the

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perpendicular and linear public access requirements at port facilities where it has determined that, based on hazardous operations of the facility or the presence of substantial structures, it is impracticable for such public access to be provided, and that there are no measures that can be taken to avert such risks. In addition, where exigent circumstances of public safety or security occur, the Department may allow temporary restrictions of public access in accordance with N.J.A.C. 7:7E-8.11(f)2. The Department believes that these provisions provide it flexibility to address the unique nature of port facilities. However, if a circumstance should arise not covered by the adopted exceptions, the Department is proposing elsewhere in this issue of the New Jersey Register, a specific exemption to address homeland security concerns.

226. COMMENT: The Federal nuclear siting law (subpart B 10 C.F.R. 100 and 10 C.F.R. 52.17) preempts State Law, including the Public Trust Doctrine. It is clear that facilities such as nuclear power plants cannot provide access at or near their facilities due to security concerns. Therefore, the state is exacting an unauthorized payment for access at an off-site location. However, in the case of nuclear power plants, it is not clear whether that authority is legally permissible given that Federal law preempts State law and the Public Trust Doctrine does not apply. In other words, the State would be exacting a payment in lieu of providing access on-site, even though the State's authority does not apply. Clarification and refinement of the State's authority to require public access in this situation should be provided. (16)

RESPONSE: Facilities such as nuclear power plants that require a Federal permit, license or other regulatory approval are subject to the Federal Consistency provisions of the Federal Coastal Zone Management Act (CZMA)(16 U.S.C. 1456). Federal Consistency is the Federal CZMA requirement that Federal actions, such as the issuance of a Federal permit, license or other regulatory approval, that have reasonably foreseeable effects on any land or water use or natural resource of the coastal zone, must be consistent with the enforceable policies of a coastal state's Federally approved Coastal Management Program. The U.S. Nuclear Regulatory Commission's Office of Nuclear Reactor Regulations prepared the guidance document "Procedural Guidance for

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Preparing Environmental Assessments and Considering Environmental Issues,” May 24, 2004.

This document provides the format for a Coastal Zone Consistency Certification and describes the governing statutory and regulatory requirements. The Coastal Zone Management rules are among the enforceable policies used by the State to determine consistency with New Jersey’s Federally approved Coastal Management Program. All enforceable policies must be approved by NOAA for incorporation into a State’s Coastal Management Program.

Although public access would not be required in certain portions of nuclear facilities, public access is not precluded in the vicinity of the nuclear power plant. For example, there is public access, commonly used for fishing, at the Route 9 Bridge over Oyster Creek, where Route 9 bisects the site of the Oyster Creek generating station in Lacey Township, Ocean County. As part of the renewal of the operating license for this facility, the Department held discussions with the operator of the facility concerning the provision of public open space and provision of access to Oyster Creek, the tidal waterway on which the facility is located. In the concurrent proposal published elsewhere in this issue of the New Jersey Register, the Department is proposing amendments to N.J.A.C. 7:7E-8.11(f) that specifically address homeland security, as described in the response to Comments 227 and 228.

227. COMMENT: The provisions at N.J.A.C. 7:7E-8.11(f)3 governing industrial use do not recognize or address the significant security issues associated with providing public access to these and other sensitive facilities that are part of New Jersey’s “critical infrastructure.” Guidelines and best practices recently developed by the Department and the New Jersey Office of Homeland Security and Preparedness for chemical facilities and similar critical infrastructure mandate strict physical security systems to protect the public and the power generating assets from terrorist attack or other hazards. These guidelines and best practices absolutely prohibit public entry onto these sites, as well as the congregating of the public in areas proximate to these sites. These facilities are also subject to strict federal requirements for physical security imposed by the Department of Homeland Security. Electric generating stations are subject to similar Federal regulations. Accordingly, those facilities could not comply with these requirements in the event a facility

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applied for a permit to conduct a regulated activity, including something as insignificant as the replacement of an existing bulkhead.

The proposed rules fail to acknowledge these significant legal limitations on those companies' ability to satisfy the requirements of the proposed rule. References in the proposal to hazards to the public and physical obstructions that cannot be removed do not address the legal limitations imposed on physical site security, which are neither safety hazards nor obstructions, but restrictions that legally prevent satisfaction of the rule. The proposed rules should be revised to categorically exempt from public access requirements those sites, such as chemical facilities and other critical infrastructure. (45, 131, 149,150)

228. COMMENT: Homeland Security issues should be included at N.J.A.C. 7:7E-8.11(f) as instances where public access may be temporarily or permanently denied, for example, public access under a bridge. N.J.A.C. 7:7E-8.11(i) and (m)6 prohibit activities that have the effect of discouraging or preventing public access. However, there may be circumstances due to Homeland Security concerns where an exception may be warranted. The rule rationale at N.J.A.C. 7:7E-8.11(r) states that linear walkways may detour around existing or proposed industry due to risk of injury from existing or proposed hazardous operations or substantial existing and permanent obstructions. The commenter suggests that a detour for the purposes of Homeland Security be included. (59)

RESPONSE TO COMMENTS 227 AND 228: N.J.A.C 7:7E-8.11(f)2 allows the Department to restrict public access where exigent circumstances of public safety or security exist. For example, the Department may allow closure of Liberty State Park during visits of heads of state. In the concurrent proposal published elsewhere in this issue of the New Jersey Register, the Department is proposing amendments to N.J.A.C. 7:7E-8.11(f) that would further address homeland security. Specifically, the Department would address situations where development that would impact a facility subject to a Federal or State homeland security statutory scheme is proposed and the Department determines, upon consultation with the Office of Homeland Security and Preparedness,

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that perpendicular access and/or a linear area along the entire shore of the tidal waterway is not practicable because it poses an unacceptable homeland security risk. The Maritime Transportation Security Act of 2002 (46 U.S.C. 701 et seq.), Section 550 of the Homeland Security Appropriations Act of 2007 (the Chemical Facility Anti-Terrorism Standards) (P.L. 109-295 (2006)), and the New Jersey Domestic Security Preparedness Act (N.J.S.A. App. A:9-64 et seq. all set forth such homeland security statutory schemes. In such a case, the required linear and/or perpendicular public access could be reconfigured and enhanced on-site, or, where that is not practicable, alternate public access of comparable use to the public must be provided at a nearby off-site location.

229. COMMENT: The Department of the Public Advocate is the civil liberties ombudsman for homeland security issues pursuant to Governor Corzine's March 16, 2006 Executive Order #5. As such, the Department of the Public Advocate has the responsibility to comment on the interaction between the defense of both New Jersey's homeland security and civil liberties. There is no inherent incompatibility between these important principles; in fact, attention to civil liberties can assist in a clearer focus upon actual security concerns. Security concerns have been used at times as an excuse to exclude the public from waterfront areas, where it was unclear whether there had been a sufficient effort to analyze and address the purported source of insecurity. If there is a real security concern in a particular area, it should be addressed substantively. The owner and operator of the facility or other property, working with local, State and, if necessary, Federal authorities, should plan and implement measures to secure the area from that actual risk. This may involve police patrols, security cameras, lighting, constructing walls, or moving, removing or replacing materials or activities that present an unusual risk of significant harm to the public. Closing streets, public walkways or waterfront areas should be at most a last resort in response to an actual crime or other security concern. In fact, research has shown that busy, well-designed areas are more secure than areas devoid of pedestrian traffic, especially after dark. See e.g., American Planning Association, *Safe-Scape: Creating Safer, More Livable Communities Through Planning and Design* (2001); Henry G. Cinsneros, *Defensible Space: Deterring Crime and Building Community*, United States Department of Housing and Urban Development (1995). Owners and operators of property and facilities, and law enforcement officials, should coordinate a plan to mitigate the security threat that impinges on the rights of the public only as a last resort. (25)

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RESPONSE: The Department agrees that closure of public access should be a last resort. It is the responsibility of the Department, based on circumstances presented, including information provided by the property owner, to determine when closure is allowed. Accordingly, the rule at N.J.A.C. 7:7E-8.11(f)1 limits closure to late night hours and unique circumstances. N.J.A.C. 7:7E-8.11(f)2 requires closure to terminate immediately when exigent circumstances of public safety or security cease; and N.J.A.C. 7:7E-8.11(f)3 allows closure only where no measures can be taken to avert the risks.

230. COMMENT: The proposed changes to allow for public access to tidally influenced waterways are in direct conflict with provisions of the Maritime Security Program, 33 CFR 105.255. While the Department's responsibility to act as the public's agent in regards to lands and waterways in the public trust is appreciated, the rule needs to recognize conflicting requirements that may prevent current and future public access that are in the best interests of the public. A provision to exempt energy/industrial facilities subject to the Maritime Security Program from this requirement should be added.

The Maritime Security Program as established by the Department of Homeland Security applies to facilities that handle hazardous chemicals, receive foreign and US cargo vessels and/or receive large passenger vessels. Facilities subject to the Maritime Security Program are required to implement security measures to: deter the unauthorized introduction of dangerous substances and devices; and control access to the facility (see 33 CFR 105.255(a)). To satisfy these requirements, facilities develop Facility Security Plans that specify: the types and locations of access restrictions or prohibitions implemented; and the means of personal and vehicular identifications required to access the facility, including the locations of designated areas to screen persons, baggage, personal effects, and vehicles for dangerous substances and devices. The Facility Security Plans are reviewed and approved by the United State Coast Guard. Further, if the facility's Maritime Security Level is raised, additional security measures are implemented, including, but not limited to, closing and securing certain access points, providing physical barriers to impede movement through open access points and deterring waterside facility access by using waterborne patrols (33 CFR

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105.255(f)). Additionally, the Maritime Security Program requires that all persons entering regulated facilities must present government issued photo identification. These security requirements are subject to agency approval, recognizing that public safety and security supercede recreational privileges afforded by public access rights.

The Department should amend the rules to exempt facilities regulated under the Maritime Security Program and similar Homeland Security rules and requirement programs from the public trust and access provisions of these regulations. (45, 100)

RESPONSE: In the concurrent proposal published elsewhere in this issue of the New Jersey Register, the Department is proposing amendments to N.J.A.C. 7:7E-8.11(f) that address homeland security. The proposed amendments are described in the response to Comments 227 and 228. The Maritime Transportation Security Act (46 U.S.C. 70 et seq.) is one of the Federal homeland security statutes which the proposed amendments would encompass.

231. COMMENT: This rule attempts to codify the Public Trust Doctrine, and incorporate it into the Coastal Zone Management rules. As it pertains to industrial facilities, manufacturing facilities, chemical plants, refineries and utilities located along tidal waters, it appears that for most of these facilities, public access to tidal waters is not feasible. Many of these facilities fall under the State Toxic Catastrophe Prevention Act (TCPA), or the Federal Homeland Security Act and cannot provide access to their property at or near the facility due to security concerns. Therefore, the rules provide no other alternative but to exact an unauthorized payment for the cost of providing access at an off-site location. (16)

RESPONSE: The Department recognizes that there are safety considerations along tidal waterways at industrial and port facilities. However, this does not relinquish public trust rights nor does it obviate the property owner from providing access. In order to accommodate the safety and security needs identified by the commenter, the Department allows alternate off-site access. The rules do not exact an unauthorized payment because the lands are impressed with public trust rights. See *National Ass'n of Homebuilders v. State, Dept. of Env't'l Protect.*, 64 F. Supp. 2d. 354 (D.N.J. 1999) (rejecting takings challenge to public access regulation). The concurrent proposal published

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elsewhere in this issue of the New Jersey Register, described in response to comments 227 and 228 would further address homeland security.

232. COMMENT: Marina patrons pay for storage and security of their investment. How does a marina owner accomplish this if anyone could be on the grounds at anytime? Security in this time of heightened alert would be compromised. The local police and Homeland Security office have contacted marina owners and asked them to keep a vigilant watch for suspicious activity and supply information on “suspicious activity around any waterfront facility and/or loitering without any apparent reason.” How can the Department demand marina owners provide public access on a 24-hour basis and be vigilant in Homeland Security? (55, 9)

RESPONSE: The rule at N.J.A.C. 7:7E-8.11(f)2i does provide the Department with the ability to allow, require or impose temporary restrictions to public access, including closure of an area otherwise subject to public access, where exigent circumstances of public safety or security exist.

233. COMMENT: The exception for energy facilities, industrial uses, port uses, airports, railroads and military facilities at N.J.A.C. 7:7E-8.11(f)3 will negate important public trust rights. Therefore, consideration of its application to a project or facility should undergo serious scrutiny. Accordingly, the Department should amend the proposed rule to require that, any time it determines that this exception is or may be applicable to one of the proposed uses or facilities, a public hearing is held before a final decision is made. The amended rule should also require that, prior to the public hearing, the public has had access to and an opportunity to review a written summary stating the basis for the determination that public access is not practicable based on the risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions, as well as the basis for the determination that no measures can be taken to avert these risks. The summary should also detail the proposed equivalent public access on site or, if applicable, the basis for the determination that equivalent on-site public access is not practicable and a description of the proposed equivalent off-site public access. (80)

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234. COMMENT: Public hearings should be required any time a proposal is made to limit public access or public parking near a public trust area. (52)

RESPONSE COMMENTS 233 AND 234: In accordance with the Coastal Permit Program rules, applications for coastal permits are required to demonstrate compliance with the Coastal Zone Management rules. Specifically, the Coastal Permit Program rules at N.J.A.C. 7:7-6 require the submission of an Environmental Impact Statement (EIS) or Compliance Statement with an application that must include a detailed statement of compliance with the Coastal Zone Management rules. Where an applicant seeks to modify permanent on-site public access in accordance with N.J.A.C. 7:7E-8.11(f)3, the EIS or Compliance Statement would explain how the proposed development would meet the standards for such modification, including a description of the proposed equivalent public access. The complete application, including the EIS or Compliance Statement, is available for public review at the municipal clerk's office and at the Department.

The Department is not requiring a public hearing for each application requesting a modification of the public access requirements pursuant to N.J.A.C. 7:7E-8.11(f)3. However, in accordance with N.J.A.C. 7:7-4.5(a), the Department may at its discretion, hold a fact-finding public hearing on a coastal permit application when the Department determines that, based on public comment or a review of the project, its scope and environmental impact, additional information is necessary to assist in its review or evaluate potential impacts and that this information can only be obtained by providing an opportunity for a public hearing. The Department believes this will assure public input is provided through the option of hearings in appropriate cases.

235. COMMENT: The proposed new rules do not adequately account for the health and safety of the public and the economic impact to existing energy facilities located along tidal water bodies in New Jersey. For years, these facilities have been operated within the confines of existing coastal regulations with no provisions for pre-planning public accessways. Generally, these facilities go to great length to keep the public away from the sites because of the dangers exposed by the types of operations occurring at the sites, the hazardous materials that are routinely a part of operations, and

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the potential impacts a security breach may have on the operations and safety of the facility.

Without prior consideration for public access, most, if not all, of these operating facilities lack the adequate space and safety provisions to provide for public access as prescribed in the proposed rules.

If facilities were static, with minimal need for improvements, the proposed rules would rarely have an impact. However, given the dynamic nature of the facilities and the need to make improvements for safety, maintenance, and compliance with other air and solid waste regulations, improvements to energy producing facilities routinely occur. Because there are virtually no de minimus quantities that exempt projects from upland waterfront development regulations, any improvement regardless of the size, based on the regulations as written, will trigger requirements for public access. Retrofitting a facility to provide for public access, per the new requirements will be disproportionately costly and potentially affect the safety and security of the existing facility. While a new facility may be able to pre-plan for public access in a means that would ensure access in a safe manner, new facilities are burdened by existing infrastructure that may be disproportionately costly, if not physically impossible, to relocate.

The Department offers off-site public access as an alternative to providing on-site when it is neither physically possible nor practical to provide such access. Given the real estate cost of waterfront property in New Jersey, the purchase of such property will result in a disproportionate cost to facilities looking to make minor improvements that is trigger coastal permits to their operations.

The requirements at N.J.A.C. 7:7E-8.11(f)3i and ii to provide equivalent public access on-site or off-site where it is not feasible to provide access to the waterfront on the subject property is an unlawful requirement that may be an ultra vires act by the Department. Requiring public access which is not waterfront access does not further the proposed intent of the rules nor does it further the Public Trust Doctrine. Accordingly, this section should be deleted from the rule.

The Appellate Division has recently held that the Municipal Land Use Law, N.J.S.A. 40:55-1 et seq. “does not obligate a developer to acquire non-owned property needed for off-site improvement.” *Id.* at 433 (incomplete citation supplied). The court explained that a private developer does not have the power of condemnation and for a private developer to have to acquire

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private property would be unreasonable and unenforceable. Id. The same logic would apply to these proposed rules. The Department does not have the authority to require the purchase of property from third parties and waterfront landowners may not have the power to condemn property should the property owner not want to sell.

Therefore, N.J.A.C. 7:7E-8.11(f)3 should be deleted in its entirety and replaced with the following:

“N.J.A.C. 7:7E-8.11(f) Permanent on-site access required at (d) and (e) above shall not be required at energy facilities, industrial uses, port use, airport, railroad or military facilities because such proposed access is not feasible based on the risk of injury from existing or proposed hazardous operations. However, failure to require access at these sites does not constitute a permanent relinquishment of public trust rights of access.” (99)

236. COMMENT: The Department does not clarify what it means by equivalent public access either on-site or off-site. (45, 100)

RESPONSE TO COMMENTS 235 AND 236: The Public Trust Doctrine establishes the right of the public to fully utilize tidal waterways and their shores. The Department acknowledges that there may be risks of injury at energy facilities, and the presence of existing permanent structures that warrant modification of on-site public access. As noted in the summary at 38 N.J.R. 4577, equivalent public access could take different forms such as an observation area along the waterfront, a public fishing pier or small boat/canoe launch along a tidal waterway, creation of new public parking spaces at another access point, or recreational enhancements (seating areas, lighting, trash receptacles, interpretive signs, access ramps or stairways, etc.) at existing public access areas. As these examples demonstrate, equivalent public access does not necessarily mean that the alternative public access is equal in waterfront length to that for which it is being substituted, nor does it necessarily require the acquisition of additional property. Rather, this standard was intended to require the provision of public access to tidal waterways and their shores that is equally meaningful to the public. Therefore, the Department is clarifying the rule language on adoption to provide that, in situations where there is a risk of injury or where existing permanent structures are present that warrant modification of the required on-site access, the on-site access may be reconfigured and

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enhanced to accommodate such structures and address such risks. Moreover, the Department is replacing the word “equivalent” with the word “alternate” to better reflect the requirement for situations where on-site public access is not practicable and alternate public access of comparable use to the public is required at a nearby off-site location. The Department is making the same change in N.J.A.C. 7:7E-8.11(f)4.

237. COMMENT: The commenter recommends that port operations be specifically exempted from the public access rule requirements. (45, 102)

238. COMMENT: In the event an applicant is unable to satisfy the proposed public access requirements on their property it is not appropriate public policy to require the property owner to provide off-site access, nor are such off-site alternatives required by the Public Trust Doctrine or any other authority. Therefore, it is inappropriate to demand that applicants provide off-site public access to tidal waters simply as the price to pay to obtain a coastal permit. (131)

239. COMMENT: In the event an energy or chemical facility is unable to satisfy the proposed public access requirements by providing on-site public access to the tidal waters and their shorelines, it is not appropriate public policy to require these types of facilities to provide off-site access nor is it required by the Public Trust Doctrine or any other authority. Facilities such as electric generating stations are already serving a public purpose; though producing power that allows electricity to flow through homes and businesses across the region is not the same as providing a place to swim or fish, these facilities provide no less of a public benefit. It is inappropriate to demand that energy and chemical facilities provide off-site public access to tidal waterways as the price to obtain a permit. (45, 149,150)

RESPONSE TO COMMENTS 237 THROUGH 239: The Public Trust Doctrine establishes the right of the public to fully utilize tidal waterways and their shores for a variety of uses. The Public Trust Doctrine applies to all tidal waterways. The Department recognizes that existing industrial

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properties with developed waterfronts, as well as energy facilities and port uses, may present situations that warrant modification of the public access requirements. Therefore, N.J.A.C. 7:7E-8.11(f)3 provides that the Department may modify the public access requirements where it determines that the risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions make it impracticable to provide perpendicular access and a linear area along the entire shore and that there are no measures that can be taken to avert the situation. In such cases, the Department will instead require alternate public access either on site or at a nearby location.

240. COMMENT: N.J.A.C. 7:7E-8.11(f)3 does not include a description of the process the Department will use to determine if it is impracticable to allow for public access. (45, 100)

RESPONSE: N.J.A.C. 7:7E-1.5 addresses the coastal decision-making process. Decision-making on individual proposed developments will weigh, evaluate and interpret complex interests using the framework established by the Coastal Zone Management rules. The limited flexibility intentionally built into the Coastal Zone Management rules provides a mechanism for incorporating recommendations and comments by applicants, public agencies, specific interest groups, corporations, and citizens into the coastal decision-making process.

In accordance with the Coastal Permit Program rules at N.J.A.C. 7:7-7.6, an applicant for a coastal permit must submit an EIS or Compliance Statement explaining in detail how the proposed development complies with the Coastal Zone Management rules. The Department will evaluate a number of materials including a statement as to how the development complies with the Coastal Zone Management rules, other comments, and conditions on and in proximity to the site, in determining compliance with the rule.

241. COMMENT: Requiring the port industry to provide or pay for alternative access for the public at facilities to which they have never had access by virtue of an application for a Waterfront Development permit is not a Public Trust Doctrine matter. These access “opportunities” were never denied to the public. In the course of the historical development of the United States, certain areas

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were vital to the economic health of the region and nation. These areas very early on were reserved solely for commercial uses. (45, 102)

RESPONSE: All tidal waterways and their shores are subject to the Public Trust Doctrine and are held in trust by the State for the benefit of all the people. While the original purpose of the Public Trust Doctrine was to assure public access for navigation, commerce and fishing, in the past two centuries State and Federal courts recognized that modern uses of tidal waterways and their shores are also protected by the Public Trust Doctrine.

242. COMMENT: The Department must reconsider the inclusion of the Arthur Kill at N.J.A.C. 7:7E-8.11(e). Long stretches of the Arthur Kill are developed and privately owned, including public and private docks, rip-rapped shorelines, and bulkheads. The shorelines owned by many industrial facilities are fully developed and may not be accessible except from the water. For example, the New Jersey Turnpike parallels the Arthur Kill shoreline with only limited passages underneath it. At the Bayway Refinery, the Arthur Kill can only be accessed by one road through the heart of the refinery and this road can not be made accessible to the general public for safety and security reasons. This road is also subject to railroad crossings and routine railroad traffic. There is no other path possible to the Arthur Kill shoreline owned by the Bayway Refinery.

Further, since access to the shoreline of the Arthur Kill is not practicable, offsite access is the only option, which is also impracticable. This by itself makes the entire rule impracticable for application on the Arthur Kill since there is inadequate offsite shoreline available for public access than may be required as property owners initiate projects that require permits. Considering the larger scale of a highly industrialized area like the Port of Newark, there are likely very few areas that would be suitable for the type of public access envisioned by these regulations. The likelihood of a facility being able to provide equivalent public access either onsite or nearby is remote. A provision should be added that would allow facilities in these highly industrial areas to be excluded from the public access requirements. (45, 100)

RESPONSE: The developed waterfront, due to its past utilization and long history of development, has been largely closed to the public, limiting their ability to exercise their public trust rights.

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Previously industrialized shorelines of New Jersey have been redeveloped over the past several decades, such as the Delaware River in Camden and the Hudson River in Hudson County and this redevelopment has incorporated provision of public access. N.J.A.C. 7:7E-8.11(e) provides for the development of a continuous linear network of open space along urban waterfronts of New Jersey's major tidal waterways that may be used for fishing, walking, jogging, bicycling, kayaking, sitting, viewing and similar recreational activities as redevelopment of the waterfront occurs. However, the Department recognizes that existing industrial properties with developed waterfronts, as well as energy facilities and port uses, may present situations that warrant modification of the public access requirements. Therefore, N.J.A.C. 7:7E-8.11(f)3 provides that the Department may modify the public access requirements where it determines that the risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions make it impracticable to provide perpendicular access and a linear area along the entire shore and that there are no measures that can be taken to avert the situation. In such cases, the Department will instead require alternate public access either on-site or at a nearby location. For example, part of the mitigation for the New York New Jersey Harbor deepening project includes a public access component. The public access component of the Woodbridge Creek Restoration Project consists of an observation deck, public access parking and a kayak/canoe launch area. The Department worked with the New York New Jersey Port Authority in developing the mitigation plan. In the concurrent proposal published elsewhere in this issue of the New Jersey Register, the Department is proposing amendments to N.J.A.C. 7:7E-8.11(f) that provide for alternate public access for homeland security purposes, as detailed in response to comments 227 and 228.

243. COMMENT: The critical nature of the port industry in New Jersey has long been recognized by the Legislature and the various regulatory agencies which interact with it. "Port rules" have been adopted both in statute and regulation; and have been upheld on many occasions by the judiciary. In fact, the Department has a specific port use policy as part of its Coastal Zone Management rules.

Since changes are not proposed to the port use rule, it could be interpreted that port facilities must address public access and the rules requiring alternative methods of providing such access. If this is the Department's intent, it runs afoul of several Federal laws and regulatory actions which

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mandate restricted access to port facilities. It would also place a major encumbrance on numerous efforts, including the redevelopment of brownfield sites in and around the Port of New York and New Jersey; a program which the Department itself has championed for many years, (45, 102)

RESPONSE: The Department recognizes the importance of ports and the nature of port operations. Therefore, N.J.A.C. 7:7E-8.11(f)3 allows the Department to modify the perpendicular and linear public access requirements at port facilities where it has determined that, based on hazardous operations of the facility or the presence of substantial structures, it is impracticable for such public access to be provided, and that there are no measures that can be taken to avert such risks. Moreover, the concurrent proposal published elsewhere in this issue of the New Jersey Register, would address homeland security issues at ports, as described in response to comments 227 and 228. The public access rule has always applied to ports and the Port use rule at N.J.A.C. 7:7E-7.9(d) requires that new or expanded ports provide public access. An example of public access provided at port facilities is an observation deck constructed adjacent to the Global Marine Terminal on the northern peninsula of Port Jersey Channel.

Brownfield redevelopment takes many forms, frequently residential, commercial and office development, where public access is an important component, enhancing the redevelopment area and contributing to its success and vitality.

244. COMMENT: Exceptions to the public access rule should be limited to the protection of endangered and threatened wildlife or vegetation species and critical wildlife habitats. There should never be an exception for development adjacent to a bay or tidal waterway. (170)

RESPONSE: The Department has determined that limitations on public access to all public trust lands are appropriate in certain circumstances to protect human health and safety, in addition to the environment, as the commenter advocates. Accordingly, the Department has identified at N.J.A.C. 7:7E-8.11(f), seven situations, each with its own specific criteria, where the permanent on-site public access requirements may be modified. The concurrent proposal published elsewhere in this issue of the New Jersey Register, contains three

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additional situations where the linear public along a tidal waterway may be modified. These are along superhighways, at marinas, and for homeland security purposes. However, in keeping with the tenets of the Public Trust Doctrine, the rule provides that no modification of the public access requirements at a site relinquishes the public trust rights of access to and use of the tidal waterway and its shore. Thus, the public trust rights of access to and use of these lands and waters are retained so that if circumstances change in the future, public access will be provided.

245. COMMENT: Atlantic City provides free beaches, a seven mile boardwalk, a seawall, jetties, piers and a maritime park at Gardener's Basin. To require a private marina to provide public access to an audience greater than the marina patrons is absurd. Atlantic City just lost its last boatyard to development. A few years ago there were three boatyards in Atlantic City, now there are none. Boaters with vessels over 28 feet in length must travel an hour up the water to find a boatyard that can accommodate them. Property value is one reason for the exodus from the business. One of the boatyards left because they were required to provide public access to the yard. Security and vandalism are serious considerations not to mention public safety. (77)

RESPONSE: The Department is also concerned regarding the loss of marinas and other water dependent uses throughout the State. In recognition of the importance of water dependent uses and the constraints of working waterfronts, the Department is adopting N.J.A.C. 7:7E-8.11(f)3, which allows alternate public access at port, energy and industrial uses along the water. In addition, in order to provide more flexibility to the design of public access at marinas, the Department is proposing in the concurrent proposal published elsewhere in this issue of the New Jersey Register, to allow alternative linear access at existing commercial marinas where warranted by site constraints.

246. COMMENT: If the dock area is opened to the public, it must be barrier-free. As the building code official for Brick Township, the commenter indicated that he is required to enforce the barrier-

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free subcode and that if the rules are adopted, he will be forced to have marinas in Brick Township provide handicapped parking and an accessible public access route of travel that has a slope no greater than 1/12 and a cross-slope no greater than 1/48. Taken to its furthest extent, will a marina owner be required to address access for the hearing and visually impaired? Will the marina owner be required to provide an audible alarm for the visually impaired to let them know they are too close to the edge of the bulkhead? Will the public access walkway have to be a certain width to allow guide dog access? Whose responsibility will it be to clean up after the guide dog? The commenter indicated that he does not want the dog relieving itself on the piling that has his power or water connection. (111)

RESPONSE: This rule does not change the barrier free subcode. Moreover, the rule does not require that the public access the entire marina site nor that the public have access on piers intended for mooring vessels. Public access to all is paramount, and includes access for those with disabilities.

247. COMMENT: Public access on a 24-hour basis at a marina is ridiculous. At a minimum, the need for restrictions on access at night are so apparent and necessary that no justification would seem necessary. (34, 35, 12, 16, 54)

248. COMMENT: Marinas must provide a safe and secure facility for their customers at all times. It is unreasonable to force marinas to allow the general public to access their properties 24 hours a day, 365 days per year. This requirement puts both the marina owner at risk to greater liability and monetary expenditure, and also the boat owner to mischief and loitering. (130, 167, 124, 103, 11, 65, 104, 90, 87, 158, 40, 82, 106, 141, 98, 159, 152, 68, 89, 20, 41, 162, 54, 17, 164, 147, 95, 72, 155, 77, 12, 115, 142)

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249. COMMENT: Forcing marinas to provide 24-hour public access is akin to forcing a retail establishment receiving any form of government aid to open its doors to the public at all times. (132, 162)

250. COMMENT: It is unreasonable to force marinas to allow the general public to access their properties at all times. (67, 29)

251. COMMENT: It is unfair for a marina owner to be responsible for the safety of the public when they are on the marina property. (111)

252. COMMENT: The rules deprive marina patrons of their right to privacy and to the full enjoyment of their property without interference from the public. It is unreasonable to force marinas to allow the public to have access to their property on a 24-hour basis. (134, 123, 127, 23, 118, 22, 95)

253. COMMENT: Does the public need to walk along the water's edge of the commenter's marina located on a man-made lagoon lined with boats at 2:00am? (95)

254. COMMENT: Insurance and security are a major concern for marina owners. The State says it will help with insurance, but that only helps after the fact. The commenter's marina is located in Atlantic City. The remote location of the street the marina is located on already attracts attention, including the criminal element at night. Currently the marina owner stated that they can lock the gates and chase people from the property at night, but not if the new regulations are passed. Word will spread very quickly in the town, as it will in other towns, of the new open access to a new "boardwalk" out of sight of the main patrolling areas. Who will pay for new security systems and for the dramatic lost business marinas will experience? (77)

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255. COMMENT: It is not economically viable and simply unconscionable forcing marinas to allow the general public to access their now relatively secure facilities 24 hours a day 365 days a year. These regulations are extremely excessive and will so severely impact the marina industry with such negative effects the waves will be felt for decades. (90, 23, 128)

256. COMMENT: The commenter indicated that she is concerned with the 24 hours/seven day a week public access rules. The existing public access at her marina is located adjacent to the area where the “in-and-out” storage customers dock overnight. She fears she will lose these customers because they will be afraid to leave their boats in the water overnight due to the potential of theft and damage. (12)

RESPONSE TO COMMENTS 247 THROUGH 256: Tidal waterways and their shores are subject to the Public Trust Doctrine and are held in trust by the State for the benefit of all the people allowing them to enjoy these lands and waters for a variety of uses. These rights of use apply to the general public as well as boaters. Public Trust Rights are not limited by time of day, nor are they exclusive to boat owners. Rather, they are shared by the general public. Therefore, the requirement that public access be provided at all times is appropriate. As stated in response to comments 141 and 142, piers intended for mooring vessels can be gated to prevent the general public from accessing them. Some marinas currently provide this type of security. The concurrent proposal published elsewhere in this issue of the New Jersey Register, would allow the required linear public accessway to be reconfigured and enhanced to accommodate site constraints.

257. COMMENT: It is unreasonable and unrealistic to force marinas to allow the general public access to their properties at all times, or in the areas covered by the conservation restriction. Marinas currently do not permit their own customers, all of whom pay for the services being provided to them, to freely roam the marina property at all times of the day, or in all areas. Marina

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owners require their customers to sign slip agreements which clearly detail the rules and regulations of the marina; rules and regulations that are in place to ensure the safety and security of their customers, their vessels, and the orderly and profitable management to the marina.

A marina owner will have no effective means to enforce marina rules and regulations towards the general public. A slip holder may lose the ability to moor his vessel at a marina if he/she does not abide by the rules that enhance safety and security. No sanction is available for a member of the general public unless he or she violates the law. Will law enforcement be able to handle the additional calls and requests for assistance that will arise once the public is allowed to access marina properties at all times? (34, 35, 12, 16, 33, 122, 46)

RESPONSE: The rule does not let the public to freely roam the marina property. Rather the rule requires access to and along the tidal waterway. Marina owners can provide signs identifying the areas of the marina available for the public to access. Marina owners may restrict access to piers intended for mooring of vessels and access to the boat slips to marina patrons only. The concurrent proposal published elsewhere in this issue of the New Jersey Register would allow the required linear public accessway to be reconfigured and enhanced to accommodate site constraints.

258. COMMENT: If water access is truly what the Department is looking for, then the State should purchase all development rights at fair market value and supply public access at these waterfront locations. It is unreasonable for the State to compromise the safety, welfare liabilities and obligations marina owners have to their customers, as well as require marina owners to provide public access on a 24 hour seven-day basis. These regulations are encouraging marina operators to look at ways to get out of the business. Most land appraisers would agree that marinas could easily become residential waterfront condominium complexes, thus reducing water access even further. (55, 14)

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259. COMMENT: If the State wishes to preserve marinas, an already rapidly disappearing business giving way to condominiums, then the State must help the marina owner run their business with less restrictions, not more. (77)

RESPONSE TO COMMENTS 258 AND 259: The Department recognizes the need to preserve our State's private marinas, many of which are being converted to private residential developments. The Green Acres Program (State Land Acquisition and Local and Nonprofit Assistance programs) can provide funding to preserve these marinas through the purchase of an easement or development rights. Purchasing the "development rights" is a way for the State to preserve these water dependent recreational facilities while enabling the owner to continue to own the land and operate the site. The purchase of development rights of private marinas is a way to retain these marinas by providing the owners with revenue through the sale, which can be used to invest in the operation and infrastructure of the facility. However, purchase of development rights is independent of rights of public access, which would remain.

In another effort to assist the marina industry in navigating the regulatory process, the Division of Land Use Regulation has identified certain staff to act as liaison for marina permit applications.

260. COMMENT: Unlimited and unsupervised access to marinas is not the answer to diminishing public access to our coasts. Better land use regulations or more workable regulations that good environmentally concerned marina owners could comply with without undue confusion or financial hardships would lead to better access. (11)

261. COMMENT: The current rules are already extremely difficult for marina owners to comply with in order to upgrade or improve their properties. These new rules only add layers to the permitting process requiring marina owners to seek additional professional services and increased costs. (46)

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RESPONSE TO COMMENTS 260 AND 261: The Department is optimistic that the recently identified Division of Land Use Regulation liaison for marina applications, and efforts such as the recent one day regulatory workshop held by the Division to work one-on-one with marina owners on specific permitting issues, will help marina owners comply with the regulations. Applications for coastal permits for developments along tidal waterways and their shores, including marinas have long required the submittal of site plan, and this adoption does not change that requirement. The site plans submitted as part of the coastal permit applications have been required to identify public access areas.

262. COMMENT: Danger arises in allowing open access to the marina docks at all times. As a result of individuals trespassing on marina patrons' boats as well as personal injuries, marina owners are encouraged by insurance carriers and their patrons to limit unauthorized access by installing security gates on each dock. At one time, to enforce safety and security, the US Environmental Protection Agency proposed that marina owners enclose their entire facility with a locked fence. To allow unmonitored public access at all times is an invitation to disaster. It would result in prohibitive increases in the cost of liability insurance, if coverage would even be made available under those circumstances. (26)

263. COMMENT: Public access at marinas on a 24-hr basis will result in theft and vandalism. Access to a marina's docks for fishing at the marina at 3:00 am is not appropriate. (115)

RESPONSE TO COMMENTS 262 AND 263: The rule does not require that public access be provided to the boats nor on the piers intended for mooring vessels. Marina owners can gate piers intended for mooring vessels to limit access to marina patrons. Some marinas currently provide this type of security. However, the public trust rights of use apply to both boaters and the general public, and are not limited by time of day, nor are they exclusive to boat owners. Rather, they are shared by the general public. Therefore, the requirement that public access be provided at all times is appropriate. As described in response to comments 152 through 173, the Department

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does not anticipate that the rule would make insurance for marinas unavailable as marinas were required to provide public access in most cases prior to these amendments.

