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ENVIRONMENTAL PROTECTION

LAND USE MANAGEMENT

DIVISION OF LAND USE REGULATION

Coastal Zone Management

Public Access

Adopted amendments: N.J.A.C. 7:7-1.3, 7.5 through 7.14, 7.17, 7.18, 7.24, 7.26 and 7.29; and 7E-1.8, 3.22, 3.23, 3.43, 3.48, 3.50, 7.2 through 7.4, 7.7, 7.11, 8.11 and 8.12

Adopted repeals: N.J.A.C. 7:7E-8A and 7:7E Appendix 6

Proposed: April 4, 2011 at 43 N.J.R. 772(a).

Notice of Proposed Substantial Changes on Adoption: March 19, 2012 at 44 N.J.R. 614(a).

Notice of Proposed Additional Substantial Changes on Adoption: July 2, 2012 at 44 N.J.R. 1864(a)

Filed: as R.2012 d. , **with substantial changes** to proposal after additional notice and public comment, pursuant to N.J.S.A. 52:14B-4.10.

The Department is adopting amendments to the public access rules at N.J.A.C. 7:7, Coastal Permit Program rules, and N.J.A.C. 7:7E, Coastal Zone Management rules. On April 4,

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2011, the Department proposed amendments to public access requirements contained in these rules.

The amendments establish public access requirements for new development based upon the type of development, for example, residential versus marina development. The rules also establish the ability of towns to develop Municipal Public Access Plans.

On March 19, 2012, the Department published a Notice of Proposed Substantial Changes on Adoption to the Proposed Rule Amendments based on comments received on the proposal of amendments to the public access rules at N.J.A.C. 7:7 and 7:7E. The changes included providing increased transparency and public participation in both the Department and the municipal review process of Municipal Public Access Plans; restoring provisions requiring that public access incorporate, to the maximum extent practicable, fishing access and associated amenities; providing a paragraph to address public access requirements for public highways; specifying a standard formula to calculate a payment amount for linear projects when a Municipal Public Access Plan requires a monetary contribution to be used to provide new or enhanced public access; and establishing a process by which the Department can revoke a Municipal Public Access plan for good cause.

On July 2, 2012, the Department filed an Additional Notice of Proposed Substantial Changes on Adoption to the public access rules at N.J.A.C. 7:7E. The changes address public access requirements for public highways, and result from consultation with the New Jersey

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Department of Transportation (NJDOT) and the New Jersey Turnpike Authority. The changes include amendments to make public access requirements applicable to linear transportation projects similar to the requirements applicable to commercial, industrial, and other public development. With respect to the NJDOT, the changes provide that when NJDOT is required to provide new or enhanced public access, that if the Department and NJDOT determine that it is appropriate, the NJDOT may provide funding for such access project to the Department or the municipality pursuant to an agreement between NJDOT and the Department. Additionally, the amendments allow and encourage transportation agencies and counties to develop Transportation Public Access Plans, and seek Department approval of Transportation Public Access Plans, similar to Municipal Public Access Plans.

The Department is adopting the amendments proposed on April 4, 2011 as modified in the two subsequent Notices of Substantial Change.

The Department held a total of seven public hearings to provide interested parties the opportunity to present oral comments on the proposal, the substantial changes to the proposal and the additional substantial changes to the proposal. The hearings were as follows:

Hearings for the October 4, 2011 Proposal

Thursday, May 12, 2011
Liberty State Park Central Railroad Terminal Building
Jersey City, NJ 07305

Tuesday, May 17, 2011

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Richard Stockton College of New Jersey
Pomona, NJ 08420

Monday, May 23, 2011
Seaside Heights Municipal Court House
Seaside Heights, New Jersey 08751

Thursday, June 2, 2011
Township of Long Beach
Municipal Court Room
Brant Beach, New Jersey 08008

Hearings for the March 19, 2012 Proposed Substantial Changes on Adoption

Wednesday, April 18, 2012
Avalon Court Meeting Room
Avalon, New Jersey 08202

Wednesday, April 18, 2012
Long Branch Council Chambers
Long Branch, New Jersey 07740

Hearing for the July 2, 2012 Additional Proposed Substantial Changes on Adoption

Tuesday, July 31, 2012
New Jersey Department of Environmental Protection
Trenton, NJ 08625

Ray Cantor, Chief Advisor to the Commissioner, New Jersey Department of Environmental Protection, was the Hearing Officer for all seven public hearings. After listening to the oral comments presented at the hearings and reviewing the hearing transcripts and written comments received by the Department, the Hearing Officer recommended that the proposed rule amendments with substantive changes be adopted with the amendments described below in the

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Summary of Public Comments and Agency Responses. The Department accepts the Hearing Officer's recommendation.

Records of the public hearings are available for inspection in accordance with applicable law by contacting:

Department of Environmental Protection
Office of Legal Affairs
ATTN: DEP Docket No. 05-11-03
401 East State Street
Mail Code 401-04L
PO Box 402
Trenton, NJ 08625-0402

This adoption document can also be viewed or downloaded from the Department's website at <http://www.nj.gov/dep/rules/adoptions.html>.

Summary of Public Comments and Agency Response:

The original proposal of amendments was submitted by the Department for publication in the April 4, 2011 New Jersey Register. Upon publication and public notice, comments were received during the initial 60-day comment period following the publication of the original rule proposal. Comments received on provisions proposed for substantial change were initially addressed in the Notice of Substantial Change on Adoption. These comments received in

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response to the initial proposal are summarized below, grouped in separate sections depending on whether the comment prompted a modification to the original rule proposal (i.e., those originally responded to in the March 19, 2012 Notice of Substantial Changes upon Adoption) or did not result in modification of the original proposal and is being addressed at this time.

Additionally, the Department received two additional public comments upon publication of the Notice of Proposed Substantial Changes upon Adoption to Proposal of Amendments, and 12 comments in response to the Notice of Proposed Additional Substantial Changes upon Adoption are included, along with the Department's responses thereto, in separate sections below.

Comments Received during Initial Comment Period, Giving Rise to Substantial Changes in Proposal upon Adoption, or Affecting Provisions that Were Substantially Changed

In response to comments received during the initial public comment period after publication of the original rule proposal, the Department proposed to make substantive changes to the proposal, with the substantive changes subjected to additional notice and public comment, in accordance with N.J.S.A. 52:14B-4.10. The proposed substantial changes upon adoption, and the comments prompting them, were published in a Notice of Proposed Substantial Changes to Proposed New Rules, published in the March 19, 2012 New Jersey Register at 44 N.J.R. 614(a), and are summarized below. Comments were received from:

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1. Andrew Bednarek, Business Administrator, Borough of Avalon
2. Victoria Bingham, Statewide Conservation Advocacy Network of Wildwood NJ
3. Ray Bogan, Marine Trades Association
4. Kevin J. Broderick
5. David Brogan, New Jersey Business and Industry Association
6. Ralph Coscia, Citizens' Right to Access Beaches (C.R.A.B.)
7. Nicole Dallara
8. Stephanie Daniels, The Historic Paulus Hook Association
9. Melissa Danko, Marine Trades Association
10. Tim Dillingham, Executive Director, American Littoral Society
11. Al Dolce, Ocean County Federation of Sportsman
12. Hugh L. Evans
13. Stewart Farrell, Coastal Research Center, Richard Stockton College
14. William M. Feinberg, Esq.
15. Ryan Firkser
16. Tom Fote, Jersey Coast Anglers Association and the New Jersey Federation of Sportsmen's Clubs
17. Jack Fullmer, New Jersey Council of Diving Clubs
18. Elizabeth George-Cheniara, Esq., New Jersey Builders Association
19. Elkins Green, Director, Division of Environmental Resources, New Jersey Department of Transportation
20. Paul Haertel, Berkley Striper Club
21. Linda Haertel, Berkley Striper Club
22. Jerramiah Healy, Mayor Jersey City
23. Helen Henderson, American Littoral Society
24. Jim Hill
25. Timothy G. Hill, Interim Borough Administrator, and Director of Parks and Recreation, Borough of Highlands
26. Paul Hottinger
27. Kevin Ingram
28. Edward J. Kelly, The Maritime Association of the Port of New York/New Jersey
29. Irene Kelly
30. Jerry Kelly, Shark River Surf Anglers
31. Christopher Len, Hackensack Riverkeeper and NY/NJ Baykeeper
32. Vincent Lepore
33. Ellis Levin
34. Robert E. Lick
35. Peter L. Lomax, The Lomax Consulting Group, LLC

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36. Joe Loreti, President, NJ Chapter, Striper Coast Surf Casters Club
37. Stephen Marks, Hudson County Planning Director
38. Tanya R. Marione-Stanton, Senior Planner to Jersey City Environmental Commission, Jersey City Division of City Planning
39. Amy Martin, PSEG Services Corporation, on behalf of Public Service Electric & Gas and PSEG Fossil LLC
40. David J. McKeon, Ocean County Planning Director
41. Ray Menell, Asbury Park Fishing Club
42. Margaret Mroz
43. Captain Adam Nowalsky, Chairman, Recreational Fishing Alliance
44. Greg O'Connell, NJ Chapter, Recreational Fishing Alliance
45. Sam Pesin, President, Friends of Liberty State Park
46. Andrew J. Provence, Esq., Ansell Grimm & Aaron, on behalf of the American Littoral Society, Bayshore Regional Watershed Council, Citizens Rights to Access Beaches, Edison Wetlands Association, Elizabeth River/Arthur Kill Watershed Association, Environmental New Jersey, Future City, Inc., Hackensack Riverkeeper, Manasquan Fishing Club, New Jersey Environmental Lobby, PaddleOut.org, Public Employees for Environmental Responsibility (New Jersey Chapter), New Jersey Sierra Club, and Sunrise Bay Anglers
47. Joseph Rettagliata, Chairman, Monmouth County Planning Board
48. Joseph S. Reynolds, Co-Chair, Bayshore Regional Watershed Council
49. Thomas E. Robb
50. Charles Santoro
51. Thomas Siciliano
52. David Sikorski
53. Doug Stuart
54. Douglas Taylor, Jersey Devil Fishing Club of Bellmawr
55. Jeff Tittel, Director, New Jersey Chapter, Sierra Club
56. Rick Traber
57. R. Van Strien
58. John G. Valeri, Jr., Wolff & Samson PC on behalf of the New Jersey Turnpike Authority
59. John L Weber, Surfrider Foundation, (Jersey Shore Chapter and South Jersey Chapter)
60. Jillian Weislo, Edison Wetlands Association
61. Kristin F. Wildman, The Lomax Consulting Group, LLC
62. Andrew Wilner, Sustainability Solutions
63. Christopher Winkel
64. Chris Witter
65. Joe Woerner, Jersey Shore Chapter of the Surfrider Foundation

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66. The following 25 individuals sent in form letters stating that if 24/7 beach access at any of the places they frequent is restricted in any way, they will no longer bring their business to the State.

Ernie Abbamonte
Dennis Bravo
James Callahan
Matt Chiccarine
Jason Cohen
Greg Crossland
John Deering
Tom Farrell
Jacob Freeman
Jason Gribschaw
Daniel Jacobs
John F. Jacoby
Nathaniel Marchetti
Bob Mohr
Jose A. Morel
Chau Nguyen
Chris Nosal
Ulumje Greg Pereborow
Timothy Schipper
Micole Sharlin
Bradley M. String
Ronald Sullivan
Daniel Timmins
Arthur Wehrhahn
Mark A. Yocum

67. The following 326 individuals sent in form letters objecting to allowing towns to create their own public access plans without any State standards or oversight. Note: The signatures of 15 of these individuals were entirely illegible and so their names are not included in this list.