264. COMMENT: Marina owners and operators are being discriminated against. Marinas already provide access for the public, during business hours. (124)

RESPONSE: The public access rules do not discriminate against marina owners as they apply to all property owners along tidal waterways and their shores, as does the Public Trust Doctrine.

265. COMMENT: The rules require that public access be provided at all times. N.J.A.C. 7:7E-8.11(f)1 creates a presumption that the beaches will be open 24 hours a day, and allows an area to be closed during specified late night hours only upon documentation of “unique circumstance” other than risk associated with the tidal waterways and that threaten public safety. It should be the municipality, not the State, that decides whether to close beaches during night hours. (138, 116)

266. COMMENT: The commenters are concerned with the requirement that municipal beaches be open on a 24-hour basis. Fear for the loss of life and other dangers need to be taken into account. (165, 109)

RESPONSE TO COMMENTS 265 AND 266: The Public Trust Doctrine provides that the public has the right to utilize tidal waterways and their shores for activities such as fishing and walking, regardless of the time of day. As the trustee of public trust rights, it is the duty of the State to protect these rights. Currently, the Division of Land Use Regulation requires public access on a 24-hour basis. However, the rule at N.J.A.C. 7:7E-8.11(f)1 allows the Department to modify the 24-hour access requirement where the municipality documents that there are unique risks associated with the late night access to the beach that threaten public safety and thus warrant such closure. The

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circumstances that threaten the public safety must be identified, must be unique to the site and must be in addition to risks associated with tidal waterways.

267. COMMENT: N.J.A.C. 7:7E-8.11(f) allows for closure of public access areas late at night for public safety; however, some exceptions listed may be in high crime areas. This could pose a problem for law enforcement officials of municipalities in those areas. Allowances may be needed in certain situations where there is a documented increase in crime even in the excepted areas. (59)

RESPONSE: The urban waterways which are the exception to N.J.A.C. 7:7E-8.11(f)1 are areas along which the rule envisions a continuous public waterfront walkway like the Hudson River Waterfront Walkway, that will function similar to a sidewalk. Research has shown that busy well designed areas are more safe than those devoid of pedestrian traffic, especially after dark. See e.g., American Planning Association, *Safe-Scape: Creating Safer, More Livable Communities Through Planning and Design* (2001); Henry G. Cinsneros, *Defensible Space: Deterring Crime and Building Community*, United States Department of Housing and Urban Development (1995). As an example, the Hudson River Waterfront Walkway has become a vital and active public accessway which is open to the public on a 24-hour basis, and is an important amenity to the waterfront communities which it serves.

268. COMMENT: Language should be inserted at N.J.A.C. 7:7E-8.11(f)1 requiring that such late night closure, based upon documentation of unique circumstances, may only be allowed if the property owner or operator is implementing a DEP-approved plan, other than closure of the waterfront area, to address the cause of that unique safety circumstance. That is, closure of an area should be a last resort that is allowed only after all other viable options have been exhausted.

The waterfront is a public area to which the public always has had legal rights of access and use. This is not a new concept, an unfunded State mandate, or an imposition upon any pre-existing private property right, but a civil right that the government must show a compelling reason to restrict, as narrowly as possible, where necessary to achieve that compelling public purpose. The

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State has the strict fiduciary obligation of a trustee to protect natural resources and ensure public access to and use of them. Any attempt by the State to convey, waive or otherwise extinguish those public trust assets or rights is void ab initio. Should the trustee fail to execute faithfully his or her duties, the beneficiaries of the trust may have the right to bring an action for an accounting to recoup the assets of the trust for their benefit. *Neptune v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 308-309 (1972); accord *Lusardi v. Curtis Point Prop. Owners Ass'n*, 86 N.J. 217, 228 (1981); *Slocum v. Borough of Belmar*, 238 N.J. Super. 179, 186-187 (Law Div. 1989).

The Public Trust Doctrine is part of the law of real property law in New Jersey, and the public rights at issue are protected by the Public Trust Doctrine. Since those public rights were never conveyed away by the Crown or the State, they remain subject to public rights of use and enjoyment that cannot be extinguished even with conveyance of title to these tidal waterfront areas. *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 316-317 (1984); *National Ass'n of Home Builders v DEP*, 64 F. Supp.2d 354, 358-359 (D. N.J. 1999). Accordingly, no owner of property along a tidal waterway in New Jersey can claim to have an absolute right to exclude the public from its rights of access to and use of the tidal waterway and its shore.

Members of the public bring significant benefits to tidal waterways, their shores and the owners of adjacent properties. The State expends significant taxpayer dollars each year to preserve and enhance natural resources protected by the Public Trust Doctrine. This includes replenishing beaches; building jetties, groins and seawalls; building, operating and maintaining sewage treatment plants; building and maintaining roads, potable water and other expensive infrastructure in coastal areas; controlling nonpoint sources of water pollution; monitoring ocean water quality; enforcing laws prohibiting dumping from ships and barges; regulating and enhancing the habitats of fish and migratory birds and other wildlife; and numerous other activities that enhance the value and enjoyment of tidal waterways and their shores, and the adjoining public and private properties. The public patronizes businesses and purchases and rents properties all long New Jersey's coastline. The publicly owned ocean and foreshore, and the public funds spent to protect and monitor them, provide so much of the value to privately owned waterfront properties. As United States Supreme Court Justice O'Connor explained, "each person burdened by a harm-prevention regulation is also reciprocally benefited because similarly situated neighbors are also burdened. The lesson for coastal regulation is obvious: coastal landowners may be burdened by reasonable public access

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exactions; nevertheless, they are reciprocally benefited, both as individual landowners and as beneficiaries of the jus publicum.” *Palazzolo v. Rhode Island Coastal Comm’n*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring). (25)

RESPONSE: The Department takes its obligation as trustee of public trust rights seriously and considered the principles outlined by the commenter in development of this rule. Closure of public access areas at late night hours must be approved by the Department and will only be approved where circumstances are identified as unique to the site. This rule would require the Department and the property owner to consider measures that could be implemented to avert the public safety concern before it would allow modification of permanent on site public access.

269. COMMENT: The public safety exception set forth at N.J.A.C. 7:7E-8.11(f)1 is of concern. This exception provides the Department with the ability to allow closure of an area otherwise available for public access during specified late night hours upon documentation of unique circumstances, other than risk associated with tidal waterways, that threaten public safety and warrant such closure. In no case shall physical barriers be used to close public access. The proposed rule further states that this exception does not apply to the Hudson River Waterfront Area, or to the following waterways: the Arthur Kill, the Kill Van Kull west of Bayonne Bridge, Newark Bay, Delaware River from the Trenton Makes Bridge to the CAFRA boundary, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, Cohansey River in Bridgeton City, or the Maurice River in Millville City.

The only explanation for the proposed rule’s distinction between public trust lands in the southern portion of the State and those in the northern part of the State is found in the rule summary, which states that in the areas excepted from the public safety provision, the “rule contemplates continuous public waterfront walkways with prescribed design that will function akin to a sidewalk that is always open to the public.” (See 38 N.J.R 4577, November 6, 2007). This explanation is not satisfactory for several reasons. First, while the rule may “contemplate” such a continuous walkway along these northern waterfront areas, the fact is, such a continuous walkway simply does not exist at this time, and it is unknown when it will be completed. Second, this walkway distinction in no way accounts for the broad conclusion that unique circumstances that

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threaten public safety are more likely to occur in the southern portion of the State, but will never occur in the specified northern areas.

Therefore, it can only be surmised that this distinction is actually in response to requests by developers, public officials and private land owners in the southern portion of the State who want an opportunity to keep the public out during the overnight hours. Regardless of the reasons behind this exception, because it will negate important public trust rights, any attempt to invoke this exception should undergo serious scrutiny. Accordingly, the Department should amend the proposed rule to require that any time a party seeks to have public access limited under this provision, a public hearing is held before a decision is made. The amended rule should also require that, prior to the public hearing, the public has had access to and an opportunity to review the documentation of the alleged unique circumstances that threaten public safety and warrant such closure that the party attempting to invoke this exception is required to submit to the Department. (80)

RESPONSE: As stated in response to comments 233 and 234, the Coastal Permit Program rules require that applicants provide a compliance statement or EIS that describes how the proposed development complies with the Coastal Zone Management rules, including the public access rule and provides for the opportunity to request a public hearing. The Department believes the process outlined will assure public input through the option of a hearing in appropriate cases.

270. COMMENT: The provisions of the proposed rule permitting the Department to modify the on-site public access requirement in limited circumstances improperly place greater emphasis on protection of endangered or threatened wildlife or plant species than on public health, safety and welfare. The proposed rules allow the Department seemingly unfettered discretion to modify the public access requirements to accommodate critical wildlife resources, endangered or threatened wildlife or plant species. In contrast, the Department's ability to modify on-site public access requirements to account for public health, safety and welfare concerns is extremely limited and requires "documentation of unique circumstances." Those "unique circumstances" cannot include the risk that people will drown by utilizing unsupervised tidal waters. (120)

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RESPONSE: The rule contains provisions to accommodate both natural resources such as endangered and threatened wildlife and plant species (N.J.A.C. 7:7E-8.11(f)2) and public health, safety and welfare (N.J.A.C. 7:7E-8.11(f)1 through 3). The discretion to modify the public access requirement to accommodate wildlife resources is not unfettered, but limited to restrictions necessary to protect these resources and is not permanent. This standard takes into account the State's role as trustee of natural resources.

271. COMMENT: N.J.A.C. 7:7E-8.11(f)2 allows for the temporary closure of public access for public safety or security, or repair, maintenance or construction relating to public access infrastructure. This provision should include circumstances where there is other public infrastructure repair, maintenance, or construction such as roadway improvements near the access area. (59)

RESPONSE: The rule at N.J.A.C. 7:7E-8.11(f)2i would allow the temporary closure of public access infrastructure when the Department has determined that public safety relating to public access infrastructure, such as a walkway, is threatened by road or other public infrastructure improvements near the public access infrastructure.

272. COMMENT: N.J.A.C. 7:7E-8.11(f)3 allows for modification of public access requirements for hazardous operations where injury may result where accommodation can not be made or where an obstruction exists. Some types of facilities and uses are listed, but the list does not include public roadways. Public roadways may present obstructions, heavy truck traffic, and vehicles traveling at high speeds. The commenter suggests that this exemption include public roadways. Further, this subsection requires equivalent public access either on-site or at a nearby off-site location. The commenter suggests that for public roadways, in situations where equivalent public access is not feasible or not available nearby, a mechanism such as alternative mitigation and/or waiver, be incorporated into the rules. (59)

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RESPONSE: In the concurrent proposal published elsewhere in this issue of the New Jersey Register, the Department is proposing to amend N.J.A.C. 7:7E-8.11(f)3 to incorporate an exception to perpendicular access and linear access along the entire shore of a tidal waterway for development of new, or modification of existing, superhighways. The amended rule would require alternate public access for superhighway projects where it is demonstrated that such access is not practicable based on risk of injury or substantial existing and permanent obstacles, and no measures could be taken to avert the risks. Thus, where work is proposed along superhighways such as the Atlantic City Expressway, the Garden State Parkway and the New Jersey Turnpike, alternate public access could be provided if such demonstration is made.

273. COMMENT: The commenters object to requiring that any development along the ocean, including construction, reconstruction or expansion of a single family home, provide public access on the private property, regardless of the circumstances, and even if the home is located adjacent to an existing public access point.(61, 151, 21, 97, 138, 176, 116, 60)

RESPONSE: Although all tidal waterways and their shores are subject to the Public Trust Doctrine and no permitting action by the Department relinquishes public trust rights under the Public Trust Doctrine, the Department decided not to require public access at all individual single family homes under these rules. However, application on the Atlantic Ocean is warranted due to the great public demand to use the Ocean, as expressed in *Matthews* "Beaches are a unique resource and are irreplaceable. The public demand for beaches has increased with the growth of population and improvement of transportation facilities." 95 N.J. 306, 323 (1984). As noted in response to comment 61, the rule does not require perpendicular accessways across a property to the water at individual single family homes in accordance with N.J.A.C. 7:7E-8.11(f)6 and 7. Rather, the rule requires access along a beach located on the Atlantic Ocean, Sandy Hook Bay, Raritan Bay, and Delaware Bay, or where beach and dune maintenance activities are proposed.

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274. COMMENT: The commenters oppose the regulations as they apply to single family homeowners. (109, 165)

275. COMMENT: The commenter is concerned that they will not be able to obtain a coastal permit for the construction of a single family home in Beach Haven unless they provide public access. (136)

276. COMMENT: A reasonable compromise to the application or the proposed regulations to single family homes would be to allow one/two family homes along with certain condominium ownership properties to be exempt from the proposed rule changes. For example, the New Jersey Meadowlands Commission zoning regulations exempt from its regulations one/two unit family homes. (125)

RESPONSE TO COMMENT 274 THROUGH 276: The Public Trust Doctrine establishes the right of the public to fully utilize tidal waterways and their shores. The amendments requiring public access at single family homes are intended to ensure that the public's rights under the Public Trust Doctrine are upheld.

At single family homes, public access is required only if the single family lot includes a beach and is located on the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or the Delaware Bay or, if located on a waterway other than those listed, beach and dune maintenance activities are proposed. Public access requirements may be imposed as a conditions of Shore Protection Program funding, pursuant to N.J.A.C. 7:7E-8.11(p). For single family homes, the extent of public access required is access to and use of the beach. Perpendicular access through single family lots is not required.

277. COMMENT: The rules assume that the developer of every single family dwelling near a tidal waterbody will be required to provide public access through privately owned upland. Absent a site specific analysis and application of the *Matthews* factors, with the burden of demonstrating the need for public access being imposed upon the Department, such a proposed rule may not stand. (70)

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RESPONSE: The rules do not assume that the development of every single family home along a tidal waterway must provide public access. As noted in response to comment 61, at individual single family homes in accordance with N.J.A.C. 7:7E-8.11(f)6 and 7, public access is only required where the single family lot includes a beach and is located on the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or the Delaware Bay, or if located on a waterway other than those listed, beach and dune maintenance activities are proposed. The rule does not require perpendicular access in these situations. Rather, the rule requires access along and use of the beach.. The specific rights and protections recognized under the Public Trust Doctrine continue to develop through individual court decisions. For that reason, the amended regulations do not specify a measured area of privately owned shoreline landward of the mean high water line, or a percentage thereof, that must be subject to public access and use. The Department recognizes that the *Matthews* factors may be applicable to a particular piece of property should the scope of the public access and use required by the Department in accordance with the adopted regulations be in dispute.

278. COMMENT: Although the proposed regulation at times purports to exempt single family homes from the need to provide public access (e.g. N.J.A.C. 7:7E-8.11(f)6 and 7), it does so only provided that the development “does not result in the development of more than one single family home or duplex either solely or in conjunction with the previous development.” What the rule does not fully disclose is that under Department policy, “previous development” means adjacent lots, previously in common ownership, and any homes constructed since 1973 are included in the calculation to determine previous development. Thus, the new owner of a present day single family lot, who is unaware that his or her lot was previously in common ownership with other land upon which homes have been constructed since 1973, will under the rules be required to satisfy the public access requirements, even though that owner is constructing only one home. Such a requirement is unfair, misleading and unnecessary. (70)

279. COMMENT: The proposed rules have the potential to apply to single family homes that are not adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and that are not

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located on a property on a beach on which beach and dune maintenance activities are proposed.

This exception to the proposed exception can occur if the proposed single-family home would result “in the development of more than one single-family home or duplex either solely or in conjunction with a previous development as defined at N.J.A.C. 7:7-2.1(b)8.” Development is defined to include “previous development” constructed after September 1973 on contiguous parcels of property that were under common ownership on or after September 1973, regardless of the present ownership, or any subdivision of a parcel on the land which occurred after September 19, 1973. “Contiguous development” is defined to include “those land areas which directly abut or are separated by a general access roadway or other right-of-way, including waterways or those land areas which are part of a subdivision existing and under common ownership on or after September 19, 1973.” Therefore, under this definition, a person who acquires a lot and seeks to build a single family house will be subject to the proposed public access requirements if the lot was under common ownership on or after September 1973, or was subdivided after September 19, 1973, with or from an adjacent piece of land that has been developed. The proposed rules should not be applied retroactively to prior contiguous development. This requirement is extremely harsh in the context of single family property owners who have no involvement with prior development of contiguous parcels. (120)

RESPONSE TO COMMENT 278 AND 279: When the Department adopted the coastal general permits for the construction, expansion or reconstruction (with or without expansion) of a single family home in October 1995 (see 27 N.J.R. 3076(a), October 16, 1995), it determined in accordance with N.J.A.C. 7:7-7.1 that the construction of one single family home or duplex would have only minimal cumulative impact on the environment. However, if one or more single family homes were constructed on a parcel subdivided after CAFRA was passed in 1973, the Department could not make such findings and therefore a CAFRA individual permit is required.

The application of N.J.A.C. 7:7E-8.11(f)6 and 7 only to single family homes that are not part of a larger development is included to ensure that the provision of public access is not undermined by repeated application of the exception for public access at single family homes, which could lead to

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failure to provide access along contiguous sections of waterfront, and in consideration of cumulative effects.

280. COMMENT: Although the Public Access Rules clearly state that the Public Trust Doctrine ensures “the public’s right of access to and use of tidal waterways and their shores, including the oceans, bays and rivers,” N.J.A.C. 7:7E-3.50(e), for the most part, the substantive provisions of the proposed rules apply to ocean beaches. Left out of these rules are the means for the public to gain, and the State to enforce, access to certain New Jersey bay and tidal river shores. For example, the proposed Public Trust Rights rule at N.J.A.C. 7:7E-8.11(f)6 specifically states that public access is not required where a single family home, duplex, associated accessory development or shore protection structure is proposed that does not include beach or dune maintenance activities and is on a site that does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and their shores. Thus, with the exception of Sandy Hook Bay and Raritan Bay, the proposed rule provides an exception for any small-scale development that occurs on the remaining bay shores and tidal rivers.

Similarly, the proposed rule at N.J.A.C. 7:7E-8.11(f)7 allows “equivalent public access”, which includes access at a nearby offsite location, where a two-unit (excluding duplexes) or three-unit residential development, associated accessory development or shore protection structure is proposed that does not include beach or dune maintenance activities and is not on a site with a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and their shores. Again, with the exception of Sandy Hook Bay and Raritan Bay, this proposed rule would provide an exception for small-scale development that occurs on the rest of the bay shores and tidal rivers.

The proposed rules do require that public access be provided in the form of both perpendicular and linear walkways for developments located along the Arthur Kill, the Kill Van Kull west of Bayonne Bridge, Newark Bay, Delaware River from the Trenton Makes Bridge to the CAFRA boundary, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, Cohansey River in Bridgeton City, or the Maurice River in Millville City. N.J.A.C. 7:7E-8.11(d). However, as described above, these requirements do not apply when the development consists of a single family home or duplex. Further, these Rules are relaxed when the development consists of

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only a two-unit (excluding duplexes) or three-unit residential development, or associated accessory development or shore protection structure. In such a case, the walkway requirements are lessened, such that the width of the linear walkway can be 10 feet wide instead of 16 feet. N.J.A.C. 7:7E-8.11(f)5. In addition, the width of the conservation restrictions intended to permanently protect a linear and perpendicular accessway to these sites is reduced from 30 feet to 20 feet for the linear accessway and from 20 to 10 feet for the perpendicular accessway.

The exceptions to the public access requirements should not be based upon which bay or river is adjacent to the development site and it is unclear why these exceptions exist. Specifically, the exception to the public access requirements provided for single family homes or duplexes, which is not available to developments that are adjacent to the Sandy Hook Bay and the Raritan Bay, should not be available to developments that are adjacent to any bay or tidal river. Further, the exceptions for two or three unit developments that are not available for developments adjacent to the Arthur Kill, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, and select portions of the Kill Van Kull, Delaware River, Cohansey River and Maurice River, should not be available to developments adjacent to any bay or tidal river.

Therefore, N.J.A.C. 7:7E-8.11(f)6 should be amended to remove the exception stating public access is not required for the development of a single family home, duplex, associated accessory development or shore protection structure on sites adjacent to bays or tidal rivers other than the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and their shores. In addition, N.J.A.C. 7:7E-8.11(f)4 and 5 should be amended to remove the exceptions stating public access can be modified (lessened) for the development of a two or three unit residential unit, associated accessory development or shore protection structure on bays and tidal rivers other than the Atlantic Ocean, Sandy Hook Bay, Raritan Bay, the Arthur Kill, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, and select portions of the Kill Van Kull, the Delaware River, the Cohansey River and the Maurice River. (80)

281. COMMENT: The proposed rules states that public access is not required where a single family home, duplex, associated accessory development or shore protection structure is proposed that does not include beach or dune maintenance activities and is on a site that does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and their shores. The

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rules also propose modifying public trust rights for two or three unit residential unit developments, associated accessory developments or shore protection structures on bays and tidal rivers other than the Atlantic Ocean, Sandy Hook Bay, Raritan Bay, the Arthur Kill, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, and select portions of the Kill Van Kull, the Delaware River, the Cohansey River and the Maurice River. Thus, the rules provide an exception for the very type of small-scale development that is likely to occur on the remaining bay shores and tidal rivers, and will exacerbate the problem of restricted access rights on those tidal areas. The distinction between tidal beaches on the one hand and tidal rivers and bays on the other hand is arbitrary and capricious. The Public Trust Doctrine applies to all tidally-flowed lands, not just those along the ocean beaches. Indeed, public trust rights in New Jersey were described in the context of disputes over fishing rights in oyster beds, and many of these beds lay in tidal bays and rivers. If these limitations spring from the limited permit jurisdiction under CAFRA (see our joint comments regarding the limited jurisdictional triggers for the rules), then the Department should say so but should not purport to impose those statutory limitations upon the broader, common law public trust rights.

Accordingly, the Department should (1) amend the Public Trust Rights rule at N.J.A.C. 7:7E-8.11(f)(6) to remove the exception stating public access is not required for the development of a single family home, duplex, associated accessory development or shore protection structure on sites adjacent to bays or tidal rivers other than the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and their shores, and (2) amend the Public Trust Rights rule at N.J.A.C. 7:7E-8.11(f)(4) and (f)(5) to remove the exceptions stating public access can be modified (lessened) for the development of a two or three unit residential unit, associated accessory development or shore protection structure on bays and tidal rivers other than the Atlantic Ocean, Sandy Hook Bay, Raritan Bay, the Arthur Kill, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, and select portions of the Kill Van Kull, the Delaware River, the Cohansey River and the Maurice River.

This is not necessarily asking that parallel public access be required for all new single family homes on the water as it may be impractical and unnecessary to protect access rights. A more practical solution might be to acknowledge that the construction of single-family homes has a deleterious cumulative effect on public trust rights and to require some creative compensation or

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mitigation for infringement of rights such as opening community bay/riverfront beaches and ramps to public access. (154)

RESPONSE TO COMMENTS 280 AND 281: The Department is not removing the exception for single family homes, nor the exceptions for 2 or 3 unit residential developments that are located on tidal waterways other than the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and those rivers listed at N.J.A.C. 7:7E-8.11(e). The single family exceptions at N.J.A.C. 7:7E-8.11(f)6 and 7 consider two factors. First, that access to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and Delaware Bay is in high demand and important to the State's tourism industry, and second, that these individual single family properties are often of a size and density that do not avail themselves to on site access. Therefore, access is not required where there is no beach.

For 2 to 3 unit residential developments, the Department believes that the distinction between the exceptions at N.J.A.C. 7:7E-8.11(f)4 and 5 based on the waterway are appropriate. These amendments will promote a continuous waterfront walkway along urban waterfronts, fostering redevelopment in these areas and improving access in densely developed areas, while accommodating 2 and 3 unit development at small sites or where access is plentiful and enhancing access off site provides more meaningful public access. Thus the focus of the mitigation provisions of the regulations is on equivalent functionality of a given public accessway or amenity, not on strict monetary equivalency.

282. COMMENT: Requiring public access at private homes along the oceanfront will be problematic. Lighting would have to be installed to allow people to see at night. Who is responsible if a person is injured on the public access easement? Signage would also be required to distinguish the location of the public access easement and private property. This could result in an increase in police presence. The likelihood of undesirables to steal from private properties would also increase as a result of their ability to observe homes, businesses and watercraft from the public access easement. (113, 114)

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RESPONSE: The Public Trust Doctrine is not limited in the hours that it is in effect, and the public use of the oceanfront such as fishing and walking, are engaged in during night time hours. The rule does not require that the oceanfront beach be lit or specific signage at single family homes . The New Jersey Landowner Liability Act, N.J.S.A. 2A:42A-2 et seq. provides limited protection from liability where landowners make their property available for public access and use. (See response to comments 108 through 112).

283. COMMENT: The commenter objects to the provisions in the proposed rules that require any development along the ocean, including construction, reconstruction or expansion of a single family home, to provide public access on private property, regardless of the circumstances, and even if the development is located adjacent to an existing public access point; and that require increased public parking sufficient to “accommodate...the beach capacity of all beaches within the municipality” regardless of the adequacy of existing public parking and the demand for public parking, including the creation of on-site or off-site parking associated with private development. (120)

RESPONSE: The standard requiring public parking to accommodate beach capacity does not apply to all development. It applies to municipalities entering into State Aid Agreements for Shore Protection Program funding and is equivalent to one of the Federal requirements imposed by the US Army Corps of Engineers. Existing public parking would be taken into account in assessing compliance with this standard. With regard to developments prior to this adoption, the public access rule required parking for public access to ensure that tidal waterways and their shores are accessible. Finally, with regard to single family homes as stated in response to comment 300, the Department is clarifying on adoption that parking is not required for development of an individual single family home.

284. COMMENT: The rule would require that “development on or adjacent to all tidal waterways and their shores provide on-site, permanent, unobstructed public access to the waterway and its shores at all times, including both visual and physical access.

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Through cross-references in other sections of the proposed rules, this requirement would apply to coastal general permits for construction, reconstruction or expansion of single-family homes, and to other small-scale residential development. An exception provided for certain small-scale residential developments (2 or 3 units) in most tidal areas does not apply to development along the Atlantic Ocean, Sandy Hook or Raritan Bays, or Delaware Bay. Thus, someone constructing or enlarging an existing single-family oceanfront home would be required to provide “on-site” public access, regardless of the proximity to public beaches or public access points, and even if it were located immediately adjacent to an existing public access point. This contravenes the mandate for case-by-case circumstance-specific determinations mandated by *Raleigh* and *Matthews*. For example, the Department has acknowledged that in the context of single-family homes, “the size of the property and density of development do not lend themselves to providing public access on-site.” The rules, however, would require public access to be provided for single family homes that are adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or that are located on a property that includes a beach on which beach and dune maintenance activities are proposed. These sites, like other single-family sites, will typically not be conducive for providing public access. The burden that the proposed rules will place on owners of such properties could be alleviated by a case-by-case, circumstance-specific determination of the reasonableness and necessity of providing public access as required by *Raleigh* and *Matthews*. However, the rules fail to contain any such provisions. (120)

RESPONSE: At individual single family homes in accordance with N.J.A.C. 7:7E-8.11(f)6 and 7, public access is required only if the single family lot includes a beach and is located on the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or the Delaware Bay or, if located on a waterway other than those listed above, beach and dune maintenance activities are proposed. Public access is required at single family homes in these situations in recognition of the high public demand and the importance of these beach areas to the State’s tourism industry. The extent of public access required at individual single family homes is access along and use of the beach. Perpendicular access at individual single family homes is not required. In contrast, two- or three- unit residential developments are required to provide both perpendicular and linear access along the entire

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waterfront portion of the site, regardless of whether the site contains a beach. Public access would not be required at a single family property located along the Atlantic Ocean, Sandy Hook Bay or Delaware Bay and their shores that does not contain a beach. Because two- or three- unit residential developments are more substantial in size than an individual single family home, but not as substantial as developments of four units or more, the standards of N.J.A.C. 7:7E-8.11(f)4 provide the Department with the ability to modify the perpendicular and linear access requirements for the development based on an evaluation of the size of the site, the character of the waterway and the availability and type of public access in the vicinity. Finally, public access requirements may be required as a condition of Shore Protection Program funding in accordance with N.J.A.C. 7:7E-8.11(p).

285. COMMENT: The commenter indicated that he supports the requirement that public access be Handicap Accessible and not just an opening through a dune. He stated that currently there are virtually no handicap vertical access points on Long Beach Island and that requiring ramps that meet the Americans with Disabilities Act requirements would benefit not only handicapped individuals, but also the senior population and families with small children. (139)

286. COMMENT: The provision of the rules that provides that public access be made available on a non-discriminatory basis, in accordance with the Law Against Discrimination, N.J.S.A. 10:5-1 et seq. is commendable. (120, 138)

RESPONSE TO COMMENTS 285 AND 286: The Department acknowledges these comments in support of the rule.

287. COMMENT: The commenter stated that he commends and supports the Department for including express provisions in the proposed rules that would ensure accessibility to waterfront areas, including beaches, for persons with disabilities. Publicly owned and funded beaches and waterfront areas are places of public accommodation, subject to provisions of both Federal and State law, that should be designed and operated to include access and use for persons with

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disabilities. The proposed rules include compliance with the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to 49 (NJLAD), as one of the public trust rights at N.J.A.C. 7:7E-8.11(g). The rules, however, do not require compliance with the Americans with Disabilities Act of 1990, 42 U.S.C. §§12101 to 12213 (ADA). Moreover, the scope of protections afforded to persons with disabilities under the NJLAD is not always as broad as that available under the ADA. The ADA, however, provides broader protections on other issues; for example, it includes a duty to remove barriers where removal is readily achievable. Accordingly, the proposed rules should require compliance with both the NJLAD and the ADA. (25)

RESPONSE: The rule at N.J.A.C. 7:7E-8.11(k) requires that development provide barrier free access where feasible and warranted by the character of the site. The Barrier Free Subcode at N.J.A.C. 5:23-7.1 through 7.32 in the New Jersey Uniform Construction Code addresses barrier free access for certain buildings and recreational facilities. In addition, the Americans with Disabilities Act (ADA) addresses facilities in the public sector, and places of public accommodation and commercial facilities in the private sector. The fact that the rule does not specifically cite the ADA, or the Barrier Free Subcode, does not obviate a development from complying with the law and code, as applicable. Regardless of the applicability of the ADA or Barrier Free Subcode to a particular access project, the Department believes that barrier free access requirements contained in the adopted rule provides sufficient authority to require barrier free access, where appropriate.

288. COMMENT: Currently, law-abiding citizens are not prevented from using the Ocean Gate Yacht Basin and will not be in the future. To publicly announce through signage “public access” allows a multitude of otherwise peaceful events to have the potential for rowdy, uncontrolled behavior with questionable enforcement. In order to maintain a high level of protection to their marina patrons and law-abiding citizens, marinas should not be forced to install signs proclaiming “public access” and provide sufficient parking. How and by whom will sufficient parking be determined? (104)

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RESPONSE: The rule requires that public access be provided to and along the tidal waterway. By installing signs, the marina owner can clearly identify the public access area(s) on site and control the locations at the marina that the public can access. Parking is an important aspect of meaningful public access. Typically, the Department requires marinas provide two to four dedicated public access parking spaces to satisfy the parking requirement, depending on the character of the site.

289. COMMENT: Certain provisions of the rules are commendable. For example, the rules would require that public access be made available on a non-discriminatory basis in accordance with the Law Against Discrimination, N.J.S.A. 10:5-1 et seq.; would require that public accessways be clearly marked with appropriate signs; and would require that beach badges or passes be readily available for sale at convenient times and locations. Such provisions are appropriate, providing that the design, size and location of such amenities are aesthetically pleasing and consistent with the character and scale of the community's standards, for example, no highway type signs. (138, 120)

RESPONSE: The Department acknowledges this comment in support of the rule. The Department provides public access signs as described in response to comment 290.

290. COMMENT: Private property owners should not be required to install and maintain in perpetuity signs indicating the location of the public access areas as is proposed pursuant at N.J.A.C. 7:7E-8.11(h). To the extent that the State deems it necessary and appropriate to provide continuous and ongoing notice to the public of the location of access areas, then the State, consistent with its responsibilities and obligations as "trustee of the private rights to natural resources," should utilize State monies to accomplish that undertaking. The Department has cited no authority, going even as far back as 500 AD, that establishes a requirement that owners of property near tidal waters are required to encourage the public to utilize public trust lands. The proposed sign maintenance requirement is, therefore, an improper extension of the Public Trust Doctrine. To the extent that the Department desires to encourage the public to utilize public trust lands, then it should take on the responsibility of maintaining public access signs in perpetuity. (120)

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RESPONSE: Signage is critical to ensuring that the public is aware of where they can access tidal waterways and their shores. The requirement for signage has been an element of the public access rule since 1986, and accordingly, such signs have been installed throughout the coastal area. Public access signs are available to owners of property located near tidal waterways from the Department. For beach nourishment projects, the Department provides and installs the signs and the partnering municipalities maintain them.

291. COMMENT: N.J.A.C. 7:7E-8.11(i) prohibits activities which discourage or prevent the public from exercising public trust rights. The word “discourage” is nebulous and invites inconsistent and unpredictable interpretation by the Department and prospective lawsuits. (34, 35, 16)

RESPONSE: The term “discouraged” is defined at N.J.A.C. 7:7E-1.8. “Discouraged” means that a proposed use of coastal resources is likely to be rejected or denied as the Department has determined that such uses of coastal resources should be deterred. In cases where the Department considers the proposed use to be in the public interest despite its discouraged status, the Department may permit the use provided that mitigating or compensating measures can be taken so that there is a net gain in quality and quantity of the coastal resource of concern.

292. COMMENT: The public access rules are a threat: a marina owner can not improve their facility without having to open the facility to public access with sufficient parking which will add more cost to an expensive project, without any additional income being generated to offset the expense. This is the start of another eminent domain with no remuneration. (104)

293. COMMENT: The parking requirements for marinas are onerous. (174, 77, 143, 48)

294. COMMENT: Gull Island County Park, a public park which provides parking and public access to the waterway is located directly adjacent to Will’s Hole Marina. This marina has a limited

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number of parking spaces on the property that are utilized year round by marina users and the commercial property tenants that share the marina's location. It is unreasonable to require additional public parking when a public parking area is readily available and in such close proximity to the marina. (33, 122)

295. COMMENT: The public parking requirement is problematic. In addition to providing parking for its marina patrons, the Channel Club Marina must also accommodate parking for customers of a restaurant open to the public for lunch and dinner daily and also for its catering facility. During the summer months there is a severe shortage of parking with no possibility for expansion of the existing parking area. There is no additional private land available for purchase. On street parking in the Borough of Monmouth Beach is already overwhelmed by vehicles generated by the public accessing the beach. (26)

296. COMMENT: Forcing marinas to provide parking for the general public in an already tight parking environment would limit slip holder parking. (69)

RESPONSE TO COMMENTS 292 THROUGH 296: Parking is an important aspect of providing public access. Insufficient parking discourages or prevents public access to and use of tidal waterways and their shores. Prior to this adoption, the rule required that parking be provided. Typically, the Department requires that marinas provide two to four dedicated public access parking spaces to satisfy this requirement, depending on the character of the site.

297. COMMENT: Requiring marinas to provide public restrooms with the attendant costs of maintenance and supplies is a burden on marina owners. Further, requiring marinas to provide deed restricted access across all waterfront property would severely lessen the value of the marina property with no recourse. (69)

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RESPONSE: The rule does not require marinas to provide public restrooms. Public restrooms are only required in conjunction with Shore Protection Program and Green Acres Program funding. The rule requires that public access areas be subject to a conservation restriction to ensure that these public access areas are preserved in perpetuity. The concurrent rule proposal would allow the reconfiguration of the linear public access area where site constraints or heavy boat moving operations warrant such reconfiguration.

298. COMMENT: Controlling and safeguarding proper conditions of a public access point such as provision of garbage cans, signs and fishing line recycling boxes, is appropriate. Creating hurdles to utilize a public access point is not. People with mobility challenges or those who need recreational equipment which cannot be transported by foot or public transportation should be able to have access to the waterfront. (161)

RESPONSE: The rule requires that development on or adjacent to tidal waterways and their shores provide barrier free access where feasible and warranted by the character of the site, and further requires that public access be available on a nondiscriminatory basis.

299. COMMENT: To assure equal access, the parking requirements should be amended to:

- (1) Establish a minimum parking availability requirement with minimal restrictions in line with past history and need projections not to exceed a sustainable holding capacity;
- (2) Require handicapped parking in proportion to total parking spaces;
- (3) Limit time for drop-off areas for handicapped persons, families with small children and equipment, while ensuring that parking is within walking distance for an able-bodied driver;
- (4) Twenty-four hour accessibility;
- (5) Require car window permit for multiple day parking as a monitoring measure;
- (6) Free or minimum fee for parking. (161)

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RESPONSE: The rule does require that parking be provided for public access. For beach projects funded through a State Aid Agreement, the number is based on beach capacity (See N.J.A.C. 7:7E-8.11(p)7v , whereas for development projects, it will be determined on a case-by-case basis, depending on the nature of the project and the access required. One way to comply with the requirement at N.J.A.C. 7:7E-8.11(p) to provide parking for public access to shore protection projects would be to provide drop-off areas and provide more long term parking. The Barrier Free Subcode at N.J.A.C. 5:23-7.1 through 7.32 in the New Jersey Uniform Construction Code contains parking standards that address barrier free parking for certain facilities, including the ratio of handicapped to non-handicapped parking spaces. The rule at N.J.A.C. 7:7E-8.11(d) requires 24-hour access. Lastly, the provision at N.J.A.C. 7:7E-8.11(i) that prohibits activities that have the effect of discouraging or preventing public access would guard against excessive parking fees. Accordingly, the Department does not believe that the commenters' amendments are necessary.

300. COMMENT: The commenter objects to the requirement for one-to-one mitigation for on-street or off-street parking eliminated as a result of development, particularly as it applies to single family homes or other small residential developments. Proposed N.J.A.C. 7:7E-8.11(j) would require that development which proposes to reduce existing on-street or off-street parking that is used by the public for access to tidal waters and their shores provide mitigation at a minimum of a 1:1 ratio, either on the development site or within 250 feet of the proposed development site. This would be applicable to development of single family homes or other small residential developments where an individual permit is required in certain circumstances or through cross references to applicable general permits. For example, the owner of a vacant single family lot located on a street where parking is permitted, proposing to develop or redevelop one single family house with a driveway which would eliminate a parking space, would be required to provide mitigation. This will significantly hinder development and redevelopment activities in regulated areas. (120, 138)

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RESPONSE: As stated in the summary at 38 N.J.R. 4579, it is the Department's intent not to require single family homes that are not part of a larger development in accordance with N.J.A.C. 7:7-2.1(b)8, identified in (f)6 and (7) to provide parking. Therefore, the Department is clarifying at N.J.A.C. 7:7E-8.11(j) on adoption to provide explicitly that parking is not required when the exceptions for individual single family homes at N.J.A.C. 7:7E-8.11(f)6 or 7 are met. However, the rule does require that small residential developments (i.e., those 2-units or more (excluding duplexes) provide parking. This requirement will ensure that the public has the ability to access and use tidal waterways and their shores.

301. COMMENT: To the extent that N.J.A.C. 7:7E-8.11(j) requires a private land owner to provide parking for public access, the rule is illegal as well as vague. None of the Supreme Court precedents cited by the Department have required a private landowner to provide public parking at his own expense. Private landowners should not have to design and construct a parking lot at their own expense. Parking for the public to access public trust land should be funded by the public through either the State or municipality. This should not be an obligation of private landowners. Moreover, the regulations provide no standards for determining how many parking spaces are required, improperly delegating such decisions to the unbridled discretion of Department staff in the permitting process. (70)

RESPONSE: Because insufficient parking discourages public access to and use of tidal waterways and their shores, development have been required to provide parking for public beaches since 1986. The public access rule was amended in July 1994 to add a requirement at N.J.A.C. 7:7E-8.11(b)14 that developments that reduce on-street parking to mitigate for this loss at a creation to loss ratio of one to one. For the same reasons, a mitigation requirement for the loss of off-street parking has been added at this time. The rule contains specific parking requirements for municipalities participating in Shore Protection Program and Green Acres Program funding at N.J.A.C. 7:7E-8.11(p) and (q). The State will provide municipalities that have entered into a State Aid Agreement additional funding of up to five percent of the shore protection project costs to assist municipalities

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with the cost of complying with the public access requirements. Further, as stated in response to comment 300, the Department is clarifying on adoption that parking is not required at a single family home that is not part of a larger development.

302. COMMENT: The requirement for parking mitigation contravenes the mandate for case-by-case, circumstance specific determinations mandated by *Raleigh* and *Matthews*. The rules fail to provide for any site-specific determination or consideration of the need or demand for on or off-street parking and the ability of the existing parking facilities to accommodate the need or demand notwithstanding the proposed development. (120)

RESPONSE: Parking is an important aspect of meaningful public access. Development that reduces on-street or off-street public parking adversely affects the public's ability to access and use tidal waterways and their shores. In light of the importance of the rights protected by the Public Trust Doctrine, these amendments will ensure that the public's rights continue to be protected and that improvements are accomplished, such as assuring parking is available, to provide families and others a realistic and meaningful opportunity to enjoy the public's resources. Therefore, the rule requires that the loss of public parking, whether on-street or off-street, be mitigated for at a ratio of one space created for one space lost. Further, the rule requires that the mitigation occur within the proposed development site or within 250 feet of the proposed development site to ensure that the parking is replaced within close proximity to that which is being lost as a result of the development. The public access rule has required parking since 1986 and since 1994, has required mitigation for the loss of on street parking. In the concurrent proposal published elsewhere in this issue of the New Jersey Register, for public road projects only, the Department is proposing to amend N.J.A.C. 7:7E-8.11(j)1 to allow mitigation for the loss of public parking to occur within one-quarter mile of a public roadway project site of mitigation can not be accomplished within 250 feet of the project site.

303. COMMENT: The requirement to record a conservation restriction maintaining the parking spaces in perpetuity will hinder redevelopment. The conservation restriction requirement will make

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it extremely difficult, if not impossible, for property owners to redevelop sites that are subject to a parking space deed restriction requirement. This unfortunate limitation on redevelopment activities is completely unnecessary if the parking mitigation requirement of the proposed rule is adopted. A person who proposes a redevelopment, if the rule were adopted, would be required to satisfy the parking mitigation requirement. However, if the parking deed restriction were already placed on the property, then the proposed redevelopment can only take place if the property owner were able to satisfy the statutory requirements for the release of a deed restriction pursuant to the current interpretation of the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1 et seq. This process is extremely onerous and will have the affect of curtailing redevelopment activities. Moreover, the requirements for a conservation restriction are inappropriate. Maintaining a parking lot or parking area has nothing to do with the conservation of natural resources. (120)

RESPONSE: A reduction in parking affects the public's ability to access and use tidal waterways and their shores. To ensure that on-street parking and off-street parking for public access is preserved for the purposes it was intended in perpetuity, the rule at N.J.A.C. 7:7E-8.11(j)2 and 3 requires that the parking be dedicated for public access through a conservation restriction and municipal ordinance respectively. This requirement is appropriate and will enable the public to exercise their public trust rights to tidal waterways and their shores. It will also make future property owners aware of the requirement to provide parking. Any impacts on redevelopment will be limited and are necessary to assure public trust rights are protected.

304. COMMENT: N.J.A.C. 7:7E-8.11(j)1 discusses mitigation for the loss of public parking areas, The rules require that new parking areas be created within the proposed development site or at another location within 250 feet of the proposed site. This may not always be feasible for public roadway projects, especially those roadways where on-street parking is not permitted. An exception should be included for situations where there is not a sufficient area to provide parking within 250 feet. (59)

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RESPONSE: Recognizing the linear nature of public roadways and the public benefit of roadway improvements, coupled with limitations presented by existing development and rights-of-way, in the concurrent proposal published elsewhere in this issue of the New Jersey Register, the Department is proposing to amend N.J.A.C. 7:7E-8.11(j) to allow mitigation for loss of public parking to occur within one-quarter mile of a public roadway project site if mitigation cannot be accomplished within 250 feet.

305. COMMENT: Parking is already a problem in coastal communities. By requiring more parking to accommodate use of the public access easement, it will become a nightmare for police, paying customers at businesses and property owners. (113, 114)

RESPONSE: The Department recognizes that a lack of public parking is a problem for many coastal communities and therefore requires that public parking be a component of its public access requirements. Reasonable, convenient and safe conditions at or around public access areas and public accessways often affect whether the public will be able to reach and use tidal waterways and their shores. One such condition is the availability of public parking near accessways. Accordingly, the Department has determined that public parking is essential to providing public access.

306. COMMENT: The regulations should require parking time limits for near beach streets to be of an adequate duration. The availability or lack of parking is one of the most furtive means of denying public access and the Department should be congratulated for its efforts to require parking as part of public access. However, the requirements at N.J.A.C. 7:7E-8.11(j) do not go far enough in that they do not address the duration of parking. Numerous oceanfront communities surreptitiously deny public access by placing unrealistic restrictions on the duration of near beach parking. In the summary of the proposed regulations, the Department recognizes that the use of the beach includes the quality of the experience. Beach use is not simply restricted to pulling into a parking space, jumping out of a car, looking at the ocean and then leaving before the meter runs out.

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A realistic expectation for a day at the beach is not restricted to two or four hours. At a minimum, all near beach parking should be at least six hours in duration. While *Matthews v. Bay Head Improvement*, opened Bay Head beaches to the general public, parking time restrictions on the near beach streets still limit access. Bay Head property owners have driveways available for off-street parking and are not affected by time limits. This is de facto preference given to residents over non-residents which is prohibited under these regulations. (19, 43)

RESPONSE: The rule at N.J.A.C. 7:7E-8.11(p)6 and (q)4 addresses municipal ordinances including parking restrictions and requires that municipalities not enact or adopt ordinances that limit public access or use of tidal waterways and their shores to participate in Shore Protection Program and Green Acres funding for a project on a tidal waterway.

307. COMMENT: It should not be the obligation of a private landowner to spend private funds in order to provide a public amenity, namely barrier-free ramps, walkways, and other amenities. This should be an obligation of either the State or the municipality. (70)

RESPONSE: Public access to all is a paramount component of the Public Trust Doctrine and includes access for those with disabilities. The rule preserves and protects the common law rights under the Public Trust Doctrine. Traditionally, the Public Trust Doctrine addressed the public's interest in the beds of tidal and commercially navigable waterways.

308. COMMENT: The rules require development to “incorporate fishing access and associated amenities to the maximum extent practicable.” The rules lack specificity as to what would constitute fishing access or associated amenities. (120, 138)

RESPONSE: Two examples of fishing access are a pull-off area next to a bridge and a fishing pier. As noted in the proposal summary at 38 N.J.R. 4579 (November 6, 2007), fishing amenities may

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include pole holders and fish cleaning stations. Trash receptacles and parking for fishermen would also be considered fishing amenities.

309. COMMENT: Funding for fishing access and associated amenities should be made available by the State or municipalities. Fishing facilities cannot be required unless there is a demonstrated need in accordance with the *Matthews* factors, and the burden of demonstrating such need rests with the Department. (70)

310. COMMENT: N.J.A.C. 7:7E-8.11(l) requires development on or adjacent to tidal waterways and their shores to incorporate fishing access and associated amenities to the maximum extent practicable. The summary of this provision suggests that amenities include pole holders and fish cleaning stations. Who is responsible for paying for these? (166)

RESPONSE TO COMMENTS 309 AND 310: The rule at N.J.A.C. 7:7E-8.11(l) requires fishing access and associated amenities be provided within the public access area to the maximum extent practicable, with costs borne by the permittee. The standard allows for fishing because the Public Trust Doctrine expressly recognizes fishing as a protected use of tidal waterways and their shores. The Department often funds fishing access and associated amenities through Green Acres funding for a project on a tidal waterway at municipal, county and State facilities.

311. COMMENT: The proposed rule at N.J.A.C. 7:7E-8.11(l) requires development to incorporate fishing access and associated amenities to the maximum extent practicable. This is an improper extension of the Public Trust Doctrine. It seems laughable to suggest, as the Department does, that the Roman Emperor Justinian contemplated that the inhabitants of buildings near the sea would be required to construct fish cleaning stations and make fish nets available to persons seeking to approach the shores of the sea. While the Public Trust Doctrine was intended to ensure access to tidal waters, it was not intended to impose upon private property owners near those waters an obligation to construct public improvements and amenities. Presumably, the people of Emperor

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Justinian's time were left to their own design to make what use of the sea and the seashore that they could upon approaching it. To the extent the State wants to provide public parks or other amenities to promote fishing, it should dedicate public funds for that purpose as its responsibility as the "trustee of the public rights to natural resources," and as it does in the context of creation of public parks. (120)

RESPONSE: The rule preserves and protects the common law rights under the Public Trust Doctrine. Traditionally, the Public Trust Doctrine addressed the public's interest in the beds of tidal and commercially navigable waterways. See *Arnold v Mundy*, 6 N.J.L. 1, 3 (Sup. Ct. 1821); *Bell v. Gough*, 23 N.J.L. 624 (E. & A. 1852); *Barney v. Keokuk*, 94 U.S. 324 (1877); *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Utah v. U.S.*, 403 U.S. 9 (1971); *etc.* However, the Public Trust Doctrine is now recognized as extending beyond those areas. In 1988, the U.S. Supreme Court recognized public trust interests beyond commerce, navigation and fisheries. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) (finding state assertion of a public right is not an unconstitutional taking or exaction if the right asserted is recognized under the public trust doctrine of the law of that state.). As noted in the response to comment 309 and 310, although the State does dedicate public funds to provide public parks, boat ramps and other amenities to promote fishing, owners of lands subject to the Public Trust Doctrine are obligated to provide access. The standard regarding fishing access and associated amenities was included in the rule because the Public Trust Doctrine expressly recognizes fishing as a protected use of tidal waterways and their shores.

312. COMMENT: What if a person cannot afford a beach badge? How is requiring fees to access beaches making public trust lands available to the general public? (136)

RESPONSE: In 1955, a statute was enacted that authorized New Jersey municipalities bordering the Atlantic Ocean, tidal water bays or rivers to charge a fee to beachgoers in order to account for maintenance and safety costs associated with them. N.J.S.A. 40:61-22.20 grants municipalities "exclusive control, government and care" of any municipally owned lands on the Atlantic Ocean,

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tidal water bays, or rivers and boardwalks, bathing and recreational facilities, safeguards and equipment. This law requires that fees charged for access to the beach and recreational grounds must be reasonable, shall not be charged for children under the age of 12 years and may be reduced or eliminated for those over 65 or those who are disabled. The fees collected can only be used to improve, maintain and police the property, to provide protection from erosion and other sea damage, and to provide facilities and safeguards for public bathing and recreation. See *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc. et al*, 185 N.J. 40 (2005) (addressing Department's ability to review beach fees)

In June 2007, the Department of the Public Advocate released its 2007 Beach Guide. This guide provides information concerning the cost, facilities and amenities offered in coastal municipalities. According to the guide, New Jersey has nine free beaches, five of which are located on a tidal bay or river. These municipalities include: Atlantic City, Atlantic County; Highlands, Monmouth County (bay beach); Keansburg, Monmouth County (bay beach); Keansburg Amusement Park, Monmouth County (bay beach); Middletown Township, Monmouth County (river beach), Point Pleasant, Ocean County (river beach); Upper Township, Wildwood and Wildwood Crest, Cape May County. Most municipalities charge between \$4 and \$7 for a daily beach badge. The Department of the Public Advocate's 2007 Beach Guide can be viewed at [www.state.nj.us/publicadvocate](http://www.state.nj.us/publicadvocate). Further, as noted in response to comment 17, the Department of Environmental Protection's Coastal Management Office Public access web page contains a map of public access points along the Atlantic Ocean from Monmouth County to Cape May County.

313. COMMENT: The rule proposal needs to address oversight of beach fee accounts and accountability. Does anyone in the State of New Jersey oversee the beach fund account? If there is a surplus in the beach fee account, what are the municipalities doing with the money? Is there an audit of the beach fee accounts for municipalities charging beach fees? Beach fees and the expenditures of these fees should be provided on a municipality's website.

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A joint investigation between the New Jersey Attorney General's Office and the Federal Attorney General's Office into the municipal beach fee accounts of oceanfront municipalities is needed. Is the money going into these accounts or is it being diverted? (5)

314. COMMENT: Municipalities should be required to create a report of the beach revenue and expenses that is easily accessible by the public. It is widely held that municipalities often spend beach revenue money on things unrelated to the beach, and they occasionally spend the surplus revenue on superfluous and unnecessary items instead of lowering the beach fees. Transparency and openness of these revenues and expenses would eliminate such unnecessary expenditures and over charging of fees. (166)

315. COMMENT: The regulations should require an annual report on beach revenues and expenses. Municipalities should be required to submit an annual report to the Department that details beach revenues, expenses and fees collected. N.J.A.C. 7:7E-8.11(m)1 requires that fees be no greater than that which is required to operate and maintain the facility. While this has been the standard prior to the November 6, 2006 proposal, only where the increase in beach fees, especially daily fees, has seemed egregious has there been any type of audit conducted. Municipalities are free to set fees based on market conditions not actual costs. Considering that it can cost a family of four almost \$30.00 to enter the beach for the day, all fees should be audited to ensure that the beach users are only paying for the services they use and not subsidizing the municipal tax rate. In cases where it is found that the beach fees for the season exceed the actual beach expenses, all fees for the following season should be adjusted proportionately downward as compensation for the overcharge. Conversely, this would provide justification for increased beach fees. An audit of this type would be no different than the audits required of construction code enforcement offices and the methods used to set fees for construction permits. (19, 43)

RESPONSE TO COMMENTS 313 THROUGH 315: The New Jersey Department of Community Affairs, Bureau of Financial Regulation and Assistance, oversees municipal budgets, including

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information on beach fee revenue and appropriations. The Bureau of Financial Regulation and Assistance reviews the revenues from beach fees in the same manner as they do every other municipal revenue. In reviewing beach fee revenues, the Bureau determines whether the revenue exceeds the actual amount collected from the previous year. If it is determined that the revenue exceeds that of the previous year, the municipality is required to submit documentation supporting the increase. Municipalities are audited on an annual basis. These audits are filed with the Bureau by a Registered Municipal Accountant.

Some municipalities choose to address beach fee revenues through a beach utility. A beach utility is a separate “fund” consisting of a set of accounts used to monitor the accomplishment of specified purposes, or uses of restricted revenue. There is no requirement by the State to maintain a beach utility. However, a court can mandate that a municipality maintain a beach utility due to the high cost of their beach badges. See generally *Slocum v. Borough of Belmar*, 238 N.J. Super. 179 (Law Div.1989) (holding municipality “shall maintain complete, accurate, and traceable records documenting the costs relating to its beachfront facilities”). The Borough of Belmar, Monmouth County, is an example of a municipality that was ordered by the Court to maintain a beach utility. Beach utilities have the benefit of improved records management, provide the ability to track how revenue is collected through beach fees, and provide accountability of beach maintenance fees.

316. COMMENT: The rule, which allows beach fees to be charged and requires the construction of public restrooms, may be used as a rationale to allow communities to charge fishermen and divers to access beaches or jetties even off season when there are no lifeguards on beaches and not for the purpose of swimming on a guarded beach. There should be no fee to access the ocean just for fishing, diving or just to walk along the beach. (52)

RESPONSE: Enacted in 1955, N.J.S.A. 40:61-22.20 authorizes municipalities bordering the Atlantic Ocean, tidal bays or rivers to charge a fee to beachgoers in order to account for maintenance and safety costs associated with them. However, the rule at N.J.A.C. 7:7E-8.11(m)

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requires that no beach fees shall be charged solely for access to or use of tidal waterways and their shores.

Through N.J.S.A. 40:61-22.20 and the New Jersey Supreme Court's findings in *Raleigh Ave. Beach Association v. Atlantis Beach Club, Inc., et al.*, 185 N.J. 40(2005), the Department has the ability to review fees charged on municipal and privately owned beaches. The fee provisions established through this rule provide that a fee may be charged for the use of bathing and recreational facilities and safeguards. Safeguards and facilities include lifeguards, restrooms and showers. Any person who avails themselves of these services may be required to pay a reasonable fee, as approved by the State.

317. COMMENT: In the 1980's and 1990's US Senator Bill Bradley walked the entire length of the New Jersey shore annually. If Senator Bradley walked the shoreline today and he paid for a daily beach badge in every town along his route, the walk would cost him \$272 (based on 2006 prices). Many visitors to New Jersey's shore do not go to only one beach. Many users will frequent a multitude of beaches during any given summer season. Many recreational users such as anglers, bird watchers, surfers, and windsurfers visit a variety of beaches based on weekly conditions. The best fishing may occur in one town one week and another town the next week.

For this reason, the Department should explore a regional or statewide beach badge that would allow a person to access any of the beaches in a given county or the State. Our country's national parks system has a fee system which allows a person to pay for admittance to a particular park or all parks. This type of system should be explored in New Jersey. Some towns are already implementing this system on a small scale. For example, Avalon and Stone Harbor, Cape May County, adjacent municipalities, honor each other's beach badges. This is also true for Margate, Ventnor and Longport, Atlantic County. (166)

318. COMMENT: Most of the coastal communities in this country do not charge the public to sit on the beach. The State should study and report on how fees are avoided in other states and explore ways that New Jersey could move to a similar system. The report should also include why and how

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municipalities such as Atlantic City, Wildwood and Seaside Heights (part time) are managing without beach fees. (166)

319. COMMENT: The Department should take a closer look at why New Jersey is one of the few places in the United States and the world that charges access fees to beaches. The Department should consider these rules an initial step towards bringing uniformity to beach access in New Jersey, but should also take bold steps to eliminate beach fees in New Jersey. This issue should be studied and a pilot project undertaken where no beach access fees are required. (43, 166)

RESPONSE TO COMMENTS 317 THROUGH 319: N.J.A.C. 7:7E-8.11(m) provides that no fee shall be charged solely for access to or use of tidal waters and their shores. N.J.S.A. 40:61-22.20 provided municipalities the ability to charge beach fees. The Department could not, through regulation, eliminate all beach fees. The Statute does not preclude municipalities from implementing a beach fee system on a regional scale.

320. COMMENT: How does the Department plan on educating municipalities on the fee provision? The Department should put significant resources into explaining this part of the rule to elected officials and beach managers. For example, 34 years after the court's decision in the *Borough of Neptune v. Borough of Avon-by-the-Sea* case, which provided that towns cannot charge a different beach fee for residents and non residents, Brick Township is still doing so. (166, 43)

RESPONSE: The Department has taken steps to educate municipalities including development of the Public Trust Doctrine handbook and workshops, and will continue education efforts. Enforcement or other legal action by the Department may be appropriate in specific cases, depending upon the particular facts of the situation presented. Citizens are also free to contact the Office of the Public Advocate with concerns.

321. COMMENT: The commenter stated he supports the transferability of badges and other

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attempts to restrain the abuse of fees to restrain public trust rights. Until the middle of the twentieth century, beaches were free in New Jersey. *Secure Heritage*, 361 N.J. Super. at 289 (citing *Avon*, 61 N.J. at 300). In 1955, the Legislature granted municipalities bordering the Atlantic Ocean the authority to charge the public for access to their beaches and bathing facilities in order to cover their then new costs, not to raise general municipal revenues. N.J.S.A. 40:61-22.20. Municipal beach fees were strictly limited to covering the cost of beach services and were authorized only “in order to provide funds to improve, maintain and police the same and to protect the same from erosion, encroachment and damage by sea or otherwise, and to provide facilities and safeguards for public bathing and recreation, including the employment of lifeguards.” *Id.*; see generally *Avon*, 61 N.J. at 311; *Secure Heritage*, 361 N.J. Super. at 310; *Slocum*, 238 N.J. Super. at 192. The Department’s rules regarding beach fees emphasize the limited nature of these fees, which “shall be no greater than that which is required to operate and maintain the facility . . . .”

New Jersey courts have struck down attempts to shift non-beach related expenses into beach access fees on both statutory and public trust doctrine grounds, ruling that “commercial” fees are inappropriate. E.g., *Slocum*, 238 N.J. Super. at 190-193. The *Slocum* court found that Belmar had “operated the beach area as though it were a commercial business enterprise for the sole benefit of its taxpayers . . . in violation of the borough’s duties under the public trust doctrine.” *Id.* at 188 (emphasis added). The *Slocum* court closely scrutinized the record, taking testimony from six experts over an eight-day trial, *id.* at 196-208, disallowed all costs save for those reasonably related to actual beach services, and allocated the costs of 30 different categories between beach and non-beach use, *id.* at 196-208. New Jersey courts have similarly scrutinized beach fees by non-municipal entities operating both privately owned and municipal beaches. See *Matthews*, 95 N.J. at 332 (allowing “reasonable fees to cover its costs of lifeguards, beach cleaners, patrols, equipment, insurance and administrative expenses”). (154)

RESPONSE: The Department acknowledges this comment in support of the rule.

322. COMMENT: Proposed N.J.A.C. 7:7E-8.11(m)1 should be changed to “fees shall be reasonable and no greater than that which is required to operate and maintain the facility, taking into

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consideration basic support amenities provided, such as lifeguards, restrooms/shower facilities and trash pickup.” Because access to the beach or waterfront areas may not entail use of bathing and recreational facilities, safeguards, such as lifeguards, toilets, showers, or parking, fees should not be excessive or for-profit, since access is based on the public’s rights under the Public Trust Doctrine.  
(101)

RESPONSE: The language at N.J.A.C. 7:7E-8.11(m)1 closely reflects the language of N.J.S.A. 40:61-22.20. Accordingly, no change is being made on adoption.

323. COMMENT: It is unclear how the provision “no fees shall be charged solely for access to or use of tidal waterways and their shores” will be implemented. How does the Department anticipate enforcing this? How will the public’s use be differentiated? How will the Department prevent misuse of this exception or prevent fee collectors from attempting to enforce the rules themselves?  
(101)

RESPONSE: The Department recognizes the challenges associated with enforcement in the event that a member of the public does not avail themselves of any of the basic beach services provided, including lifeguards, restrooms, showers, and trash removal. In cases where complaints regarding fee provisions are brought to the attention of the Department, the Department will evaluate potential violations of New Jersey's public access regulations or the Public Trust Doctrine. Enforcement or other legal action by the Department may be appropriate, depending upon the particular facts of the situation presented. Citizens are also free to contact the Office of the Public Advocate with concerns. Any person who does avail themselves of these types of basic beach services may be required to pay a reasonable fee, as approved by the State.

324. COMMENT: The regulations should expand the availability of daily beach badges for purchase. The sale of beach badges is always a contentious issue and the ability to purchase badges compounds the problem. The requirement for availability of the purchase of beach badges at

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N.J.A.C. 7:7E-8.11(m)4 should be expanded to require that all badge checkers or staffed entry checkpoints (public or private) be required to offer badges for purchase in person. This requirement should also include daily badges.

Until they were ordered to stop, Seaside Park had a policy of exclusively selling daily badges at the beaches at the northern end of the Borough. This limited sale was intended to confine day-trippers to that section of the beach closest to Seaside Heights. A similar situation occurred in Point Pleasant Beach when a new, oceanfront housing development was required to provide public access and badges for sale. In this case, the badges available to the public were sold only at a store that was several blocks from the beach. Both of these efforts were a clandestine means of restricting access. Any entity that requires beach badges and checks to see if the people on the beach possess those badges should also be required to make badges immediately available for purchase. Many beaches with walking badge checkers already do this, and therefore, such requirement would not be an added burden to the beach operators and would enhance revenues for the beaches as people would be able to purchase badges instead of having to leave the beach. (19, 43)

RESPONSE: As the commenter notes, the Department has attempted to improve the availability of beach badges by requiring at N.J.A.C. 7:7E-8.11(m) that they be available at times and places reasonably convenient for the public and at the hours the beach is staffed. These changes should alleviate some of the problems described by the commenter. While the Department would encourage the sale of badges by badge checkers, it has determined that the standards at N.J.A.C. 7:7E-8.11(m) suffice at this time.

325. COMMENT: The rule at N.J.A.C. 7:E-8.11(m)6 states public access to and use of tidal waterways and their shores may not be conditioned upon providing identification or signing or otherwise agreeing to any waiver or similar disclaimer of rights. Does this mean that a person cannot be required to fill out a form? (166)

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RESPONSE: N.J.A.C. 7:7E-8.11(m)6 provides that public access to and use of tidal waterways and their shores may not be conditioned on providing identification or signing or otherwise agreeing to any waiver or similar disclaimer of rights. This provision is intended to prevent discrimination against individuals exercising their public trust rights. Thus requiring identification on a form would be contrary to this rule requirement.

326. COMMENT: The commenters support the requirement that badges be transferable. What does the Department mean when it says that beach passes shall be transferable? Does that mean it will be illegal to sell gender-specific beach passes which is the current practice in Bradley Beach? (166, 43)

RESPONSE: The Department acknowledges this comment in support of the rule. Transferable means that the beach badge may be conveyed from one person to another. For example, an owner of a summer rental home may purchase seasonal beach badges for the use of their guests. The beach badges may be transferred from one group of guests to another without a fee, and regardless of gender.

327. COMMENT: The commenters stated that they support the requirement that all beach badges, daily, weekly or seasonal, be sold wherever beach badges are available and at all times. Does this rule prohibit the selling of beach badges between Christmas and New Year's at half price? This is the practice of several municipalities. Many towns discount their badges to a certain date, such as June 1. This is much more reasonable. (166, 43)

RESPONSE: The rule at N.J.A.C. 7:7E-8.11(m)4 does not preclude municipalities from discounting fees for beach badges during certain times of the year, provided the badges are available to all at that time. However, the rule does require that the beach badges be available at all times and places that are reasonably convenient for the public.

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328. COMMENT: In order for the public to use the majority of New Jersey's beaches there is a fee paid and a badge worn. Would marinas be able to sell badges so the public could have access to the marina property? That fee could be used to offset the maintenance of the facility. (104, 68, 9, 171, 157)

329. COMMENT: How can the Department hold any business to a higher standard than it holds the State of New Jersey? How can these Federally and State owned parks charge a fee while tax-paying marinas are required to provide access to the public at no fee? (124, 82, 17, 148, 104, 40, 41, 94)

RESPONSE TO COMMENTS 328 AND 329: The rule provides that no fee shall be charged solely for the public to access or use tidal waterways and their shores. Accordingly, neither a marina or any other facility can charge a fee solely for such access. However, subject to State approval, fees may be charged for bathing and recreational facilities and safeguards that are provided, such as lifeguards, restrooms, showers and trash removal.

The Commissioner will issue an Administrative Order to increase public access and use opportunities at Department facilities, through development and implementation of public access plans for lands the Department manages that are located along tidal waterways and their shores. The Administrative Order will set forth a plan to increase public access and use opportunities for State parks, State marinas and State wildlife management areas.

330. COMMENT: N.J.A.C. 7:7E-8.11(n) requires private landowners to permanently dedicate for public use any land required for public access through the recording of a Department-approved conservation restriction. In essence, all private owners of the upland "shore" near tidal waterways are being required, as the price for approval of a permit to develop their land, to deed a portion of their land to the State for public access. Such an exaction is impermissible absent a clear nexus between the project proposed by the private landowner and the need for public access. At a minimum, before any such exaction may be demanded by the State, it is the State's burden according to the United States Supreme Court, to demonstrate "rough proportionality" between the

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private project and the exaction. *Dolan v. City of Tigard*, 512 U.S. 374, 114S. Ct. 23098, 129 L. Ed. 2<sup>nd</sup> 304(1994). In *Dolan*, the Supreme Court considered a case in which a landowner obtained approval to expand his plumbing and electric supply store. As a condition of the approval, the government required dedication of “sufficient open land for a greenway adjoining and within the flood plain...at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain.” 512 U.S. at 319. Although the court acknowledged that the exaction advanced a legitimate public purpose, it nonetheless held that it was required to analyze whether the exaction bore “the required relationship to the projected impact” of the proposed store expansion. 512 U.S. at 387. The Supreme Court in *Dolan* held that a constitutionally required degree of connection must exist between exactions demanded by the conditions to be imposed and the projected impact of the proposed development. 512 U.S. 386. The court defined the required degree of connection as “rough proportionality” and placed the burden upon the government to demonstrate that such a connection exists between the condition or exaction imposed and the proposed project at issue.

Therefore, before the Department can require a private landowner to dedicate land, by way of deed restriction, for public access, the Department must first demonstrate pursuant to the *Matthews* factors that public access is necessary and appropriate at the particular site. Thereafter, the Department must demonstrate in accordance with *Dolan* that there is a sufficient nexus, or “rough proportionality” between the public access which is the subject of the exaction and the project proposed by the private landowner. This requirement, according to the United States Supreme Court, is one of constitutional dimensions. Since the regulations fail to comply, they are illegal and should not be adopted. (70)

RESPONSE: The goal of a conservation restriction is to restrict development in order to permanently safeguard the public benefits of a particular piece of land. The Federal District Court of New Jersey has held: “The Rule’s requirement that individuals grant the State a conservation easement for the “public trust property” upon which a walkway is constructed merely memorializes the State’s role in protecting the public’s right to use and enjoy the property under the public trust doctrine.” (*National Ass’n of Homebuilders v. State, Depart. Env’tl Protect.*, 64 F. Supp.2d 354 (D.N.J. 1999) 358)

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331. COMMENT: The requirement for a conservation restriction to maintain public access areas in perpetuity will unnecessarily have the effect of limiting and discouraging future redevelopment opportunities because of the difficulties that property owners will face in efforts to secure a release and relocation of deed-restricted areas pursuant to the current interpretation of the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1 et seq. The requirement is unnecessary because any development or future redevelopment activities will be required to satisfy the public access provisions of the proposed rules. Additionally, the State's interest in ensuring that the required public access areas are respected over time can be met through some legal mechanism other than a "conservation restriction." For instance, a property owner could enter into a license for access revocable only upon the written confirmation from the Department. This would protect the State's interest in ensuring that public accessways are maintained, while easing the burden on property owners who seek to redevelop a parcel that maintains the public access area, since the property owner will not be subject to the onerous requirements of the Conservation Restriction and Historic Preservation Act. (120)

RESPONSE: A conservation restriction is the best, most appropriate mechanism to accomplish the objectives of the rule. The Department's experience with restrictions, other than filed conservation restrictions, imposed by coastal permits is that they have not protected the reserved areas over the long term. In the New Jersey Supreme Court case *Island Venture Associates v NJDEP*, 179 N.J. 485 (2004), the Supreme Court held that the purchaser of a property was not bound to a restriction that was imposed by the Department as part of a coastal permit issued to the owner's predecessor in title because the restriction could not be found by diligent search of the title. As a result, the rule requires that the public access portion of the site be permanently dedicated for public use through a conservation restriction maintaining the publicly dedicated area in perpetuity. The rule also requires that the conservation restriction be properly recorded and be maintained in the chain of title thereby ensuring that the restriction is enforceable against successors in title. This requirement is appropriate and will ensure both that the public access area is maintained and that future owners are

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aware of the publicly dedicated area. Any impacts on future redevelopment will be limited and necessary to assure public trust rights are protected.

332. COMMENT: The commenter indicated that, because she is currently applying for a dredging permit for her marina, she must provide a public access easement. The commenter said that she negotiated a location for a public access area with the Department to comply with the rule. She stated that she needs to change the location of the area because she wants to replace a non-operating 100 year old crane. She said that she spoke with DEP staff who indicated that moving the public access area in the future would not be a problem. However, the commenter explained that her attorney is concerned that the easement as currently written, would not allow modification of the public access area in the future. (12)

333. COMMENT: N.J.A.C. 7:7E-8.11(n) requires that the areas set aside for public access to tidal waterways and their shores be dedicated for permanent public use through conservation restrictions. In certain circumstances, an amendment to a conservation restriction should be allowed if there is a compelling public need to use the area for a public roadway project in the future, if alternate access is provided. A mechanism to provide alternate public access as mitigation for impacts to areas of existing access should be included in the rules. (59)

RESPONSE TO COMMENTS 332 AND 333: It may be appropriate to allow the amendment of a conservation easement protecting public access to tidal waterways and their shores if alternate access is provided. However, since the New Jersey Conservation Restriction and Historic Preservation Restriction Act at N.J.S.A. 13:8B-5 and 6 already allows the Commissioner to approve releases of conservation easements, and to impose conditions on such approvals, it is not necessary to address the commenter's suggestion as part of the rule adoption.

334. COMMENT: It is unnecessary to require public access easements on private properties and waterfront businesses when municipal docks, street-ends and beaches already offer freedom of access. (113, 114)

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RESPONSE: The Public Trust Doctrine establishes the right of the public to fully utilize tidal waterways and their shores. Therefore it is the responsibility of the State to ensure that the public has the ability to access and use these public trust areas. Conservation restrictions are required to ensure that the required public access measures are maintained in perpetuity.