Daniel Acker
Manah Acker
Eugene Aiken
Tom Algamo
Sari Alkhjeel
Michelle Ameida
Joaquin Anderson

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Joe Araman
Pasquale Attanasio
Ayanna Aviles
Anthony Batlout
Karen Battinger
Zachary Borchuk
Jim Bourne
Justin Bridges
Buncee Brotic
Eryk Brito
Joe Brown
Bruce Buckiewucz
Ed Bunnell
Tim Burden
Chris Burle
Robert Brewer
Luke Cahill
Jonathan Camacho
Lucile Canniggao
W. Cantelmo
Mexico Refugio Capilla
Cathy Carlson
Tyler Carter
Bobby Celli
Maegan Cerruti
A.J. Chivaro
Ryan Church
Gary Coleman
Chris Color
Jennifer Cook
Amanda Conceica
Dylan Corona
Jose Costa
Nick Costa
Robert Clevenger
Lamayjah D.
Jim D'Annonzio
Dominick Cardella

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Zach Christian
Daniella Daly
Kevin David
Dillon Davies
Darrius Raymond Daivs
Joshisona Davis
Kim Davis
Nick DeLisa
Ivan Delafunete
Luke Dellaperute
Joe DeLucia
Jonathon De Silva
Diana Diaz
Roman Divan
Vinny Donisto
P. Dorsi
Kevin Dos Santos
Morgan Downs
Arianna Duncan
Jacob Dresser
Bill Drooks
Derek Drummond
Alex Dunn
Stan Dziuba
Drew Eastwood
Mergene Edgulban
Cassidy Egan
Osi Emele
Warren Emley
Alejandro Esiobar
Janis Faler
Stephen Farkouh
Gabby Fernandes
Megan Filoramo
Joseph Fields
Fred Fillippone
Ana Fracao
Glenn Frattini

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Roi Frazao
Dan Friedman
Joe Fruncillo
Ken Ganz
Thomas Garcia
Hope Gardiner
John Garzon
Eric Geller
Robert Gery
Kevin Gian
Anthony Giglio
Ryan Gillaspie
Sergio Girminaino
Nikki Glassman
Joseph Golubor
Briana Gomes
Nicole Gomez
Charles Goodson
Emily Gottlieb
Pat Grasso
S. Grant
Yaritza Grant
Kathleen Greenwald
Barbara Grossman
Ryan Gundel
Brendan Gutzler
Jim Hanf
Scott Hann
Scott Hanson
A.J. Hanron
Pat Hemeraly
Manuel Hernandez
Michael Hernandez
Emily Hieger
Jackie Horn
Parker Hilton
Don Hudson
Mike Hunt

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A. Illegible
Bill Illegible
Brett Illegible
Cristian Illegible
Donald Illegible
Elton Illegible
Gregory Illegible
Janice Illegible
Jeremy Illegible
Joe Illegible
Lois Illegible
Mara Illegible
Michael Illegible
Mike Illegible
Nicky Illegible
Richie Illegible
Ryan Illegible
Zack Illegible
Jack Inman
Jessica Isabella
Tony Jackson
Ronnie Jackson
Pete Jaminski
Jane Jasien
Pedro Jimenz
Jittal Jill
Chris Jones
Cameron K.
Chuck Kababick
Karly Kachonisky
Laura Kale
Ted Kamis, Jr.
Alex Kartchell
David Kelly
Jerry Kelly
Wayne King
John Kinsey Jr.
Ann Kratz

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Lyndsay Kutiak
James Laco
E. Lagrotteria
Salvatore LaMarca
Anna Lamb
Mike Langan
Victor Layton
Caroline Leite
Sam Leitner
Alfie Lenkiewicz
Keith Levitz
Renato Limo
Brett Mahon
Chris Maida
Michele Maida
Roy Magia
Bryan Maldonado
P. Malley
O.J. Mareak
Anthony Martino
Mel Martens
John Masiello
Robert Massa
Dan Mattis
Andi Maurp
Barbara McDermott
Sheldon McCie
Brienne McDonough
Gregory McLead
Mike Megill
Luana Mendes
Robert Mentel
Jamie Mettem
Diane Meucracz
Jill Milano
The Milano Family
Terry Miller
Jessica Mineo

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Elizabeth Moeno
Brett Murphy
Mikaela Muniz
Vinh Nguyen
Lois Noland
Cynthia No Name
Jermaine No Name
Nayeli No Name
Amanda Norwills
Bud Nunmain
Greg O'Connell
Lissett Olivera
Keone Osby
Kathi Owens
Michelle P.
Athanasia Pappas
Carl Patron
Thomas Park
J. Parker
Bob Pastor
Rein Pelle
Jack Pensabene
R. Phillips
Ngo Phuonc
Tyler Piantanida
Eric Pidqean
Al Pohlman
Scott Policastro
David Pollera
Tina Pope
Tony Pope
Jim Porcello
Tom Porowski
PJ Raia
Itzel Rameriaz
Amado Ramirez
Brian Reale
Travis Reed

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Scott Reeves
Joe Reinor
Kris Renart
Michael Repsha
Krystal Rivera
Lilian Robles
Chelsea Rocha
Lizzet Rojas
Chris Rooinson
Nick Ruppea
Jenna Russo
Larissa Russo
Chris Sanchez
Monaca Sanon
Brian Santes
Apollo Santiago
Christina Santoro
Ryan Santos
Ebony Saxton
Melissa Schleich
Bob Shoykhet
Eduasdo Sia
Chris Sicbi
B.J. Sichlor
Ron Sickler
Aliyah Smith
Richie Smith
Samantha Smith
Marissa Stall
Kevin Staub
Robert Staub
Ron Stocktum
Nick Stokes
Christine Sturt
Kendra Sullivan
Emily Sutton
Brian Sweeney
Robert E. Tallman, Jr.

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Darby Tarrant
Don Tarrant
Adrianna Therstad
Kenny Throckmorlon
Alex Todd
Matt Tomernk
No name Torris
Angelo Tracey
Rob Trimble
Julia Tupy
Darlene Tyler
Brian Unger
Norberto Vagas
J. Vamvas
Robert Van Buren
Meghan Van Note
Gene Van Severen
Angel Vivescanos
Nicole Walker
Chris Wech
William Wei
Laura Wessels
Kim Westhead
Sara Wheaton
John Whittaker
Greg Widmaier
Dyamante Williams
Illegible Williams
Grace Wills
John Wills
Chris Witter
Andrea Witter
Richard Wollner
Robert Woods
Junior Yocute
Gabby Yoseiso
Robby Young
Robert Young

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Tony Zappolil

The number(s) in parentheses after each comment identifies the respective commenter(s) listed above.

Rules too vague or broad

1. COMMENT: There is not enough detail and information in the proposed rule. Access is a problem right now and it is not going to improve under these proposed rules. (51)

2. COMMENT: The rules are too vague and will be used to get around proper access. Since the rules are so vague as to let the towns do whatever they please instead of providing the necessary access, these rules will be open to political gain and subject to abuse. (7)

3. COMMENT: The amendments were not crafted very well. Department spokespersons have said that opponents to the rules do not understand what is being proposed. Does that speak ill of the intelligence of the public or of the communication skills of the Department, which believes that communication is vital to enhance public access opportunities? (49)

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4. COMMENT: The rule has some parts that make sense but it falls short on a lot of the public interest at stake here. The DEP must take into consideration all of the testimony heard from the stakeholders and their concerns, and rewrite the rules to give the public a little more protection.

(52)

5. COMMENT: The rules as written are too broad. Many people with different interests are going to be affected. The rules are very vague, and leave loopholes for businesses and for development, and allow the townships to do whatever they want to with waterways and beaches. The rules do not support the people and their recreational activities or their uses of public resources. (64)

RESPONSE TO COMMENTS 1 THROUGH 5: The Department believes that the adopted rules establish a comprehensive framework to provide meaningful public access to the State's citizens and encourage municipalities to develop plans that ensure this access while considering each locality's specific circumstances. The Department recognizes, however, based on comments received on the proposal, that changes to the proposed rules are necessary to provide clarity and ensure consistent application of procedures and standards. Therefore, the Department has modified the rules on adoption, as explained further in the Responses to Comments below.

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Municipal role in providing public access and public involvement in review of Municipal

Public Access Plans

6. COMMENT: Towns should not be in control of public access. (6, 20, 21, 30)

7. COMMENT: Towns should not be in control of public access. The commenter provided an example of how he was arrested at 15 years old for not having a beach badge while surfing and how Sea Girt spent \$85,000 of taxpayer money to fight a \$30,000 penalty for killing a Federally listed species. The courts have spoken clearly that the Public Trust Doctrine is “one size does fit all.” (65)

8. COMMENT: The biggest problem with this rule proposal is giving control to municipalities like Sea Bright, Deal, and many others because trusting the municipalities to do what is good for all the public is difficult. Municipalities do not always listen to non-municipal residents because they do not vote in the town and they do not contribute taxes to the municipality. (11,16)

9. COMMENT: The fiduciary responsibility to protect the public trust rights lies with the State. The authority should be with the Governor and Legislature, not delegated to the Department. The Department should not be giving the municipalities the authority to control public access. (49)

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10. COMMENT: Public access decisions should not be made by towns because towns are charging residents a different price for beach badges than they charge non-residents. This is proof that the towns are not doing the right thing to start with and the DEP does not seem to know it.(59)

11. COMMENT: Restrictions have been placed upon the right of public access frequently at the behest of beachfront property owners who have the necessary influence with municipal governing bodies in order to implement these restrictions. At the behest of fishermen, the DEP created an access route in the Borough of Deal which consisted of a staircase down to the beach and to two jetties. The Borough has locked this access route and has removed a staircase on another street which led to a jetty that is a favorite among surf fishermen. It has also vacated street ends as well. One particularly restricted area is on Long Beach Island where successive streets throughout the North Beach area are all marked “private street no beach access.” The proposed rules regarding beach access will certainly make the situation worse. The DEP virtually abdicates its responsibility to protect the right of the public to access the beach to the local municipal governments which have in the past been largely responsible for the restrictions. The beaches in New Jersey should be protected by State government rather than property owners and politicians. (14)

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12. COMMENT: There are more than 250 municipalities that have waterfront access to tidal waters. Each one will be given the opportunity to write its own individual municipal access plan. This will be giving the authority and police powers to enforce where and when the public will have access to tidal waters within their municipality. There will be 250 different rules and regulations instead of one. Many of these towns have in the past shown their unwillingness to allow public access. The State of New Jersey will no longer be the advocate for the public access rights that belong to all of us. The DEP is relinquishing its responsibility as the trustee of the public trust doctrine to protect these rights. This is a formula for abuse. (36)

13. COMMENT: The towns should not be allowed to control the amount of public access. The DEP is delegating to towns to adopt these plans, to develop these plans, and in many cases up and down the coast, not only on Long Beach Island, towns have eliminated off-street parking. They have closed up public access points. They have sided with private property owners in public access disputes and resisted public access to the beaches created with taxpayers' dollars and are going to be in control of the public access decisions. (10)

14. COMMENT: Control of public access should not be given to municipalities. As an example, the commenter stated that the City of Long Branch passed a resolution to give five parking

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spaces to the public when, had the City performed its due diligence, the public should have had access to 15 or 16 parking spaces. (32)

15. COMMENT: It is important within the context of the rules to give the citizens a voice in keeping public areas as they are. As an example, the commenter stated that Brant Beach has a park that provides a limited amount of open space in an already overdeveloped community. Citizens are concerned that alterations are planned to the park that many feel are detrimental. The rules that are the basis for access plans and other waterfront improvements should contain sufficient protections for the taxpayers and residents to have some say in whether or not that park is altered. (33)

16. COMMENT: Proposed N.J.A.C. 7:7E-8.11(i) provides that if the Department approves a Municipal Public Access Plan, it shall publish notice in the New Jersey Register and DEP Bulletin. There is no useful purpose for this requirement. It is suggested that the rule provide that, if approved, the draft plan will be published in the New Jersey Register thereby beginning a public comment period and at least one public hearing. Any public comments need to be considered before the draft Municipal Public Access Plan is conditionally approved and returned to the municipality. (59)

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17. COMMENT: The proposed rules allow individual municipalities too much authority over access to the public's waterways and beaches. Many communities along the coast are employing methods to restrict the public's access to these resources. Some communities treat the beach adjacent to million dollar homes as a playground for the privileged. Other communities have been imposing seasonal restrictions to prevent fishermen access in the spring and fall, and others are restricting parking. The Department cannot rely on municipalities to provide proper 24-hour seven-day-a-week access to waterways and beaches. The Department is entrusted to ensure that 24-hour access seven days a week is provided. Without rules requiring unlimited access, these communities will continue to restrict or eliminate access to certain user groups such as fishermen and surfers. (15)

18. COMMENT: The Department must continue to regulate public access to coastal areas. Coastal towns should not decide what is best for the public. Residents of inland communities have no voice in any actions taken by communities such as Deal, Long Branch, or Sea Bright that would restrict or change access. (41)

19. COMMENT: It is understood that Municipal access plans are optional, but if a municipality decides to submit a plan, will there be a mechanism for a public hearing at the municipal level

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prior to approval at NJDEP and, if a public hearing mechanism is in place, will that public hearing be optional or mandatory? (59)

20. COMMENT: The rules do not provide the public with the ability to review and comment on a proposed Municipal Public Access Plan prior to its consideration by the Department. There is no requirement that a hearing be held on a proposed plan or that the plan be published in the New Jersey Register for comment. The rule only provides that the Department will publish its decision to approve a plan in the New Jersey Register and DEP Bulletin. The Department's determination is likely to be a rubber stamp approval. (17)

21. COMMENT: Proposed N.J.A.C. 7:7E-8.11(e) through (g) set forth the contents of a Municipal Public Access Plan and do not include a public participation component. As a result, the public residents and non-residents alike may be excluded from participation in the plan development. Nothing in proposed N.J.A.C. 7:7E-8.11(e) through (g) prevents a local mayor from sitting down with the Borough Administrator and drafting a Municipal Public Access Plan. It is suggested that language be added to the rule specifying that this process needs to be done through the town's governing body with members of the public involved in plan development. (59)

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22. COMMENT: The public comment opportunities on a Municipal Public Access Plan need to be expanded. As proposed, the Department would publish in the DEP Bulletin the agency's decision to approve a municipality's plan, but no public comment opportunity is given before the Department makes that decision. The public would only be able to provide comment when the Municipal Public Access Plan came before the Municipal Council or Committee for adoption as a component of the municipal Master Plan, after Department approval. The public must be involved in shaping the Municipal Public Access Plan from the beginning, including public hearings to hear from citizens on the areas and types of access that they would like the municipality to provide. As proposed, the municipalities would be able to determine where and how access is provided with no public input. (55)

23. COMMENT: The public has no role in the creation of Municipal Public Access Plans. (31)

24. COMMENT: The rule does not require public participation in the Municipal Public Access Plan process. Under the proposed rule, a Municipal Public Access Plan is a plan prepared by a municipality stating what public access, and any related amenities, are available and what additional public access and related amenities will be provided. The rule does not require any public participation in the preparation, municipal adoption or Department's approval of municipal plans. A public hearing with adequate notice would be helpful to municipalities in

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developing a credible needs assessment as required by the proposed rule, and would further help a municipality distinguish the types of access and amenities that would be meaningful or conversely, useless, to the public. The Department does not see any value in letting the public have any input in the planning process. (46, 48, 59)

25. COMMENT: N.J.A.C. 7:7E-8.11(j) requires a municipality to initiate action to incorporate the Municipal Access Plan into their municipal master plan after they have received approval from the Department. Under the Municipal Land Use Law, the municipal planning board would then be required to hold a public hearing. There does not appear to be any requirement for a municipality to involve interested residents and business owners earlier in the public access planning process. It would be prudent to require an opportunity for public involvement prior to the municipal submittal to the Department. This could be accomplished through holding a visioning exercise or forming a stakeholder group to guide plan development. (25, 47)

26. COMMENT: A municipality should be required to hold at least three public hearings as it develops a Municipal Public Access Plan to submit to the Department and the Department should take public comment on the final Municipal Public Access Plan submitted by the municipality, before issuing a final consistency decision, as part of its review process. (55)

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27. COMMENT: It is suggested that the draft plan have at least three public hearings instead of the normal two hearings for local ordinances because the plan will affect non-residents as well.