335. COMMENT: The Department does not have the authority to limit the Public Trust Doctrine in any way, which it acknowledges throughout the proposal. The proposed Public Trust Rights rule at N.J.A.C. 7:7E-8.11(o) contains the following disclaimer: “No authorization or approval under this chapter shall be deemed to relinquish public rights of access to and use of lands and waters subject to public trust rights.” In addition, the proposed amendments to the Coastal Permit Program Rules would incorporate the following statement: “Authorization of construction shall not constitute a relinquishment of public rights to access and use tidal waterways and their shores.” N.J.A.C. 7:7-1.5(b)(19). A similar relevant disclaimer stating that “the Department recognizes that the rights of the public under the Public Trust Doctrine are inalienable and that the incorporation of these common-law principles into the Coastal Permit Program Rules and the Coastal Zone Management Rules in no way diminishes or relinquishes any of those rights” should be added to each of the four sections in which the Public Trust Doctrine is defined or explained (N.J.A.C. 7:7-1.3, N.J.A.C. 7:7E-3.50(a), N.J.A.C. 7:7E-3.50(e), and N.J.A.C. 7:7E-8.11(r)). These changes are particularly relevant to public trust rights along tidal bays and rivers, as well as oceanfront landowners such as grandfathered houses, hotels and motels that may not need a CAFRA permit. (154)

RESPONSE: These rules indicate how the Department will implement the Public Trust Doctrine when reviewing applications for coastal permits, funding for Shore Protection projects or funding for Green Acres project sites. The Public Trust Doctrine applies regardless of these rules and is not limited by the rules. Tidal shorefront property in New Jersey has long been impressed with public trust rights, and it is unreasonable for private investors to appropriate resources impressed with public rights for exclusive private use. See, e.g., *National Ass'n of Homebuilders v. State, Dept. of Env't'l Protect.*, 64 F. Supp. 2d. 354 (D.N.J. 1999) (clarifying that the public trust doctrine is a

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background common law principle in New Jersey). Accordingly, the suggested language is not necessary.

336. COMMENT: The commenter applauds the Department's efforts with respect to public access and opening the beaches of Long Beach Island to the public. (18)

337. COMMENT: The commenter stated he supports the requirement that municipalities provide public access to beaches in return for public funding. (160)

RESPONSE TO COMMENTS 336 AND 337: The Department acknowledges these comments in support of the rule.

338. COMMENT: Meaningful beach and jetty access to the ocean and inlets in New Jersey is very important to the sport diving community. Shoreline diving is the only type of diving that can be done in New Jersey without a boat. Too often little or no reasonable access is available to the beach and jetties, or the location of the access is an unreasonable distance from the shoreline dive location. Sport divers have to carry heavy equipment to the water which is difficult over long distances. In some communities, parking near the ocean is deliberately discouraged and roadside street parking is not permitted near the ocean. In some cases expensive fees are charged to cross the beach and or an expensive seasonal pass required. This is a problem for sport divers who, like fishermen, may want to dive or fish at a number of locations in different shoreline communities during the diving season. (52)

RESPONSE: The Department recognizes the need for divers to be able to access tidal waters. The intent of this rule is to facilitate access to and use of tidal waters as shorefront areas are developed and municipalities engage in shore protection projects, by increasing public parking, restrooms and public access points and ensuring reasonable fees.

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339. COMMENT: The public should have access to public lands. If State and Federal taxpayer dollars are spent for beach nourishment projects, the public should have access to those beaches and lands. The beaches of New Jersey are a public resource and should be available to all the public regardless of their race. If municipalities do not want to allow public access, then they should not use public money. (49)

RESPONSE: The Department acknowledges this comment in support of the rule.

340. COMMENT: The commenter applauds the Department for trying to expand the Public Trust Doctrine, however it is inappropriate to place the responsibility and costs associated with such an endeavor on the municipality while holding up desperately needed funds for Shore Protection Programs. (96)

RESPONSE: Public funds are invested in numerous ways to protect the lands and waters subject to public trust rights. New Jersey's Shore Protection Program provides \$25 million annually for State-sponsored shore protection projects. In addition, the Federal government contributes significant funding for beach nourishment and shore protection projects. In part as a result of the investment of Federal and State funding in these projects and because these projects are built on and adjacent to tidal waterways and their shores, the public has the right to use these resources. New Jersey's Shore Protection Program is financed not just by the communities within which these lands and waters subject to the Public Trust Rights are located, but by residents statewide. Additionally, residents statewide contribute to fund various Federal Programs that protect and enhance lands and waters subject to public trust rights. Therefore, requirements at N.J.A.C. 7:7E-8.11(p) are intended to ensure that all residents who contribute to the protection of these lands and waters are able to exercise their rights to access and use these lands and waters. The requirements of N.J.A.C. 7:7E-8.11(p) are also consistent with Federal programs that require projects utilizing Federal funds to provide public access upon receipt of those funds.

Since their inception in 1978, the Coastal Zone Management rules (formerly the Coastal Resource and Development policies) have contained a requirement that municipalities receiving

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Shore Protection Program funding provide public access, both at N.J.A.C. 7:7E-7.11, the Coastal Engineering rule and N.J.A.C. 7:7E-8.11, the Public trust rights rule. The rules provided that municipalities that do not currently provide, or have active plans to provide access to the water were not eligible for shore protection funding, and that public access must be provided to publicly funded Shore protection structures and nourished beaches. Under this adoption, N.J.A.C. 7:7E-8.11(p) builds on this requirement by providing greater specificity with respect to public access conditions, including perpendicular access to tidal waterways and their shores, the frequency of perpendicular access, and restroom and parking requirements.

341. COMMENT: If the rule is adopted and results in the loss of Federal funding for certain beach nourishment or shore protection projects, will the State assume the Federal share to allow the beach nourishment or shore protection project to move forward? (96)

RESPONSE: Regardless of funding, the Department is obligated under the Public Trust Doctrine to protect public trust rights. The concurrent proposal published elsewhere in this issue of the New Jersey Register would help reduce the chances of funding being lost.

342. COMMENT: The proposal states that the Department will assist municipalities in funding public restrooms and access. What does “assist” mean? (85)

343. COMMENT: The State should consider partial reimbursement of some shoreline communities where it could be proven that beach fees would not be sufficient to defray the cost of public restrooms required by this rule. (52)

RESPONSE TO COMMENTS 342 AND 343: Where a municipality has entered into a State Aid Agreement with the Department because they are receiving State funds under the Shore Protection Program, the State will provide additional funding of up to five percent of the beach construction costs to assist municipalities with the cost of providing restrooms, parking and accessways. As stated in response to comment 41 and 42, the Department has offered the five municipalities

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affected by the Long Beach Island beach nourishment project \$50,000.00 per restroom to meet the requirements of the rule.

344. COMMENT: Will a coastal permit be held hostage or rescinded if a municipality cannot implement the required public access improvements in a timely manner? (96)

RESPONSE: The rule at N.J.A.C. 7:7E-8.11(p)1 requires that the municipality submit a draft public access plan that complies with N.J.A.C. 7:7E-8A.2 and 8A.3 and draft ordinance adopting the plan, as well as a draft Public Access Instrument prior to the Department issuing a coastal permit. Once a permit is issued, the rule sets forth milestones for implementation of the components of the public access plan. For example, N.J.A.C. 7:7E-8.11(p)4 requires the municipality to adopt the ordinances adopting the Public Access Instrument approved by the Department prior to commencement of construction or nourishment, while N.J.A.C. 7:7E-8.11(p)vi requires the municipality to install Department approved public access signs immediately upon completion of project construction. Further, N.J.A.C. 7:7E-8.11(p)9 provides a remedy for failure to comply with the standards applicable to a municipality that participates in Shore Protection Program funding. The remedies set forth at N.J.A.C. 7:7E-8.11(p)9 are intended to enforce the Public Trust Doctrine, ensure appropriate use of public funds, and codify existing remedies for failure to adhere to a State Aid Agreement. For municipalities not participating in State Shore Protection Program funding through a State Aid Agreement, municipalities must still comply with the provisions of (a) through (o) of this rule.

345. COMMENT: The rules require that a single family property owner provide a public restroom on their property in order for it to be developed. The State may condemn a property in order to meet the restroom requirement. (136)

RESPONSE: The rule does not require a single family homeowner to provide a public restroom on their property. Restrooms are required when a municipality participates in Shore Protection Program funding or for a municipality, county or nonprofit to be eligible for Green Acres funding

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for a project on a tidal waterway. Restroom locations will be identified by the municipality, county or nonprofit through their public access plan.

346. COMMENT: Will handicapped access including restrooms be required at one-quarter mile and one-half-mile intervals respectively? (136)

RESPONSE: The rule at N.J.A.C. 7:7E-8.11(k) requires that development provide barrier free access where feasible and warranted by the character of the site.

347. COMMENT: Steps should be taken to remove the fence at the Point Pleasant Beach jetty since the jetty belongs to the public. (5)

348. COMMENT: The regulations should place some of the burden of proof for defining when public access to jetties and groins pose an extraordinary risk on the municipality or private entity and require it to be approved by the Department.

N.J.A.C. 7:7E-8.11(p)7 allows the restriction of public access “To those portions of jetties and groins where it is demonstrated that access poses an extraordinary risk of injury.” This restriction grants broad powers to permanently restrict public access, without oversight, to the municipality or entity where these jetties and groins are placed. An example of the capricious manner in which this restriction can be applied is the Manasquan Inlet. There is unrestricted public access to the jetty on the Manasquan (north) side of the inlet and it is adjacent to the public beach. On the Point Pleasant Beach (south) side of the inlet, access to the jetty is restricted. There is no publicly owned beach on the south side and coincidentally, the restriction starts at the point where the privately owned beach begins. While not identical, the jetties on both sides of the inlet are very similar. What makes the south side such an extraordinary risk of injury? All such permanent restrictions should be subject to review by the Department and marked with a sign indicating that it is an approved restriction. (19, 43)

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RESPONSE TO COMMENTS 347 AND 348: The rule at N.J.A.C. 7:7E-8.11(p)ii provides that public access is required to the entire shore protection project except for the those portions of jetties and groins where it has been demonstrated that access poses an extraordinary risk of injury. Under this provision, the applicant is required to demonstrate to the Department that public access on these structures would result in an extraordinary risk of injury.

In November 2006, the Department entered into a settlement agreement with the owners of Jenkinson's Pavilion and Boardwalk to permanently remove a fence that has prevented free public access for fishing and walking on the south jetty of the Manasquan Inlet east of the Point Pleasant Beach boardwalk during the summer season. The fence was removed in the beginning of June 2007. Due to the close proximity of the jetty to existing public parking, restrooms, concessions and amusements, removal of the fence is expected to greatly enhance the waterfront experience for visitors and residents.

349. COMMENT: The rule should not apply to Harvey Cedars and to various other municipalities along the New Jersey coast. Harvey Cedars sells very few daily beach badges, has a park with many parking spaces and public restrooms that are now accessible to all parties. It has other restrooms in the municipal building. (140)

350. COMMENT: The State's requirement for bathrooms and accessways is met in Harvey Cedars. Bathrooms are available in locations where there is extra parking available. It would be an extreme hardship to add new restrooms to fully developed residential areas. There is an old saying that "one-size does not fit all," which is true in this matter. The Department must be reasonable regarding restrooms and parking and must continue with the much needed beach replenishment project in the Borough of Harvey Cedars. (88, 31)

351. COMMENT: In the specific case of Long Beach Island, access is already limited due to the fact that there is only one road to the island. A trip to the island during the summer months requires a great deal of time getting on and off the island. Our State's dense population typically finds more accessible shore locations to visit. (178)

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RESPONSE TO COMMENTS 349 THROUGH 351: Since shore protection and beach nourishment projects are constructed on lands and waters subject to the Public Trust Doctrine and significant amounts of public funds (both State and Federal) are invested in these projects, the Department has determined that it is appropriate to have specific standards for municipalities seeking to participate in Shore Protection Program funding. The standards at N.J.A.C. 7:7E-8.11(p)7 and 8 vary depending on the type and location of the proposed project. As stated previously, the Coastal Zone Management rules have always contained a requirement that public access be provided in order to be eligible for Shore Protection Program funding. N.J.A.C. 7:7E-8.11(p) builds on this requirement by providing greater specificity with respect to public access conditions, including perpendicular access to tidal waterways and their shores, the frequency of perpendicular access, and restroom and parking requirements. The provision of an access point every one-quarter mile, restrooms and parking will ensure that the public has the ability to access and use lands and water subject to public trust rights and that such access is meaningful. The existing restrooms and parking provided by the Borough of Harvey Cedars will be incorporated into the municipality's public access plan and will assist the municipality in complying with the public access requirements associated with Shore Protection Program funding.

352. COMMENT: This rule is unfair to the residents of coastal communities. Anyone can park in front of our houses. Surfers change their clothes, discard their garbage and block our parking spaces. Other streets in our town have no parking signs and illegal parkers are fined, why isn't this the practice on our street? There is a park across from our street yet parking is allowed on our street. The day-trippers come without beach badges, food to be eaten on the beach and they are never checked for beach badges. They come by the carload and our taxes pay for them. Why can't there be one public beach that can accommodate everyone? Perhaps Holgate or Surf City? There are many empty beaches that should be considered. (7)

RESPONSE: The Public Trust Doctrine provides for public access to and use of tidal waterways and their shores for the benefit of all the people, residents of coastal communities and the general public alike. In addition to the historic legal rights retained by the public to tidal areas, public funds

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are invested in numerous ways to protect these public resources and their adjacent lands, including State and Federal dollars which have been invested in beach replenishment and shore protection. In part, as a result of this investment, the public has the right to use these resources. These programs are financed not just by the communities within which these lands and waters subject to public trust rights are located, but by residents statewide. The public access rule is intended to ensure that all are able to exercise their rights to access and use these lands and waters.

353. COMMENT: The Borough of Avalon is almost fully developed with little privately owned open land available for development. The Borough prides itself on preserving the dune system that borders the Atlantic Ocean as a means of protecting life and property as well as being a habitat for numerous species. Almost all of the dune system in the Borough is located on municipally owned property that is zoned Public; there are very few privately owned properties with dunes. Public access is available at all street ends except in the high dune area and to require public access in this area would compromise the dune system which is the only area of high dunes in New Jersey. Access through this area would also impact the threatened and endangered species that use the high dunes as a nesting area.

Dunes by their nature are fragile; they are often affected by wind, water and by any activity on them. Any vegetation that grows on the dunes is extremely important to anchor the sand in place. To allow the public to walk through the dunes is inviting destruction of the plant root systems that hold the dune together. (126, 83)

RESPONSE: The rule at N.J.A.C. 7:7E-8.11(f)2 provides the Department the ability to modify the public access requirements in circumstances that warrant temporary restrictions to public access, including closure of a public access area for a limited time. Specifically, N.J.A.C. 7:7E-8.11(f)2ii and iii provide that temporary restrictions of public access, including closure of an area subject to public access, may be approved, required or imposed by the Department to protect endangered or threatened wildlife or plant species or to protect other critical wildlife resources. Therefore, the Department could, in accordance with this provision, modify the public access requirements in this area where the high dunes are present if necessary to protect endangered or

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threatened wildlife species or other critical wildlife. Properly designed accessways will allow crossing of the dunes to the beach, but not foot traffic throughout the dune system.

354. COMMENT: The Borough of Avalon does not have a commercially developed area adjacent to the beach or dune system. As a result, there is little opportunity to have public restrooms as required by these rules. During storms, the ocean comes to the foot of the dunes making portable toilets infeasible. These units can be overturned in storms thus increasing the health hazards instead of minimizing them. In addition, vandalism may occur. This could result in temporary toilet facilities being overturned or moved into the ocean, again increasing health concerns. Construction of facilities off the beach would either damage the dune system or result in their placement in residential areas. (126, 83)

355. COMMENT: Most of the visitors to Long Beach Island are renters and already have access to restrooms and showers. (137)

RESPONSE TO COMMENTS 354 AND 355: The availability of restrooms is critical to the ability of those members of the public who do not live or rent in close proximity to the beach to use the beach. Accordingly, the Department requires the provision of restrooms when it is providing public funds for Shore Protection projects along the oceanfront. The restroom must only be in place from Memorial Day through September 30. If the municipality opts to meet the restroom requirement by placing portable toilets near the beach, they can be removed if a significant storm is predicted during this four month period. This would be similar to how oceanfront municipalities currently prepare for storms with other facilities. The Department does not agree that providing restrooms is a health hazard; rather restrooms are a necessary public facility.

356. COMMENT: One has to consider the practicality of the proposed rules. By encouraging use of any waterfront area on a 24 hour basis, one is causing considerable increase in the cost of maintenance of those areas. For example, there is likely to be an increase in littering and with it, the increased cost of cleaning it up. Sleeping and other after-dark activities on the beach would be

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encouraged, since presumably signage prohibiting these would not be allowed. There will be a need for additional police surveillance and the beaches may not be able to take vehicular traffic. The potential for drowning accidents would be increased, resulting in increased liability. (126, 83)

357. COMMENT: The commenters object to requiring that beaches must be open 24 hours a day, unless the Department decides that there are special “unique circumstances” that warrant closing beaches at night. To preserve the public’s peace and quiet and safety, each town should be able to decide whether to close beaches at night, not some bureaucrat in Trenton. (61, 151, 21, 97, 138, 176, 116, 60)

RESPONSE TO COMMENTS 356 AND 357: The provision of public access at all times allows for the public to exercise its rights under the Public Trust Doctrine, allowing the public to use tidal waterways and their shores for activities such as fishing and walking, regardless of the time. It does not require that a municipality allow sleeping on the beach, and littering would be subject to the same fines as during the day. The provision of access at all times also has no effect on the ability of the beach to handle vehicular traffic, although it is noted that many municipalities use ATVs to patrol beaches.

358. COMMENT: All requests for Shore Protection Program funding and Green Acres funding will require the submission of a considerable amount of paperwork and passage of ordinances. There are very serious fears and doubts that a review of funding requests will be objectively reviewed in a timely fashion in order to enable shoreline maintenance to be carried out before an emergency arises. The net result will be a sharp decrease in the return in tourist dollars because the New Jersey shoreline that is so attractive to tourists will have been destroyed through inaction. (126, 83)

RESPONSE: Shoreline maintenance is typically carried out by a municipality through a Beach and Dune Maintenance general permit. While a municipality applying for such general permit will be required to meet the rule, demonstrating that fees, signage and beach access policies are in

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compliance, the municipality is not required to prepare a public access plan. Public access plans are required for municipalities participating in Shore Protection Program funding or Green Acres funding for a Green Acres project site on a tidal waterway. The Department has been and will continue to work with municipalities in developing their public access plan well in advance of funding cycles.

359. COMMENT: Eminent domain should be used by the State in situations where ends of streets facing the ocean have been privatized to prevent beach access. (52)

RESPONSE: This rule will require public access as lands adjacent to tidal waterways and their shores are developed. In addition, through the requirements that municipalities participating in Shore Protection Program funding along the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and the Delaware Bay provide an accessway to the beach every ¼ mile, beach access will be achieved.

360. COMMENT: The rules should clarify that the public trust rights apply to beach replenishment projects and those that receive Green Acres funding. If State or Federal monies have been spent to maintain beach or beach facilities, access to public trust areas should be a requirement of the permit. (52)

RESPONSE: The rules at N.J.A.C. 7:7E-8.11 (p) and (q) do require public access to beach nourishment projects and projects along tidal waterways that receive Green Acres funding. The provisions at N.J.A.C. 7:7E-8.11(n), (p) and (q) require conservation restrictions to ensure that the public access portion of the site, including accessways, restrooms and parking be permanently dedicated for public use. As public trust rights apply regardless of whether Shore Protection or Green Acres funding is implicated, the Department does not believe addition of a statement indicating that the public trust rights are applicable specifically to funded projects would be appropriate.

361. COMMENT: Local ordinances that restrict beach access should be removed as part of these rules. The Department is encouraged to approach towns with such ordinances directly and provide

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them with guidance rather than wait for a resident to realize that the local ordinances are in violation of these rules. For example:

- (1) Monmouth Beach has no parking ordinances on streets near the beach. The signs stating so are removed at the end of the summer.
- (2) Avon-by-the-Sea does not allow the public to access the beach at night.
- (3) Ocean Grove does not allow patrons on the beach or in the Ocean on Sunday before church services are completed.
- (4) Certain beaches in Brick Township charge a higher fee for non residents than residents. (166, 43)

RESPONSE: The Department encourages citizens to report any local conditions and policies, such as those described by the commenter, that may be in violation of New Jersey's public access regulations or the Public Trust Doctrine. Enforcement or other legal action by the Department may be appropriate, depending upon the particular facts of the situation presented. Citizens are also free to contact the Office of the Public Advocate with concerns.

362. COMMENT: The Department should not cave in to pressure from groups and municipalities who think the rules concerning restrooms, parking and access points are too strict. Clearly these people want it both ways. (166, 43)

RESPONSE: The Department acknowledges this comment in support of the rule.

363. COMMENT: The commenter disagrees with the claim of some municipal officials that the public access requirements as they relate to Shore Protection Program funding are too onerous. For example, the Mayor of Long Beach Township has argued that the proposed regulations, particularly the requirements for access points and restrooms, are excessive and do not allow for compromise. See, "No Access, No Aid for Beaches", New Jersey Star Ledger, Monday, November 13, 2006. Specifically, the Mayor stated "When you're accepting public money, you have to go by their rules, but I think it's totally unreasonable. This beach replenishment project is something we need desperately. I feel they're holding us hostage." Id. Opposition to the public access requirements

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was also voiced by many residents of Long Beach Island, who feel the requirements place an unfair burden on their towns.

These arguments are seriously flawed for several reasons. First, the beach nourishment municipalities continuously fail to acknowledge that the overwhelming majority of the cost of beach nourishment projects – projects that these same municipalities say they need desperately - is paid for by state and federal taxpayers that do not live there. For example, it has been estimated that the Long Beach Island beach nourishment project will cost as much as \$75 million dollars. The funding for such projects, including that proposed for Long Beach Township, is allocated as follows: The federal government contributes 65 percent of the project cost, while the remaining 35 percent is divided into a cost-share between the state and local government, with the state contributing 75 percent and the local government contributing 25 percent. Based on this cost-share allocation, for a total cost of \$75 million, the federal contribution will be \$48.75 million, the state contribution will be \$19.69 million and the local contribution will be \$6.56 million. Thus, \$68.44 million of the cost to protect mostly private residential properties in Long Beach Island is being borne by taxpayers who do not live there. The cost of public access amenities, which can be defrayed as described below, is a small price to pay for the monies and protections each town receives. As was aptly stated in the New York Times in response to the Department’s proposed rules and the vehement opposition to them expressed by the residents of Long Beach Island: “Bravo. There is something infuriating about a town that gets beach restoration money from federal or state taxpayers, and then proceeds to keep these very same taxpayers from going to the beach.” See “New Jersey – Broadening Beach Access”, New York Times, Sunday, December 11, 2006 (New Jersey Section).

Second, the State of New Jersey has recently committed to provide municipalities, including Long Beach Township for its upcoming beach nourishment project, 5 percent of the total cost of the project to help local governments pay for public access. See “State OK With Plan to Extend Pumping”, Asbury Park Press, Saturday, December 16, 2006. This 5 percent is in addition to the share of the project cost that the State already contributes. This means that, for a project that cost \$75 million dollars, the State will provide an additional \$3.75 million dollars to the municipality to put towards public access. Although this funding responds directly to the most vehement argument against the public access requirements raised by the municipal officials and the residents of Long

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Beach Island, these same officials continually fail to acknowledge the State's offer publicly and, most significantly, have failed to apprise their own residents of this funding.

Third, municipalities can, and do, charge fees for the use of bathing and recreational facilities and safeguards. The proposed rules specify that these fees can include the costs of providing restroom facilities and parking at publicly owned beach or waterfront areas. N.J.A.C. 7:7E-8.11(m).

Finally, it is anticipated that more public access will bring more visitors to an area. An increase in visitors means an increase in consumers, which translates into more customers for a town's convenience stores, restaurants, gas stations, hotels and summer rental market: all in support of a strong local shore economy. (80)

RESPONSE: The Department acknowledges this comment in support of the rule.

364. COMMENT: Large commercialized communities like Atlantic City, Seaside and Wildwood may benefit from the proposed regulations as they are capable of providing the required public access points, bathrooms and parking as well as 24-hour use of beaches, without putting a strain on the structure or quality of life of their community. They can accommodate any tourism and economic boom that the regulations are expected to spur. However, smaller residential communities like those that make up much of Long Beach Island could suffer greatly from such regulations. The required public access points, restrooms, and parking will all be paid by local municipalities, through local taxes. Thus the financial burden will fall on the shoulders of local landowners, the very same people who gain the least from the changes. (62, 138)

RESPONSE: The State's tidal waterways and their shores are impressed with public trust rights and the requirements are imposed to ensure that the public can exercise these rights. The requirement for a municipality to provide public access points, restrooms and parking is triggered by the municipality entering into a State Aid Agreement to participate in a shore protection project using State and often Federal shore protection money. The people in the municipality do gain considerably from the Shore Protection project. In fact, the shore protection projects are designed

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and funded in order to protect these communities from coastal storms. Moreover, as discussed in response to comment 41 and 42, the Department has agreed to share funding of these facilities up to five percent of the beach construction costs to assist municipalities with the cost of complying with the public access requirements of the rule.

365. COMMENT: Small residential communities like Long Beach Island, do offer their beaches for public use and in fact, some are just as accessible now as they would be under the new regulations. For example, North Beach on Long Beach Island is less than one-third square mile in total area with a central parking lot, restrooms and tennis courts that are all open to the public for use when going to the beach. These spaces are available without a charge and are rarely filled to capacity. This prompts one to believe that it might not be accessibility, but another factor that attracts people to beaches; the most likely possibility being the presence of commercial vendors. However, the influx of commercial vendors and tourists would increase traffic congestion and certainly have a negative effect on the environment.

Long Beach Township including North Beach and Loveladies as well as some other districts, has public restrooms in the following locations:

Holgate (one location)

Brant Beach (three locations)

North Beach (Long Beach Township is proposing to add a bathroom facility at the location of the existing public parking and tennis court area)

Loveladies (two locations)

Imposing access at quarter mile intervals and “meaningful” parking as “demand” dictates as well as the State’s arbitrary calculus for bathroom implementation would change the character of the North Beach community as well as other Long Beach Island communities. (62, 138)

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RESPONSE: Where a municipality has existing parking, restrooms and perpendicular access points that meet the requirements of N.J.A.C. 7:7E-8.11(p), additional parking, restrooms and perpendicular access will not be required.

366. COMMENT: The proposed rules are consistent with New Jersey case law, which has, on a case-by-case basis struck a balance between the public's right to beach access under the Public Trust Doctrine on the one hand, and the rights of private property owners, the character of coastal neighborhoods and the interests of the residents of these communities on the other hand. (36)

RESPONSE: The Department acknowledges this comment in support of the rule.

367. COMMENT: The proposed rules are inconsistent with New Jersey case law, which has, on a case-by-case basis struck a balance between the public's right to beach access under the Public Trust Doctrine on the one hand, and the rights of private property owners, the character of coastal neighborhoods and the interests of the residents of these communities on the other hand. (177)

RESPONSE: The Department has determined that the rule provides a balance between the public right to beach access and rights of private property owners. Moreover, the Department has determined that these rules are necessary to ensure the public's rights to access and use tidal waters and their shores afforded under the Public Trust Doctrine.

368. COMMENT: Small residential communities have a nature, character and culture that are far different from the large, tourist attraction communities. Unfortunately, the rules fail to recognize that simply because North Beach lies between two bodies of water, its culture, character and very essence is not defined by just those two bodies of water. Residents have a right to maintain and enjoy the quality of life to which they are accustomed. (62, 138)

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369. COMMENT: The character of Long Beach Island must be preserved for future generations, not destroyed through these rules. (137)

370. COMMENT: Through this rule, the State neglects to consider the quality of life for someone living in coastal neighborhoods. When land is acquired for parking lots, it begins to dismantle the sense of community. Therefore, the commenter is opposed to the forced destructive change to community character. (105)

371. COMMENT: The rules relating to shore protection funding will have a devastating effect on residential neighborhoods and the people who live there. Requiring more access points and bathrooms and parking at such frequent intervals would transform quiet tranquil residential neighborhoods with parking lots, lights, noise and pollution. (97)

372. COMMENT: The regulations on the Public Trust Doctrine will ruin Long Beach Island. Can't New Jersey preserve anything that it has going for it? People are exiting the State in droves and the proposed regulations only add to the exodus. (13)

373. COMMENT: The uniqueness of Long Beach Island's geography and role in present and future protection of its unique ecosystem must be factored into this project. Long Beach Island is a barrier island that has so far resisted the high-rise and dense development that has destroyed so much of the rest of New Jersey. The detrimental aspects of this project far outweigh any benefit of a boardwalk, restrooms and access. This seems to be lost on the very people who are charged by the taxpayers of the State with environmental protection. (15)

374. COMMENT: The rules and Long Beach Island beach nourishment project go against the character of the neighborhood and the area in which the commenter bought his home. (76)

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375. COMMENT: Instead of recognizing that the New Jersey shore includes quiet residential neighborhoods, the Department's rules emphasize the travel and tourism industry. Admittedly, travel and tourism is an important industry in New Jersey, and many coastal communities promote and profit from this industry. But like "industry," the travel and tourism industry by its nature involves commercial enterprises. Not every neighborhood in every municipality along the New Jersey shore is involved in commercial activity in general, or in the travel and tourism industry. The rules fail to recognize this.

There are many people in New Jersey who choose to live in neighborhoods bustling with commercial activity, and the parking lots, lights and noises needed to sustain that activity. However, there are many residents who choose to live in quiet neighborhoods without such commercial development. Classic coastal communities located just off the sand that provide quiet residential neighborhoods such as North Beach and Loveladies should have their character preserved, not destroyed by this rule. (138)

376. COMMENT: Do not adopt these rules because they will: destroy the character, and charm of Long Beach Island and other coastal communities; punish the people who live and vacation there; and increase burdensome property taxes; (37, 61, 151, 21, 60)

377. COMMENT: The commenters indicated that they moved from Surf City to Loveladies seven years ago because of the character of the area, that is less public, nicer homes and larger properties. The character of the area is at risk because of the proposed regulations as well as the beach nourishment project, which eliminates the privacy the commenters indicated they bought into. (151)

378. COMMENT: The proposed rules would effectively destroy the character of established neighborhoods that happen to be located in coastal communities. (116)

379. COMMENT: The rules do not fairly accommodate the legitimate interest of the residents and property owners in New Jersey's many and diverse coastal communities. (60)

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380. COMMENT: The rules do not honor the character of long-established residential neighborhoods and effectively mandate the homogenization of the New Jersey shore. The fact that a community lies close to a tidal waterway does not mean that the nature, character and culture of that community is defined solely by its proximity to the tidal waterway. (138, 177)

381. COMMENT: The regulations will have a deleterious effect on the environment of the communities that draw vacationers to Long Beach Island. (38)

382. COMMENT: The proposed rule effectively destroys the character of established residential neighborhoods located in coastal communities. The rules would have devastating effects on residential neighborhoods and the people who live and vacation at the shore. Requiring more access points, restrooms and parking at such frequent intervals will transform quiet tranquil residential neighborhoods with parking lots, lights, congestion, and pollution. Long-established neighborhoods are not the underbelly of the beaches along the Atlantic Ocean, yet that is how the proposed rules treat these communities. (61, 151, 21, 97, 138, 176, 116, 60)

383. COMMENT: The personality and physical characteristics of each community on the ocean are different. The Department should craft rules that recognize these differences. Prior to Justinian was Julian, who lived in the 4<sup>th</sup> century. Julian was a philosopher and a mediator. The commenter requests reasonableness, dialog, and resolution rather than angst and crammed down philosophy (109)

RESPONSE TO COMMENTS 368 THROUGH 383: The Department has determined that these rules are necessary to ensure that the public's rights to access and use tidal waterways and their shores afforded under the Public Trust Doctrine are upheld. The public can only exercise these rights if it has the ability to reach tidal waterways and their shores via perpendicular access points, and to use the tidal waterways with available parking and restrooms. In addition, under this rule,

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municipalities are required to provide these facilities as they participate in shore protection projects funded by State and often Federal money, paid by all members of the public, not just members of the community directly benefiting from the shore protection project. Communities naturally evolve over time. However, the Department does not expect these rules to result in dramatic changes in communities, and the rules do not require large tourist attractions nor new commercial development. Instead, the rule requires that the public can access and use tidal waterways and their shores, and requires provision of the necessary parking and restrooms to do so.

384. COMMENT: The Department should withdraw the proposed regulations. The commenter shares the objectives of the rules enhancing the public's ability to access and use tidal waterways and their shores consistent with the Public Trust Doctrine and applauds the efforts of the State to bolster the State's tourism industry and increase revenue to both State and local governments. However, advancing these objectives can and must be done in a manner fair to coastal municipalities and to the residents and property owners within these neighborhoods. Instead, these regulations would cause severe unwarranted hardships to private property residents in coastal communities. (105)

385. COMMENT: If the proposed regulations are the price of beach replenishment projects, then forget them. It is disgraceful that the Department would dangle beach replenishment as the bait for public accommodation. (146)

385. COMMENT: The proposed rules cause severe and unwarranted hardships to private property owners and to affected municipalities and their taxpayers. (38, 177, 138, 116, 133)

387. COMMENT: Contrary to the court decisions, the proposed rules fail to recognize the legitimate interests of the residents and property owners in coastal communities. The proposed rule would cause severe and unwarranted hardships to private property owners. (120)

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RESPONSE TO COMMENTS 384 THROUGH 387: The Department does not believe that these requirements cause a severe unwarranted hardship to private property residents in coastal communities. The rule provides a balancing between the public's right to beach access and the rights of private property owners. It is proper and fair to require public access, restrooms and parking where State funds are being used for shore protection projects. In addition, the Department is willing to share in the cost of providing the perpendicular accessways, restrooms and parking to comply with the rule.

388. COMMENT: The requirements of the proposed public access rules, and thus the opportunity for the Department to enforce them, are triggered in three distinct circumstances: (i) when a development permit is sought under either the Coastal Permit Program Rules or the Coastal Zone Management Rules, N.J.A.C. 7:7-1.3, et seq., and N.J.A.C. 7:7E-1.8, et seq.; (ii) when a municipality participates in Shore Protection Funding through a State Aid Agreement, N.J.A.C. 7:7E-8.11(p); and (iii) when a municipality, county or nonprofit organization seeks to be eligible for Green Acres Funding, N.J.A.C. 7:7E-8.11(q). More specifically, prior to obtaining a development permit, applicants must demonstrate through the submission of site plans and/or a Compliance Statement, how the proposed development meets the public access requirements of both the new Lands and Waters Subject to the Public Trust rule and the Public Trust Rights rule. See, e.g., N.J.A.C. 7:7-5(b)(1)(ii) and N.J.A.C. 7:7-7.7(c)(4).

A municipality participating in Shore Protection Funding through a State Aid Agreement must submit a draft public access plan, a draft ordinance adopting the public access plan and a draft public access instrument to the Department for approval prior to the issuance of a coastal permit. N.J.A.C. 7:7E-8.11(p)(1). Prior to the commencement of a beach nourishment project or other shore protection construction, the municipality must actually provide the required public access, adopt the public access plan ordinance and record the public access instrument. N.J.A.C. 7:7E-8.11(p)(3).

Similarly, in order to be eligible for Green Acres Funding, a municipality must submit to the Department before even applying for Green Acres funding, a public access plan, a draft ordinance

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adopting the public access plan, a draft public access instrument and must actually provide public access to all tidal waterways and their shores on or adjacent to lands it holds. N.J.A.C. 7:7E-8.11(q)(1), (3) and (5). Before Green Acres funding can be disbursed, N.J.A.C. 7:7E-8.11(q)(5)(ii) and (iii) require that the ordinance must be adopted and the public access instrument recorded.

While these jurisdictional provisions are somewhat straightforward, there is one specific area where the new rules are not completely clear as to the Department's jurisdiction. This is where, in accordance with a State Aid Agreement, one or more phases of a beach nourishment project has commenced or been completed but, under the same Agreement, additional phases have yet to occur.

By way of example, a sizable beach nourishment project in Monmouth County has commenced, but has yet to be completed. Sponsored by a combination of Federal, State and local funding, and pursuant to State Aid Agreements between the State and each benefiting municipality executed in and around 1993, the project is designed to provide a beach that is 100 feet wide from Sea Bright to the Manasquan Inlet. The project consists of an initial nourishment phase, which is complete with the exception of Elberon, Deal, Allenhurst and Loch Arbour, where real estate easements are still being negotiated. Additional periodic maintenance re-nourishment is scheduled for eight-year cycles as required over the next 50 years.