(59)

28. COMMENT: The State must recognize that the drafting of a Municipal Public Access Plan is not for the benefit of the residents of that municipality only: it is for the benefit of everyone in the State who wishes to visit those shores. Accordingly, the rules governing Municipal Public Access Plan's need to be more inclusive of the general public.(59)

RESPONSE TO COMMENTS 6 THROUGH 28: Under these rules, the Department does not give control of public access to the municipalities. The rules establish goals and basic requirements for public access and are intended to encourage municipalities to take an active role in designing and ensuring public access to beaches and tidal waters in ways that will work best for their respective circumstances. The adopted rules require a municipality to obtain approval of its Municipal Public Access Plan from the Department in order for the plan to be operational. The Department will work with the municipalities on development of their access plan and the plans will be required to meet the goals of the public access rules.

In response to these comments, the Department is adopting new N.J.A.C. 7:7E-8.11(e)6 that requires municipalities to include as part of their application for approval of a Municipal

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Public Access Plan, documentation of any public meetings held by the municipality to accept comments on the proposed access plan. In addition, to assure that an opportunity for public input on proposed Municipal Public Access Plans is available in all cases and that the Department can consider this input in making its determination on a proposed Municipal Public Access Plan, the Department is adopting modified N.J.A.C. 7:7E-8.11(i) through (l), regarding the review and approval of proposed Municipal Public Access Plans, proposed in the Notice of Substantial Changes.

While the Department does not believe it is necessary to require proof of public involvement prior to submittal of a proposed plan to the Department, to assure that an opportunity for public input on proposed Municipal Public Access Plans is available in all cases and that the Department can consider this input in making its determination on a proposed Municipal Public Access Plan, the Department is adopting changes at N.J.A.C. 7:7E-8.11(i) through (l), regarding the review and approval of proposed Municipal Public Access Plans, proposed in the Notice of Substantial Changes.

Under adopted N.J.A.C. 7:7E-8.11(i), the Department will provide a 30-day public comment period on applications for approval of Municipal Public Access Plans and post the proposed plans on the Department's website, notify by e-mail individuals who have requested notice of the applications, and publish notice in the DEP Bulletin. The Department may request that the municipality revise its proposed Municipal Public Access Plan after the close of the

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public comment period. Once the Department receives the requested revisions, the Department will thereafter, within 60 days, notify the municipality that the proposed Municipal Public Access Plan either satisfies the requirements of the rules, specifically N.J.A.C. 7:7E-8.11, Public access, and is approved, or is not approved, with an explanation of why the proposed Municipal Public Access Plan is not satisfactory. If the Department does not request revisions to the proposed Municipal Public Access Plan, it will issue its decision regarding approval or disapproval within 60 days of the end of the public comment period. The Department will post notice of its determination to approve or disapprove a proposed Municipal Public Access Plan on its website, publish notice in the DEP Bulletin and will also notify by email individuals who have requested notice of the applications.

Once the Department approves a proposed Municipal Public Access Plan, N.J.A.C. 7:7E-8.11(j) requires the municipality to incorporate the approved plan into its Master Plan, which is accomplished by resolution in accordance with the Municipal Land Use Law. To increase transparency and public participation in this municipal process, the Department is adopting the changes proposed in the Notice of Substantial Change at N.J.A.C. 7:7E-8.11(j)2 to require a municipality to notify the Department two weeks in advance of the dates and times of any scheduled public meetings on the Department-approved Municipal Public Access Plan. The Department will post the meeting information on its website at <http://www.nj.gov/dep/bulletin/>

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and will also send the information by e-mail to individuals who have requested notice of Municipal Public Access Plan applications.

Under N.J.A.C. 7:7E-8.11(k), once the Department receives from the municipality the resolution incorporating the DEP-approved Municipal Public Access Plan into the Master Plan, public access required by the Department's coastal permits must be provided in accordance with the Municipal Public Access Plan. To ensure the public is made aware that a Municipal Public Access Plan is operational for this purpose, the Department proposed a change at N.J.A.C. 7:7E-8.11(k) to provide that the Department will include on the Department-approved Municipal Public Access Plan that it posts on its website the date of its receipt of the resolution.

Under N.J.A.C. 7:7E-8.11(k), once the Department receives from the municipality the resolution incorporating the Department-approved Municipal Public Access Plan into the Master Plan, public access required by the Department's coastal permits must be provided in accordance with the Municipal Public Access Plan. The herein adopted changes at N.J.A.C. 7:7E-8.11(c)1, 2, and 3 specify whether public access requirements are based upon the terms of a Department-approved Municipal Public Access Plan or upon the rules. As requirements contained in a Municipal Public Access Plan only become operational upon the Department's receipt of the municipal resolution, the Department proposed changes at N.J.A.C. 7:7E-8.11(c) 1, 2, and 3 to clarify that the requirements of a Department-approved Municipal Public Access Plan will only be used to determine public access requirements after the Department receives the resolution

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incorporating the Department-approved access plan into the Master Plan, consistent with N.J.A.C. 7:7E-8.11(k).

At N.J.A.C. 7:7E-8.11(l), which requires a municipality to obtain prior approval from the Department in order to modify its Department-approved Municipal Public Access Plan in ways that impact the location or type of access or that institute or amend the terms of a contribution in lieu of onsite public access, the Department is adopting changes proposed in the Notice of Substantial Changes that provide that the Department's review of the requested plan amendments will be conducted and a determination made in accordance with N.J.A.C. 7:7E-8.11(i), described above. Upon the Department's approval of the amended Municipal Public Access Plan, the municipality must comply with the procedures at N.J.A.C. 7:7E-8.11(j), described above, to incorporate by resolution the approved, modified Municipal Public Access Plan into its Master Plan.

The Department believes that the adopted amendments will provide appropriate opportunities for public input and improve the information available to the Department for determining whether a proposed public access plan is appropriate. Rather than providing notice through the New Jersey Register and scheduling additional public meetings, the Department believes the adopted amendments expand the notice provided to the public, including through direct notice by e-mail to all individuals who notify the Department of their interest, will provide

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unparalleled notice both of the opportunity to comment on pending applications as well as of scheduling of public meetings regarding the proposed plan.

29. COMMENT: Municipal governments only have to be responsive to their respective constituents while non-residents have little or no redress. The State rules should require access for residents as well as non-residents of a municipality. (34, 59)

RESPONSE: The rule as proposed on April 4, 2011 requires a municipality to obtain approval of its Municipal Public Access Plan from the Department. The public access goals listed at N.J.A.C. 7:7E-8.11(b), as adopted, apply to all public access provided to satisfy N.J.A.C. 7:7E-8.11, including public access provided in accordance with Department-approved Municipal Public Access Plans. As indicated at N.J.A.C. 7:7E-8.11(b)1, all levels of government are to create opportunities for public access on a non-discriminatory basis. Accordingly, the Department will not approve a Municipal Public Access Plan that provides for public access that is not open to non-residents.

30. COMMENT: It is strongly recommended that the development of a Municipal Public Access Plan be coordinated as much as possible with the municipal master planning process.

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There are well established and familiar processes in place at the local level that should identify the best suited locations to provide meaningful public access in the municipality. (18)

31. COMMENT: The commenter expressed support for the rule, but seeks assurance that the Municipal Public Access Plan requirement does not turn into the kind of costly and lengthy process that so often results from DEP rulemaking. (1)

32. COMMENT: The Department should establish a timeline for its review and approval of a Municipal Public Access Plan. (13)

RESPONSE TO COMMENTS 30 THROUGH 32: The Department's intent in proposing the six-year term for a Department-approved Municipal Public Access Plan was to enable a municipality to review and update as appropriate the Municipal Public Access Plan at the same time as the municipality reviewed its municipal Master Plan in accordance with the Municipal Land Use Law, while providing the Department with a periodic opportunity to review progress toward accomplishing the goals established in the approved Municipal Public Access Plan. The changes summarized in the Responses to Comments 87 through 90 and Comment 91 outline the process that allows municipalities to develop and update Municipal Public Access Plans in a coordinated manner with the municipal master planning process.

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In response to requests for further specificity as to the Department's review process, the Department is adopting the changes at N.J.A.C. 7:7E-8.11(i) and (j) proposed in the Notice of Substantial Change. In addition to the establishment of an opportunity for public comment as part of the Department's review process, as discussed above in the Response to Comments 6 through 28, N.J.A.C. 7:7E-8.11(i)3 as modified, specifies that the Department may request revisions to the proposed Municipal Public Access Plan after the close of the public comment period. This clarifies that the Department is not limited to either approving or denying a proposed plan, but may work with the municipality to attempt to address any issues that became apparent either through the Department's review of materials provided or as a result of public comment. N.J.A.C. 7:7E-8.11(i)4 requires the Department, if revisions are requested, to notify the municipality in writing within 60 days of the receipt of the revisions that the Municipal Public Access Plan either satisfies the requirements of N.J.A.C. 7:7E-8.11 and is approved, or that it is not approved with an explanation of why the proposed plan does not satisfy the rules. N.J.A.C. 7:7E-8.11(i)5 specifies that, if no revisions are requested by the Department, the Department shall notify the municipality in writing within 60 days of the end of the public comment period that the proposed Municipal Public Access Plan is approved or is not approved.

N.J.A.C. 7:7E-8.11(i)6, as modified, establishes the method that the Department will use to provide notice of its determination on an application for approval of a Municipal Public Access Plan. Particularly, the Department will provide notice of its determination on the

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Department's website; by e-mail to individuals who have requested notice of applications for approval of Municipal Public Access Plans; and by publishing the determination in the DEP Bulletin.

The Department believes that these adopted rules will provide predictability in the review process while assuring that the municipality is provided with appropriate opportunities to remedy any deficiencies in the initially submitted proposed plan and that the public has an opportunity for input into the contents of the plan.

Standards for Municipal Public Access Plans (N.J.A.C. 7:7E-8.11(c) through (m))

33. COMMENT: N.J.A.C. 7:7E-8.11(n) includes public access standards for certain types of development for municipalities that do not have an approved Municipal Public Access Plan. However, the public access requirements for municipalities with a Municipal Public Access Plan are not proposed within this rule. Municipalities should not have the autonomy to develop specific standards that govern public access on privately owned sites. The rule should be modified to include uniform public access requirements for all site uses within Municipal Public Access Plans, similar to those proposed within N.J.A.C. 7:7E-8.11(n). (39)

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34. COMMENT: These rules should give towns guidance on what a plan should or must contain. (31)

35. COMMENT: The Department should eliminate the concept of a Municipal Public Access Plan that does not have State standards. (17)

36. COMMENT: The proposed rule should create a process for review of Municipal Public Access Plans and standards for their approval by the Department. (46, 48)

37. COMMENT: The Department should have strict standards for approval of Municipal Public Access Plans and compliance and enforcement mechanisms. (55)

38. COMMENT: The rules set an extremely low bar for public access requirements. The rules should encourage towns to exceed the standards in the rules and not limit them to the rule standards. (31)

39. COMMENT: Towns should not be able to create their own public access plans without any State standards or oversight. (67)

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40. COMMENT: The Department is proposing an approach whereby municipalities, many of which have repeated and overtly thwarted public access to “their” shores, now hold the power to dictate the terms of public access. The Department has not provided any firm standards that municipalities must meet in creating their access plans. (46)

41. COMMENT: The public access rule proposal is strongly opposed because it will result in less access for the public. The proposed rules provide shore towns with the ability to create their own public access plans without State standards or oversight. Certain seaside communities have historically prevented or limited public access to their beaches; this proposal would allow these communities to continue their restrictions on public access and they may even further restrict public access. (50)

42. COMMENT: Proposed N.J.A.C. 7:7E-8.11(j) sets forth the process once the Department approves the Municipal Public Access Plan. This process is severely flawed. Many towns pass resolutions without public comment. Typically it is done at the beginning of a regular town meeting and the public does not have a chance to comment the same way they would if it were a local ordinance. The town would say that the plan has already been approved by the Department. The town would then be forced to either adopt the plan and ignore the public comment or not adopt the plan and put themselves in a Department-Municipal Public Access

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Plan limbo, subjecting themselves to penalties imposed on towns with no plans. Full public participation needs to follow these plans every step of the process. This includes allowing public hearings on the municipal level while drafting the plan, public hearings on the State level once the Department has approved the plan, and public hearings on the local level again to adopt the Department-approved plan. Non-residents need to be given ample opportunity to review and comment on the plan. (59)

43. COMMENT: The proposal allowing each locality to set and enforce the rules will lead to the “Balkanization” of New Jersey’s rules and the injustice of uneven enforcement of those rules. (12)

RESPONSE TO COMMENTS 33 THROUGH 43: As indicated in the Response to Comments 6 through 28 above, the rules do not give municipalities the ability to establish public access standards without having to meet State standards and without Department oversight. Instead, the rules establish goals and basic requirements for public access and are intended to encourage municipalities to take an active role in designing and ensuring public access to beaches and tidal waters in ways that will work best for their respective circumstances. The plans developed by the municipalities are only effective if they are approved by the Department.

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Rather than providing unfettered discretion to municipalities, the adopted rules lay out a framework with requirements that must be met both in municipalities with Department-approved municipal public access plans and those without.

The rules provide goals for public access at N.J.A.C. 7:7E-8.11(b), including that public access be on a non-discriminatory basis and that all existing public access must be maintained to the maximum extent practicable, that will be utilized by the Department in determining whether a proposed plan should be approved.

The rules provide guidance on the types of activities that will be considered to provide public access. Particularly, the April 4, 2011 proposal at N.J.A.C. 7:7E-8.11(n)1iii specified examples of types of public access that the Department would accept to satisfy public access requirements for Department permits for activities in municipalities that do not have a Municipal Public Access Plan. While this subparagraph applied specifically to commercial development, this same list was incorporated for other types of development in municipalities that do not have Municipal Public Access Plans by cross-reference at N.J.A.C. 7:7E-8.11(n)2iii(1), (n)2iv, (n)3ii, and (o)4. The specified acceptable methods of providing public access include a public accessway located parallel to the shoreline with perpendicular access; a boat ramp, pier, fishing, or other direct access to the waterway; a waterfront pocket park; public restrooms; and/or additional public parking to accommodate public access, beyond that needed to support the development to be located on the site.

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It is the Department's expectation that these same forms of public access will be incorporated in Municipal Public Access Plans approved by the Department. To clarify that these same types of public access are also what the Department expects to be included in proposed Municipal Public Access Plans that are submitted seeking Department approval, in response to these comments the Department is deleting the list of public access options from N.J.A.C. 7:7E-8.11(n)1iii (as well as the cross-references to this list discussed above) and incorporated the list into the public access goals at N.J.A.C. 7:7E-8.11(b)3i, which are applicable in all municipalities, both those with Municipal Public Access Plans and those that do not seek approval of such a plan. Relocating the list of public access options to N.J.A.C. 7:7E-8.11(b)3i clarifies that the list applies not only to site-specific public access projects, but also to Municipal Public Access Plans. In addition, to further clarify that these standards are applicable to Municipal Public Access Plans, the Department is adopting changes to N.J.A.C. 7:7E-8.11(d) proposed in the notice of substantial changes to add a cross-reference to provide that Municipal Public Access Plans shall satisfy the public access goals at N.J.A.C. 7:7E-8.11(b). To complete the list of requirements and goals that Municipal Public Access Plans must satisfy, the Department added to the list referenced in subsection (d) a reference to the paragraphs that make up that subsection, N.J.A.C. 7:7E-8.11(d) 1 through 4. Furthermore, the Department deleted the phrase "local requirements such as local zoning and ordinance" from N.J.A.C. 7:7E-8.11(n)2iii(2) and (n)3iv to ensure that it is clear that public access satisfying this chapter may

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only be created in accordance with a Department-approved Municipal Public Access Plan, not any other local ordinances.

The adopted rules specify at N.J.A.C. 7:7E-8.11(g) types of development and geographic areas where municipalities proposing Municipal Public Access Plans are not allowed to include standards in the proposed plans that vary from the public access requirements applicable in the absence of a Department-approved Municipal Public Access Plan. For example, public access along the Hudson River may not be proposed that varies in any way from the access required at N.J.A.C. 7:7E-3.48(e) (see the Response to Comments 115 through 121 regarding changes to this requirement).

The rules further require various analyses through which the municipality is required to review and itemize existing public access, identify public access needs that are not being met by existing facilities, formulate a plan for providing public access, and demonstrate that the public access proposed will meet the identified public need. As summarized in the Response to Comments 30 through 32 above, the adopted rules will increase notice to the public of the filing of proposed Municipal Public Access Plans and opportunities for public input to assure that the public access proposed in a Municipal Public Access Plan truly satisfies a local public access need and satisfies the goals and requirements of the Coastal Zone Management rules.

Further, as discussed in the Response to Comments 6 through 28 above, the adopted modifications to the review process for Municipal Public Access Plans still provide the

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Department with the ability to reject plans that do not meet the intent of the rules, while giving the individual municipality the ability to tailor the public access to be provided to the specific needs of that municipality. For example, if a municipality proposes to create a fund to accomplish the creation of a public access project that would not be possible through public access requirements that would be imposed on any individual project, such as creation of a waterfront park, the municipality is required to specify in the proposed Municipal Public Access Plan details regarding the project(s) to be funded, and provide sufficient information to allow the Department to ensure that the project satisfies some real need in that area through the required needs assessment (see N.J.A.C. 7:7E-8.11(e)3). The implementation strategy at N.J.A.C. 7:7E-8.11(e)5 requires specification of an implementation schedule to ensure that proposed actions will be conducted in a timely manner. N.J.A.C. 7:7E-8.11(f) specifies exactly how contributions to a fund to accomplish the project(s) specified in the plan are calculated to assure that this is accomplished in a consistent manner.

The Department believes that the rules provide adequate standards to guide municipalities in preparing a proposed plan and for the Department in determining if the proposed plan meets the rules' requirements.

With reference to compliance and enforcement, this public access rule can be enforced in the same manner as any other Department approval under the Coastal Zone Management rules

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pursuant to the Coastal Permit Program rules (N.J.A.C. 7:7-8), including imposition of monetary penalties.

While the Department anticipates most, if not all, municipalities that have voluntarily sought approval of a Municipal Public Access Plan will comply with that plan, the Department is not adopting N.J.A.C. 7:7E-8.11(m) as originally proposed. This modification eliminates the proposed six-year term for an approved Municipal Public Access Plan and instead requires more frequent progress reporting on a five-year interval at N.J.A.C. 7:7E-8.11(j)4. The Department is adopting N.J.A.C. 7:7E-8.11(m) proposed as part of the notice of substantial changes, to provide the Department with the ability to revoke an approved Municipal Public Access Plan for good cause. Good cause is defined to include failure to implement the Municipal Public Access Plan and/or noncompliance with the Municipal Public Access Plan such as inappropriate expenditure of dedicated Public Access Fund monies for purposes other than public access, conversion of public access sites to other uses, and failure to maintain existing public access and signage. These changes will give the Department the ability to act appropriately should instances of non-compliance with approved plans occur. As permits for projects imposing public access requirements will continue to be issued by the Department, both in municipalities that have obtained a Department-approved Municipal Public Access Plan and those that have not obtained plan approval, enforcement of the public access requirements contained in those permits will continue to be the sole responsibility of the Department as specified in the Coastal Permit

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Program rules and the Coastal Zone Management rules; municipalities will not gain any enforcement authority as part of obtaining approval of a Municipal Public Access Plan.

44. COMMENT: Municipal Public Access Plans should preserve existing public access and amenities and create increased public access and amenities. (46, 48)

RESPONSE: N.J.A.C. 7:7E-8.11(b)2 requires that existing public access to and along tidal waterways and their shores be maintained to the maximum extent practicable. Municipal Public Access Plans are intended to provide guidance for locating additional public access in the municipality. As discussed in the Response to Comments 33 through 43 above, the Department is adopting changes proposed in the notice of substantial changes to delete the list of public access options from N.J.A.C. 7:7E-8.11(n)1iii (as well as the cross-references to this list) and incorporate the list into the public access goals at N.J.A.C. 7:7E-8.11(b)3i, which are applicable to all municipalities, both those with Municipal Public Access Plans and those that do not seek approval of such a plan. This clarifies that these are the types of additional public access and amenities that are anticipated to be created in all municipalities.

45. COMMENT: The Department's Public Trust in New Jersey guide (developed prior to this rule) could have been used to develop standards for towns to create better public access. Section

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III lists regulatory, planning, engineering and enforcement measures that municipalities can take to enhance access (pages 26 - 28). Section IV sets forth tools that municipalities can employ to enhance access, including access inventories, signage, zoning regulations, access ordinances, community outreach, etc. (pages 32 - 38). Part H of Section IV (“Model Municipalities”) presents a virtual checklist of measures municipalities can take to promote access along various types of waterfronts (pages 36 - 38), which could also be transformed into the type of flexible, yet tangible, standards for plan review that should be included in the proposed rule. The Department should adopt standards for review of Municipal Public Access Plans that enhance access requirements. (46)

RESPONSE: In developing this rule, the Department held stakeholder meetings seeking input from representatives of marine trades, environmental and recreational interests, business and industry and coastal municipalities. The purpose of this extensive stakeholder process was to take a fresh look at public access in order to maintain and enhance the public’s access to coastal and tidal waters in a reasonable, planned manner. Although all details contained in the Public Trust in New Jersey Guide are not specifically incorporated in the rules, much of the guidance in the document, such as creating public access plans, adopting municipal ordinances to enforce public access, providing an inventory of public access facilities in the municipality, identifying those facilities with signs, and placing conservation restrictions on public access ways, is

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consistent with the requirements in the rule proposal. In addition, as discussed in the Response to Comments 33 through 43 above, as proposed in the notice of substantial changes, the Department is deleting the list of public access options from N.J.A.C. 7:7E-8.11(n)1iii (as well as the cross-references to this list discussed above) and incorporating the list into the public access goals at N.J.A.C. 7:7E-8.11(b)3i, which are applicable to all municipalities, both those with Municipal Public Access Plans and those that do not seek approval of such a plan. Relocating the list of public access options to N.J.A.C. 7:7E-8.11(b)3i clarifies that the list applies not only to site-specific public access projects in municipalities that do not have a Department-approved Municipal Public Access Plan, but also to projects in municipalities that do obtain Department approval of a Municipal Public Access Plan.

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

46. COMMENT: The Department should reconsider the proposed changes to N.J.A.C. 7:7-7.6 that eliminates the ability for municipalities to receive a coastal general permit for beach and dune maintenance activities unless those municipal applicants have developed and obtained approval of a Municipal Public Access Plan. Although the Department states that this policy will encourage municipalities to develop these plans, the policy may also burden disadvantaged communities that do not have the resources to immediately undertake efforts to develop a plan.

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By enforcing the proposed standards, the Department is eliminating the right to manage public beach and dune systems without an individual permit that is burdensome to obtain in both timing and cost. Shore communities rely on maintenance, including beach sanitation and raking, to maintain safe and healthy conditions for tourism. If it is decided to retain the above requirement, then a provisional use period should be established to give municipalities adequate time to prepare. Given that this rule will alter the manner in which many municipalities provide public access and maintain their oceanfront resources, the proposed rules should, at a minimum, include a period after adoption that municipalities could continue to apply for and receive this coastal general permit while they are preparing the necessary design and planning elements of their public access plan. (35, 61)

RESPONSE: The Department agrees that it is appropriate to allow municipalities time to prepare the necessary design and planning elements of their public access plan before restricting use of the general permit for beach and dune maintenance activities to those municipalities that have Municipal Public Access Plans. Accordingly, the Department is adopting changes to N.J.A.C. 7:7-7.6 proposed in the notice of substantial changes on adoption to provide, at N.J.A.C. 7:7-7.6(c), that, as of three years from the effective date of these amendments, the Department will not approve authorizations under this general permit to a municipality that does not have an approved and operational Municipal Public Access Plan in accordance with the

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rules. During that three-year period, municipalities without plans can continue to apply for and obtain authorization under the coastal general permit for beach and dune maintenance activities.

The addition of new subsection (c) rendered the need to differentiate between municipal applicants with Department-approved plans and those without Department-approved plans in N.J.A.C. 7:7-7.6(a) unnecessary. N.J.A.C. 7:7-7.6(a) is applicable to all municipal applicants as well as non-municipal applicants. Accordingly, the reference to municipal applicants with Department-approved plans and non-municipal applicants is deleted as proposed in the substantial changes upon adoption.

Coastal Zone Management Rules -- Definitions (N.J.A.C. 7:7E-1.8)

47. COMMENT: The definition of “homeland security facility” refers to the Federal Department of Homeland Security. It is suggested that this reference be changed to “United States Department of Homeland Security” as this is the Department’s official title. (19)

RESPONSE: The Department agrees, and is adopting a change to the definition of “homeland security facility” at N.J.A.C. 7:7E-1.8 proposed in the notice of substantial changes on adoption to replace “Federal Department of Homeland Security” with the agency’s official title, “United States Department of Homeland Security.”