N.J.A.C. 7:7E-8.11(p) and its related provisions can be interpreted as being applicable to the Monmouth County beach nourishment project, and all other similar projects that have commenced but are not yet completed. The commenter indicated that they have been advised by Department staff that this interpretation is correct because each additional maintenance or renourishment portion of these ongoing projects requires a new agreement between the State and the municipality and that the State intends to incorporate the new public access requirements into each such agreement.

In addition, such an interpretation of the proposed rules is entirely consistent with the position the Department is asserting in its pending litigation against the Borough of Sea Bright. See, *State of New Jersey, Department of Environmental Protection v. Borough of Sea Bright, et als.*, Complaint filed in the Superior Court of New Jersey, Chancery Division, Monmouth County, New Jersey, September 22, 2006, hereafter "DEP Complaint." In that litigation, the Department refers throughout its Complaint to this same beach nourishment project and the State Aid Agreements executed in 1993. The Department argues that the Public Trust Doctrine is a common law doctrine of ancient origin, that it was one of the State laws that existed at the time the Agreements were

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entered into and, that it therefore forms a part of the Agreements as if it was expressly referred to or incorporated into their terms. See, DEP Complaint, par. 51, 61. The Department further notes that, since the Agreements were executed, Court decisions have clarified the rights of the public under the Public Trust Doctrine – rights that have existed since ancient times - and argues that the original Agreements must be interpreted and enforced consistent with what the Courts have now clarified as being the governing State law at the time the parties entered into the Agreements. DEP Complaint, par. 46-48; 64, *citing Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005); *National Association of Homebuilders v. DEP*, 64 F.Supp. 2d 354 (D.N.J. 1999); and *Liu v. City of Long Branch*, 363 N.J. Super. 411 (Law Div. 2003). The Department concludes that enforcement of the terms of the original Agreements without taking into account these clarifications of the public’s rights “would be contrary to the law and public policy of this State.” DEP Complaint, par. 66.

Such interpretation of the Rules is consistent with the posture of the Department in the above litigation and legal precedent recognizing the State as a Trustee of the “historic legal rights retained by the public.” Specifically, the Department’s arguments lead to the conclusion that the proposed rules apply to all beach nourishment and shore protection projects, whether they have commenced or not and regardless of when the State Aid Agreements were executed. To find otherwise would be contrary to the law and public policy of this State.

Accordingly, the Department should clarify the language of N.J.A.C. 7:7E-8.11(p) to expressly ensure that its public access requirements are applicable to ongoing beach nourishment projects and that all parties are certain of this intent. (80)

389. COMMENT: Will these rules apply to shore protection projects that are already underway or projects that have received funding? (166)

RESPONSE TO COMMENTS 388 AND 389: Through previous State Aid Agreements to participate in Shore Protection Program funding, municipalities have been required by the Department to provide public parking, beach access easements and perpendicular accessways. N.J.A.C. 7:7E-8.11(p) applies to future State Aid Agreements, including State Aid Agreements

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executed as part of a continuing replenishment project. Regardless, the Public Trust Doctrine remains in effect. The Department does not believe clarification is required.

390. COMMENT: In addition to the historic rights retained by the public to tidal lands and waters, the Department cites to the many State and Federal dollars invested in these types of public projects as providing another basis for the public's right to use these resources. For these same reasons, N.J.A.C. 7:7E-8.11(p) should include and apply to other projects constructed adjacent to public trust lands and waters that rely on public funding, including, but not limited to, the construction of the various commuter ferry terminals throughout the State, the construction and reconstruction of bridges, roads and other Department of Transportation projects, and publicly funded brownfields remediation projects. Under the proposal as currently written, such projects would fall under the category of "all other development", meaning development other than shore protection/beach nourishment projects or a Green Acres project. As such, they would only be required to provide parking to accommodate residents seeking public access to the waterfront if construction of the project will reduce existing on-street or off-street parking that is already used by the public for access to the waterfront. N.J.A.C. 7:7E-8.11(j). In addition, there are no restroom requirements for such development projects and, unlike with the shore protection/beach nourishment projects, there is no requirement that the public access areas and public accessways be provided prior to the commencement of or even immediately upon completion of construction. Accordingly, the proposed public access rules should be amended to include other publicly funded projects in subsection 8.11(p), subjecting such projects to the same public access requirements as shore protection and beach nourishment projects. (80)

RESPONSE: N.J.A.C. 7:7E-8.11(j) does require that parking be provided at developments for the public to access tidal waterways and their shores in addition to requiring the replacement of public parking to access the water that will be lost due to development. While the Department would encourage the provision of public restrooms at publicly funded projects adjacent to all tidal waterways as these sites are subject to the Public Trust Doctrine, the Department has determined that the restroom requirements of the rule at N.J.A.C. 7:7E-8.11(p) should apply to Shore Protection

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Program and Green Acres Program funding at this time. The determination was made because these two capital spending programs are implemented by the Department, are in the forefront of municipal projects along tidal waterways and their shores and have been addressed in the public access rule since 1980.

391. COMMENT: The requirements being placed on municipalities to develop and implement a public access plan will be costly. Why is the Department mandating new costs to be placed upon municipalities when the State government is trying to cap their budgets and lower property taxes? Clarification on the impact of these regulations on municipal budgets and property taxes is required. (16)

392. COMMENT: Why should municipalities be forced to pay more money to make it more accessible? (21)

393. COMMENT: The Green Acres Program which provides funds to obtain open space land and provide recreation facilities for all the residents of the State would be severely restricted by these amendments. (93)

394. COMMENT: The State of New Jersey is holding beachfront communities hostage when it comes to Green Acres funding. The goal of the Green Acres Program is creating open space and recreation for the general public. This program has been very successful with exemplary cooperation between State and local government. The proposed rule is a failure on the part of the State to listen to the local officials needs and logic. Implementation and expansion of the Green Acres Program will be threatened by these regulations. (56)

RESPONSE TO COMMENTS 391 THROUGH 394: The requirement to prepare a public access plan is imposed upon a municipality only when that municipality is seeking State Green Acres Program or Shore Protection Program funding for a project along a tidal waterway. In addition, since 1980, the rule at N.J.A.C. 7:7E-8.11 has provided that municipalities that did not have active

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plans to provide access to the water were not eligible for Green Acres or Shore Protection funding. In light of the Public Trust Doctrine, as well as the use of public money for these projects, the Department has continued the requirement for a public access plan, and identified specific elements of such plans. However, in the concurrent proposal published elsewhere in this issue of the New Jersey Register, the Department is proposing to amend N.J.A.C. 7:7E-8.11(q) to modify the timing for submission of a public access plan for applicants for Green Acres funding for projects located along a tidal waterway. Rather than requiring that the public access plan be submitted prior to application, the rule proposal would require that the public access plan be submitted within 90 days of receipt of a letter from the Department notifying the applicant that its application for Green Acres funding has been approved. Approval of the public access plan would be required prior to the Department entering into a project agreement for the Green Acres project.

395. COMMENT: While Long Beach Island is comprised of numerous Townships, the Island's overall development has been one which has provided numerous public accesses along the entire island, more frequently in areas where commercial zoning is significant. For example, in Beach Haven and Surf City, there are public access points as frequent as every 200 yards. The traffic these access points attract are willingly met by a symbiotic relationship with commerce that places eating establishments, hotels, service stations, and retail stores in the area. While there are public access points in all towns on the Island, it is not a surprise that the more residential areas have fewer of them. Nevertheless, the total number of private access points on the 18-mile island is more numerous than one per quarter-mile and there is no township on the island that does not have an access average of one per one-half mile.

The fact is Long Beach Island probably has more total access than even the most stringent requirements would define, but to require that the access for commercial zones be equivalent to the access for residential zones is unnecessary, impracticable, and inconsistent with sound municipal planning. This is particularly true when access in the residential zones is better than every 800 yards. (30)

RESPONSE: The public has the right to access all tidal waterways and their shores, not just those tidal waterways located in commercial areas. Accordingly, this rule requires that perpendicular

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access points be provided at intervals that facilitate access to all beaches, not just in commercially developed areas. While the rules do provide some flexibility in the placement of individual access points under N.J.A.C. 7:7E-8.11(p)7iii(1), it would be inappropriate to allow significant spacing between access points in one area simply because increased access is allowed at another location at the same distance away. In the concurrent proposal published elsewhere in this issue of the New Jersey Register, the Department is proposing to apply the requirements for the one-quarter mile access and easements to the project area, rather than to the entire municipality.

396. COMMENT: The commenter indicated that they were incensed when a request for an easement was delivered to accommodate beach replenishment conditional on forfeiting their property rights in perpetuity to unlimited public access. The easement request was unnecessarily overreaching in its scope and threatened the character of the residential zoning of the community. Many characterized the commenter's resistance as "Anti-beach replenishment" but the fact is that no one is going to sign an unlimited easement to their property regardless of their demographic and then hope that local and State governments will "do the right thing." This is no different than government coming to a community and ordering a public park area every one-quarter mile even though the town already has a public park and gathering area, then requesting that the property owner sign an easement that allows the government in perpetuity to access any part of your property for public use. Would you perceive such an easement request as in the public interest or in violation of your constitutional property rights? (30)

RESPONSE: The easement language specifies the need for perpetual public interest in the property and that the public use will be limited to the project construction and its maintenance and to access and use of the beach area by the public. The area of the easement is limited to that area of the private property needed for construction of the project. If the private property area is in whole or in part a dune, then State and local regulations will restrict public use of that portion of the property covered by the easement.

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397. COMMENT: Mandated expenses of Shore Protection Program funding that are required by this rule are easy for State agencies to make as they are not responsible for the resulting State and local taxes. (1)

398. COMMENT: At a time when elected officials are trying to reduce property taxes, the Department's rules will greatly increase Long Beach Island's property taxes. Senior citizens may not be able to afford an increase in their taxes and may be forced to sell their homes. (85)

399. COMMENT: The proposed rules will lead to increases in already burdensome property taxes on the people of these communities. (61, 151, 21, 97, 138, 176, 116, 60, 37, 105)

400. COMMENT: The Department should not adopt any rules that will increase taxes. (37)

401. COMMENT: All too often the Department adopts rules that sound great, but are not practical. Who will pay for all the access points, restrooms and parking? This rule puts a heavy burden on coastal municipalities and their residents. (1)

402. COMMENT: If the mandated facilities are to be provided for the benefit of the public at large, the cost of such installations, land, maintenance and operation, should be borne by the State, not the local property taxpayers. (121)

403. COMMENT: While the concept of public access is a fair one, it is unfair for the State to force it on the oceanfront community residents without a clear method of who will pay for the improvements. Requiring parking and public restrooms imposes an undue, unfair and unbalanced burden on the property owners and coastal municipalities. If the State wants access for all it should pay a fair share. (133)

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404. COMMENT: These regulations saddle towns with increased expenses that will cause either increased property taxes or increased ratables. The rule will result in a higher building intensity creating unmanageable traffic on Long Beach Island's main boulevard. (63)

405. COMMENT: The rules will increase property taxes to maintain the restroom and parking facilities. (137)

406. COMMENT: Since the State has determined that the Public Trust Doctrine benefits all the people of the State, the State should obtain all the access, beach easements and provide restrooms and parking for all the people of New Jersey and not place this burden only on oceanfront communities. (93)

407. COMMENT: The Long Beach Island beach nourishment project is projected to cost \$71 million, which, if adjusted based on the cost of the first phase in Surf City, will exceed \$120 million. Federal taxes will pay for 65 percent of the project; New Jersey taxes for three-quarters of the remaining 35 percent and county and local property taxes for the balance. Adding beach maintenance in the years between the Federal renourishment cycle, which has been estimated at \$34 million per year for Long Beach Township's renourished beaches, it is evident that there is a financial burden placed on the residents of Long Beach Island. Now the Department is asking the residents to pay for acquiring additional access points, constructing restrooms and parking lots, and paying for their maintenance. Long Beach Township Mayor Gove has stated that land for one parking space, not lot, will cost \$50,000. Middle income families and small businesses will be driven off Long Beach Island and replaced by high-density projects that provide a larger tax base. (64)

408. COMMENT: The proposed rule fails to reflect or accommodate its real economic impact. In Mantoloking and many other similarly situated communities, the cost of land acquisition for restrooms and parking will be charged to local private property owners, in effect an unwarranted real property tax surcharge resulting from an aspirational and self-serving view of decisional law.

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The authorizing statute does not contemplate such an imposition. Will any funds be made available to municipalities to acquire land, construct and maintain mandated facilities as a component of New Jersey Department of Environmental Protection beach nourishment projects? (121)

409. COMMENT: The commenter is opposed to the proposed rule. The proposed public access requirements will markedly decrease the bayfront property values and have nothing to do with environmental protection. Ninety percent of New Jersey taxes are paid by 10 percent of the population. Where will the money come from when actions such as this proposal continue to drive high-income individuals from our State? (13)

410. COMMENT: The Department seems to be at odds with the elected government of the State, which have all committed to a reduction in the taxes in the State. Regardless of who foots this bill, these rules will cost significant dollars, and contradicts the electorates' expressed desires. (53)

411. COMMENT: The proposed regulations will mandate that Long Beach Island communities provide public beach access every one-quarter mile, restrooms every one-half mile and sufficient parking to accommodate the capacity of the beach. At first glance these rules seem fair because they allow the State's citizens to enjoy the beaches, however, these requirements will be unfairly burdensome to the Island residents. The Island resident's taxes will be increased and used to pay for the accesses and most of the cost of land for restrooms and parking. The State may share in the cost. Maintenance costs would be paid through local taxes. (63)

RESPONSE TO COMMENT 397 THROUGH 411: The provisions of N.J.A.C. 7:7E-8.11(p) only apply to municipalities that are entering into a State Aid Agreement with the Department because they are receiving State funds under the Shore Protection Program. The State, and the Federal government when involved in the project, will pay the vast majority of the project costs, not the local government, which will pay only nine percent of a Federal project and 25 percent of a State project. Nonetheless, local communities will derive great benefits from the shore protection offered by the project. The State will provide additional funding of up to five percent of the initial project construction costs to assist municipalities with the cost of complying with the public access

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requirements of the rule. This funding can assist in the provision of one-quarter mile perpendicular accessways, restrooms and parking. In addition, parking can be met through additional on-street parking and restroom facilities may be made available at existing public buildings or using portable toilets. For example, the Department has offered the five municipalities affected by the Long Beach Island beach nourishment project up to \$50,000.00 per restroom to meet the public access requirements of the rule. This funding must be equally matched by municipal funds. This funding can only be used for compliance with the public access rule and expenditure of these funds will require prior Department approval. The additional funding may not be used for legal or engineering fees, surveying or other professional services, or sewer connections. This additional funding provided by the Department for compliance with the public access rule requirements will be incorporated into the State Aid Agreement between the State and municipality. Where a municipality is developing a shore protection project without State or Federal funds, the rule requires access to the water at that development, as it did prior to adoption of these amendments.

412. COMMENT: The proposed rules are bad for Long Beach Island since they are more stringent and not in compliance with Federal standards. This can result in a loss of funding for the Long Beach Island beach nourishment project. (85)

413. COMMENT: There is no one stopping the public from going to the beach on LBI. There is access at every street. The commenter stated that he opposes that LBI beach nourishment project and because of his opposition he is going to be rewarded by having a bathhouse located 150 feet from his property. (76)

414. COMMENT: Requiring public restrooms every half-mile is both unreasonable and prohibitively expensive. Currently, Long Beach Island does not meet this requirement, even in areas having adequate numbers of vertical public access points such as the southern towns of Long Beach Island. How can the Department expect towns in the less densely populated northern portion of Long Beach Island to meet this requirement? Most families that use Long Beach Island's beaches would probably be happier with free-standing showers at the street ends. (139)

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415. COMMENT: The intent of public access is admirable but not practical. There is no evidence that there should be access to the beach less than the Army Corps of Engineers' one-half mile requirement. The requirement seems to have been established only from a "model municipality" profile in the Department's handbook and does not reflect need or impact on municipalities.

The one-quarter mile access requirement with parking and toilets will destroy the neighborhoods of Long Beach Island and decrease their value and ratables. The parking requirement does not have any standards or documentation and does not allow for local implementation. There is no justification for toilets, an issue that was only raised for the Long Beach Island beach nourishment project in 2005.

The Department should revise the rules to reflect that the distance between access points be one-half mile with the goal of an average distance of one-quarter mile throughout the municipality. In addition, parking should be provided using all municipally owned infrastructure and restrooms should be provide on municipal property, the need for which should be determined by the municipality. (84)

416. COMMENT: What is the basis for the Department's decision to override the US Army Corps of Engineers' restroom facility requirements. (53)

RESPONSE TO COMMENTS 412 THROUGH 416: Both the Federal government and the State require public access. Both the State and the Federal government require parking to accommodate beach capacity, with the Federal government providing the alternative of parking to accommodate peak demand. However, given the dense population of New Jersey and the great demand for beach use, the Department has determined that more frequent perpendicular access points are warranted in New Jersey than may be the case in other, less populated areas of the country. Restrooms are necessary for public health and to provide meaningful public access. Portable restrooms available from Memorial Day through September 30 would meet this requirement and not be prohibitively expensive. It is up to the municipality to determine the exact location and type (either permanent or portable) of restrooms. Although the rule does not require the installation of showers, it does not

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preclude them. If a municipality is willing to comply with these standards, there should be no loss in funding.

417. COMMENT: The Department is endeavoring to force the public access requirements relating to Shore Protection funding without legislative approval while also applying them retroactively. (1, 85)

RESPONSE: Under the Administrative Procedure Act, and in accordance with the authority cited in the proposal the Department has the authority to adopt regulations such as the public access rules. The regulations will be applied to future State Aid Agreements.

418. COMMENT: Many of the homeowners that are currently refusing to sign the property easements are the same people that have benefited from past replenishments that now afford them with their multi-million dollar views. Appropriately, new proposed public access at quarter-mile intervals will in no way do harm to the property values of those on the Oceanside, but in fact, raise the value of their property, a direct result of the added protection that the new beaches and dunes will provide. It is long overdue that publicly funded projects such as the Long Beach Island shore protection project should now benefit the public and not just the few homeowners that want another government freebie. These same recipients of past free money post "Private Property No Trespassing" signs on the beach.

The Department needs to be realistic as to the scarcity of open space in New Jersey, the most densely populated State in the nation. Requiring public access vertical to the beach however, is consistent with the Public Trust Doctrine. Homeowners that are fearful of hordes of buses loaded with people invading their beaches, boardwalks being erected on the dunes, or a surfer not catching the right wave is baseless and ludicrous. The beaches are meant for everyone. Even a novice can see that one average size storm could cripple Long Beach Island. Waves crested the dunes in several of the northern towns last summer. What would happen if a real storm strikes the Island? Demonstrating this real vulnerability, most insurance companies refuse to underwrite on Long Beach Island. (139)

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RESPONSE: The Department acknowledges this comment in support of the rule.

419. COMMENT: Requiring increased public parking as part of the Long Beach Island project should have been incorporated at an earlier time. Towns on Long Beach Island that have public access at the ends of streets already have ample parallel parking on their adjacent streets. Towns such as Loveladies that have few open vertical accesses do have two large lots, one in the northern and one in the southern Oceanside section of the town. Any additional parking can be gained along the lagoonfront side streets. If more vertical access points are granted at one-quarter mile intervals in towns such as Loveladies, a short walk to access Long Beach Boulevard would not be problematic. Currently, one may have to walk upwards of a mile to reach a public access point from the bayside in Loveladies. (139)

RESPONSE: The Department acknowledges this comment in support of the rule. Parking is an important aspect of meaningful public access and insufficient parking discourages public access to tidal waterways and their shores.

420. COMMENT: Parking spaces based on “capacity of all beaches within the municipality” rather than the demonstrated need is reasonable. (36)

RESPONSE: The Department acknowledges this comment in support of the rule.

421. COMMENT: How will the Department determine if the parking required as a result of shore protection funding provided by a municipality is adequate? (166)

422. COMMENT: N.J.A.C. 7:7E-8.11(p)7v requires that for municipalities to participate in Shore Protection Program funding, the municipality must provide parking sufficient to accommodate public demand to access the project and the beach capacity of all beaches within the municipality along that portion of the waterway on which the project occurs. What is beach capacity? (97)

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423. COMMENT: Within the proposal, several important terms and provisions are left vague, confusing and unclear. Proposed N.J.A.C. 7:7E-8.11(p)8iv requires “parking sufficient to accommodate public demand to access...the beach,” however there is no further explanation of how the public demand should initially be gauged. Furthermore, the public demand, if it were to grow as the proposal suggests, could likely exceed what smaller communities could feasibly handle, particularly on narrow Long Beach Island. (62, 138)

424. COMMENT: The rule requires that shore protection projects provide adequate parking, yet there is no attempt to define what this is or how it is to be determined. (53)

RESPONSE TO COMMENTS 421 THROUGH 424: The required parking for shore protection projects along the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and Delaware Bay is the same as one of the Federal parking standards that has been in effect for the past 18 years. Water Resources Policies and Authorities Regulation No. ER1165-2-130 states that lack of sufficient parking facilities for the general public (including non-resident users) located reasonably nearby, and with reasonable public access to the project, will constitute de facto restriction on public use, thereby precluding eligibility for Federal participation. Generally, parking on free or reasonable terms should be available within a reasonable walking distance of the beach. Street parking is not considered acceptable in lieu of parking lots unless curbside capacity will accommodate the projected use demands. In some instances, the Federal government may allow State and local plans that call for a reduction in automobile pollutants by encouraging public transportation. Thus, public transportation facilities may substitute for or complement parking facilities. However, reports which consider public transportation in this manner must indicate how the public transportation system would be adequate for the needs of projected beach users. In computing the public parking accommodations required, the beach users not requiring parking should be deducted from the design figure. This policy is reiterated in ER1105-2-100 effective April 2000.

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Beach capacity is determined by the size of the beach berm available for resting, space between blankets for walking and for some active recreational uses, such as tossing a football, without resulting in crowding conditions. The size of the beach berm is determined by the Army Corps of Engineers computer modeling based on physical conditions and desired level of protection.

425. COMMENT: The Department should reconsider requiring that beaches be open on a 24-hour basis. Except for the occasional fisherman, why would there be a need for the public to have access 24-hours a day? Almost all towns in the State of New Jersey have curfews, especially if individuals are underage. Just about all State and local parks, and municipal recreational facilities have a curfew regardless of age. (139)

426. COMMENT: The State itself is being hypocritical in attempting to create such regulations and not submitting its own parks and beaches to the same standards. At both Island Beach State Park and Sandy Hook, public access points, restrooms and parking are not found in such abundance as they are expected to be found on privately owned property. (62, 138)

427. COMMENT: It is ironic that the Department is not willing to abide by the proposed rules. For example, the Department does not provide restroom and parking facilities in accordance with the proposed rule at Island Beach State Park. Further, the Federal government does not provide parking, beach access and restrooms in accordance with the proposed rule at Sandy Hook. If the Department believes there is a need for more beach access, parking and restrooms, it should start with publicly owned lands rather than impinging on private property rights. (61, 151, 21, 97, 176, 116)

428. COMMENT: The rule demonstrates State hypocrisy. While the State seeks to compel construction of restroom and parking facilities at designated linear intervals, the Department will not provide amenities at such frequent intervals at the beaches it controls, such as Island Beach State Park. (177)

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429. COMMENT: The rule requires more restroom facilities than the State provides in its parks (such as Island Beach State Park). Is this a case of “do as I say, not as I do?” (53)

RESPONSE TO COMMENTS 425 THROUGH 429: The Public Doctrine provides that the public has the right to utilize tidal waterways and their shores regardless of the time. The standards with regard to intervals between access points and restrooms apply to shore protection projects funded under the Shore Protection Program through State Aid Agreements. Nonetheless, the Commissioner will issue an Administrative Order to increase public access and use opportunities at Department facilities, through development and implementation of public access plans for lands the Department manages that are located along tidal waterways and their shores. In developing the public access plans, the Department will consider the amenities cited by the commenters. The Administrative Order will set forth a plan to increase public access and use opportunities for State parks, State marinas and State wildlife management areas. It should be noted that Gateway National Recreation Area is not a State park, but is part of the National Parks System operated by the Federal government.

430. COMMENT: The Department’s requirement that all publicly owned, funded and maintained waterfront areas include actual public access, including parking, restrooms, access routes and appropriate signage is applauded. The U.S. Army Corps of Engineers guidance documents for shore protection projects already contain minimal standards. These include the public use provisions extract from Engineer Pamphlet EP 1165-2-1, Digest of Water Resources Policies and Authorities, Chapter 14, “Shore Protection” (7/30/99); full text available at <http://www.usace.army.mil/inet/usace-docs/eng-pamphlets/ep1165-2-1/c-14.pdf>; and the public use and access provisions included in Engineering Regulation ER 1165-2-130, “Federal Participation in Shore Protection,” United States Army Corps of Engineers (6/15/89); full text available at <http://www.usace.army.mil/inet/usace-docs/eng-regs/er1165-2-130/entire.pdf>. Through these rules, the Department is appropriately improving upon those guidance documents due to the fact that New Jersey is the most densely populated state. (25)

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RESPONSE: The Department acknowledges this comment in support of the rule.

431. COMMENT: The Federal Standards Analysis of the proposed rules states that public transportation may be used to supplement or substitute for automobile parking. For a variety of reasons, including traffic, limited land in some areas and energy use concerns, this is a laudatory measure. The rules themselves, however, do not contain a specific provision allowing the supplemental or substitute use of public transportation. The commenter recommends including such an express provision in appropriate sections; for example, N.J.A.C. 7:7E-8.11(p). (25)

RESPONSE: The rule at N.J.A.C. 7:7E-8.11(p)7v provides that a reduction in parking may be permitted by the Department only if the municipality documents that there are no possible means to provide parking. Various alternatives that must be considered by the municipality include land acquisition to construct additional parking lots, reconfiguration of existing parking that could resize or reorient parking to provide additional spaces, removing existing parking restrictions and remote or offsite parking with a shuttle service.

432. COMMENT: Would the Department permit privately funded beach nourishment projects in the absence of compliance with restrooms and parking being provided by the municipalities or before such compliance is attained? Given the lack of Federal funds and the urgent need for replenishment, would the Department permit a locally funded renourishment project to be initiated without the imposition of grants of easement requirement for the entire dry sand area? (121)

RESPONSE: The requirements that N.J.A.C. 7:7E-8.11(p) apply when a municipality enters into a State Aid Agreement with the Department s for Shore Protection Program funding. Accordingly, they would not apply to a Shore Protection project where a municipality does not enter into a State Aid Agreement. However, the remaining provisions of N.J.A.C. 7:7E-8.11 would apply, as applicable.

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433. COMMENT: The location of perpendicular access points and the number of restrooms and parking spaces is arbitrarily determined. Why only restrooms and parking? Will the Department next contemplate the inclusion of changing facilities, restaurants and public transportation? (121)

434. COMMENT: The commenters indicated that they have never objected to public use of the beaches, and in fact signed an easement allowing public access to the flat portion of the beachfront property. However, proposed regulations requiring access, parking and bathrooms every one-quarter mile are excessive and unreasonable and do not allow for the special circumstances of an area that, by chance, was developed without streets and without any commercial establishments. There are sufficient accessways and bathroom facilities on the properties in the area already owned by Long Beach Township. To require access every one-quarter mile, exceeding the Federal guidelines, and which makes no allowance for the characteristics of individual communities is unreasonable and unwise. (58)

435. COMMENT: The methodology used to determine need for public access, parking and restrooms is arbitrary at best. Existing utilization and projections of future demand to determine the need and location of public access, parking and restrooms have not been performed by the Department. Do eight to ten automobiles require bathrooms? In popular areas near Route 72 the existing municipal bathrooms become rooms for changing clothes and require cleaning and policing. Remote shelters will require constant attention by police to check for drugs, alcohol and other misbehavior. Is this another expense to be borne by local taxpayers? Will local merchants be required to provide restrooms without compensation, tying-up their facilities by non-customers? (42, 175)

436. COMMENT: Why has the Department decided to impose more stringent standards than those of the Army Corps of Engineers? The methodology used to determine the need for public access, parking and restrooms is arbitrary. Use of existing access areas, parking and restrooms and projections of future demand should be performed by the Department to determine the need and location of public access, parking and restrooms. (175, 117)

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437. COMMENT: Rather than overbuilding and overtaxing Long Beach Island, the Department should respect its family-oriented character by adopting the Army Corps of Engineers mandate of access every half-mile. (64, 1)

438. COMMENT: The commenter objects to the mandate that municipalities establish public access points an average of every one-quarter mile with the distance between points not to exceed three-eighths mile, regardless of whether existing public access is sufficient to satisfy demand.

The commenter objects to the requirement that increased public parking sufficient to “accommodate...the beach capacity of all beaches within the municipality” regardless of the adequacy of existing public parking and the demand for public parking, particularly since the Long Beach Island beach replenishment project will increase the width of the beaches on the island and hence their capacity. (116)

439. COMMENT: The commenters object to mandating that municipalities establish public access points an average of every one-quarter mile with the distance between points not to exceed three-eighths mile, regardless of whether existing public access is sufficient to satisfy demand The commenters also object to requiring public restrooms every one-half mile with the distance between restrooms not exceeding five-eighths mile as well as within one-quarter mile of every municipal boundary, regardless of the adequacy of existing public restrooms and the demand for public restroom facilities. In addition, the commenters object to requiring increased public parking sufficient to “accommodate...the beach capacity of all beaches within the municipality” regardless of the adequacy of existing public parking and the demand for public parking, particularly since the Long Beach Island beach replenishment project will increase the width of the beaches on the island and hence their capacity; (61, 151, 21, 97, 138, 176, 116, 60)

440. COMMENT: The commenter opposes the Shore Protection Program funding provisions relating to the frequency of public access points, restrooms and parking. (138)

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441. COMMENT: Please consider the “bigger picture” before imposing unnecessary public access and bathroom requirements on Long Beach Island. (178)

RESPONSE TO COMMENTS 432 THROUGH 441: The Federal government requires the provision of public access for a shore protection or beach nourishment project when Federal funds are used. This requirement is contained within contracts, Federal guidance documents and coastal zone consistency determinations. Specifically, the document entitled, “Water Resources Policies and Authorities: Federal Participation in Shore Protection,” released June 1989 (Corps Regulation CECW-PR Regulation No. 1165-2-130, ER 1165-2-130) establishes standards for Federal participation in shore protection. Paramount among them is the requirement for public use of the shore protection project. These standards require that the shores be available for public use on equal terms to all.

The provision of adequate parking is important to ensuring that the public can access and use tidal waterways and their shores. The Corps standards cited address parking and access. With respect to parking, the Corps standards cite the need for sufficient parking facilities for the general public located reasonably nearby. The standards require that parking be sufficient to accommodate the lesser of the peak demand or the beach capacity, but allow for public transportation to supplement or substitute for such parking. The rule at N.J.A.C. 7:7E-8.11(p)7v is consistent with this requirement.

In addition, the Corps standards require reasonable public access to the project. The standards tie reasonable public access to the recreational use objectives of the particular area. They require public access points within one-half mile. This is a national standard that applies to Federal participation in any shore protection project in the nation. The Department has determined that a more stringent standard is warranted in New Jersey. This requirement is in part based on the fact that New Jersey is the most densely populated State in the nation and on the need for the public to have the ability to access beaches nourished by State and Federal funding. Further, the New Jersey Supreme Court in *Matthews* held “Beaches are a unique resource and are irreplaceable. The public demand for beaches has increased with the growth of population and improvement of transportation facilities.” 95 N.J. 306, 323 (1984). The population has only increased in the decades since

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*Matthews* was decided. The Department has determined that it is necessary and appropriate to exceed the Corps national standard. It should be noted that the rule provides flexibility in meeting the one-quarter mile requirement by allowing municipalities to adjust the location of the accessways provided the one-quarter mile distance between accessways is met on average. This enables the municipality to consider the characteristics of the area while ensuring that public trust rights are protected..

The Corps standards do not address the provision of public restrooms. For provision of meaningful public access and public health reasons, the Department has determined that where Shore Protection Program funding is utilized, it is appropriate to require restrooms at one-half mile intervals during the active beach season. Similar to the one-quarter mile accessway requirements, the rule provides the municipality with some flexibility in determining the location of these facilities while ensuring that the restrooms are located close enough to the beach and to one another for use by beach patrons.

Existing facilities and accessways will be considered in determining compliance with this rule. The Department is not contemplating requiring changing facilities, restaurants and public transportation, nor does it require local merchants to provide restrooms. The concurrent proposal published elsewhere in this issue of the New Jersey Register would modify the requirements for easements and accessways, requiring them in the project area only.

442. COMMENT: The proposed restroom requirements may present a danger to children by attracting the types of people targeted by Megan's Law. It is ironic that the State that led the country into awareness of the danger presented by pedophiles should be the State that will make it easier for such persons to prey upon our unsuspecting children when they are most vulnerable.  
(145)

RESPONSE: Public restrooms are needed for people to enjoy the beaches and there is no reason to expect restrooms at beaches to present a greater risk than public restrooms elsewhere.

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443. COMMENT: To provide the required parking, North Beach would potentially lose its tennis courts. Further, should beachfront property owners provide the required public access, they will be subject to a 40-foot wide ramp over the dunes in front of their property. (84)

RESPONSE: The rule does not require a 40-foot ramp over the dune nor does it specify where the parking must be located. The parking requirement is both a Federal and State requirement for shore protection projects.

444. COMMENT: The commenters object to mandating that municipalities use eminent domain, if necessary, to acquire lands for parking, public access and restrooms. (61, 151, 21, 97, 138, 176, 116, 60)

445. COMMENT: Should these regulations be adopted to serve the public without regard to local communities, the citizens of New Jersey and not the local governments and taxpayers should pay for the eminent domain proceedings and essential infrastructure. (84)

RESPONSE TO COMMENTS 444 AND 445: The citizens of New Jersey will be paying for the shore protection project that triggers the requirements of the rule through both State and Federal taxes that provide the shore protection project funding. In addition, the State and thus the citizens of New Jersey will share in costs of parking and restrooms up to five percent of the cost of the shore protection project. The regulations provide municipalities with the flexibility in the provision of perpendicular accessways, public parking and public restrooms, and municipalities must determine whether condemnation proceedings are necessary in unique circumstances. The rule does not reference eminent domain. Rather, the language at N.J.A.C. 7:7E-8.11(p)7i(1) regarding other legal proceedings was proposed because the State did not want to limit the approaches a municipality might use to obtain conservation restrictions for privately held beaches outside the project area. Since conservation restrictions would no longer be required outside the project area under the

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amendment set forth in the concurrent proposal published elsewhere in this issue of the New Jersey Register, this language is proposed to be deleted.

446. COMMENT: The Department has signed a cooperative agreement as part of the Long Beach Island beach replenishment project and therefore should fund their share with state funds or revise these arbitrary and capricious regulations so that the quality of life on Long Beach Island will not be destroyed. (84)

RESPONSE: The Project Cooperation Agreement for the Long Beach Island beach replenishment project is between the US Army Corps of Engineers and the Department. The agreement states that the Federal to non-federal cost share will be 65 to 35 percent. The Department's State Aid Agreements with each of the municipalities will require that the municipalities provide 25 percent of the 35 percent non-federal share (or about 9 percent of the total project cost); the State share will be 75 percent of the non-federal cost in each municipality. Public access, as defined by Federal and State requirements, is also part of the State Aid Agreements and what each municipality provides in addition to their cost shares in order to receive the project and its shore protection and recreational benefits.

447. COMMENT: The requirements for beach access every one-quarter mile and restrooms every one-half mile clearly define the public's right to use New Jersey's beaches. Please do not bend to self-serving, provincial interests by altering these requirements. The inclusion of requirements for parking and restrooms shows that the Department clearly understands the issues of beach access and is acting in the public interest. (19, 43)

RESPONSE: The Department acknowledges this comment in support of the rule.

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448. COMMENT: It is easy for a State agency to mandate “nice social rules.” Do these regulations protect our environment? Are these regulations within the Department’s charter, objectives and jurisdiction? How does New Jersey respond to Federal mandates? It is too easy for some to demand changes when they are not responsible for funding the demanded requirements. (42)

449. COMMENT: The proposed rules are about the public having access to tidal waterways and their shores, not restrooms. 36

RESPONSE TO COMMENT 448 AND 449: These rules are within the State’s role as trustee of the public rights to natural resources, including tidal waterways and their shores. It is the duty of the State to allow and protect the public’s right to use tidal waterways and their shores and ensure adequate access to them. The New Jersey Supreme Court found in *Egg Harbor*, 94 N.J. at 371 that “CAFRA mandates DEP to utilize, in performing its statutory role, all relevant considerations of an enlightened public policy” and to “advance the ‘best long term, social, economic, aesthetic and recreational interest of all people of the State.’” The Department will share in the cost of restrooms and parking associated with shore protection projects to assist municipalities in complying with the rules. Restrooms and parking are important aspects of meaningful public access and restrooms are necessary for public health.