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48. COMMENT: The rule defines homeland security so vaguely that almost any business on a waterway is exempt from the requirements of the rule. (45, 57, 62)

49. COMMENT: The definition of a homeland security facility is too broad and could have a very significant impact on access around bridges or rail lines which traverse New Jersey's most productive bays, estuaries, and inlets. This definition could also include wind turbines, which could potentially impose restrictions around these structures. In addition, this definition could affect tidal waters located adjacent to power plants. It is important to maintain existing access rules around and near energy facilities for fishing. (43)

RESPONSE TO COMMENTS 48 AND 49: The definition in the proposal provides that homeland security facilities are those deemed to be critical in nature or a key resource by the New Jersey Office of Homeland Security and Preparedness, or the United States Department of Homeland Security. These agencies have the expertise in applying their risk assessment models to specific situations in order to determine if a facility, including critical infrastructure, is a homeland security facility. However, it is not the Department's intent that these designations will be made by these agencies without the Department's perspective as it relates to the public access purposes of these rules. Therefore, the Department is adopting changes to the definition

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proposed in the Notice of Substantial Changes upon adoption to provide that the Department, in consultation with the New Jersey Office of Homeland Security and Preparedness, or the United States Department of Homeland Security, will be making the determination as to whether or not a facility is either critical in nature or a key resource.

50. COMMENT: Homeland security facility is defined too broadly. For example, the inclusion of transportation infrastructure as a homeland security facility could be interpreted to include every highway overpass above any waterway. Clearly some types of transportation infrastructure should be considered a homeland security facility. However, further clarification is necessary to distinguish between a train station and an overpass crossing a stream. (59)

RESPONSE: The Department believes the definition is appropriate with the change discussed in the prior Response to Comments 48 and 49. Transportation infrastructure is included in the definition as an example of a potential homeland security facility. However, to make it clear that not all transportation infrastructures would be considered a homeland security facility; the Department is adopting changes proposed in the Notice of Substantial Changes to the definition to qualify the example, “transportation infrastructure” to read “certain transportation infrastructure.”

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51. COMMENT: Proposed N.J.A.C. 7:7E-8.11(b) refers to homeland security vulnerability. It is suggested that a definition of “vulnerability” be included in the definition of homeland security facility or in a new definition of “critical infrastructure/key resource site” at N.J.A.C. 7:7E-1.8.

(19)

RESPONSE: As discussed in the Response to Comments 48 and 49 above, the Department modified the definition of “homeland security facility” to provide that the Department, in consultation with the New Jersey Office of Homeland Security and Preparedness, or the United States Department of Homeland Security, will be making the determination as to whether or not a facility is either critical in nature or a key resource. In line with that change, the Department modified N.J.A.C. 7:7E-8.11(b)5 through the notice of substantial change process to add the same language, to clarify that the Department will be making the determination whether a particular site is considered to be vulnerable on a case-by-case basis in consultation with the New Jersey Office of Homeland Security and Preparedness and/or the United States Department of Homeland Security based upon these agencies expertise in applying their risk assessment models to specific situations and the Department’s perspective as it relates to the public access purposes of these rules. The Department believes that this process is adequately addressed in the rules without a definition of the term “vulnerability.”

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52. COMMENT: The definition of homeland security facility is supported as it allows the New Jersey Office of Homeland Security and Preparedness and the Federal Department of Homeland Security to apply their risk assessment models to specific situations. However, it is recommended that the definition be expanded to allow for the New Jersey Office of Homeland Security and Preparedness, and the Federal Department of Homeland Security, to apply their risk assessment models to specific “security concern” situations which may otherwise not be captured. Proposed language follows (addition indicated in underlined boldface):

“Homeland security facility means any facility deemed by the New Jersey Office of Homeland Security and Preparedness or the Federal Department of Homeland Security to be either critical in nature or a key resource; **or interdependent, clustering or concentrations of critical infrastructure sites at the discretion of the New Jersey Office of Homeland Security and Preparedness or the Federal Department of Homeland Security.** These facilities may include, but are not limited to, airports and military facilities, transportation infrastructure, and certain chemical or energy facilities and utilities, marine terminal or transfer facilities, and freight or passenger rail lines.” (39)

RESPONSE: The Department acknowledges the commenter’s support for the definition of homeland security facility in the proposal. However, the Department does not believe it is

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necessary to expand the definition as suggested. As part of the consultation by the Department with the New Jersey Office of Homeland Security and Preparedness, or the United States Department of Homeland Security, to designate these facilities for purposes of the public access rules, interdependent, clustering, or concentrations of critical or key resources can be considered. It is not necessary to revise the definition to allow for this.

53. COMMENT: The New Jersey Turnpike represents a major route of egress from New York City, providing high speed access from the George Washington Bridge, the Lincoln Tunnel, the Holland Tunnel, and the Goethals Bridge, and the Garden State Parkway serves as a direct north/south coastal evacuation route for much of southern New Jersey during coastal storms, flooding, and wildfires. As such, the New Jersey Turnpike and Garden State Parkway represent infrastructure that is critical to State and Federal economic, transportation, and security concerns. For these reasons, the Turnpike and Parkway should be considered homeland security facilities under the proposed rule. Accordingly, the definition of homeland security facility should be revised as follows (additions underlined):

“‘Homeland security facility’ means any facility deemed by the New Jersey Office of Homeland Security and Preparedness or the Federal Department of Homeland Security to be either critical in nature or a key resource. These facilities specifically include the New Jersey Turnpike and the Garden State Parkway and/or the surveyed right-of-ways associated with these

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roadways, and may include, but are not limited to, airports and military facilities, other transportation infrastructure, and certain chemical or energy facilities and utilities, marine terminal or transfer utilities, and freight or passenger rail lines.” (58)

RESPONSE: While the Department recognizes that portions of these major highways may qualify as homeland security facilities, the Department believes it is appropriate to consult with the New Jersey Office of Homeland Security and Preparedness or the United States Department of Homeland Security in order to make that determination. The Department did not modify the definition in response to this comment.

54. COMMENT: The New Jersey Turnpike Authority owns and operates large, linear land holdings designated as rights-of-ways, not “parcels,” and owns multiple parcels which comprise the rights-of-way making up both the New Jersey Turnpike and the Garden State Parkway. It is requested that the definition of “parcel” be revised as follows (addition underlined): “Parcel means the totality of all lots and/or rights-of-way under common ownership upon which an existing development is located.” Alternatively, the definition could be revised to read (addition underlined): “Parcel means the totality of all lots under common ownership upon which an existing development is located, including any areas where additional riparian leases or grants may be required to conduct a development.” (19, 58)

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55. COMMENT: According to the proposed rules, if a municipality has an approved Municipal Public Access Plan, all development in that municipality would be subject to the requirements of that plan regardless of whether a neighboring municipality also has an approved Municipal Public Access Plan with different access requirements. This non-uniformity creates significant compliance issues for entities that have projects which can span several municipalities and/or counties. The application of a uniform approach would provide needed certainty as well as accomplish the Department's goals for public access. It is suggested that applicable public access requirements for developments located in municipalities without Municipal Public Access Plans as set forth at proposed N.J.A.C. 7:7E-8.11(n) be made applicable to the Turnpike and Garden State Parkway and their respective rights-of-way in all municipalities. This revision can be effected by amending proposed N.J.A.C. 7:7E-8.11(c)3 as follows (addition underlined):

“In all municipalities, regardless of whether there is a Department-approved Municipal Public Access Plan, access shall be provided in accordance with N.J.A.C. 7:7E-8.11(n) for any development located along the lengths of the New Jersey Turnpike and the Garden State Parkway and/or within the surveyed right-of-ways associated with these roadways, N.J.A.C. 7:7E-8.11(o) for marinas...” (58)

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RESPONSE TO COMMENTS 54 AND 55: In response to these comments, the Department modified the rules through the notice of substantial change process by adding a paragraph at N.J.A.C. 7:7E-8.11(o) (proposed as N.J.A.C. 7:7E-8.11(n)6 in the March 19, 2012 notice of substantial changes) to specifically address public access requirements for superhighways and other public roads. This language is discussed in further detail in the Response to Comments 124 through 128 below. The adopted modifications to N.J.A.C. 7:7E-8.11(o) obviate any need to modify the definition of “parcel” to include rights-of-way.

56. COMMENT: Defining “parcel” as the size of the property when the development scheme is submitted to the Department and then not requiring access for a development if other property within the property does not require access is too broad. This definition would allow a property owner to buy adjacent property and even if the new development would have, by itself, required access, the newly or recently purchased property would have the same status as the original access-free property. It is suggested that if the parcel definition is changed, a date be struck, such as the effective date of any new rules, stating a parcel is defined as adjacent lots and blocks under common ownership as of the effective date of the rule. (4)

RESPONSE: The definition of “parcel” in the proposal is “the totality of all lots under common ownership upon which an existing development is located on April 4, 2011.” Thus the issue

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raised in this comment regarding a date reference in the definition has been addressed. However, the Department did determine that clarifying changes to the definition of parcel were warranted. These changes included the addition of the word “contiguous” to clarify that lots under common ownership must be contiguous to meet the definition of parcel, and the removal of the phrase, “upon which an existing development is located,” because the Department determined that this wording was unnecessary since in all parts of the rule where this limitation is appropriate, the term “parcel” is specified to be the property on which an existing development is located (see, for example, N.J.A.C. 7:7E-8.11(n)1i “... where the proposed activity consists of maintenance, rehabilitation, renovation, redevelopment, or expansion that remains entirely within the parcel containing the existing development”). The only place in the rule text that the term “parcel” is used without this qualifying language in the specific provision containing the term is N.J.A.C. 7:7E-8.11(n)1ii; however, the context of that provision makes clear that the parcel is part of a group of contiguous property containing an existing development. Including the term “upon which an existing development is located” in the definition of “parcel” could create unnecessary confusion as to what is intended in subparagraph (n)1ii.

Hudson River Waterfront Area (N.J.A.C. 7:7E-3.48)

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57. COMMENT: It is troubling that this rule proposes to restrict access to portions of the Hudson River Walkway. Currently access is provided 24 hours a day but this rule would allow facilities to shut off access to the Walkway outside of normal business hours. The Walkway must remain open 24 hours a day to provide for recreational access when most working families and individuals can utilize the Walkway, after business hours and on weekends. (55)

RESPONSE: The Department appreciates the commenter's concern and determined that several changes to the proposed rules were warranted to clarify that public access to and along the main route of the Hudson Waterfront Walkway and on the adjacent piers must still comply with the Hudson Waterfront Walkway Planning and Design Guidelines (1984) and the Hudson Waterfront Walkway Design Standards (1989), pursuant to N.J.A.C. 7:7E-3.48(e), and, in accordance with N.J.A.C. 7:7E-3.48(e)1, must be on a 24-hour basis except in certain very limited circumstances.

In proposing N.J.A.C. 7:7E-8.11(a), it was the Department's intent that, with limited exceptions, public access for the Hudson River waterfront would be governed by N.J.A.C. 7:7E-3.48, the special area rule for the Hudson River waterfront that already establishes unique public access requirements, including the Hudson River Walkway. The only intended proposed exception was for ports and certain existing industrial, public, and homeland security facilities for which public access would not be required, in accordance with N.J.A.C. 7:7E-8.11(n)3i,

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which governs public access for existing industrial or public development; (n)4i, which governs public access for existing homeland security facilities; and (n)5, which governs public access for ports. As explained in the proposal Summary, the Department therefore proposed cross-references in the Hudson River waterfront special area rule at N.J.A.C. 7:7E-3.48 to those specific portions of the public access rule at N.J.A.C. 7:7E-8.11, with the intent that existing public access must be maintained in all these areas, including the Hudson River waterfront area. However, because proposed N.J.A.C. 7:7E-8.11(n)3i referred the reader to subparagraph (n)3ii, which provides that when public access is required for new industrial development or conversions of existing uses to industrial or public use, it is to be provided during normal operating hours, the inference could be drawn that this allowance applies to the Hudson River waterfront as well, despite the clear and specific direction in existing N.J.A.C. 7:7E-3.48(e)1, noted above, that public access to and along the main route of the Hudson Waterfront Walkway is to be on a 24-hour basis, except in limited circumstances.

The Department is adopting the changes proposed in the notice of substantial changes that clarify the applicability of the public access rules for the Hudson River waterfront special area. At N.J.A.C. 7:7E-8.11(a), the provision stating that public access for the Hudson River waterfront area must be provided in accordance with the special area rule at N.J.A.C. 7:7E-3.48 (except for ports and certain existing industrial, public, and homeland security facilities for which public access is not required in accordance with N.J.A.C. 7:7E-8.11(n)3i, 4i, and 5) is not

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being adopted. Similarly, the Department is not adopting at N.J.A.C. 7:7E-3.48(c) the reference to N.J.A.C. 7:7E-8.11(a), (n)3i, 4i, and 5 for the reasons discussed above. Adopted N.J.A.C. 7:7E-3.50(b) does not include “except for the Hudson River Waterfront Area,” “Public access to lands and waters subject to public trust rights in the Hudson River Waterfront Area shall be provided in accordance with the Hudson River Waterfront Area rule, N.J.A.C. 7:7E-3.48” and “or with N.J.A.C. 7:7E-3.48 in the Hudson River Waterfront Area.” These modifications are necessary since public access along the Hudson River and adjacent piers is addressed in adopted N.J.A.C. 7:7E-8.11, and proposed N.J.A.C. 7:7E-3.50(b) excluded the Hudson River Waterfront Area from having to comply with N.J.A.C. 7:7E-8.11. At N.J.A.C. 7:7E-8.11(d), which specifies the public access requirements for Municipal Public Access Plans, the Department is adopting new paragraph (d)2 proposed in the notice of substantial changes, establishing that Municipal Public Access Plans must require public access along the Hudson River and adjacent piers in the Hudson River waterfront special area consistent with N.J.A.C. 7:7E-3.48(d) and (e). N.J.A.C. 7:7E-3.48(d) specifies the standards that apply to all developments proposed on piers in the Hudson River waterfront area and is used by the Department as a guide for developments proposed on platforms in the Hudson River waterfront area. This subsection includes requirements for specific amounts of usable landscaped public open space to be incorporated into projects on piers and platforms and also includes the requirement that at least one public access walkway of a least 16 feet in width be provided along the entire length of a pier, from the

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waterward end to the landward end at the point at which it abuts the Hudson River Waterfront Walkway. All such walkways shall be at pier deck level or ramped so that disabled access is provided between the public open space areas at both ends of a pier. Pursuant to N.J.A.C. 7:7E-3.48(e), 24-hour public access is required along the main route of the Hudson Waterfront Walkway and adjacent piers unless it can be demonstrated that strict compliance is not practicable based on the risk of injury from substantial permanent obstructions or proposed hazardous operations, or upon documentation of a threat to public safety due to unique circumstances concerning the subject property that would make 24-hour access not feasible. At N.J.A.C. 7:7E-8.11(g), which as proposed specified the types of public access that Municipal Public Access Plans shall not require, the Department is adopting the changes proposed in the notice of substantial changes that recodify paragraph (g)2 as paragraph (g)1 and prohibit Municipal Public Access Plans from providing public access along the Hudson River in the Hudson River waterfront special area that is inconsistent with N.J.A.C. 7:7E-3.48(e). To ensure that it is clear that public access in any municipality that does not have an approved Municipal Public Access Plan must be provided in accordance with the requirements of the Hudson River waterfront special area rule, the Department is adopting new N.J.A.C. 7:7E-8.11(n)1ii(1), (n)2iii(3), (n)2iv(1), (n)3ii(1), and (n)4ii(1), which specifically require that public access along the Hudson River and on adjacent piers must be provided in accordance with N.J.A.C. 7:7E-

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3.48(d) and (e) for commercial development, residential development, industrial and public development, and homeland security facilities .

Public access definition (N.J.A.C. 7:7E-8.11(a))

58. COMMENT: Proposed N.J.A.C. 7:7E-8.11(a), which defines public access, references other sections of the rule that may alleviate or preclude the need to provide public access in certain circumstances, but then states 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 in accordance with N.J.A.C. 7:7E-3.50. This appears to be contradictory and needs clarification. (19)

RESPONSE: Please see the Response to Comment 57, explaining the change the Department proposed at N.J.A.C. 7:7E-8.11(a) regarding the reference in this subsection to public access for the Hudson River waterfront area. The Department notes that the statement at N.J.A.C. 7:7E-8.11 that no authorization or approval under the coastal zone management rules shall be deemed to relinquish public rights of access to and use of lands and waters subject to public trust rights in accordance with N.J.A.C. 7:7E-3.50 is continued from the existing rules. The statement emphasizes that while the public access rules govern the type and extent of public access the

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Department will require based on the types and location of proposed development along tidal waters under the Department's jurisdiction pursuant to CAFRA and the waterfront development law, the rules and permits issued under the rules do not relinquish the underlying rights of access to tidal waters that are vested in the State in trust for the public according to the Public Trust Doctrine. As indicated in the proposal Summary, the Department's efforts to promote public access, and its promulgation of public access requirements, derive from various authorities, including the Public Trust Doctrine, the Federal Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1531 et seq., as implemented by the State of New Jersey, and the Department's management of the State's coastal areas under the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 et seq., and other statutes.

The Department's rules reflect an attempt to use the authority derived from these various sources to ensure that public access to the water is provided in a comprehensive and consistent manner Statewide. The statement in the rules is intended to make clear that these rules are not intended to provide an interpretation of all rights falling under the Public Trust Doctrine and that the rules do not in any way limit any existing or future rights deemed to be part of the Public Trust Doctrine.

Public access goals

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59. COMMENT: Public access should be clearly marked both on and off the beach. (32)

RESPONSE: The rules as proposed required, at N.J.A.C. 7:7E-8.11(t), that public access to tidal waterways must be clearly marked and that Department- approved public access signs must be installed and maintained by the permittee and any successors in title and interest in perpetuity at each public accessway, public access area, and/or public parking area. To emphasize and ensure that the signage requirement must be met in municipalities with Municipal Public Access Plans, the Department is adopting changes at N.J.A.C. 7:7E-8.11(d) proposed in the notice of substantial changes, to specifically provide at new paragraph (d)3 that Municipal Public Access Plans must require the installation and maintenance of appropriate public access signage in accordance with N.J.A.C. 7:7E-8.11(u) (proposed as N.J.A.C. 7:7E-8.11(t)).

60. COMMENT: It is recommended that the Department provide additional details and specifications for boat ramps, piers, fishing, pocket parks, public restrooms, and additional public parking. Applicants and builders should be required to clearly label their public access facilities in perpetuity through conservation easements and legal instruments. As time passes it will be very tempting for businesses, residential property owners, and homeowner associations to take over public access facilities to deny access by visitors or non-patrons. Public access facilities and amenities should be very clearly marked with signs. (37)

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RESPONSE: The Department believes that environmental protection and public access policy goals of these rules can be accomplished without extensive prescriptive requirements. Therefore, the Department did not modify the rules to include additional details and specifications for boat ramps, piers, fishing, pocket parks, public restrooms, and additional public parking.

Regarding the second part of the comment concerning labeling public access facilities in perpetuity through conservation easements and legal instruments, N.J.A.C. 7:7E-8.11(z) (proposed as N.J.A.C. 7:7E-8.11(y)), requires that areas set aside for public access 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; thus, the issue raised in this comment has been addressed. Regarding signage, the April 4, 2011 proposed rule amendments did require signs be installed and maintained in perpetuity, and the Department modified the rule through the notice of substantial change process to require Municipal Public Access Plans to provide for appropriate public access signage in accordance with N.J.A.C. 7:7E-8.11(u) (proposed as N.J.A.C. 7:7E-8.11(t)).

61. COMMENT: Proposed N.J.A.C. 7:7E-8.11(n)3ii requires public access be provided onsite unless it can be demonstrated that continued public access is not practicable based on the risk of

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injury from proposed hazardous operations or substantial permanent obstructions and no measures can be taken to avert these risks. This is consistent with the proposed goals at N.J.A.C. 7:7E-8.11(b)4 and 5. Proposed N.J.A.C. 7:7E-8.11(b)4 allows for restrictions on public access so as not to create conditions that may be reasonably expected to endanger public health or safety. Proposed N.J.A.C. 7:7E-8.11(b)5 allows for prohibition of public access where homeland security concerns are present or where it is not practicable based on the risk of injury from hazardous operations or substantial permanent obstructions, and no measure can be taken to avert these risks. "Hazardous operations" should include activities such as high traffic volume that could endanger public health and safety. This could then be used to demonstrate why onsite public access may not be warranted on certain roadways and bridges. (19)

RESPONSE: The Department agrees that high traffic volume could endanger public health and safety, in which case public access might be restricted in the appropriate case and still meet the public access goals at N.J.A.C. 7:7E-8.11(b). The Department notes, as indicated in the Response to Comment 53, that portions of major highways may also qualify for reductions in public access as homeland security facilities in appropriate circumstances. Any determination of whether or not the provision of public access could create a significant homeland security vulnerability would be made by the Department in consultation with the New Jersey Office of Homeland Security and Preparedness or the United States Department of Homeland Security on a case-by-

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case basis. The Department added a new paragraph at N.J.A.C. 7:7E-8.11(n)6 (recodified at N.J.A.C. 7:7E-8.11(o) in a subsequent notice of additional substantial changes proposed on July 2, 2012) to specifically address public access requirements for superhighways and other public roads (see the Response to Comments 124 through 128 below). The Department believes this change addresses the commenter's concerns in an appropriate manner.

Public access for fishing

62. COMMENT: The removal of N.J.A.C. 7:7E-8.11(l), which specifies that development on or adjacent to tidal waterways and their shores shall incorporate fishing access and associated amenities to the maximum extent practicable, is not supported. Fishing is one of the main points of the Public Trust Doctrine. (4, 17, 43, 46, 54)

63. COMMENT: The proposed rule will remove many existing legal requirements established over the years that have a proven track record in creating and protecting access. Creating and protecting public access has been a long fight, and legal tools to deal with ongoing, chronic problems created over the years, including requirements for the dedication of access and parking for fishing (existing N.J.A.C. 7:7E-8.11(l)). (46, 48)

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64. COMMENT: Being a non-resident who spends 95 percent of his recreational time on New Jersey's beaches, losing fishing access in New Jersey could be devastating. Fishermen love what they do and it keeps them sane. Do not take access away from the fishermen. (24)

65. COMMENT: The DEP must make sure that any regulation that is ultimately adopted does nothing to impede the ability of fishermen to fish. One of the first components of the Public Trust Doctrine is the ability to go down to the water to fish. (3)

66. COMMENT: The State should outline what the town should do in terms of providing and guaranteeing rights to anglers. (44)

67. COMMENT: Public access to beaches and tidal waters is crucially important for recreational anglers. The provision of uniform guidance on public access that is promulgated and enforced by the Department and which is consistent with the Public Trust Doctrine is the most common sense approach to ensuring that the rights of anglers to access tidal waters and marine resources is carried out. (43)

68. COMMENT: According to the U.S. Fish and Wildlife Service, the total economic impact of recreational fishing in New Jersey exceeds \$1.6 billion per year. This impact generates over \$23

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million in State sales tax, over \$100 million in total State tax impacts, and supports over 10,000 fulltime jobs. Further, regional salt water anglers 16 and older make on average \$1,151 per person in total trip and equipment expenditures each year, with approximately \$219.00 on food and lodging, \$137.00 on transportation and \$795.00 directly on fishing equipment and services. This economic activity is generated by recreational anglers fishing from platforms (boats, piers, jetties, docks, and beaches) that all stand to be impacted by the proposed changes to the rule.

(43)

69. COMMENT: The main thing fishermen would ask is that the DEP make sure any regulation ultimately adopted does nothing to impede the ability of fishermen to fish. One of the first components of the Public Trust Doctrine has been the ability to go down to the water to fish. (3)

70. COMMENT: The rule should require that residential communities can no longer cede streets or dead-end roads to the owners of the adjacent coastal properties. This is a “loop hole” to prevent access. White Hall Avenue and Roseld Avenue in Deal, Monmouth County were both ceded to the owners of the residential properties bordering the ends of the streets. Despite publicly paid-for rock walls and jetties to protect these residential properties, fishermen no longer have access. (41)

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71. COMMENT: The commenter stated that he is an avid surf fisherman who has experienced drastically reduced access to beaches in Cape Cod and beaches along the east coast whenever local officials are given control over them. The Department should not implement any policy that would have the same result in New Jersey. The commenter also stated that he fishes at Long Beach Island, Island Beach State Park, Ocean City, Sea Isle City, Wildwood, and Cape May and that he spends thousands of dollars in gear, bait, fuel, and food every year, which supports dozens of businesses in New Jersey. (26)

72. COMMENT: The commenter stated he is a life-long resident of Maryland and that nobody comes to visit the Chesapeake Bay to fish because it is almost impossible to access the Bay's 5,000 miles of shoreline. The commenter stated that he is a surf fisherman that spends his time and money in New Jersey because of the access it has for fishing and that if the rules are implemented he will have to take his business elsewhere. (27)

73. COMMENT: Many of those strong legal requirements that are in the rule now, concerning bridges rebuilt with public money, such as fishing access and parking have been removed. (10)

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RESPONSE TO COMMENTS 62 THROUGH 73: The Department agrees that fishing access has long been recognized as an important part of the Public Trust Doctrine and that recreational fishing in New Jersey has a significant positive economic impact on the State. Therefore, in response to these comments, the Department restored the provision that was proposed in the notice of substantial changes to amend N.J.A.C. 7:7E-8.11(l) to require that public access must incorporate, to the maximum extent practicable, fishing access and associated amenities. The Department is adopting this requirement to the specific public access goals at N.J.A.C. 7:7E-8.11(b), which public access must be designed to meet. N.J.A.C. 7:7E-8.11(b)3ii also addresses parking to accommodate nighttime fishing. The Department is adopting the change proposed in the notice of substantial changes at N.J.A.C. 7:7E-8.11(d) to include a similar provision at paragraph (d)1 to make it clear that municipalities must incorporate fishing and associated amenities, including parking that accommodates nighttime fishing for a reasonable duration of time, in their Municipal Public Access Plans to the maximum extent practicable. Accordingly, the Department would not approve a Municipal Public Access Plan that does not protect existing public access points controlled by the municipality.