450. COMMENT: Long Beach Township opposes portable toilets. However, unless toilets at reasonable locations in proximity to the beach are required, sanitation will be compromised because people will not walk back to their homes. (6)

RESPONSE: The Department agrees that the provision of public restrooms at a reasonable frequency is necessary. Therefore, the rule requires a municipality entering into a State Aid Agreement for shore protection to provide restrooms every one-half mile. The location and type of restrooms facilities provided is the decision of the municipality.

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451. COMMENT: The Department should mandate open access to the ocean from every street corner so that everyone will continue to have the same access to the ocean that they currently enjoy and visitors to the island will also have many access points. Visitors to the beach should be able to enter the beach in close proximity to where they parked their car. If beach access is reduced, off-street parking will become very problematic in areas where access is limited. Most oceanfront property owners own property to the edge of the water. They can currently walk directly from their property to the water's edge. If direct access is prevented, this will cause legal issues, which can be avoided by insisting on open direct access to the beach from all locations which currently exist. (6)

RESPONSE: By requiring perpendicular access to the beach every one-quarter mile as a condition of entering into a State Aid Agreement, visitors to the beach will be able to access the beach in close proximity to where a car is parked. In addition, the requirement at N.J.A.C. 7:7E-8.11(p)1ii and (q)5i that a municipality file a Public Access Instrument identifying all streets, roads, paper streets, easements and other dedicated public rights-of-way held by the municipality that lead to the tidal waterway and its shores will help to maintain the access that the public currently enjoys. The rule does not preclude direct access to the beach from oceanfront homes.

452. COMMENT: The job of the Department is not social engineering, but the protection of New Jersey's environment. The Department should be more concerned with the damage that projects such as the proposed Long Beach Island beach nourishment project will do to the environment and less concerned with making sure that people going to the beach do not have too far to walk. Long Beach Island beachfront homeowners have already made their property accessible to the general public. (21)

RESPONSE: As a partner in shore protection projects subject to this rule and reviewing projects for consistency with the Coastal Zone Management rules, the Department does carefully consider the environmental effects of beach nourishment projects.

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As the trustee of public trust rights, the State of New Jersey is obligated to ensure that the public has access to and use of the tidal waterways and their shores. These rules are adopted to assist the State in fulfilling its role as trustee and ensure that tidal waterways and their shores are accessible to the public.

453. COMMENT: The proposed rules will not cause severe and unwarranted hardships to private property owners and to affected municipalities and their taxpayers. (36)

RESPONSE: The Department acknowledges this comment in support of the rule.

454. COMMENT: No State cost-benefit study supporting the one-quarter mile spacing of accessways or the one-half mile spacing of restrooms has been made available to the public. (177)

455. COMMENT: If the State has performed a cost-benefit analysis for municipalities participating in Shore Protection Program funding that supports the case that tourists will defray the costs of compliance with these rules, such analysis should be made public. (38)

RESPONSE TO COMMENTS 454 AND 455: The New Jersey Supreme Court in *Matthews* held “Beaches are a unique and irreplaceable. The public demand for beaches has increased with the growth of population and transportation facilities.” 95 N.J. 306, 323 (1984). The Department has determined that the one-quarter mile perpendicular access and one-half restroom standards are necessary in this densely populated state with high demand for beach use. Many municipalities already provide access to the beach at one-quarter mile intervals, and therefore would not require new accessways. In addition, restrooms in existing public facilities such as municipal buildings, amusement areas or parks can be used to meet the restroom requirement as can portable toilets, reducing the cost of compliance. Finally, the Department has agreed to share in the cost of meeting these requirements, up to five percent of the initial project cost. The Department considers the economic impacts of its proposals, including these amendments. The results of this consideration,

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including impacts resulting from access and restroom requirements for the receipt of shore protection funding, were included in the proposal in the Economic Impact Statement. Additionally, as part of the analysis of individual projects, a cost-benefit analysis is performed for shore protection projects in which the U.S. Army Corps of Engineers is a participant.

456. COMMENT: Two municipal resolutions were submitted opposing the public access rules. According to these resolutions, the municipalities support the Long Beach Island beach replenishment project and also support the position of Long Beach Township. The resolutions request that State legislators having constituents within their borders who own property in the Borough of Harvey Cedars and Borough of Ship Bottom and who support the project, petition the Department to relax its requirements for public access every one-quarter mile and restrooms every one-half mile. (32, 168)

RESPONSE: As stated previously, the one-quarter mile perpendicular access and restroom requirements are appropriate. In the concurrent proposal published elsewhere in this issue of the New Jersey Register, the Department is proposing to apply these standards only within the shore protection project area, not along the municipality's entire Ocean shoreline.

457. COMMENT: N.J.A.C. 7:7E-8.11(p)3, (q)7 and 8 set forth the timing for providing public access prior to commencement of construction. However, if construction is about to begin, this could create a public safety issue in the immediate project area, In addition, there may be a need to temporarily limit access until construction is completed as set forth at N.J.A.C. 7:7E-8.11(f)2. (59)

RESPONSE: N.J.A.C 7:7E-8.11(p)3 requires that public access be provided to all municipally held tidal waterways and their shores in addition to the project site prior to commencement of construction or nourishment. However, in accordance with N.J.A.C 7:7E-8.11(f)2i, the project area can be temporarily closed due to exigent circumstances of public safety during construction. N.J.A.C 7:7E-8.11(p)7ii requires that immediately upon completion of construction, public access

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be provided to the entire project area. Similarly, N.J.A.C 7:7E-8.11(q)3 requires provision of public access to all tidal waterways and their shores on or adjacent to lands held by the applicant in order to be eligible for Green Acres Program funding for a Green Acres project site on a tidal waterway. Where the Green Acres funding is for construction and the Green Acres project site on a tidal waterway is already owned by the applicant, N.J.A.C 7:7E-8.11(f)2 would allow temporary closure during construction where public safety is at risk.

458. COMMENT: The rule at N.J.A.C. 7:7E-8.11(p)5 requires a municipality to repeal any ordinance that limits access to or use of tidal waterways and their shores or is in conflict with the Public Trust Doctrine. Does this include ordinances that restrict parking and close beaches at night?  
(166)

RESPONSE: N.J.A.C. 7:7E-8.11(p)5 requires the repeal of any ordinances that limits access to or use of tidal waterways and their shores and includes parking ordinances. Closure of beaches at night would also be included, as the rule requires public access to tidal waterways and their shores at all times, unless closure is specifically approved by the Department in accordance with N.J.A.C. 7:7E-8.11(f).

459. COMMENT: The beaches along the entire New Jersey coastline are replenished with public funds and taxpayers' money. As such, they must be exempt from any and all development regardless of whether they have grandfathered site plans or property lines that have been claimed by the Ocean. No construction should be allowed. (43)

RESPONSE: The Department has stringent standards for development on beaches. The Coastal Zone Management rules at N.J.A.C. 7:7E-3.22 prohibit development on beaches except for development that has no prudent or feasible alternative in an area other than a beach, and that will not cause significant adverse long-term impacts to the natural functioning of the beach and dune

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system, either individually or in combination with other existing or proposed structures, land disturbances or activities.

460. COMMENT: Parking associated with a shore protection project is based on capacity of all beaches within the municipality rather than a demonstrated need. (175)

RESPONSE: As stated in response to comment s 432 through 441 the Corps standards require that parking be sufficient to accommodate the lesser of peak demand or the beach capacity. The rule however, requires parking be sufficient to accommodate beach capacity.

461. COMMENT: The rules state specific distances for restrooms from each other and from the beach. The Department should clarify whether restrooms located within a commercial establishment are considered “public” for the purposes of this rule. If restrooms in commercial establishments are allowed to meet the restroom requirement, then the purchase of products from those establishments should not be required in order to use the restrooms. (166, 43)

RESPONSE TO COMMENT 460 AND 461: In general, commercial establishments will not satisfy the restroom requirement. However, where a municipality demonstrates that a restroom facility at a commercial establishment is similar to a public facility, that there is a mechanism in place to ensure that the restroom remains available to the public, and that there is no fee to use the facilities, such restroom could be used to satisfy the requirement of this rule. An example of such a commercial establishment would be an amusement area.

462. COMMENT: The Department should outlaw “No Changing” rules in municipally operated restrooms whose primary purpose is to serve beach patrons. There is no economic advantage by not allowing beachgoers to change their clothes after spending a day at the beach. (43, 166)

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RESPONSE: Although the Department encourages changing facilities, these regulations do not specifically address “No Changing” rules in municipally operated restrooms.

463. COMMENT: It is absurd to think that the construction of a 22-foot dune will protect Long Beach Island from the “BIG ONE”: Why do the residents of Long Beach Island need to sign away their property rights forever? Once the government has its hands on these properties what will keep them from selling it to developers or doing some other insane program that is in the best interest of the public trust?

For those who think that oceanfront homeowners should sign away their property rights under the pretension that this will protect their investment, wake up. When oceanfront property values go down, so do the inland values. Oceanfront property owners stand to lose the most in a storm. However, oceanfront property owners refuse to buckle to threats of eminent domain and this ridiculous crusade in the name of safety. (61)

RESPONSE: It is up to a municipality to decide if it wishes to enter into a State Aid Agreement for shore protection. A conservation restriction recorded under this rule would be for public access and would not give the government the ability to develop the property or sell it to a developer. The State’s tidal waterways and their shores are impressed with public trust rights and the requirement for public access is imposed to ensure that the public can exercise these rights, as well as in recognition of expenditure of State funds. In the concurrent proposal published elsewhere in this issue of the New Jersey Register, the Department has proposed to limit the requirement for a conservation restriction to a project area rather than the entire municipal ocean or bayfront for municipalities located along the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay.

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464. COMMENT: Where will the required restrooms be located? Is it the Department's intention to take a home, demolish it and build a restroom? Similarly, where will the cars of the day-trippers be parked? Will the Department consider condemning other properties for parking lots? (146)

RESPONSE: The rule does not prescribe the exact location of restrooms, and provides municipalities with flexibility in meeting these requirements.

465. COMMENT: The commenter indicated that they had attended a seminar by Dr. Psuty of the University of New Jersey. According to the commenter, Dr. Psuty recommended that barrier islands be abandoned to the ocean. This would be a lot cheaper for the taxpayers than the Department alleges it is protecting. Manahawkin would become oceanfront where there's a lot more room for restrooms and accessways. (146)

RESPONSE: The State legislature has entrusted the Department with the responsibility of shore protection, and appropriates \$25 million annually for State sponsored shore protection projects. The State works with municipalities and the Federal government to accomplish shore protection projects where a municipality desires to pursue such projects and meets the necessary access requirements. The requirements of this rule will allow shore protection projects to proceed while protecting the public's right to access tidal waterways and their shores.

466. COMMENT: The proposal at N.J.A.C. 7:7E-8.11(p)7v and 8iv requires that parking must be sufficient to accommodate public demand and beach capacity of all beaches within the municipality. Why not apply this approach to bathrooms and public access issues as well?

With respect to N.J.A.C. 7:7E-8.11(p), the municipal requirements should vary depending on the classification of the municipality as follows. (1) Those that are developed municipalities providing little or no public access; (2) Those municipalities that are not developed; and (3) Those developed municipalities that already provide reasonable public access. For municipalities in

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categories 1 and 2, the proposed rules should be applied. For municipalities in category three, the standard used for parking should be applied to both restrooms and access points, that is, they must be sufficient to accommodate public demand and beach capacity of all beaches within the municipality.

There is no point in requiring what amounts to excessive restrooms and public access. Instead, the State should provide more practical solutions to unique situations instead of the blanket passing of steadfast rules that do not resolve the State's goal. (24)

RESPONSE: The Department does not believe that a different standard should be applied to municipalities that already provide reasonable public access than to those that do not. Although the Department would encourage provisions of restrooms and accessways at more frequent intervals, it believes that the one-quarter mile perpendicular access requirement and the one-half mile restroom requirement will provide sufficient access and facilities, and thus further the public's use of tidal waterways and their shores.

467. COMMENT: It is disconcerting that the State would deny money in emergency situations, for example to restore our beaches after a storm, unless the new public access requirements are met. Even if a municipality was able to pay for the emergency beach restoration itself, without State funds, the municipality would still require State permits to complete the work. This work could be prevented by the State if the municipality did not comply with the rules. (24)

468. COMMENT: The commenter is concerned that through these rules, the Department will require parking and restrooms as part of a permit to address an emergency situation. (119)

469. COMMENT: The State is holding beachfront communities hostage when it comes to emergency funding. If a disaster happens and the need for emergency funding is necessary, the State has the right to withhold any monies until these proposed stringent rules are satisfied. This is unconscionable. (56)

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470. COMMENT: The quid pro quo of requiring unrealistic public access standards in return for funding to restore our beaches during emergency situations is wrong. Even if our local municipalities on Long Beach Island were able to pay for any emergency beach restoration themselves, and not require State funds, the municipalities would still require State permits to complete the work. This work could be prevented by the State if the municipalities did not comply with the proposed access rules. (178)

RESPONSE TO COMMENTS 467 THROUGH 470: These requirements are appropriate given the State's role as trustee of the public's rights to access tidal waterways and their shores. The rule does not preclude an emergency project from proceeding while the municipality complies with the rule. The rule at N.J.A.C 7:7E-8.11(p)9 provides a municipality 180 days after project completion to comply with N.J.A.C 7:7E-8.11(p)1 through 8. Restrooms are not required as part of a permit for emergency repairs, unless a municipality is entering into a State Aid Agreement.

471. COMMENT: The commenter is concerned with the one-half mile restroom requirement. This requirement should be based on the municipality and the type of beaches within that municipality. (119)

RESPONSE: For provision of meaningful public access and public health reasons, the Department has determined that for the purposes of Shore Protection Program funding, restrooms are required at one-half mile intervals during the active beach season. Similar to the one-quarter mile accessway requirements, the rule provides the municipality with the flexibility in determining the location of these facilities while ensuring that the restrooms are located close enough to the beach and to one another for use by beach patrons. Existing facilities and accessways will be considered in determining compliance with this rule.

472. COMMENT: The commenter indicated that he supports the efforts of the Department to ensure unfettered access to New Jersey's beaches and waterways. He stated that the fact that the public has a right to access and use the beaches and waterways has been well established by both

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common and case law. The commenter also stated that unfortunately, the reality is that many entities, both public and private, have knowingly and deliberately worked to deny access. He said that this disregard of the Public Trust Doctrine is shameful and despicable as we see publicly funded, beach replenishment projects where access is still being denied. (19)

RESPONSE: The Department acknowledges this comment in support of the rule.

473. COMMENT: The commenter indicated that he supports the State's efforts to provide beach access for the general public by requiring access every one-quarter mile, restrooms every one-half mile and adequate parking. (8)

RESPONSE: The Department acknowledges this comment in support of the rule.

474. COMMENT: The State Aid formula is unclear regarding allowable project activities and level of State funding. The State Aid Agreement requirement is totally arbitrary to its involvement. (175, 42, 1)

RESPONSE: To participate in Shore Protection Program funding, a municipality must enter into a State Aid Agreement, which is a cost sharing agreement. These regulations will ensure that municipalities meet their obligations under the Public Trust Doctrine and take steps to enhance public access to tidal waterways and their shores within the municipality. The Department will share in funding of accessways, parking and restrooms up to five percent of the initial project construction costs.

475. COMMENT: Creating parking lots will require condemnation of existing property and compensation to the owners, making for some of the most expensive parking spaces on the east coast. In addition, according to the commenter, taxpayers will have to pay through their local tax rate for these parking areas. Even if the State were to pay for the beach nourishment project in its entirety, the net cost will be astronomical. For example, 20 parking spaces on a 120 foot by 120

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foot site at a cost of \$1 million, yields \$50,000 a parking space without demolition and construction costs or maintenance or parking attendants. Assuming a parking space is used 20 times a summer, it would cost \$125 per parking space for over 20 years. Even Manhattan is cheaper to park. (73)

RESPONSE: The rule does not specify how the parking requirement is satisfied. In lieu of the acquisition of land for a parking lot, a municipality could meet the parking requirement through the dedication of on-street parking for public access, reconfiguration or reorientation of existing parking spaces to provide addition spaces, removal of existing parking limitations or provision of remote or off-site parking with a shuttle service.

476. COMMENT: Although the Department highlights the federal and state dollars used for the Long Beach Island beach nourishment project, it fails to highlight the local expense. The property owners of Long Beach Island need to be apprised of this project's expense to them. Is the state going to pay for the restrooms, parking and access points? What about the impact of these regulations on property values? The beachgoers this rule is supposedly accommodating will not be required to pay any additional costs for all the facilities and services the residents of Long Beach Island are being required to provide. This is not reasonable. After the restrooms, will the taxpayers have to provide the public with lights, towels and food? (61)

477. COMMENT: The Department's basis for requiring public access is the Public Trust Doctrine. Under that Doctrine, the coastline is held by the State in trust for the benefit of all the people and not just residents of Long Beach Island. However, the Department is requiring local taxpayers to share in the cost for access, parking and restrooms for all the people. If the benefits are for all the people then it is the responsibility of the State to pay all the costs. (175, 42, 1, 85)

478. COMMENT: This proposed policy statement appears to be perhaps well intentioned, but untouched by any practical considerations. I have to assume that your Department has performed both an estimated cost analysis as well as an environmental impact study of the probable effects of the implementation of this policy. It is presumed that since these rules are designed to benefit all of

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the residents of New Jersey, they in turn will be funded by all of the residents; not just those in the impacted area. (53)

RESPONSE TO COMMENTS 476 THROUGH 478: The Department will share in the cost for accessways, parking and restrooms, up to five percent of the initial project cost. Because the municipality and local property owners are the beneficiaries of the shore protection provided by the project, it is appropriate that there is a local share in the cost as well. The Department pays the majority of the cost of the shore protection project at a 75 to 25 percent State-local ratio. When the Federal government is involved in the project, the Federal government pays 65 percent of the project. There is no requirement to provide lights, towels and food.

479. COMMENT: Why is there a difference between public access requirements for homes situated on ocean versus bay? Both are being supported by Federal, State and municipal monies. (61, 109)

RESPONSE: The rule requires that all development located on or adjacent to tidal waterways and their shores provide public access, except for certain single family homes. Along the Raritan, Sandy Hook and Delaware Bays, which are large bays that have a number of beaches wide enough for public bathing, public access requirements are the same as those applicable to homes situated on the Atlantic Ocean. Similarly, public access is required where a beach is large enough to warrant beach maintenance activities, the beach would be large enough to warrant public access. With regard to State funding of shore protection projects, projects located on the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and Delaware Bay require access, perpendicular access, restrooms and parking whereas shore protection projects on the other bays have the same requirements except for restrooms because of the different nature of the use.

480. COMMENT: The rules are not clear as to their impact on bayfront properties. It is questionable as to how the accessways are going to be provided in areas that have been developed as private properties without public access to bayfronts (96)

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RESPONSE: The rule is triggered in one of two ways. First, the rule is triggered when new development is proposed, at which time accessways can be incorporated into the project design. Second, the rule is triggered when a municipality seeks State Shore Protection Program funds at which time it is at the discretion of the municipality and bayfront homeowners to determine where accessways can be provided for the Sandy Hook Bay, Raritan Bay and Delaware Bay. The concurrent proposal published elsewhere in this issue of the New Jersey Register requires the one-quarter mile perpendicular access requirement apply only to the project area, not the entire bayfront.

481. COMMENT: According to the Department's current rationale, if New Jersey owned a small strip of land in Antarctica the taxpayers would be required to provide public paths, signage and bathrooms, but no parking lot! (24)

482. COMMENT: The Department in the proposal says that its ability to protect public trust rights is handed down from Roman Law and English Common Law. The Department cites two fallen empires that grew and thrived by taking away the rights of everyone they touched. These empires conquered people, took their land and property rights. It was not until after the citizens of the empires became subservient that they got to enjoy the public trust rights such as air and water. This is similar to what the Department is doing under this proposal. (61)

483. COMMENT: The proposal cites a pagan society, Rome, for how the State is going to decide what its regulations should be for providing public access to the waterfront. This makes no sense. The rules should cite laws which make sense in this country. (136)

RESPONSE TO COMMENTS 481 THROUGH 483: The tenets of public trust, influenced by Roman civil law, were maintained through English common law and adopted by the original thirteen colonies, each in their own form. Following the American Revolution the royal rights to tidal waterways and their shores were vested in the thirteen new states, then each subsequent state. Accordingly, they apply in New Jersey.

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484. COMMENT: The Department should reconsider this proposal and spend the taxpayers money on maintaining our valuable shores while providing reasonable public access instead of spending the taxpayers money on court and legal fees. (24)

RESPONSE: This rule will provide public access as it continues to maintain New Jersey's shores through its Shore Protection Program. The rule strikes an appropriate balance between public access and protecting shorefront areas.

485. COMMENT: The Department's rationale for seeking more stringent requirements than Federal regulations because New Jersey is densely populated is flawed and does not take into account that large parts of New Jersey's population live near New York City and the southern shores of New Jersey are not accessible to these people as a "day trip." The Department should have examined Florida's public access requirements. Clearly Florida has a substantially larger beach-going population than New Jersey. (24)

486. COMMENT: The State's rationale for seeking more stringent requirements than those of the Federal government is that we are a densely populated state. This does not take into account the proximity of that population to Long Beach Island, as the majority of residents lives in the northern part of our state and is not typically visiting Long Beach Island on a day trip. (178)

RESPONSE TO COMMENTS 485 AND 486: As stated in response to comments 432 through 441, more stringent requirements are appropriate. The Supreme Court in *Matthews* found that beaches are a unique resource and are irreplaceable. The public demand for beaches has increased with the growth of population and transportation facilities. Many people visit the southern shores of New Jersey from central and southern New Jersey and Pennsylvania, both of which can reach the New Jersey shore as a day trip.

487. COMMENT: The rule at N.J.A.C. 7:7E-8.11(p)7i(1) states that "nourishment projects can only proceed if the municipality or State has entered into condemnation or other legal proceedings

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to diligently obtain the necessary easements. Given the unsavory conduct of many New Jersey State politicians in recent years, they won't wait long to acquire the properties for their personal use. (146)

RESPONSE: The rules do not require acquisition of property rather a conservation restriction providing for public access to the property in perpetuity is required. The conservation restriction would specify the purpose of the restriction as shore protection and public access. Furthermore, the concurrent proposal published elsewhere in this issue of the New Jersey Register would delete N.J.A.C. 7:7E-8.11(p)7i(1) since it would require public access easements within the project area only.

488. COMMENT: The commenter submitted a resolution (06-1201.06) on behalf of Long Beach Township. In the resolution, the Township indicates that it has been working diligently with other Long Beach Island municipalities, the Department and US Army Corps of Engineers to become a participant in the Federally funded Storm Damage and Reduction Project (beach nourishment project). The proposed public access amendments have been drafted in such a narrow manner that they exclude almost any alternative other than the most burdensome and costly to the Township. The resolution acknowledges that public access is a major and important issue, and one of the requirements to receive funding and ultimately sand to replenish the township's beaches. Based on the Army Corps of Engineers requirements of access every one-half mile, the Township indicated it had projected access points for its North Beach and Loveladies sections and submitted them to the Department for approval in 2003. As of December 1, 2006 the resolution states that the Township had not received a decision from the Department on their acceptability. According to the resolution, the proposal requiring access points every one-quarter mile mischaracterizes Long Beach Township in that no commercial amenities currently exist for North Beach and Loveladies to warrant one-quarter mile access and a restroom every one-half mile.

With respect to the proposed restroom requirement of a restroom every one-half mile, the Township indicates that they were advised of this requirement on December 13, 2005. Further, the

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Township states that it has cooperated to the best of its ability in identifying restrooms, proposing new locations as well as reaching out into the business community by recommending public restrooms through its Land Use Board approval process and proposing utilization of some current business sites. The Township noted that the beach nourishment project went through a feasibility study, mapping and planning and while access and restroom requirements were cited as Department policy, they were not adopted in the Department's rules. In addition, the Township indicated that the parking, restroom and access requirements are excessive and are being mandated by the Department with no provision for financial assistance.

The Township expressed its disappointment and strong opposition to the proposed amendments to the Coastal Zone Management rules relating to public access. According to the resolution, the proposed amendments put an impossible monetary burden on the Township to acquire the land needed for a disproportionate number of access points and restroom locations. The Township requests that the Department relax the requirements of public access every one-quarter mile and restrooms every one-half mile. (92, 56)

RESPONSE: As stated previously, the State will provide additional funding of up to five percent of the initial project construction costs to assist municipalities with the cost of complying with the public access requirements of the rule. This funding can be used for land acquisition to obtain the one-quarter mile perpendicular accessways, restrooms and parking. For example, the Department has offered the five municipalities affected by the Long Beach Island beach nourishment project up to \$50,000.00 per restroom to meet the public access requirements of the rule. This funding must be equally matched by municipal funds. This funding can only be used for compliance with the public access rule and expenditure of these funds will require prior Department approval. The additional funding may not be used for legal or engineering fees, surveying or other professional services, or sewer connections. This additional funding provided by the Department for compliance with the public access rule requirements will be incorporated into the State Aid Agreement between the State and municipality.

In addition, the concurrent proposal published elsewhere in this issue of the New Jersey Register limits the one-quarter mile perpendicular accessway requirement to the project area rather than the entire municipality.

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489. COMMENT: When taxes increase and maintenance of the restroom and parking and beaches decreases, residents will be faced with graffiti and litter and will ask where have their property values gone. (60, 62)

RESPONSE: The requirement to provide restrooms is triggered when a municipality enters into a State Aid Agreement for shore protection. The shore protection projects are designed to protect the value of properties in the community. Because State funds are used and the shore protection project is on public trust lands, it is appropriate that restrooms be provided for the public. It is anticipated that a municipality would maintain beaches with the same care after a beach nourishment project as before, and would also maintain the restrooms and parking provided for the public.

490. COMMENT: The road and bridge onto Long Beach Island is not sufficient for the increased traffic volume that will result from this rule. (137)

RESPONSE: The public has the right to access tidal waterways and their shores under the Public Trust Doctrine. The public will pay the largest share of the shore protection project costs for Long Beach Island, as the rule trigger is a municipality entering into a State Aid Agreement. Traffic congestion is common in a densely populated State such as New Jersey.

491. COMMENT: The rules honor the character of long-established residential neighborhoods. The public has the right to access tidal waterways and their shores. (36)

RESPONSE: The Department acknowledges this comment in support of the rule.

492. COMMENT: The national requirement for restrooms is every one-half mile, which the Department is reducing to one-quarter mile. This restroom requirement is determined by the demand for access to Long Beach Island beaches. There are plenty of restrooms, access points and

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parking on Long Beach Island. However, because a very few people want to access the beach via private lanes, the maintenance of which is supported 100 percent by private money, the residents of Long Beach Island are supposed to spend millions of dollars to accommodate them. Part of the appeal to beaches in Loveladies is no commercialization and to attract people who respect and appreciate what the area has to offer. If Long Beach Island residents allow the Department to make these changes, a real natural resource will be lost. The creation of access points, additional restrooms and parking is not only very expensive to construct, but also very expensive to maintain.

Everyone is not entitled to a restroom every one-quarter mile and access through private property wherever they want. What about the property rights of the oceanfront homeowners? What is reasonable? Is there a town that has a public restroom every one-quarter mile? (61)

RESPONSE: The access requirements arise from the Public Trust Doctrine and the fact that the State is spending public funds to construct a shore protection. Therefore, they are appropriate. As noted in response to comments 432 through 441 there is no national requirement for restrooms. However, for provision of meaningful public access and public health reasons the Department has determined the restrooms should be required when a municipality enters into a State Aid Agreement for a project on the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and the Delaware Bay. These are required every one-half mile, not every one-quarter mile. Under the concurrent proposal published elsewhere in this issue of the New Jersey Register, perpendicular accessway are required in the project area only, similar to the requirements for restrooms and parking. A municipality can decide not to enter into a State Aid Agreement and pursue a shore protection project if it decides the shore protection project is not warranted.

493. COMMENT: The commenter expressed concerns with the Department's economic and job impact analyses. How much tourism dollars will the State lose when they ruin New Jersey's beaches? Has the Department asked the tourists and renters if they want a longer walk to the water over extra dunes and to fight for a parking space because of all the additional traffic? With respect to the creation of jobs, why are the workers on the project in Surf City from Louisiana? Doesn't Louisiana have enough work and problems? What about jobs for the people of New Jersey? (61)

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RESPONSE: The rule will allow the public to access New Jersey's beaches as is their right under the Public Trust Doctrine. The Department intends to continue beach nourishment and other shore protection projects to maintain New Jersey's beaches and support tourism. These projects are important in light of the hazards posed by coastal storms. Accordingly, the State has established a Realty Transfer Fee to provide \$25 million annually for shore protection and the State's Federal representatives continue to seek Federal funding for shore protection projects in New Jersey. The selection of a contractor to conduct shore protection projects is subject to public contracting laws.

494. COMMENT: The commenter indicated that he had attended the public hearing on this proposal that was held in Trenton at the DEP Headquarters on December 1, 2006. The commenter indicated that there were no restroom facilities within one-quarter mile of its headquarters. He indicated that in order to use the restrooms located in the Department's headquarters, a person is required to show identification. The commenter stated that the same agency that does not have a public restroom within one-quarter mile of its headquarters in all directions wants to make the residents of Long Beach Island pay for a restroom and its maintenance for people who do not have to show identification or pay for access. The commenter asked if a neighborhood in Iowa could be required to build a restroom and provide access across their property. (61)

RESPONSE: The public access rules pertain only to New Jersey and only to lands adjacent to or containing tidal waterways and their shores.

495. COMMENT: What is meant by "other legal proceeding" at N.J.A.C. 7:7E-8.11(p)7i(1)? This term is vague and should be deleted. The term is objectionable and should be deleted from the proposal. The State recently lost a court case to gain permanent access to five properties in Surf City to complete a replenishment project. The judge told the State they have a legal remedy at their disposal, eminent domain. In summary, the judge ruled that the State's legal remedy is eminent domain. This is an example of an "other legal proceeding" that failed. (166, 43)

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RESPONSE: The State is appealing the referenced case. Moreover, it was proposed because the State did not want to limit the approaches that a municipality might use to obtain conservation restrictions for privately held beaches outside of the project area. Since conservation restrictions would no longer be required outside the project area under the amendment at N.J.A.C. 7:7E-8.11(p)7i(1) set forth in the concurrent proposal published elsewhere in this issue of the New Jersey Register, this language is proposed to be deleted.

496. COMMENT: Throughout the summary of the proposed rule changes, there are references to the demand for access, parking and restrooms. In discussing the need for such facilities, the municipalities located on Long Beach Island agree there is a need, however, the basis for the need and the location of these facilities should be determined based on data which establishes daily tourism requirements. The only real data available for analysis is beach badge sales by patrol which represents beach use by daily visitors to Long Beach Island municipalities.

For example, the Borough of Harvey Cedars submitted its public access plan as part of the Long Beach Island beach replenishment project. In developing the plan, the Borough analyzed the 2006 daily beach badge sales for the 11-week season and determined the average sales to be 30 daily badges per day. Assuming all 30 persons who purchased daily badges drove their own car, the need for parking would have been 30 daily cars per day. In planning development within Harvey Cedars, the municipality has always maintained recreational facilities and in fact developed an approximately 4-acre park utilizing Green Acres funding. This park provides restroom facilities, 158 parking spaces, fishing pier, ball fields, playground, tennis courts, basketball, jogging, track and access to Barnegat Bay. In addition, the Borough has public street access at 250-foot intervals to the beach and also provides a Barnegat Bay beach area and Borough Hall, both with public restrooms. Despite these amenities, the Department rejected the Borough's public access plan.

In light of the fact that the average daily beach badge sales are 30 per day and the Borough has a business center, Barnegat Bay bathing beach area and 158 public parking spaces with restrooms in the public park funded through the Green Acres Program, the requirement of having restrooms every one-half mile was applied with no consideration for the unique character of the municipality or consideration for how the municipality planned to accommodate tourism.

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In contrast, the daily beach badge sales for the Loveladies section of Long Beach Township was 23 badges per day and the average for the North Beach section of Long Beach Township was 10 badges per day. The heavier concentration of daily beach badge sales occurs in Surf City, Ship Bottom, Beach Heaven and the portions of Long Beach Township south of Ship Bottom. If the Borough of Harvey Cedars only attracts on average 30 daily beach users and provides all possible amenities to attract daily visitors as it exists today, why would the installation of restrooms at one-half mile intervals make any sense? In addition, the majority of visitors to Long Beach Island use the beaches of the municipalities where business centers are present and not Loveladies and North Beach.

Based on this example, it is inappropriate to apply a linear measurement of one-half mile for restrooms and one-quarter mile for public access points and spend millions of dollars acquiring and constructing these types of access when the demand and need for these facilities in the Loveladies and North Beach sections of Long Beach Township is not warranted.

Another example of the inappropriateness of the public access requirements is their application in the Holgate section of Long Beach Township. Long Beach Township provides a permanent restroom facility with multiple toilets and a 66 space parking lot. In 2006, the average daily beach badge sale showed 38 daily badges. There is no need to provide restrooms at one-half mile intervals as everyone visiting the Holgate section of Long Beach Township uses the existing parking area and restrooms.

The amendments provide no methodology for a proper analysis and conclusion for the access, restroom and parking requirements and if adopted, provide no means of working a compromise with the Department short of receiving a permit denial and pursuing an appeal.(93)

RESPONSE: In response to comments 432 through 441, the Department has explained the rationale for the parking, restroom and perpendicular access requirements. By considering only the existing beach badge sales, the commenter fails to recognize that additional people may use the beach if it is wider and more accessible, which is what these rules call for. For the past year, the Department has been working with municipalities to develop public access plans.

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497. COMMENT: The commenter disagrees with the exclusion of certain residential construction from the requirement that coastal development adjacent to coastal waters provide perpendicular and linear access to the waterfront. If the public access rules are being amended, the amendments should apply across the board. For instance, in the Loveladies and North Beach section of Long Beach Township, oceanfront development between Long Beach Boulevard and the beach occurs on a regular basis. Since this is where the Department feels access is limited, any development within this area should be required to provide public access regardless of the type of development. (93)

RESPONSE: Where only one single family home is being developed in these municipalities on the oceanfront, the applicant will be required to provide access along and use of the beach. All other types of development, including residential development on the oceanfront, will be required to provide both perpendicular and linear access. Additional access requirements may be required as a condition of Shore Protection Program funding in accordance with N.J.A.C. 7:7E-8.11(p).

498. COMMENT: The rule summary states that “New Jersey’s Shore Protection Program was created through the State Legislature (N.J.S.A. 12:6A-1), to provide for the protection of life and property along the coast, preserve the vital resources of New Jersey and maintain safe and navigable waters throughout the State.” The commenter indicated that he fails to see how the withholding of State money as a result of bathrooms and access will protect life and property. (93)

RESPONSE: The requirement for restrooms and accessways is being imposed in recognition of the importance of public access and the State role to hold tidal waterways and their shores in trust for the public to ensure that the public has access to and use of these lands and waters. In addition, public access is a requirement of Federal shore protection funding.

499. COMMENT: The rule proposal summary states “therefore the Department has concluded that the proposed new rules and amendments do not exceed Federal Standards or requirements.” In the next paragraph it directly contradicts the statement by stating, “The proposed amendments exceed the Federally established maximum distance of one half mile between access points establishing a maximum distance of one-quarter mile.” (93)

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RESPONSE: The rules do not exceed Federal standards under the Federal Coastal Zone Management Act, which provides broad guidelines for states developing coastal management programs rather than specific development standards. The rules do exceed Federal standards with respect to standards for Federal participation in shore protection projects, as discussed in detail in response to comments 432 through 441.

500. COMMENT: Increasing the location and number of restroom facilities and access points on both the oceanfront and bayfront of the Borough of Stone Harbor should be accomplished through municipal planning, not just a one size fits all standard that is applied to every municipality. The new public access rules should contain a fair and balanced process whereby a municipality can appeal the access requirements. (165, 109)

RESPONSE: The provision of restrooms and access points will be accomplished through municipal planning and strikes a balance between the need for facilities for public use and the municipality's wants. The rule provides flexibility in meeting the one-quarter mile perpendicular accessway requirement by allowing municipalities to adjust the location of the accessways provided the one-quarter mile distance is met on average. Similarly, the rule provides the municipality with the flexibility in determining the location of restrooms while ensuring that restrooms are located close enough to the beach and to one another for use by beach patrons. Moreover, the concurrent proposal published elsewhere in this issue of the New Jersey Register would limit the requirement for restrooms and parking for oceanfront shore protection projects to the project area, rather than the entire oceanfront of the municipality.