74. COMMENT: The majority of fishing in New Jersey is done at night or on the weekends when business people are not working. Restricting public access to normal operating hours would be a huge hindrance to the fishing community. (2)

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75. COMMENT: If 24/7 beach access at any of the places the commenters frequent is restricted in any way, they will no longer bring their business to the State. (66)

76. COMMENT: The proposed rules would only require public access during normal operating hours. Apparently the Department believes that the public does not fish on weekends, at night, or in the early morning. (46)

77. COMMENT: The Christie Administration should not lock fishermen out from accessing the beach. It should let them retain their freedom to fish on the beach and jetties 24 hours a day seven days a week; and allow them to pursue their love and passion for surf fishing in a respectful and fair manner. (41)

78. COMMENT: There should be provisions to distinguish between the legitimate activities of fishermen and the need to police against illegal activities during normal off hours. (40)

79. COMMENT: The proposed rule should make it clear that public access must be provided for fishing during evening, weekend and early morning hours, not just business hours. (17)

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80. COMMENT: In many areas along the waterfront, the public will no longer have 24-hour a day, seven days a week access. The proposed rules allow towns to set public access to areas of the waterfront to “normal business hours.” Therefore fishermen will no longer be able to fish their favorite jetty or beach at 2:00 A.M. during the traditional fall striper run. Fishing for striped bass and other species is best done between the hours of 9:00 P.M. and 4:00A.M. Fishing tournaments along the coast will also be devastated should the 24-hour fishing access be deleted.
(41)

81. COMMENT: Many fishing businesses, such as marinas and waterfront tackle shops, are seasonal and, therefore, their normal operating hours vary throughout the year. In addition, fishing activity is most closely linked with tidal cycles and weather patterns which often have no relevance to normal operating hours. (43)

82. COMMENT: Longport is an example of a place where access for fishermen has been compromised. The Longport Bridge is an awesome location for fishing. A few years ago, it was closed to fishing for safety reasons. After many meetings and objections from fishermen, fishing access was permitted from October 1 through April 30 from the hours of 6:00 P.M. to 6:00 A.M. The reason it was closed for fishing was because the people that lived there wanted to be able to

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ride their bikes, jog, and walk along the bridge. How are fishermen a safety issue and these other user groups are not? (63)

RESPONSE TO COMMENTS 74 THROUGH 82: In recognition of the commenters' concerns regarding access for fishing during the overnight hours, and as explained in the Response to Comments 62 through 73, the adopted rules require that public access incorporate, to the maximum extent practicable, fishing access and associated amenities, including parking that accommodates nighttime fishing for a reasonable duration of time.

83. COMMENT: All access points should have parking available within 100 feet or less of the access point. The Department should be responsible for determining the appropriate number of parking spaces at each access point. This is necessary because the fishing tackle required for fighting larger species of fish found in the ocean can be heavy and bulky especially for seniors and children. For example, Sea Bright has an access point on Ocean Avenue but parking is not permitted. (41)

84. COMMENT: Limiting parking hours to two hours or less is a barrier to fishermen. Two hours or less is not enough time to fish particularly if one is fishing a full moon tide or needs to walk a long distance over rocks or a sandy beach with waders to get to a favorite fishing

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location. Many fishermen are now using expensive fishing kayaks to launch from the beach and it does not make sense for a kayaker to move the car every two hours. Some towns turn a blind eye to their own parking laws allowing residents and their friends to park unrestricted while fishermen are being ticketed. The rule should provide that restrictions to parking time limits shall not be permitted. In addition, parking fees should not be charged for parking in residential neighborhoods. Parking fees should only be charged in commercially-zoned areas where it can be enforced. (41)

85. COMMENT: Longport has closed many streets off from parking and makes the public walk over a mile to get to the beach to fish. The Department should think about the people who come to the shore for the day or who do not live on these islands but pay taxes. (63)

RESPONSE TO COMMENTS 83 THROUGH 85: In recognition of these commenters' concerns regarding parking for purposes of access to the beach for fishing, and as explained in the Response to Comments 62 through 73, the adopted rules require that public access incorporate, to the maximum extent practicable, fishing access and associated amenities, including parking that accommodates nighttime fishing for a reasonable duration of time.

To further address parking concerns, as discussed in the Response to Comments 33 through 43, the Department is not adopting the list of public access options as part of N.J.A.C.

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7:7E-8.11(n)1iii, but is incorporating the list into the public access goals at N.J.A.C. 7:7E-8.11(b)3i, which are applicable to all municipalities, both those with Municipal Public Access Plans and those that do not seek approval of such a plan. This list includes additional public parking to accommodate public access, beyond that needed to support the development to be located on the site. Relocating the list of public access options to N.J.A.C. 7:7E-8.11(b)3i clarifies that the list applies not only to site-specific public access projects, but also to Municipal Public Access Plans. This parking would be available to anyone utilizing public access, including fishermen.

In response to the comment concerning municipalities placing restrictions on parking, N.J.A.C. 7:7E-8.11(e)3iii requires a municipality seeking approval of a Municipal Public Access Plan to include in the application for approval, a public access needs assessment that evaluates existing practical limitations to public access. As discussed in the Response to Comment 86, the Department is adopting the change proposed in the notice of substantial changes at N.J.A.C. 7:7E-8.11(e)3iii to make clear that practical limitations to public access include not only a lack of parking, but also restrictions on parking availability, which could limit the public's access to tidal waterways.

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86. COMMENT: Towns are no longer required to remove parking restrictions (two-hour limits, no parking zones near access) in order to receive State funding for such projects. Without sufficient parking, public access to the waterfront can be meaningless. (46)

RESPONSE: In response to this comment, the Department is adopting the change proposed in the notice of substantial changes at N.J.A.C. 7:7E-8.11(e)3iii to require municipalities to make clear that practical limitations to public access include not only a lack of parking, but also restrictions on parking availability, such as those described by the commenter, which could limit the public's access to tidal waterways.

Expiration of Municipal Public Access Plans

87. COMMENT: These rules place additional requirements on small towns along the Delaware River. The requirement to update Municipal Public Access Plans every six years is another burden to small towns. The Department should require updates to the plans consistent with the municipal master plan requirements to update plans. Having different updating requirements is costly to municipalities. (53)

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88. COMMENT: Expiration of an approved Municipal Public Access Plan after six years, as noted in N.J.A.C. 7:7E-8.11(m), should be revised to make review of the Municipal Public Access Plan concurrent with the municipal master plan reexamination since the approved Municipal Public Access Plan is required to be adopted as part of the municipal master plan. Each municipality's master plan reexamination is on a different schedule but is currently required to occur at least every six years. (25, 47)

89. COMMENT: The proposal currently states that the Municipal Public Access Plan would be evaluated and readopted every six years as part of the Master Plan; however, recent legislation has modified the Municipal Land Use Law to allow municipalities to readopt their municipal master plans every 10 years instead of six. Therefore, the public and the municipality would only be presented with the opportunity to evaluate, comment on, and hopefully improve their Municipal Public Access Plan every 10 years, much too long of a time frame to ensure adequate access is provided. (55)

90. COMMENT: The Department should provide for more frequent reviews of the implementation of a municipal access plan. The Department should commit to confirm that municipalities are actively implementing their public access plans. If implementation has not commenced or becomes stagnant, the Department should be able to take corrective actions,

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including, but not limited to, assuming the role of the municipality in plan implementation and/or plan approval revocation. Implementation reviews should occur at least twice a year and should be triggered by applications that are subject to the public access rules. The public's right to access the waterfront is not served by a review occurring once every six years. (46)

RESPONSE TO COMMENTS 87 THROUGH 90: The Department proposed a six-year period of validity of the Municipal Public Access Plan in order to allow the review of the plan to be performed concurrently with the municipality's review of its master plan. While the Department does not anticipate that noncompliance with Department-approved Municipal Public Access Plans will be a significant issue, it does agree that compliance does need to be monitored and a mechanism is necessary to enable the Department to act expeditiously when non-compliance is discovered. In response to these comments, the Department modified N.J.A.C. 7:7E-8.11(m) through the notice of substantial change process, to eliminate the six-year expiration date and the requirement for municipalities to renew their Municipal Public Access Plans. Instead, the Department amended N.J.A.C. 7:7E-8.11(j)4 to require municipalities to report on the success or failure of their approved plan every five years after the date of adoption of the Municipal Public Access Plan into the municipal Master Plan.

In addition, the Department is adopting the changes proposed at N.J.A.C. 7:7E-8.11(m) in the notice of substantial changes , to replace the six year expiration and renewal process with a

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new process by which the Department can revoke a Municipal Public Access plan for good cause. Good cause is defined to include failure to implement the Municipal Public Access Plan and/or noncompliance with the Municipal Public Access Plan such as inappropriate expenditure of dedicated Public Access Fund monies for purposes other than public access, conversion of public access sites to other uses, and failure to maintain existing public access and signage. These changes give the Department the ability to act appropriately in instances of non-compliance.

91. COMMENT: The proposed six-year term for Municipal Public Access Plans at N.J.A.C. 7:7E-8.11(m) is supported. However, the rule should afford municipalities the opportunity to revise the plans sooner to take advantage of opportunities to provide greater public access through property acquisitions for funding assistance programs. Proposed N.J.A.C. 7:7E-8.11(m)1 through 5, which address renewal of Municipal Public Access Plans, is supported (43)

RESPONSE: The Department acknowledges the commenter's support of originally proposed N.J.A.C. 7:7E-8.11(m). The Department's intent in proposing the six-year term for Municipal Public Access Plans was to allow municipalities to review the plans at the same time as they reviewed their Municipal Master Plan in accordance with the Municipal Land Use Law, while also providing the Department with a periodic opportunity to review progress toward

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accomplishing the goals established in the approved Municipal Public Access Plan. However, recent legislation has modified the Municipal Land Use Law to allow municipalities to readopt their municipal master plans every 10 years instead of six. Since the originally proposed rules require municipalities to adopt Municipal Public Access Plans into their Master Plans, the Department has determined that, rather than setting the plan renewal at a term inconsistent with Master Plan review or extending the term of the plan (and thus the frequency of Department review) to 10 years, it is appropriate to delete the six-year expiration date and the requirement for municipalities to renew their Municipal Public Access Plans originally proposed at N.J.A.C. 7:7E-8.11(m). Instead, the Department is adopting changes proposed in the notice of substantial changes at N.J.A.C. 7:7E-8.11(j)⁴ to require municipalities to report on the status of accomplishment of their approved plan every five years after the date of adoption of the Municipal Public Access Plan into the municipal Master Plan. Additionally, as referenced in the Response to Comments 87 through 90 above, under adopted N.J.A.C. 7:7E-8.11(m) the Department may revoke an approved Municipal Public Access Plan for good cause. The Department believes that these changes accomplish an appropriate balance between making the process as efficient as possible for participating municipalities while enabling the Department to monitor progress in accomplishing plan goals and, if necessary, take appropriate action should a municipality be expending public access funds for non-public access purposes, taking other inappropriate actions or simply not acting to achieve the goals of the approved plan.

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While it is anticipated that the required analyses that are part of the information that must be submitted as part of an application for approval of a proposed Municipal Public Access Plan (including a public access needs assessment and implementation strategy, see N.J.A.C. 7:7E-8.11(e)) will result in plans that do not need to be frequently amended, municipalities are not limited as to when they may propose to amend a plan. In fact, the adopted rules anticipate that approved plans may be periodically amended and specify at N.J.A.C. 7:7E-8.11(l) what types of amendment require Department review and approval.

Enforcement of Municipal Public Access Plans

92. COMMENT: The proposed regulations lack any enforcement mechanism. (22)

93. COMMENT: The proposed rules rely too much on municipal planning and lack enforcement and compliance mechanisms to ensure that access is provided. (55)

94. COMMENT: The Department has not created any oversight or enforcement measures to ensure these plans are implemented so that the promised access actually results. The Department has repeatedly told the public that it has the power to withhold funding and permits from towns that do not properly promote access; but it has not codified those powers in this proposal. The

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Department has entrusted an essential public right to those who have often trampled upon it, and told the public, “Trust us, we’ll keep the towns in line.” (46)

95. COMMENT: The Department must also establish enforcement standards for Municipal Public Access Plans to compel the municipalities to actually implement the plans they develop. (55)

96. COMMENT: The Department claims it possesses tools to compel towns to generate plans that expand access, but the rule contains no enforcement provisions or guidance for the Department to follow when using its implied enforcement mechanisms. As a consequence, any attempt to compel adequate plans would be arbitrary. (31)

97. COMMENT: There is a serious disconnect between the plan approval stage and the plan implementation stage. The rule has no provisions for the Department to oversee or to compel the implementation of a Municipal Public Access Plan, nor does the proposed rule give the Department the power to enforce such plans. (46, 48)

98. COMMENT: The deletion of existing N.J.A.C. 7:7E-8A leaves a gap in enforcement of the rules as no clear method is provided for how municipalities will ensure all rules are met. (8)

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99. COMMENT: Even if the idea of these plans was a good one, there are very few enforcement mechanisms in the proposed rules. And there is really no detail as to how the towns pay money instead of providing access, how that money is going to be managed or how the public will be assured that such money is used to provide better access in the places where it is needed. (10)

100. COMMENT: Even if a town adopts a beneficial Municipal Public Access Plan, that plan, like so many other municipal land use plans, may not be implemented right away or ever. A well-conceived plan that is never implemented does nothing to promote public access to the waterfront. (46, 48)

101. COMMENT: Proposed N.J.A.C. 7:7E-8.11(i) does not specify the course of action should the Department find a plan inconsistent with that Doctrine. (43)

RESPONSE TO COMMENTS 90 THROUGH 101: As indicated above in the Response to Comments 33 through 43 above, the Department is not adopting the proposed six-year term for an approved plan. The adopted rules instead require more frequent progress reporting on a five-year interval at N.J.A.C. 7:7E-8.11(j). Additionally, adopted N.J.A.C. 7:7E-8.11(m) provides the

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Department with the ability to revoke an approved Municipal Public Access Plan for good cause. Upon determination that good cause exists, the Department will furnish written notice of its determination to the municipality and will provide to the municipality a 30-day minimum period to correct the noncompliance, explain why the noncompliance cannot be remedied, submit a plan to remedy such noncompliance, or demonstrate that good cause for revocation does not exist. N.J.A.C. 7:7E-8.11(m)2 provides that, if the requirements are not met, the Department will provide the municipality with written notice by certified mail of its intent to revoke the Department's approval of the plan and of the municipality's right to a hearing pursuant to the provisions of N.J.A.C. 7:7-5. Finally, N.J.A.C. 7:7E-8.11(m)3 provides that, if a hearing is not requested within 10 days of receipt of the notice of intent to revoke, the Municipal Public Access Plan shall be revoked. The Department believes that these herein adopted changes will provide the Department with sufficient ability to ensure compliance with the plans and also afford municipalities a reasonable opportunity to remedy any non-compliance.