501. COMMENT: The Borough of Harvey Cedars used Green Acres funding to construct a park to provide access, restrooms and parking for the public. Similarly, the municipal building has a number of spaces available to the public and restrooms. As a result, beachgoers typically use the beach in the area of the park and municipal building. The rule should take into account the planning principle of clustering. (119)

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RESPONSE: The rule does allow a municipality to take into account existing parking and restrooms to meet the rule. However, it does not obviate the municipality from providing parking and restrooms elsewhere in the municipality.

502. COMMENT: Walking distance from parking to the public access area has been defined but has the extent of the required available parking and nature of the parking? (161)

RESPONSE: The extent and nature of parking for a particular development will be determined on a case-by-case basis taking into account factors such as the size, location and tidal waterway at the development site.

503. COMMENT: There is a general trend that once an access point has been officially designated or marked as a public access point in an often formerly considered “bad” neighborhood which transitions into a more desirable higher income area, individual surrounding area interests proceed to limit access. These limitations may take the form of previously non-existent parking zoning and time limits or fee restrictions on parking. As a result, the public is forced to park so far away that public access becomes a “paper reality.” It appears that such limitations are an attempt to exclude certain sectors of the public. Public access is limited in Shrewsbury Borough. In Shrewsbury Borough, access at a street end that was a traditional African American fishing area and used by Latin Americans as a kayak launching area was chained off to the public. Further, signs were posted along the street on which this access point was located limiting parking to 2 hours. Such limitations make it nearly impossible to continue to access the water on weekdays with fishing gear or launch a small watercraft for any length of time. No alternative parking is available. There was no evidence that local fishermen or boaters were involved in the process, or were aware of the changes until after they were implemented.

While the municipality’s waterfront park has been upgraded, it is not accessible to the public who wish to use it during their lunch hour as the parking is either too expensive or too far from the park.

High season free or nominal fee mandatory ADA compliant continuous shuttle service from further removed parking areas is an alternative in high interest public access areas when logistics

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require such a measure due to the number of visitors. This would prevent people congregating in parking lots, littering of parking areas and the costs associated with cleaning them up, traffic congestion and air pollution. (161)

RESPONSE: The Department concurs that measures such as those outlined by the commenter that have the effect of discouraging or preventing the exercise of public trust rights are problematic and the rule at N.J.A.C. 7:7E-8.11(i) prohibits such measures. The Department is attempting to address problems such as those identified by the commenter through provisions of this rule at N.J.A.C. 7:7E-8.11(p) and (q) that pertain to municipal eligibility to participate in State Shore Protection Program funding and Green Acres Program funding for sites adjacent to tidal waterways. In addition, the rule at N.J.A.C. 7:7E-8.11(p) allows for shuttle services to meet the parking requirement associated with shore protection projects on the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and Delaware Bay.

504. COMMENT: Will the receipt of Green Acres funding result in a requirement to provide restroom facilities on the beach? (119)

RESPONSE: The receipt of Green Acres Program funding for on a tidal waterway will not require the one-quarter mile perpendicular accessway and restroom requirements. Instead, to be eligible for Green Acres Program funding for a site on a tidal waterway, at least one public accessway to the site is required and the requirement for provision of restrooms and parking is dependent upon the proposed use of the project site and the nature and extent of public demand.

505. COMMENT: Will existing and previously allocated funding through the Green Acres Program be jeopardized if the municipality cannot adopt and implement the required public access plan in a timely manner? (96)

RESPONSE: The rule applies to future funding of Green Acres projects and acquisitions.

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506. COMMENT: The proposed rules at N.J.A.C. 7:7E-8.11(q)11, contain no standard for the amount of public parking that will be required at properties subject to this rule that are acquired by Green Acres funds, or if any parking will be required at such properties. Access should be generally available, and limited only in narrow circumstances such as, for example, the nesting season for an endangered or threatened species within a particular area. Without parking or adequate public transportation, the publicly funded land is functionally available only to local residents. The rule should include a provision that imposes a minimum standard for parking in order to access Green Acres-funded properties that are subject to this rule. (25)

RESPONSE: Because Green Acres Program funds are used for such diverse projects, the parking required will be determined on a case-by-case basis. For example, a site acquired for protection of sensitive habitat and thus passive use by the public, may not require a restroom or parking as these needs may be satisfied by on-street parking. However, Green Acres Program funding for development of a picnic area, playground or soccer fields would likely require restrooms and on site parking.

**Subchapter 8A. Information required to demonstrate compliance with the public trust rights rule, N.J.A.C. 7:7E-8.11; Conservation restrictions and public access instruments**

N.J.A.C. 7:7E-8A.2 Information requirements for public access plans submitted by municipalities to participate in Shore Protection Program funding or be eligible for Green Acres funding

N.J.A.C. 7:7E-8A.3 Information for public access plans submitted by counties or nonprofit organizations to be eligible for Green Acres funding

507. COMMENT: Proposed rules at N.J.A.C. 7:7E-8A.2 and 8A.3 require municipalities, counties and nonprofits to submit public access plans in order to be eligible for Green Acres funding. The commenter agrees with the purpose and practice of these requirements, however, the Department must recognize that some Green Acres funding may be used for preservation of land containing sensitive habitat, necessitating limited access. Although the burden of proof should be on showing that sensitive habitat exists, perhaps an exception can be created that would allow for public access

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in a more limited form. Such limited access could consist of a lone vantage point with raised pilings on the property being preserved. This would provide access for the public to enjoy and view the habitat, while limiting the possibility of the habitat being trampled or disturbed by foot or bicycle traffic. (101)

RESPONSE: Access to a site such as that described by the commenter could be restricted or closed temporarily pursuant to N.J.A.C. 7:7E-8.11(f)2ii or iii based on the presence of endangered or threatened wildlife or vegetation species or critical wildlife habitat. In addition, N.J.A.C. 7:7E-8.11(e)3 provides that the walkway width requirements on major developed waterways can be reduced as necessary to protect endangered and threatened wildlife or plant species and critical wildlife habitats, or natural areas.

508. COMMENT: It is crucial that public access plans submitted and adopted by municipalities and counties contain access to industrial areas that have a history of little to no access (such as along the Passaic River and Arthur Kill). It is particularly important that access be provided when brownfield sites are redeveloped or are converted to greenfields. Also, remediation measures are always a great opportunity to require access for the public.

Public access plans submitted and adopted by municipalities and counties must include access to working waterfronts where, due to gentrification of the coast, traditional facilities are being lost due primarily to residential development. In 2005, Baykeeper and Rutgers University completed a gentrification survey of the Bayshore from Long Branch to Carteret, NJ. The findings included that the State is losing its working waterfront. (101)

RESPONSE: As industrial areas are redeveloped with residential development under CAFRA and Waterfront Development permits, public access would be required under the rule. For the Passaic River and Arthur Kill, the rule at N.J.A.C. 7:7E-8.11(e) specifies a 16 foot-wide walkway with perpendicular access every one-half mile, subject to provisions at N.J.A.C. 7:7E-8.11(e)3 and (f)3 due to existing obstruction, public safety and hazardous operations.

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509. COMMENT: The summary of proposed N.J.A.C. 7:7E-8A.2(c)2i(2) which addresses the location of restrooms relative to the municipal boundary found on the Department's website incorrectly references five-eighths mile instead of three-eighths mile set forth in the rule text. (24)

RESPONSE: While the version of the proposal found on the Department's website incorrectly referenced five-eighths mile in the summary of proposed N.J.A.C. 7:7E-8A.2(c)2i(2), the summary of the proposal as published in the November 6, 2006 New Jersey Register at 38 NJR 4584 correctly references three-eighths mile. As stated in the disclaimer found on the Department's version of the proposal found on the website, the copy of the proposal on the web site is a courtesy version and if there are any discrepancies between the web version and the official version, the official version governs. Upon receipt of this comment, the Department corrected the courtesy copy and posted it on the Department's website prior to the close of the public comment period.

#### **N.J.A.C. 7:7E-8A.4 Conservation restriction form and recording requirements**

510. COMMENT: The commenter stated he supports the objectives of the section of the proposed rules that mandates the conservation restriction form and recording requirements at N.J.A.C. 7:7E-8A.4, as well as the sections that require recordation of a uniform conservation restriction under N.J.A.C. 7:7E-8.11(n), (p) and (q). The Department should adopt a comprehensive method to ensure that those conservation restrictions are recorded to preserve all waterfront areas where the public has rights of access and use. This is necessary to preserve the public rights in those area in perpetuity by giving clear notice, consistent with the Recording Act, N.J.A.C. 46:15-1.1 to 46:26.1, to future purchasers of properties subject to those public rights. Such a uniform recording process is consistent with the mandates of the New Jersey Supreme Court in *Island Venture Associates v. DEP*, 179 N.J. 485, 493-496 (2004), the Legislature under the Coastal Area Facility Review Act, N.J.A.C. 13:19-1-21 and the Waterfront Development Law, N.J.S.A. 12:5-2 and 3, and the State's common law trustee obligations under the Public Trust Doctrine. There are a variety of methods the Department could adopt. One option would be for the Department itself to record the conservation restriction. Another would be for the Department to issue only a facsimile document upon approval of a permit, and issue the final permit document only upon receipt of documentation that the

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Department-approved conservation restriction has been recorded. The proposed rule, however, does not specify just how it will ensure that the recordation actually occurs, and it is recommended that the Department adopt such a method in the regulation. (25)

RESPONSE: The rule provides at N.J.A.C. 7:7E-8A.4(c) and (e) that a permit is not effective and is not valid to begin site preparation until a conservation restriction has been recorded. The Department has recently modified its database for coastal permits to identify permits with a public access condition, enabling the Department to track such permits and conditions and take enforcement actions as necessary.

511. COMMENT: The Department should research the title to any property on which it intends to expend any public funds to build, rebuild or replenish any waterfront area, and ensure that a uniform conservation restriction ensuring perpetual public access to and use of that area is first recorded for the property. This will ensure that the Department does not expend any public funds on an area to which the public will not have access. (25)

RESPONSE: The rule provides at N.J.A.C. 7:7E-8.11(p)7i and 8i that where the Department is entering into a State Aid Agreement for a shore protection project a Department-approved conservation restriction be recorded prior to commencement of construction or nourishment. The rule provides at N.J.A.C. 7:7E-8.11(q)10 that immediately upon disbursement of Green Acres funding for a Green Acres project site on a tidal waterway, a Department-approved conservation restriction be recorded. These requirements are further refined at N.J.A.C. 7:7E-8A.4(d)1 and 2.

#### **N.J.A.C. 7:7E-8A.5 Public Access Instrument Requirements**

512. COMMENT: To be eligible for Green Acres funding, N.J.A.C. 7:7E-8A.5(b)2 requires all municipally held land for recreation and conservation purposes must be listed on the Recreation and Open Space Inventory (ROSI). A similar requirement for municipalities and counties is also found at N.J.A.C. 7:7E-8.11(q)10. Does the requirement to list land on the ROSI include conservation restriction and Public Access Instrument areas? This information would be useful in planning future NJDOT projects. (59)

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RESPONSE: The requirement of listing land on the ROSI does include a requirement to include the conservation restricted areas held by the municipality and public instrument areas required under the rule.

513. COMMENT: The proposed rule appropriates significant private property interests by or for the benefit of the State without recognition of or provision for compensation to the diminished private property owner. This is most profoundly the case where the Department would impose an easement requirement as a condition of a permit when the project is privately funded. It is also present, albeit to a lesser magnitude, in the instance of permits which require property concessions where the impact of settled common law principles is exacerbated and unreasonably imposed in the guise of the “public welfare.” It is inequitable to appropriate private property interests for the “benefit of the public” under circumstances wherein the public benefit is attained at the uncompensated expense of private property owners and without regard to reasonable accommodation between private property rights and public rights, determined upon a case-by-case basis. (121)

514. COMMENT: These regulations will result in a massive taking of land from small business owners who paid for, maintained and paid taxes on the affected land. Nowhere in the history of the application of the Public Trust Doctrine, or in New Jersey Common Law, has such a direct taking of utilized land from small businesspersons been proposed.

Proposed new N.J.A.C. 7:7E-8.11 purports “to make it clear that public trust rights also includes the use of” inter alia, marina property for various uses, and the right to largely unfettered perpendicular and linear access, In fact, it creates this new entitlement to the detriment of the rights of marina owners, operators and customers. (34, 35, 12, 16)

RESPONSE TO COMMENTS 513 AND 514: Tidal waterways and their shores are subject to the Public Trust Doctrine and are held in trust by the State for the benefit of all the people allowing

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them to enjoy these lands and waters for a variety of uses. The public has always had the right to access tidal waterways and their shores. The right is not exclusive to marina and boat owners. Accordingly, since their inception in 1978, the Coastal Zone Management rules have required public access. As stated in response to comment 34, the State of New Jersey is the trustee of public rights to the State's natural resources, including tidal waterways and their shores. Accordingly, it is the duty of the State to protect the public's right to use and ensure that there is access to these resources. Requiring public access to and use of the shores of tidal waterways is not an unconstitutional taking of property since these public rights are background principles of New Jersey State law. See *National Association of Home Builders v. State of New Jersey, Department of Environmental Protection*, 64 *F.Supp.2d* 354, 358-359 (D.N.J. 1999)(upholding Hudson Riverfront Walkway rule as a valid exercise of the police power to safeguard public trust rights, as these rights of use and enjoyment cannot be extinguished even with conveyance of title to these tidal waterfront areas). See also, e.g., *Adirondack League Club, Inc. v. Sierra Club*, 92 *N.Y.2d* 591, 604, 706 *N.E.2d* 1192, 1196, 684 *N.Y.S.2d* 168, 171 (N.Y. Court of Appeals 1998)("Having never owned the easement, riparian owners cannot complain that this rule works a taking for public use without compensation."); *Coastal Petroleum v. Chiles*, 701 *So.2d* 619 (Fla. Dist. Ct. App. 1997); *Public Access Shoreline Hawaii. v. Hawaii County Planning Comm'n*, 903 *P.2d* 1246 (Haw 2006); Michael C. Blumm and Lucus Ritchie, Article, "Lucas' Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses," 29 *HARV. ENVTL. L. REV.* 321 (2005).

515. COMMENT: Forcing marina owners to give up their property without just compensation will only result in marina owners choosing not to upgrade or to sell their marina altogether. This will result in the loss of even more access to the waterfront for recreation and the development of more condominiums. These proposed rules are literally making public parks out of private business's property. Marina owners will either have to improve their property to remain competitive and successful thereby increasing their liability and exposure, or they will seek the unfortunate option of selling to residential developers.

This sad consequence is a very real prospect. Marinas have traditionally been family owned and operated, in many cases for several generations. They have limited resources and do not have

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access to the endless amount of money it takes to operate a business in New Jersey. Because of this, many marina owners have been forced to sell their property to other interests. (130, 103, 65, 164, 40, 106, 141, 98, 118, 152, 50, 89, 10, 12, 46, 111, 163, 107, 174, 67, 29)

516. COMMENT: Business at marinas is decreasing because of the increasing pressures from the government in the form of increased taxes and burdensome regulations. This coupled with the additional operation and maintenance expenses that will be incurred by marina owners and the risks associated with the liabilities to property and persons will make it more attractive to sell a marina to a developer. (33, 122, 103, 128, 9)

517. COMMENT: Without compensation, marinas will forgo needed repairs and expansions. Marina owners will have one more reason to sell their waterfront property to residential developers, who have no obligation to retain the boat ramps, dry stacks and boat slips depended upon by owners of the 191,000 boats registered in New Jersey. If not carefully written and administered, these regulations could unintentionally decrease access for boaters while providing only marginal access for pedestrians and others. (39)

RESPONSE TO COMMENTS 515 THROUGH 517: The Department is concerned with the loss of marinas and other water dependent uses and the conversion of these uses to residential development. The Green Acres Program's Marina Preservation Program is one way the State can help to preserve these water dependent uses. Through this program, the State purchases an easement or development rights from the marina owner preserving the marina use, while providing the marina owner with revenue through the sale which can be used to invest in the marina operation and infrastructure. Under this program, the marina owner continues to own the land and operate the site.

Under this rule, marinas like other developments, are required to provide public access to and along the tidal waterway. The public access areas are subject to a conservation restriction to ensure that they are preserved in perpetuity. The goal of a conservation restriction is to restrict

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development in order to permanently safeguard the public benefits of land in its natural condition. As stated in response to comment 34, the State of New Jersey is the trustee of public rights to the State's natural resources, including tidal waterways and their shores. Accordingly, it is the duty of the State to protect the public's right to use and ensure that there is access to these resources. Requiring public access to and use of the shores of tidal waterways is not an unconstitutional taking of property since these public rights are background principles of New Jersey State law. The Department recognizes that public access along the entire tidal waterway is not always feasible due to site constraints at existing commercial marinas and the operation of heavy boat moving equipment. Therefore, the Department in the concurrent proposal published elsewhere in this issue of the New Jersey Register is proposing to amend the rule to allow for the reconfiguration of the linear public access area where warranted.

518. COMMENT: Fencing off areas for people who are not involved with the marina is a taking of property. (159)

RESPONSE: The rule does not require fencing off areas for people who are not marina patrons. Rather, the rule requires that the public have access to and along the tidal waterway in accordance with the Public Trust Doctrine.

519. COMMENT: If under these rules, the State effectively seizes all the waterfront property from marina owners without compensation, marina owners will stop upgrading their facilities, will sell their properties to developers for condominiums and diminish the number of slips available to the public and transient boaters.

Just compensation would be significant payment for taking the most valuable part of a marina owner's property. Just compensation should include maintenance of the bulkheads by the State. If the State has seized the waterfront, the State should maintain it. Just compensation should include significant reduction in property taxes, since marinas will no longer be waterfront properties. Just

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compensation should include monies to marina owners to cover repair of vandalism, increased operating costs, and increased insurance costs. (72)

520. COMMENT: The rules are a taking without just compensation. (171)

521. COMMENT: What type of compensation will a marina owner receive if they are forced to deed restrict a section of property? (69)

522. COMMENT: Based on these regulations, the State will procure land for public access without fair remuneration or just compensation, thus decreasing the value of the property without any consideration for this loss to the owner of the property. (46)

523. COMMENT: The rules as proposed represent a taking or partial taking of private property suggestive of egregious domain policies, and therefore, warrant legal challenge. To force additional access reduces property rights and value. Many of these obligations never could have been foreseen by the prior generations who ran these businesses, and thereby afforded access to marine waters to the public. The proposed rules offer no compensation for the loss of private property. (34, 35, 12, 16)

524. COMMENT: How can the Department alter the American Constitution and Bill of Rights? The Department can not take private property without just compensation. It is hard to believe that the Department is exempted from the laws of the United States. (87)

525. COMMENT: Increasing access to our nation's waterways is a priority. The commenter applauds the Department's innovative initiative to solve this significant problem. However, the commenter indicated that the proposed regulations have a significant flaw that could impede their

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ability to achieve the State's goal of increasing public access. While the commenter indicated that he supports increased access to public waters for boaters, he stated that this access should not be at the expense of individual property owners. The commenter stated that if New Jersey requires public access across privately held lands, the State should compensate the property owner for this taking. (39)

RESPONSE TO COMMENTS 519 THROUGH 525: The rule does not constitute a seizure of all waterfront property from marina owners, nor does it alter the Constitution or the Bill of Rights. The rule requires that the public be allowed to walk along the tidal waterway in accordance with the public rights under the Public Trust Doctrine, and that a conservation restriction be recorded to ensure that the public access is maintained in perpetuity. The goal of a conservation restriction is to restrict development in order to permanently safeguard the public benefits of land in its natural condition. As stated in response to comment 34, the State of New Jersey is the trustee of public rights to the State's natural resources, including tidal waterways and their shores. Accordingly, it is the duty of the State to protect the public's right to use and ensure that there is access to these resources. Requiring public access to and use of the shores of tidal waterways is not an unconstitutional taking of property since these public rights are background principles of New Jersey State law, as described in response to comments 528 through 539.

526. COMMENT: Granting the public access in accordance with the rules does not result in taking of private property without just compensation. This is an issue that has been fully contemplated and resolved by our courts and it has been definitively held that granting the public access to land and waters under the Public Trust Doctrine is not a taking.

In 1988, the U.S. Supreme Court reaffirmed the long-held precedents that the States, upon entry into the Union, received ownership of all lands and waters subject to the tides and that the authority to define the limits of the lands held in public trust rests entirely with the individual states. *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988). The *Phillips* Court further held that the fact that a private party has long been the record title holder to the property or has paid taxes on the lands in

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question cannot divest a State of its claim to ownership. Id. In New Jersey, our courts have continually defined the lands that are held in public trust through a series of decisions, all of which are discussed in the proposed Rules, including *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984), *National Association of Home Builders v. N.J.DEP*, 64 F.Supp 2d 354 (D.N.J. 1999) and *Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005). Collectively, these and other cases have defined the public trust rights to mean that tidal waterways and their shores are subject to the Public Trust Doctrine and are held in trust by the State for the benefit of all people; that, as the Trustee, it is the obligation of the State to protect the public's right to use and enjoy these lands and waters for a variety of uses, including swimming, sunbathing, fishing, surfing, walking and boating; that the dry sand and filled areas landward of the mean high water line are also subject to certain public rights under the Public Trust Doctrine; and that various portions of dry sand and filled areas above the mean high water line are subject to certain rights of access to and use by the public in order to ensure their ability to fully use and enjoy the lands subject to the Public Trust Doctrine. The New Jersey Supreme Court has even set forth specific factors for determining the amount of dry sand available for public use in a given area to ensure that a taking does not occur. *Matthews v. Bay Head Improvement Association*, 95 N.J. 306, 326 (1984).

It is the holdings of these cases that govern takings claims in New Jersey, and efforts to provide and enforce the public's rights that are in accordance with these decisions are not takings under the law. See, e.g., *National Association of Home Builders v. N.J.DEP*, 64 F.Supp 2d. 354, 359 (D.N.J. 1999), citing *Matthews v. Bay Head Improvement Association*, 95 N.J. at 355. The proposed Public Access Rules are based upon and were developed in response to the holdings of each and every one of these and other New Jersey Public Trust Doctrine cases. See, e.g., N.J.A.C. 7:7E-3.50(e) and N.J.A.C. 7:7E-8.11(r). Accordingly, their adoption, implementation and enforcement do not constitute a "taking" under the law of this State.

It is also important to emphasize that these Court decisions have simply clarified the rights of the public under the Public Trust Doctrine – rights that have existed since ancient times - and that the decisions, and the proposed Rules, merely reflect our current understanding of rights that have always existed. The lands and waters subject to the Public Trust Doctrine have always belonged to the people, and not to any one private owner. Simply put, the State cannot take from a property owner something that the property owner never had. (80)

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527. COMMENT: Access to public trust lands is not a taking of private property for public use in violation of the Fifth Amendment to the U.S. Constitution. Relevant Supreme Court jurisprudence makes clear that there is no taking if the regulation at issue derives from or is a natural outgrowth of “background principles” of state law. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), plaintiff purchased two residential lots of shoreline property before the State of South Carolina passed a statute having the “direct effect of barring petitioner from erecting any permanent structures on his two parcels,” rendering them “valueless.” 505 U.S. at 1007. In response, the plaintiff sued, alleging that the government effected a complete deprivation of his property. The Court held that “[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership,” and remanded for a determination of whether such “background principles” would have prevented the proposed use of plaintiff’s property. *Id.*, 505 U.S. at 1029. This caveat reflects the fact that since at least the 19th century, the rule has been that “a prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property.” *Mugler v. Kansas*, 123 U.S. 623, 628-29 (1887). The New Jersey Supreme Court agrees with that analysis. *Mansoldo v. State*, 187 N.J. 50, 60-62 (2006).

The “background principles” of New Jersey law clearly include public trust rights. The Public Trust Doctrine is part of the two-century-old law of this State. See *Arnold v. Mundy*, 6 N.J.L. 1 (1821); *Avon*, 61 N.J. at 308-309 (explaining that public trust rights “should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.”). Indeed, New Jersey’s highest courts recognized the public trust doctrine as the law of the State several decades before the U.S. Supreme Court, in another case arising out of New Jersey waters, adopted the doctrine. Compare *Arnold*, 6 N.J.L. 1 (1821) with *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842). The State’s strong policy of open beaches is expressed in New Jersey Supreme Court decisions, the Beaches and Harbors Bond Act of 1977, L.1977, c.208 and other legislation, and NJDEP coastal regulations. See *Lusardi*, 86 N.J. at 228-29. As the recent *Atlantis* case made clear, private land can be subject to public trust rights. See also *Matthews*, 95

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N.J. at 325 (concluding that there is “no reason why rights under the public trust doctrine for use of the upland dry sand areas should be limited to municipally-owned property.”) and 333-34 (“private land is not immune from a possible right of access to the foreshore for swimming or bathing purposes, nor is it immune from the possibility that some of the dry sand may be used by the public incidental to the right of bathing and swimming.”)

For that reason, courts have rejected takings claims based upon regulations designed to protect access to public trust rights. In *National Association of Home Builders v. New Jersey Dep’t of Environmental Protection*, 64 F. Supp. 2d 354, 358 (D.N.J. 1999), the court held that former tidally flowed land along the Hudson River was part of the public trust, that owners did not have the right to exclude the public, and that the State could require owners to construct and maintain a walkway on that land without creating a taking. As to adjacent upland areas, takings depends upon the *Matthews* balancing factors, but the Department can balance the factors in a rulemaking and does not have to make “individualized determinations” for every parcel of property. *Id.* at 359-60. See also *East Cape May Associates v. State, Dep’t of Environmental Protection*, 343 N.J. Super. 110 (App. Div. 2001) (regulation of riparian grant lands was not a taking because such land is impressed with a public trust); *Karam v. State, Dep’t of Environmental Protection*, 308 N.J. Super. 225 (App. Div. 1998) (denial of permit to build a dock on public trust lands was not a takings). The courts of other states have similarly denied takings claims for limitations on privately-owned public trust lands. *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993); *Orion Corp. v. Washington*, 747 P.2d 1062 (Wash. 1987); *Esplanade Properties, LLC.*, 307 F.3d 978 (9th Cir. 2002) (applying Washington law); *Marine One, Inc. v. Manatee County*, 898 F.2d 1490 (11th Cir. 1990) (applying Florida law); *Palazzolo v. Rhode Island*, 2005 WL 1645974, \*6-\*7 (R.I. Super. July 5, 2005). (154)

RESPONSE TO COMMENT 526 AND 527: The Department acknowledges these comments in support of the rule.

528. COMMENT: The amendments impose a condition of public access to the entire dry sand beach even in the instances where the development was not publicly funded. This is an impermissible denial of the right of a private property owner to restore or maintain his or her own

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real property. Such a condition has no rational nexus to technical construction issues. A private property owner should be enabled to care for his or her property, utilizing private funds, without being required to cede valuable property rights to the public as a concomitant cost of such protective action. (121)

529. COMMENT: The rule requirement to further deed restrict land provided for public access is also in essence a taking of private property without any proposed compensation to the landowner. (45, 100, 131)

530. COMMENT: Imposing public access upon private property raises serious constitutional issues. There is a long line of United States Supreme Court cases that hold that the forced opening of private property to public use where the project will not cause an adverse impact justifying the exaction is unconstitutional, *See Dolan v. City of Tigard*, 512 U.S. 374 (1994) and related cases such as *Loretto*, *Nolan* and *Kaiser Aetna*. This is especially true where the property is already developed with dwelling units and private amenities such as pools, picnic/BBQ areas, decks, walks, and docks or where boating clubs have been established and privately owned boats and other property are kept. Imposing a blunt public access requirement on an already developed site merely because for example, an existing bulkhead needs to be replaced or some other Department-regulated activity is undertaken clearly constitutes the taking of private property for public use without compensation.

While certain New Jersey cases such as *Raleigh* have upheld public access to beaches, beaches are fundamentally different, being inherently undeveloped and unoccupied by private uses and in strong demand for swimming, sun bathing and fishing. The uplands along bays, harbors, rivers, man-made lagoons and other tidal waters (not adjacent to bathing beaches) have none of the justifications for public access as in the case of an ocean beach. People seldom swim in these water bodies, except where the upland has been improved with landscaped yards, decks or pools. The public interest of New Jersey's citizens lies in protecting these private property areas, not in stripping them of their privacy and security from intruders. For the Department to interpret *Raleigh*

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as allowing public access to non-beach areas is a complete misunderstanding and misapplication of that case. (160)

531. COMMENT: The State fails to address the hardships these regulations place on private property owners. If dry sand is usurped for the public good, then the public has an obligation to compensate the private property owner. (38)

532. COMMENT: The proposed rules represent a further expansion of government powers to take private citizens' property and destroy their way of life, and to do so without just compensation or no compensation at all. The State seeks to usurp more and unbridled power to take private property for a purported public good.

Owners of properties along the Atlantic Ocean, through these regulations, will lose exclusive use of that portion of their land landward of the mean high water line, forfeiting it to a conservation easement. The property owner bears the cost of the public good, dry sand, that these regulations provide, suffering an economic hardship. If the dry sand is usurped for the public good, the public has an obligation to pay the private property owner for it. The burden should not be borne by only selected citizens, placing the onus on the private citizen.

The commenter opposes the expanded taking of private property, the forced destructive change of character of coastal communities, and the added costs and consequent tax increases. The current use of eminent domain and the public trust doctrine and the current State and Federal regulations are more than enough power for the government to attack the issue of "public" vs. private. These regulations are a blatant disregard of private property rights in contravention of the Fifth and Fourteenth Amendments of the Federal Constitution and in violation of the Constitution of New Jersey. (138)

533. COMMENT: The rules are arguably inconsistent and interfere with the property rights of New Jersey oceanfront property owners, which are recognized in the New Jersey Appellate Court case of *City of Ocean City v. Maffucci*, 326 N.J. Super. 1 (App. Div. 1999) (loss of ocean view, breeze, and access are elements for which severance damages have been recognized). In this regard, the proposed rule changes are an improper method to circumvent the longstanding constitutional and

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statutory norms regarding the government's use of its eminent domain powers. The proposed rule changes are, on its face, an instrument of the State in an attempt to usurp longstanding private property rights. (125).

534. COMMENT: Private property rights will be denigrated as the State mandates that municipalities acquire conservation easements from beachfront property owners without providing for just compensation. (63)

535. COMMENT: Three commenters opposed the rules since they result in a taking of private property. (76, 105, 116)

536. COMMENT: The proposed rules are an unlawful taking of property. (133)

537. COMMENT: The rule is unwarranted and will create substantial hardships to private property owners and municipalities who have to obtain land through condemnation in order to meet the rule. (140)

538. COMMENT: This proposal invokes a taking, without just compensation, based on the Department's position that the State needs a one-size fits all approach to public access. For example, if a landowner has purchased the riparian rights and thus compensated the State for the use of that property, it is legally impermissible for the State to subsequently require additional payment for the use of that property whether it is for access to waterways either on- or off-site. (16)

539. COMMENT: The proposed rules violate the Fifth Amendment of the United States Constitution which states that private property shall not be taken without just compensation. The Public Trust Doctrine upon which the Department relies protects the rights of the people to engage in certain activities on the waterfront. This access should be reasonable to allow access to the

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waterfront and allow the public to use and enjoy the wet sand. However, the proposed rules require a 30-foot conservation easement and parking areas where appropriate. This requirement goes well beyond the New Jersey Supreme Court's requirements under the Public Trust Doctrine and constitutes an unlawful taking.

In *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984), the New Jersey Supreme Court set forth factors to determine how much property is necessary for the public to use and enjoy the public trust lands, including: (1) the location of the dry sand area in relation to the foreshore; (2) the extent and availability of publicly-owned upland sand area; (3) the nature and extent of the public demand and (4) usage of the upland sand by the owner. *Id.* at 312. The Department did not take these factors into consideration in requiring blanket 30-foot wide conservation easement on all land bordering tidal waterways. This 30-foot requirements is arbitrary and constitutes an unlawful taking. Given that the proposed rules lack the balancing of private property owners rights under the *Matthews* test and the unconstitutional taking of private property without just compensation, it is apparent that the proposed rules should not be enacted, but reworked to assure that the right of the public to access and use waterfront is balanced by a private property owner's right to the use and enjoyment of their property without violating the 5<sup>th</sup> Amendment. (99)

RESPONSE TO COMMENTS 528 THROUGH 539: The State of New Jersey is the trustee of public rights to the State's natural resources, including tidal waterways and their shores.

Accordingly, it is the duty of the State to protect the public's right to use and ensure that there is access to these resources. Requiring public access to and use of the shores of tidal waterways is not an unconstitutional taking of property since these public rights are background principles of New Jersey State law. See *National Association of Home Builders v. State of New Jersey, Department of Environmental Protection*, 64 F.Supp.2d 354, 358-359 (D.N.J. 1999)(upholding Hudson Riverfront Walkway rule as a valid exercise of the police power to safeguard public trust rights, as these rights of use and enjoyment cannot be extinguished even with conveyance of title to these tidal waterfront areas). See also, e.g., *Adirondack League Club, Inc. v. Sierra Club*, 92 N.Y.2d 591, 604, 706 N.E.2d 1192, 1196, 684 N.Y.S.2d 168, 171 (N.Y. Court of Appeals 1998)("Having never owned the

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easement, riparian owners cannot complain that this rule works a taking for public use without compensation.”); *Coastal Petroleum v Chiles*, 701 So.2d 619 (Fla. Dist. Ct. App. 1997); *Public Access Shoreline Hawaii. v. Hawaii County Planning Comm'n*, 903 P.2d 1246 (Haw 2006); Michael C. Blumm and Lucus Ritchie, Article, "Lucas' Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses," 29 HARV. ENVTL. L. REV. 321 (2005).

540. COMMENT: The commenter submitted correspondence from his constituents on the proposal for consideration by the Department. (79)

RESPONSE: The constituents are listed with the commenters that submitted form letters requesting the Department not adopt the proposal (see commenters 175). As such, their comments are addressed throughout the adoption.

Comments beyond the scope of the proposal

541. COMMENT: The dredging of the ocean to create a barren 400-foot wide artificial dune as part of the Long Beach Island beach replenishment project will destroy not only the look of the beach, but will no doubt kill thousands of animals and plant life both on the beach and in the ocean. It's mind-boggling that the Department has signed on to this project where public access has usurped keeping the beach as pristine as possible. Why? The Department should reconsider this project and look for alternative solutions that will both protect the beach and allow the public to enjoy one of New Jersey's finest natural attractions. (15)

542. COMMENT: Worthwhile projects, when given to government oversight, become hopeless, expensive, never-ending boondoggles. Please don't let that happen to the Long Beach Island project. (146)

543. COMMENT: The Department should be concerned with promoting less development along the coast, not more. Instead, the State Development and Redevelopment Plan contains a policy for infrastructure investment that calls for "enhancement of tourism that capitalizes on the State's

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natural resources and amenities...” How is replacing a motel and restaurant with condos “capitalizing” on tourism? (64)

544. COMMENT: The sand used in beach nourishment projects is not of the same quality, size, and color as the existing beach. The practice of nourishing beaches should be stopped. Taxpayers dollars are being washed away with the tide. The Department should only replenish those portions of Long Beach Island’s beaches that are in need of replenishing. Should the conditions of these beaches change, they should be addressed on a case-by-case basis. (61)

545. COMMENT: The Department has indicated that the sand placed as part of the Long Beach Island beach replenishment project will have to be replaced within 5 years. The \$71 million budget has already been extended to over \$100 million. People refer to the storm of 1962. During that storm event, houses were not built on pilings, and the large dunes Long Beach Island currently has did not exist. This comparison to other storms is a scare tactic. There is no plan or budget for protecting the storm surge from Barnegat Bay. Does the Department plan on damming off Barnegat Inlet? Maybe the Department should consider creating a lock system similar to the Panama Canal. The boulders that protect the Barnegat Lighthouse and the homes and businesses of Barnegat are not more than 10 feet high. Is the super storm going to be able to distinguish where it should strike with the highest tides and most violent force? The sand, which costs millions of dollars, will wash away. Maybe it should be replaced with boulders of pilings and sea walls that will stand the test of time. If the Department is to reference ancient civilizations let them learn of the great stone walls, bridges and barriers that exist hundreds of years past their creation.

The Department should produce a scientific rendition of how a violent storm would affect the coast, as it exists now. Graphics such as this seem readily available when predicting and/or explaining other disasters or predicting impending doom. Graphics of traffic flows, facilities, additional maintenance workers, police and emergency support teams should be produced. When dealing with a project of the magnitude of the Long Beach Island beach replenishment project, the Department should be more prepared than to produce some forty year old pictures and a pencil graph profile of the proposed beach that is not to scale. For a \$100 million project, the Department’

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description and information would not receive anything above a “C” grade for a sixth grade report. Based on this, the Department wants the residents of Long Beach Island to change the very core of life on the island.

The Long Beach Island beach replenishment project has many flaws. The major flaw is that there are different options and a needed, more publicized forum on these options. The public forum must be established. Yes, there are those that say former Mayor Mancini and State Representative Saxton have worked hard to get the money for this beach replenishment project, but Mayor Mancini would not have let the Department run rampant over the island. Mr. Saxton should make sure his hard work doesn’t wash away with the tide. Mayor Gove is only one person and is working against tremendous pressure to do what is best for the island. The Governor must sit down with her and other citizens and customize a workable solution. (61)

546. COMMENT: The commenter is concerned with the scope of the Long Beach Island beach nourishment project. (6)

547. COMMENT: A narrow beach does create risk from storms. However, the Long Beach Island beach shore protection project as proposed will destroy the natural environment and charm of Long Beach Island. (6)

548. COMMENT: The Long Beach Island beach nourishment project will result in a beach that will no longer be within walking distance for small children and their families, with an arm full of chairs, umbrellas and beach toys. People walk two blocks to the beach entrance and then walk across a short beach to the water’s edge. Some people will simply not be able to use the beach, as they have for many years, unless the project is reduced in scope.

The proposed dunes associated with the project are too high. With the beach at its current height, sand blows into oceanfront property owners yards and continually builds the dunes in front

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of the houses. The proposed new dunes do not have to be the height proposed to accomplish the same end.

The Department should consider lowering the height of the dune and reduce the width of the proposed beach. This would save taxpayers money and make the beaches more user friendly. (6)

549. COMMENT: The commenter indicated that he supports the Long Beach Island beach replenishment program. The commenter indicated that they own a beachfront property in Harvey Cedars that is in need of protection. He stated that has worked hard every year to stabilize the dune in front of their property with dune fencing and dune grass. He stated that what is left of the beach is extremely low and the remaining dune is getting frighteningly narrow.

The commenter also stated that it is difficult to understand why people don't want to protect their property against storm damage and don't consider the safety of the properties behind them or the interests of all the businesses on Long Beach Island.

According to the commenter, two beachfront property owners are withholding granting easement which is effectively vetoing a project that has been approved by more than two-thirds the majority. Please assist local governments to get the beach replenishment project approved and implemented. (3)

550. COMMENT: Suppose someone ties up a derelict boat to a public access site and abandons it after removing all the items of identification. The boat sinks overnight and leaks oil into the water. Who is responsible for the environmental clean-up as well as the cost of raising and disposing of the boat? Surely not the marina owner. (67)

551. COMMENT: Marinas are already required to comply with US Environmental Protection and New Jersey Department of Environmental Protection Regulations and will now be required to meet the NJPDES Stormwater permit requirements. (55)

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552. COMMENT: The uniqueness of Long Beach Island must be factored into the beach nourishment project. Long Beach Island is a coastal community setting with residential/recreational atmosphere. The only commercial enterprise on the island is to serve the need. The culture of Long Beach Island has not been factored into the beach nourishment project. (175, 85)

553. COMMENT: There is a new development proposed on Lafayette Street in Cape May. This development will include condominiums and boat slips. While the developers indicate that dredging is not necessary now, it will have to be done in the future. No one knows how this will affect Cape Island Creek in the future. Development that occurred on Sunset Boulevard has resulted in flooding on the other side of the street and now Phragmites are becoming a problem. This was not the case in the 1940's, 50's and 60's. The condominiums constructed on Myrtle Ave in West Cape May flooded out people on that street. The development of the North Cape May Acme resulted in the filling of a natural pond being it with natural springs. I pray the earth can talk and not money. (91)

554. COMMENT: The commenter stated that while they are in favor of economic development and the construction of high rise buildings in the City of Wildwood, they have become increasingly concerned about development tipped in favor of developers who seek to construct high rise buildings on relatively small parcels of property and which are in apparent conflict with Department regulations. Such construction has been facilitated by both the City of Wildwood Commission, which has increasingly relaxed zoning restrictions on setbacks, FAR, and lot coverage as well as through decisions of the Planning Board and Zoning Board of Adjustment, who have bent over backwards to accommodate applicants unable to comply with the most increasingly liberal building requirements.

High rise projects that fail to provide for appropriate setbacks, lot coverage and FAR threaten ocean views and breezes currently enjoyed from the commenter's properties, are out of character with surrounding traditional heights and residential densities and have an adverse impact on air quality, traffic and the existing infrastructure (see N.J.A.C. 7:7E-7.14(b)).

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The commenter indicated that they are concerned with the erosion of these and other rights guarded by the Department, such as the requirements that the longest lateral dimension of any high-rise structure be oriented perpendicular to the beach or coastal waters.

The commenter does not believe that the proposed rules concerning coastal permits and public access will have any direct effect on their properties. However, they indicated that they are concerned about any changes to any DEP regulation that may be directly addressed to the City of Wildwood, or seek to exempt the City of Wildwood from CAFRA protections. The commenter is also aware that the Mayor of the City of Wildwood has recently appeared before the Department seeking changes with regard to CAFRA's interplay with the City of Wildwood. The indicated that they feel uninformed about these developments and would like to know what changes are being proposed or otherwise suggested, so that they may have a voice in these matters.

To the extent that applications in the City of Wildwood seek exemptions or waivers from CAFRA requirements, the commenter indicated that they believe that neighboring parcel owners should, as a matter of right, have a say concerning whether they object to or approve of the project. Where the neighbor object, waivers from CAFRA should not be granted. (78)

555. COMMENT: The commenter opposes the Long Beach Island beach nourishment project. (47)

556. COMMENT: Long Beach Island is prone to flooding. Should a category II or III Hurricane hit the island, the proposed LBI beach nourishment project will have no effect. Residents of LBI need to leave the island during storm events. (75)

557. COMMENT: The commenter indicated that he is scared because the local government can pass an ordinance at anytime. The commenter referred to an ordinance in Surf City which requires the residents pay to put back sand lost during a storm event. (76)

558. COMMENT: The commenter indicated that he submitted an application in October 2005 for a coastal permit. As part of that application, the commenter indicated that he offered perpendicular, linear and visual access along the bulkhead of the marina, 25 parking spaces, handicapped restroom

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facilities, two picnic areas, a swimming pool and pavilion for public use to satisfy the public access rule requirements. The commenter indicated despite all the public access amenities he proposed, his coastal permit application was denied. (72)

559. COMMENT: The commenter stated that a boat ramp was constructed for a commercial yacht club, partially on her property. The yacht club then went bankrupt and the property was taken over by a private citizen who began to build a dock and closed off the boat ramp. The commenter said that she had an injunction placed on the building and referred it to the municipality and the Department because a CAFRA permit was issued for the property. The commenter indicated that she received a letter indicating that there was a deed restriction. She indicated that it was never intended to go with the land. (142)

**Summary of Agency-Initiated Changes:**

Reference to *Karam v. NJDEP*, 308 N.J. Super. 225, 240 (App. Div. 1998), *aff'd*, 157 N.J. 187 (1999), *cert. denied*, 528 U.S. 814 is being added to the definition of “Public Trust Doctrine” at N.J.A.C. 7:7-1.3 to provide additional support for the principle of law set forth in *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892) that government may not abdicate control of public trust property.

Reference to *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892); *Karam v. NJDEP*, 308 N.J. Super. 225, 240 (App. Div. 1998), *aff'd*, 157 N.J. 187 (1999), *cert. denied*, 528 U.S. 814; and *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) is being added to the rationale of the Lands and waters subject to public trust rights rule at N.J.A.C. 7:7E-3.50(e) to make it consistent with N.J.A.C. 7:7-1.3. The rationale of the Lands and waters subject to public trust rights rule at N.J.A.C. 7:7E-3.50(e) is also being amended to correct a citation error to *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984). Additionally, the rationale is being amended to clarify the New Jersey Supreme Court’s decision with respect to private beaches in *Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc. et al.*, 185 N.J. 40 (2005).

The Department is clarifying that the exceptions at N.J.A.C. 7:7E-8.11(f)3, 4, 5, 6 and 7 apply to both development of new and development at existing energy, port and industrial facilities; and single family, duplex, and two or three unit residential developments. The rule at N.J.A.C. 7:7E-

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8.11(f)3, 4, 5, 6 and 7 contains criteria for modification of the permanent on-site public access requirements that are set forth at N.J.A.C. 7:7E-8.11(d) and (e) at energy, port and industrial facilities; and single family, duplex, and two or three unit residential developments. As noted in the summary at 38 N.J.R. 4577, exceptions may be made in accordance with (f)3 where energy facilities, industrial uses, port uses, airports, railroads and military facilities contain existing obstructions that preclude access along the entire shore on-site or where risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions occur. The summary at 38 N.J.R. 4577 and 4578 describes the exceptions at N.J.A.C. 7:7E-8.11(f)4 through 7 that apply at one, two or three unit residential developments or associated accessory development. The addition of the phrase “development of a new or at an existing” clarifies that these paragraphs apply to both new development and existing development that meet the criteria specified.

The rationale of the Lands and waters subject to public trust rights rule at N.J.A.C. 7:7E-3.50(e) is being amended to correct a grammatical error in citing the *Matthews* case.

The rule at N.J.A.C. 7:7E-8.11(q) defines a “Green Acres project site” as the land that is subject to an application for Green Acres funding that contains or is adjacent to tidal waterways and their shores. The rule contains a number of references to Green Acres funding. For clarity, the Department is inserting the term “for a Green Acres project site” in these cases. These insertions are found at N.J.A.C. 7:7E-8.11(h), (j), (m), (n), and (q)1 and 5 through 12..

The rationale of the Public trust rights rule at N.J.A.C. 7:7E-8.11(r) lists the public uses guaranteed by the Public Trust Doctrine as recognized by State and Federal courts in New Jersey. The Department is deleting “bathing” from this listing because it is redundant with the terms “swimming” and “sunbathing” and is therefore not necessary. The Department is also adding the term “bird watching” to the listings at N.J.A.C. 7:7-1.3 and N.J.A.C. 7:7E-3.50(e) and 8.11(r) and the term “fishing” at N.J.A.C. 7:7E-8.11(r). These changes will provide for consistency of the listing throughout the rule, though such listings are not exhaustive.

To correct an error in codification, N.J.A.C. 7:7E-8A.2(b)8 is being recodified as (b)7. An error in punctuation is also being corrected.

## **Federal Standards Analysis**

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Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. require that State agencies which adopt, readopt or amend State regulations that exceed Federal standards or requirements include in the rulemaking document a comparison with Federal law.

The Federal Coastal Zone Management Act (16 U.S.C. §§1450 et seq.) was signed into law on October 27, 1972. The Act does not set specific regulatory standards for development in the coastal zone; rather, it provides broad guidelines for states developing coastal management programs. These guidelines are found at 15 CFR Part 923. The guidelines do not specifically address the review standards that should be applied to new coastal development in order to preserve and protect coastal resources and to concentrate the pattern of coastal development. They simply provide a planning and management process, without establishing development standards for development in the coastal area. Therefore, the Department has concluded that the adopted new rules and amendments do not exceed any Federal standards or requirements of the Federal Coastal Zone Management Act.

Many shore protection and beach nourishment projects subject to the adopted new rules and amendments will be conducted through a joint funding agreement between the State of New Jersey and the United States Army Corps of Engineers (Corps), and often include local government participation and funding as well. Many of the standards at proposed N.J.A.C. 7:7E-8.11 apply to these projects. Such projects are authorized by Congress through Federal Water Resources Development Acts, generally passed annually. In a document entitled "Water Resources Policies and Authorities: Federal Participation in Shore Protection," released June 1989 (Corps Regulation CECW-PR Regulation No.1165-2-130, ER 1165-2-130), the Corps establishes standards for federal participation in shore protection, paramount among them the requirement for public use of the shore protection project areas. These Federal standards require that the shores be available for public use on equal terms to all. The standards cite sufficient parking facilities for the general public located reasonably nearby, and with reasonable public access to the project area itself, as requirements. The standards state that parking should be sufficient to accommodate the lesser of the peak hour demand or the beach capacity, but allow for public transportation to supplement or substitute for such parking. Furthermore, the standards tie reasonable public access to the recreational use objectives of the particular area. They require public access points within one-half mile of one another. The

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adopted new rules and amendments exceed the Federally established maximum distance of one-half mile between access points, establishing a maximum distance of one-quarter mile.

The Corps standard is a national standard that applies to Federal participation in any shore protection project in the nation. The Department has determined that a more stringent standard is warranted here. New Jersey is the most densely populated state in the nation, with a population exceeding 8.5 million, all of whom live within 55 miles of the shore. According to the 2006 Tourism Economic Impact Study conducted by Global Insight, Inc. for the New Jersey Commerce, Economic Growth & Tourism Commission (<http://www.nj.gov/travel/ppt/fy2006-04-tourism-ecom-impact.ppt>) the travel and tourism industry in New Jersey contributed \$37.6 billion in economic activity in 2006, when the travel and tourism industry employed 480,000 people directly and indirectly, making it the State's second largest private sector employer. In 2006, more than 71 million people visited New Jersey and tourism activity generated \$4.3 billion in state and local government revenues. The ability of tourists to access the State's tidal waterways and shorelines is crucial, as New Jersey's tidal waterways and their shores offer a wide variety of commercial and recreational water-related activities. Accordingly, the Department determined that it is necessary and appropriate to exceed the Corps' national standard regarding maximum distance between access points.

**Full text** of the adoption follows (additions to proposal indicated in boldface with asterisks **\*thus\***; deletions from proposal indicated in brackets with asterisks \*[thus]\*):

7:7E-8.11(f)

## CHAPTER 7

### COASTAL PERMIT PROGRAM RULES

#### 7:7-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

...

“Public Trust Doctrine” means a common law principle that recognizes that the public has particular inalienable rights to certain natural resources. These resources include but are not limited to tidal waterways, the underlying submerged lands and the shore waterward of the mean high water

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line, whether owned by a public, quasi-public or private entity. In the absence of a grant from the State, submerged lands under tidal waterways and the shore of tidal waterways waterward of the mean high water line are owned by the State. Regardless of the ownership of these resources, under the Public Trust Doctrine the public has rights of access to and use of these resources, as well as a reasonable area of shoreline landward of the mean high water line. Under the Public Trust Doctrine, the State is the trustee of these publicly owned resources and public rights for the common benefit and use of all people without discrimination. As trustee, the State has a fiduciary obligation to ensure that its ownership, regulation and protection of these properties and rights will safeguard them for the enjoyment of present and future generations. The public rights to use these resources extend both to traditional activities such as navigation and fishing, but also to recreational uses such as swimming, sunbathing, fishing, surfing, \*sport diving, bird watching,\*walking and boating. The specific rights recognized under the Public Trust Doctrine, a common law principle, continue to develop through individual court decisions. *See, for example, Arnold v. Mundy, 6 N.J.L. 1 (1821); Borough of Neptune v. Borough of Avon-by-the-Sea, 61 N.J. 296 (1972); Hyland v. Borough of Allenhurst, 78 N.J. 190 (1978); Matthews v. Bay Head Improvement Association, 95 N.J. 306 (1984); Slocum v. Borough of Belmar, 238 N.J. Super. 179 (Law Div. 1989); National Ass'n of Homebuilders v. State, Dept. of Env't'l Protect., 64 F.Supp.2d 354 (D.N.J. 1999); Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 185 N.J. 40 (2005); Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892); Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988); and "Karam v. NJDEP, 308 N.J. Super. 225, 240 (App. Div. 1998), aff'd, 157 N.J. 187 (1999), cert. denied, 528 U.S. 814."*

...

7:7-7.10 Coastal general permit for construction of a bulkhead and placement of associated fill on a manmade lagoon

(a) This coastal general permit authorizes the construction of a bulkhead on a lot located on a substantially developed manmade lagoon, provided that the bulkhead complies with the following:

1. – 6. (No change.)

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7. Public access shall be provided in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11. Additional requirements may be imposed as a condition of Shore Protection Program funding, pursuant to N.J.A.C. 7:7E-8.11(p).

\*[i. In accordance with N.J.A.C. 7:7E-8.11(f)6, the Department shall not require public access for the development under this coastal general permit provided no beach and dune maintenance activities are proposed and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or their shores. This provision does not apply to the Hudson River Waterfront Area at N.J.A.C. 7:7E-3.48.]\*

(b) (No change.)

## CHAPTER 7E COASTAL ZONE MANAGEMENT RULES

7:7E-3.50 Lands and waters subject to public trust rights

(a) – (b) (no change.)

(c) \*[Development that adversely affects or limits public access to lands and waters subject to public trust rights is prohibited, except as provided at N.J.A.C. 7:7E-8.11.]\* **Reserved.**\*

(d) (No. change.)

(e) Rationale: The public's rights of access to and use of tidal waterways and their shores, including the ocean, bays, and tidal rivers, in the United States predate the founding of this country. These rights are based in the common law rule of the Public Trust Doctrine. First codified by the Roman Emperor Justinian around 500 AD as part of Roman civil law, the Public Trust Doctrine establishes the public's right to full use of the seashore as declared in the following quotation from Book II of the Institutes of Justinian:

“By the law of nature these things are common to all mankind-the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore,

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provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations.”

Influenced by Roman civil law, the tenets of public trust were maintained through English Common Law and adopted by the original 13 colonies, each in their own form. The grants that form the basis of the titles to private property in New Jersey never conveyed those public trust rights, which were reserved to the Crown. Following the American Revolution, the royal rights to tidal waterways and their shores were vested in the thirteen new states, then each subsequent state, and have remained a part of law and public policy into the present time. Tidal waterways and their shores always were, and remain, subject to and impressed with these public trust rights. See *Arnold v. Mundy*, 6 N.J.L. 1 (1821); *Borough of Neptune v. Borough of Avon-by-the-Sea*, 61 N.J. 296 (1972); *Hyland v. Borough of Allenhurst*, 78 N.J. 190 (1978); *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984); *Slocum v. Borough of Belmar*, 238 N.J. Super. 179 (Law Div. 1989); *National Ass’n of Homebuilders v. State, Dept. of Env’tl Protect.*, 64 F. Supp.2d 354 (D.N.J. 1999); *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005). See also *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892); *Karam v. NJDEP*, 308 N.J. Super. 225, 240 (App. Div. 1998), *aff’d*, 157 N.J. 187 (1999), *cert. denied*, 528 U.S. 814.

The Public Trust Doctrine serves as an extremely important legal principle that helps to maintain public access to and use of tidal waterways and their shores in New Jersey for the benefit of all the people. Further, it establishes the right of the public to fully utilize these lands and waters for a variety of public uses. While the original purpose of the Public Trust Doctrine was to assure public access for navigation, commerce and fishing, in the past two centuries, State and Federal courts recognized that modern uses of tidal waterways and their shores are also protected by the Public Trust Doctrine. See, e.g., *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

In New Jersey, the Public Trust Doctrine expressly recognizes and protects natural resources as well as public recreational uses such as swimming, sunbathing, fishing, surfing, \*sport diving, bird watching,\* walking and boating along the various tidal waterways and their shores.

The Public Trust Doctrine is an example of common law authority that is continually developing through individual court cases. The first published court case in New Jersey to discuss the Public Trust Doctrine was in 1821. See *Arnold v. Mundy*, 6 N.J.L. 1 (1821). Within the past three decades, several New Jersey court decisions have clarified the public rights of access to and

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use of areas above the mean high water line as needed for access to and use of tidal waterways and their shores, under the Public Trust Doctrine. *See for example, Arnold v. Mundy, 6 N.J.L. 1 (1821); Borough of Neptune v. Borough of Avon-by-the-Sea, 61 N.J. 296 (1972); Hyland v. Borough of Allenhurst, 78 N.J. 190 (1978); Matthews v. Bay Head Improvement Association, 95 N.J. 306 (1984); Slocum v. Borough of Belmar, 238 N.J.Super. 179 (Law Div. 1989); National Ass'n of Homebuilders v. State, Dept. of Env't'l Protect., 64 F.Supp.2d 354 (D.N.J. 1999); Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 185 N.J. 40 (2005).*

As the trustee of the public rights to natural resources, including tidal waterways and their shores, it is the duty of the State not only to allow and protect the public's right to use them, but also to ensure that there is adequate access to these natural resources. As the State entity managing public access along the shore, the Department has an obligation to ensure that this occurs. Development and other measures can adversely affect tidal waterways and their shores as well as access to and use of those lands. One example of adversely affecting tidal waterways and their shores would be the development of a building that "shadows" a public beach. The proximity of the building serves to diminish the quality of the experience of the beachgoer, encouraging them to go elsewhere. Development that adversely affects or limits public access to tidal waterways and their shores includes building over traditional accessways, putting up threatening signs, eliminating public parking, and physically blocking access with fences or equipment.

In addition to cases involving physical barriers to access, there have been instances where municipalities and local property owner associations have attempted to limit use of recreational beaches to their residents and members through methods designed to exclude outsiders. In the majority of these cases, New Jersey courts have ruled that these actions violate the Public Trust Doctrine because lands that should be available for the general public's recreational use were being appropriated for the benefit of a select few. The decision in *Matthews v. Bay Head Improvement Association, 95 N.J. 306 (1984)* recognized that, under the Public Trust Doctrine, not only does the public have the right to use the land below the mean high water mark, but also they have a right to use a portion of the upland dry sand area on quasi-public beaches. *\*Id. at 325.\** "(...where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner." *\*Id. at 325.\** The New Jersey Supreme Court recognized that this principle also applies to

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*\*exclusively\** private beaches, in *Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc. et al.*, 185 N.J. 40 (2005).

7:7E-8.11 Public trust rights

(a) Public trust rights to tidal waterways and their shores (public trust rights) established by the Public Trust Doctrine include public access which is the ability of the public to pass physically and visually to, from and along lands and waters subject to public trust rights as defined at N.J.A.C. 7:7E-3.50, and to use these lands and waters for activities such as *\*[fishing,]\** swimming, sunbathing, *\*fishing, surfing, sport diving,\** bird watching, walking and boating. Public trust rights also include the right to perpendicular and linear access. Public accessways and public access areas provide a means for the public to pass along and use lands and waters subject to public trust rights.

(b) (No change.)

(c) *\*[Development that adversely affects or limits public trust rights to tidal waterways and their shores is prohibited, except as otherwise provided in this section.]\** **Reserved.**

(d)– (e) (No change.)

(f) The permanent on-site public access required at (d) and (e) above may be modified in the following circumstances. However, in no case shall such modification constitute permanent relinquishment of public trust rights of access to and use of tidal waterways and their shores.

1. – 2. (No change.)

3. Where *\*development of a new or at an existing\** *\*[an]\** energy facility, industrial use, port use, airport, railroad, or military facility is proposed and the Department determines that perpendicular access and/or a linear area along the entire shore of the tidal waterway is not practicable based on the risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions, and no measures can be taken to avert these risks: *\*[, the Department shall require:*

i. Equivalent public access on-site; or

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ii. Equivalent public access at a nearby off-site location, if equivalent public access on-site is not practicable;]\*

\*i. The linear public access that would be required in accordance with (d) on site shall be reconfigured and enhanced to accommodate such structures and address such risks; or

ii. If public access on site is not practicable in accordance with i above, alternate public access of comparable use to the public shall be provided at a nearby off site location;\*

4. Where \*development of a new or at an existing\* \*[a]\* two-unit (excluding duplexes) or three-unit residential development, or associated accessory development or associated shore protection structure is proposed, the Department may allow the provision of \*[equivalent]\* \*alternate\* public access on-site or at a nearby offsite location based on an evaluation of the size of the site, the character of the waterway, and the availability and type of public access in the vicinity, provided i through iii below are met. This paragraph does not apply to the Hudson River Waterfront Area and the waterways listed at (e) above. Public access requirements may be imposed as a condition of Shore Protection Program funding, pursuant to (p) below.

i. – iii. (No change.)

5. Where \*development of a new or at an existing\* \*[a]\* two- unit or three- unit (excluding duplexes) residential development, or associated accessory development, or associated shore protection structure is proposed that meets (f)4i above and is located on a site that is located along the Arthur Kill, Kill Van Kull west of Bayonne Bridge, Newark Bay, Delaware River from the Trenton Makes Bridge to the CAFRA boundary, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, Cohansey River in Bridgeton City, and Maurice River in Millville City, linear and perpendicular public access shall be provided in accordance with the following:

i. – ii. (No change.)

6. Except as provided in (f)7 below, the Department shall not require public access where \*development of a new or at an existing\* \*[a]\* single family home, duplex, or associated accessory development or associated shore protection structure is proposed, provided (f)6i through iii below are met. Public access requirements may be imposed as a condition of Shore Protection Program funding, pursuant to (p) below. This paragraph does not apply to the Hudson River Waterfront Area at N.J.A.C. 7:7E-3.48.

i. – iii. (No change.)

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7. Where \*development of a new or at an existing\* \*[a]\* single family home, duplex, or associated accessory development, or associated shore protection structure is proposed that meets (f)6i above and is located on a site that includes a beach on which beach and dune maintenance activities are proposed or a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and their shores, public access along and use of the beach and the shore shall be provided. Additional requirements may be imposed as a condition of Shore Protection Program funding, pursuant to (p) below.

(e) – (g) (No change.)

(h) Public access to tidal waterways and their shores shall be clearly marked. Department approved public access signs shall be installed at each public accessway, public access area and/or public parking area at the development site and maintained in perpetuity by the permittee and its successors in title and interest,. N.J.A.C. 7:7E-8.11(p) contains the standards for signs for municipalities that participate in Shore Protection Program funding. Subsection (q) below contains the standards for signs for municipalities, counties and nonprofits that receive Green Acres funding \*for a Green Acres project site\*.

(i) (No change.)

(j) Parking shall be provided for the public to access tidal waterways and their shores, except where public access is not required in accordance with (f)6 above \*or the project is limited in scope in accordance with (f)7.\* Subsection (p) below contains the parking standards for municipalities that participate in Shore Protection Program funding. Subsection (q) below contains the parking standards for municipalities, counties and nonprofits that receive Green Acres funding \*for a Green Acres project site\*. All other development shall provide parking as follows:

1. – 3 (No change.)

(k) – (l) (No change.)

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(m) A fee for use of bathing and recreational facilities and safeguards, such as lifeguards, toilets, showers, and parking, at publicly or privately owned beach or waterfront areas, may be charged in accordance with (m)1 through 6 below. However, no fees shall be charged solely for access to or use of tidal waterways and their shores. The fee schedule and documentation of compliance with this paragraph shall be submitted to the Department by the permittee, Shore Protection Program participant or \*recipient of\* Green Acres funding \*[recipient]\* \*for a Green Acres project site,\* and its successors in title and interest upon request.

1. – 6. (No change.)

(n) The areas set aside for public access to tidal waterways and their shores shall be permanently dedicated for public use through the recording of a Department approved conservation restriction under the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1 et seq., maintaining the publicly dedicated areas in perpetuity. Subsection (p) below contains the conservation restriction standards for municipalities that participate in Shore Protection Program funding. Subsection (q) below contains the conservation restriction standards for municipalities, counties and nonprofits that receive Green Acres funding \*for a Green Acres project site\*. N.J.A.C. 7:7E-8A.4 contains the recording requirements for all conservation restrictions.

(o) – (p) (No change.)

(q) To be eligible for Green Acres funding \*for a Green Acres project site\*, a municipality, county, or nonprofit organization shall comply with (q)1 through 4 below. For the purposes of this subsection, the "Green Acres project site" is the land that is the subject of an application for Green Acres funding that contains or is adjacent to tidal waterways and their shores. Applicants for Green Acres funding \*for a Green Acres project site\* shall:

1. Submit to the Department for approval, prior to application for Green Acres funding \*for a Green Acres project site\*, a public access plan that meets the requirements at N.J.A.C. 7:7E-8A.2 and 8A.3.

i. (No change.)

2. – 4. (No change.)

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5. In addition to complying with (q)1 through 4 above, an applicant that is a municipality shall:

i. Prior to application for Green Acres funding \*for a Green Acres project site\*, submit to the Department for approval, a draft Public Access Instrument that meets the requirements of N.J.A.C. 7:7E-8A.5;

ii. Prior to disbursement of Green Acres funding \*for a Green Acres project site\*, repeal any ordinance that limits access to and use of tidal waterways and their shores or is in conflict with the Public Trust Doctrine; and

iii. Prior to disbursement of Green Acres funding \*for a Green Acres project site\*, adopt the ordinance and record the Public Access Instrument approved by the Department pursuant to (q)1i and 5i above, respectively;

6. In addition to complying with (q)1 through 4 above, prior to disbursement of Green Acres funding \*for a Green Acres project site\*, an applicant that is a county shall adopt an ordinance adopting the public access plan approved by the Department pursuant to (q)1 above;

7. Immediately upon disbursement of Green Acres funding \*for a Green Acres project site\*, provide public access along the tidal waterway and its entire shore at the Green Acres project site;

8. Immediately upon disbursement of Green Acres funding \*for a Green Acres project site\*, provide at least one accessway to the tidal waterway, its shore and the project site across land held by the recipient of Green Acres funding. Additional accessways shall be provided as necessary given the size, location, and proposed use of the site;

9. Immediately upon disbursement of Green Acres funding \*for a Green Acres project site\*, install and maintain in perpetuity Department approved public access signs at each public accessway and/or public access area at the project site;

10. Immediately upon disbursement of Green Acres funding \*for a Green Acres project site\*, record a Department-approved conservation restriction maintaining the following areas for public access in perpetuity. All lands held by the municipality or county for recreation and conservation purposes also must be listed on the Recreation and Open Space Inventory for the municipality and county, respectively, as required by Green Acres as a condition of funding pursuant to N.J.A.C.

7:36.

i. – iii. (No change.)

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11. Within 10 days of completion of a Green Acres funded development \*for a Green Acres project site\* or within 180 days of disbursement of Green Acres funding for acquisition \*for a Green Acres project site,\* provide public restrooms and parking for the project site as directed by the Department based on the proposed use of the project site and the nature and extent of public demand; and

12. Any Green Acres funding recipient \*for a Green Acres project site\* that, after the effective date of this rule, undertakes any action that is determined by the Department to be in conflict with the Public Trust Doctrine, will be required to take corrective action within 30 days of notification by the Department of the conflict with the Public Trust Doctrine. If the Green Acres funding recipient \*for a Green Acres project site\* does not take corrective action, or if the corrective action taken is not adequate, then the Department may:

i. - iii. (No change.)

(r) Rationale: The Public Trust Doctrine states that natural resources, including but not limited to tidal waterways and their shores, air and wildlife in this State are held by the State in trust for the benefit of all of the people. Further, the Public Trust Doctrine establishes the right of the public to fully utilize these natural resources for a variety of public uses. The original purpose of the doctrine was to assure public access to waters for navigation, commerce and fishing. In the past two centuries, State and Federal courts in New Jersey have recognized that public uses guaranteed by the Public Trust Doctrine also include public recreational uses such as \*[bathing,]\* swimming, sunbathing \*,fishing, surfing, sport diving, bird watching,\* \*[and]\* walking \*and boating\* along the various tidal shores.

As the trustee of the public rights to natural resources, including tidal waterways and their shores, it is the duty of the State not only to allow and protect the public's right to use them, but also to ensure that there is adequate access to these natural resources. As the State entity managing public access along the shore, the Department has an obligation to ensure that this occurs. Access ensured by the Public Trust Doctrine can be classified into different types, including linear/lateral access, perpendicular access, and visual access.

Reasonable, convenient and safe conditions at or around public access areas and public accessways often affect whether the public will be able to reach and use tidal waterways and their shores. Such site conditions include informative signage marking public accessways, the absence of

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threatening or misleading signage, adequate facilities (such as restrooms and fish cleaning tables) within a reasonable distance of tidal waterways and their shores and sufficient parking located near public accessways. Additionally, special measures, such as ramps installed in accordance with the Americans with Disabilities Act, can be taken to ensure that coastal lands and waters are accessible by all members of the public.

Development can block tidal waters from public view and/or make physical access to tidal waterways and their shores difficult or impossible. Tidal shore areas located in residential areas or within private beach areas are sometimes fenced, blocked or otherwise obstructed, further complicating access to these sites. In addition, municipalities have at times sold portions of the public beaches and vacated public streets and street ends to private owners. The private ownership of land immediately inland from tidal waterways and their shores can limit public access to tidal waterways and their shores. This leads to limited access to and enjoyment of public resources by citizens who have rights of access and use recognized and protected by the Public Trust Doctrine. Furthermore, public funds have been used to support protection and maintenance of these resources. Barriers to access also negatively affect tourism, which is one of the top revenue producing industries in New Jersey.

The developed waterfront, due to its past industrial utilization and long history of development, has been largely closed to the public, limiting their ability to exercise their public trust rights. In an effort to encourage public access, the Department intends to promote a continuous linear network of open space along the shore of all tidal waters that may be used for fishing, walking, jogging, bicycling, kayaking, sitting, viewing and similar recreational activities. The path will be continuous but may detour around existing or proposed industry due to risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions. These linear walkways will connect future and existing waterfront parks and open space areas. The goal of the rule is to assemble a system, through acquisitions and easements, that will provide continuous linkages and access along the waterfront, enabling the State to adhere to its responsibilities to safeguard public rights of access to and use of all tidal waterways and tidal waterfront areas in New Jersey. Where easements are secured from landowners for public access purposes, the New Jersey Landowner Liability Act (N.J.S.A. 2A: 42A-2 et seq.) offers limited protection from the liability they would normally face under the common law.

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In addition to the historic legal rights retained by the public to tidal areas, public funds are invested in numerous ways to protect these public resources and their adjacent lands. The lands and waters subject to public trust rights receive many State and Federal dollars which have been invested in beach replenishment, shore protection, road projects, water quality and monitoring programs, and solid waste monitoring. In part as a result of this investment, the public has the right to use these resources. State funds are also used to acquire and develop lands for parks and recreation through the Department's Green Acres Program. These programs are financed not just by the communities within which these lands and waters subject to public trust rights are located, but by residents Statewide. Additionally, residents Statewide contribute to fund various Federal programs that protect and enhance lands and waters subject to public trust rights. The rule ensures that all residents who contribute to the protection of these lands and waters are able to exercise their rights to access and use the lands and waters. Further, they are consistent with Federal programs which require projects utilizing Federal funds to provide public access upon receipt of funds and will ensure that increases in public access apply to lands and waters subject to public trust rights Statewide.

The Public Trust Doctrine is an example of common law authority that is continually developing through individual Court cases. In addition to cases involving physical barriers to access, there have been instances where municipalities and local property owner associations have attempted to limit use of recreational beaches to their citizens and members through methods designed to exclude outsiders. In the majority of these cases, New Jersey courts have ruled that these actions violate the Public Trust Doctrine because lands that should be available for the general public's recreational use were being appropriated for the benefit of a select few.

New Jersey Supreme Court cases including *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296 (1972) and *Van Ness v. Borough of Deal*, 78 N.J. 174 (1978) held that municipalities could not discriminate between residents and non-residents using municipally owned beaches through differential fees or by setting aside separate areas for each. The decision in the case *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984) recognized that, under the Public Trust Doctrine, not only does the public have the right to use the land below the mean high water mark, but also they have a right to use a portion of the upland dry sand area, on quasi-public beaches, "...where use of dry sand is essential or reasonably necessary for enjoyment of the ocean,

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the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner.”

Most recently, the Court's ruling in *Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc., et al.*, 185 N.J. 40 (2005) used the criteria established in the *Matthews* case, and recognized that this principle also applies to the upland dry sand of a wholly privately owned and operated beach. The decision also confirms that the Department has the authority to regulate fees charged for use of beaches under CAFRA. The decisions in these cases guide the Department in upholding the Public Trust Doctrine and providing adequate public access. Other such cases include *Arnold v Mundy*, 6 N.J.L. 1, 3 (Sup. Ct. 1821); *Bell v. Gough*, 23 N.J.L. 624 (E. & A. 1852); *Martin v. Waddell's Lessee*, 41 U.S. 367, 10 L.Ed. 997 (1842); *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894); *Slocum v. Borough of Belmar*, 238 N.J.Super. 179, 185 (Law Div. 1989).

#### SUBCHAPTER 8A INFORMATION REQUIRED TO DEMONSTRATE COMPLIANCE WITH THE PUBLIC TRUST RIGHTS RULE, N.J.A.C. 7:7E-8.11; CONSERVATION RESTRICTIONS AND PUBLIC ACCESS INSTRUMENTS

7:7E-8A.2 Information requirements for public access plans submitted by municipalities to participate in Shore Protection Program funding or be eligible for Green Acres funding.

(a) (No change.)

(b) A public access plan shall include the following:

1. – 6. (No change.)

[8.]7. A compliance statement, including supplemental documents as needed, demonstrating how the municipality and the proposed project comply with N.J.A.C. 7:7E-8.11(p) or (q) as applicable[;].

(c) – (d) (No change.)