Parking for public access

102. COMMENT: In Deal, you are not allowed to park anywhere for more than two hours. Also at the north side of Sea Bright, you really are not able to park. (64)

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103. COMMENT: There should not be strict restrictions on parking such as in South Mantoloking, which has a two-hour parking limit. Easy access points and parking should be provided to allow spreading out of crowds on the beaches which contributes to the safety of the public. (54)

104. COMMENT: The Borough of Lavallette has two-hour parking. It was approved by the Department of Transportation. What this has done to the highway is really horrendous. Anyone that would want to utilize the stores now knows they can only park there two hours. So what they are doing is parking on the opposite side of the highway, which is less than 50 feet away, and parking from morning till night to go to the beach. There is no public parking required by most businesses, and you have to scramble in order to get to the beach or to park your car. Two-hour parking restrictions should be stopped. (29)

105. COMMENT: In many towns, short parking terms such as 30 minutes have been imposed and in other cases “no parking signs” have appeared. (14)

106. COMMENT: The Department should eliminate “no parking” regulations near the beaches that are designed to limit access to this public trust resource. (17)

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107. COMMENT: The proposed rules do not bind towns to any specific requirements for increasing or maintaining parking and other amenities as part of public access. Firm requirements are sorely needed because towns such as Sea Bright, Deal and Long Branch's Elberon section have taken extra steps to prevent public access by limiting parking to two hours or less or prohibiting parking altogether. (41)

108. COMMENT: Providing a walkover to access the beach without providing parking is meaningless. Providing adequate parking must be considered with any of the access mechanisms identified above. (43)

RESPONSE TO COMMENTS 102 TO 108: The Department agrees that adequate parking, including parking of sufficient duration to allow realistic opportunities for public access, is a significant component of public access. In recognition of the importance of parking as a component of public access, N.J.A.C. 7:7E-8.11(e)3iii as proposed required that an application for approval of a Municipal Public Access Plan include a needs assessment that evaluates existing practical limitations to public access including a lack of restrooms or parking. This provision additionally required that the municipality submitting the application include an analysis of alternatives to address any limitations determined to exist. To clarify that the Department considers adequate parking to include parking that is not restricted (including

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restrictions to the duration of parking allowed), the Department is adopting changes to this subparagraph proposed in the notice of substantial changes to explicitly require the analysis to include restrictions on available parking. In reviewing applications for approval of Municipal Public Access Plans, the Department will be considering whether any restrictions that are in place are reasonable and do not inappropriately limit the public's right to access. The Department is also adopting changes proposed in the notice of substantial changes on adoption, as explained further in the Response to Comments 6 through 28, to provide a comment period on a proposed Municipal Public Access Plan submitted to the Department for approval. This will provide the public with an opportunity to identify for the Department any situations, including parking restrictions, that have limited access to tidal waterways and their shores that are not adequately addressed in the proposed plan.

Monetary contribution formula for linear projects

109. COMMENT: A standard formula should be utilized to calculate a payment in lieu of access whether or not a municipality has an approved Municipal Public Access Plan. The formula at proposed N.J.A.C. 7:7E-8.11(f) could apply to linear projects. To effect this change, it is suggested that a new paragraph N.J.A.C. 7:7E-8.11(c)4 be inserted stating:

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“Notwithstanding the provisions of this section, the public access requirements for development involving applications by the New Jersey Turnpike Authority shall, in all municipalities, be fulfilled using the formula provided for at N.J.A.C. 7:7E-8.11(f). Any Municipal Public Access Plan adopted pursuant to this section shall require that applicants for development by the New Jersey Turnpike Authority shall be fulfilled pursuant to N.J.A.C. 7:7E-8.11(f).” (58)

110. COMMENT: The formula to calculate the amount of a monetary contribution to be made to a Municipal Public Access Plan or equivalent fund needs clarification as to its application to a linear transportation project. It is suggested that alternative calculation be devised for linear projects. (19)

111. COMMENT: Proposed N.J.A.C. 7:7E-8.11(f) calculates the Total Walkway Cost (TWC) and the Land Acquisition Cost (LAC) and adds those values to determine a total monetary contribution. The TWC is calculated by first determining a total square foot area of walkway based, in part, on the length of perpendicular access and length of access to the shoreline. While these values are calculable for a traditional lot of property, they are not applicable to a right-of-way. For roadways, it is suggested that the length of walkway be based on the width of the right-of-way measured perpendicular to the centerline of the roadway that is the subject of the

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application. That width would then be multiplied by 10 feet which is the standard width of a walkway and by the proposed \$7.00 per square foot cost in the current formula to calculate the TWC applicable to a highway project. The LAC for roadway projects is more difficult to formulate because it is based on the assessed value of a property which does not apply to roadway rights-of-way. If the Department wants to include LAC in the formula for rights-of-ways then it is requested that the Department clarify how this would be calculated for highway rights-of way. (58)

112. COMMENT: A fund that could be utilized to meet a public transportation project's public access requirements is supported. The use of a fund would eliminate use of public funds to search for and design offsite public access when onsite public access is prohibitive or not practical due to "substantial permanent obstructions or the risk of injury from proposed hazardous operations." (19)

113. COMMENT: The Department should set up a Statewide Public Access Fund for State agencies much like the No Net Loss Reforestation Act Fund. The No Net Loss Reforestation Act allows direct monetary compensation to the Department; the host municipality can then apply to the Department for the money for tree planting. The same process could be set up for public access finding, thus providing a reasonable and consistent approach to meeting public

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access requirements by State agencies. If a Statewide Public Access Fund were established as an option, it should be able to be utilized without the burden of demonstration of alternative locations. This would alleviate the need to expend limited public funds in pursuit of an alternative offsite location. This would be a more cost-effective approach to reach the goal of providing public access and to satisfy the requirements of the rule. The opportunity to contribute to a Statewide Public Access Fund would also be beneficial in situations where a municipality does not have a Department–approved Municipal Public Access Plan or where a linear transportation project traverses multiple municipalities. The latter scenario could further complicate the public access requirements if each municipality has a Department-approved Municipal Public Access Plan with different public access requirements. A Statewide Public Access Fund is an important alternative approach that would be fiscally responsible for State monies, especially in the current economic situation. (19)

RESPONSE TO COMMENTS 109 THROUGH 113: The Department agrees that clarification is necessary to address how the public access fund calculation would apply to linear projects, including roadways. In response to comments received, the Department modified N.J.A.C. 7:7E-8.11(f)2, to specify a standard formula to calculate a payment amount for linear projects when a Municipal Public Access Plan requires a monetary contribution to be used to provide new or enhanced public access. The original formula for determining the amount of monetary

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contribution did not work for rights-of way because rights-of-way are long linear properties. The LAC was not appropriate because rights-of-way are valued differently than residential, commercial or industrial properties. Therefore, the adopted rules contain a formula that identifies the boundaries of the right-of-way to be used to calculate the total walkway cost (TWC). The new formula also accounts for the value of the right-of-way by using the value of adjacent residential, commercial, or industrial properties within one-half mile upstream and downstream from the centerline of the right of way to calculate the LAC. The Department acknowledged that a Statewide Public Access Fund for State agencies modeled after the fund created by the No Net Loss Reforestation Act could be a beneficial means to further enhance public access on a municipal, regional, and Statewide basis. Please note that the Department explored the feasibility of a separate State fund for payments from State agencies and determined that it was appropriate to provide that when the issuance of any permit to the NJDOT under this chapter requires new or enhanced public access and the Department and NJDOT determine that it is appropriate for the Department or the municipality to undertake the public access project, the NJDOT may provide funding for such access project to the Department or the municipality pursuant to an agreement between NJDOT and the Department. Therefore, the Department is adopting changes proposed in the notice of additional substantial changes to include this provision. (see N.J.R. 1864(a)).

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114. COMMENT: Proposed N.J.A.C. 7:7E-8.11(a) describes public access to the waterfront and N.J.A.C. 7:7E-8.11(f) provides a fee calculation to calculate monetary contributions instead of providing access. Frequently utility rights-of-way are located within easements whereby public access cannot be conveyed since the applicant does not own the property. It is recommended that the language within these sections be modified to exempt linear utility facilities such as pipelines or power lines from public access requirements and fees in lieu of access in situations where the permit applicant occupies the right-of-way by an easement. (39)

RESPONSE: The Department does not agree that linear facilities such as pipelines or power lines should be exempt from public access requirements because public access is appropriate when development occurs regardless of whether the development is being proposed by the owner of the property in fee simple or by someone else with the permission of the fee simple owner. While it is true that onsite public access may not always be possible, it is appropriate that these types of linear projects provide public access opportunities. However, as discussed in the Response to Comments 109 through 113 above, the Department does agree that a monetary contribution formula is needed to address linear projects and is adopting changes proposed in the notice of substantial changes to add a formula at N.J.A.C. 7:7E-8.11(f)2 for calculating a payment amount for linear projects.

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Exclusions from Municipal Public Access Plans (N.J.A.C. 7:7E-8.11(g))

115. COMMENT: Although the port access language is part of proposed N.J.A.C. 7:7E-8.11(n), which pertains only to municipalities that have not adopted an approved Municipal Public Access Plan, proposed N.J.A.C. 7:7E-8.11(g) provides that Municipal Public Access Plans shall not include "...on site public access requirements in excess of those that would be required under this chapter in the absence of an approved Municipal Public Access Plan."

Accordingly, it appears that port facilities will be treated the same regardless of whether they are located in a municipality that has or does not have an approved Municipal Public Access Plan.

For the purposes of clarity, the rule should refer to offsite access as well as onsite. (28)

116. COMMENT: The commenters oppose the proposed language at N.J.A.C. 7:7E-8.11(g) and (g)1 that states that a Municipal Public Access Plan shall not include onsite public access requirements in excess of those that would be required under the rules in the absence of an approved Municipal Public Access Plan because the exemptions for existing commercial, residential, industrial, homeland security facilities, and marinas would apply even to towns with Municipal Public Access Plans. (46, 48)

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117. COMMENT: Proposed N.J.A.C. 7:7E-8.11(g) limits the ability of the municipality to create its own Municipal Public Access Plan based on what it believes are the appropriate regulations for its own municipality. If the Department is encouraging the creation and use of the Municipal Public Access Plan, it should not then create a clause that limits the Municipal Public Access Plan based on the standard of regulations it highlights later for municipalities without a plan. There is no incentive for a municipality to create a plan because the public access requirements for municipalities without a plan are vague and create too many loopholes for developers to opt out. Proposed N.J.A.C. 7:7E-8.11(g)1 limits a municipality's ability to address any weaknesses with the standard requirements, taking away any incentive for the municipality to go through the costly and time consuming process of creating a master plan element. (38)

118. COMMENT: In the face of overwhelming public opposition to this rule proposal, the Department continues to claim its "goal is to provide better access in more appropriate locations." But the fact that municipalities are prohibited from requiring better access in their plans than the proposed rule requires in towns without a plan in accordance with N.J.A.C. 7:7E-8.11(g)1 is clearly contrary to this stated "goal." (46)

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119. COMMENT: Proposed N.J.A.C. 7:7E-8.11(d) provides that a Municipal Public Access Plan shall not provide for access that is contrary to any requirement contained in this chapter. However, proposed N.J.A.C. 7:7E-8.11(g) provides that a Municipal Public Access Plan shall not contain onsite public access requirements in excess of those that would be required under this chapter in the absence of an approved Municipal Public Access Plan. It should be clarified that a Municipal Public Access Plan should not have more stringent requirements for onsite or offsite public access. (19)

120. COMMENT: It is requested that N.J.A.C. 7:7E-8.11(g) be amended to state that Municipal Public Access Plans may not require public access for rehabilitation, renovation, and expansion of a current development for which no public access currently exists. (58)

RESPONSE TO COMMENTS 115 THROUGH 120: It was not the Department's intent to require that Municipal Public Access Plans mirror in all cases the standards applicable to municipalities that do not have a Municipal Public Access Plan. Instead, the intent of the originally proposed language at N.J.A.C. 7:7E-8.11(g) was to not impose a requirement to provide public access at the local level for a type of activity that was exempted at the State level. For example, since the Department has made the determination that it is inappropriate to require new public access solely because an existing facility is performing maintenance activities, the

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Department will not approve a Municipal Public Access Plan that requires provision of public access or payment into a public access fund for an existing facility in that municipality performing these same maintenance activities.

To clarify that intent, in response to these comments the Department is adopting changes at N.J.A.C. 7:7E-8.11(g) proposed in the notice of substantial changes to more clearly specify what a Municipal Public Access Plan shall not require. These adopted amendments will additionally help clarify when municipalities do have the discretion to include in a Municipal Public Access Plan submitted for approval, public access requirements different from those that would apply in a municipality that does not have a Department-approved Municipal Public Access Plan. These changes included the replacement of the word “include” with “require” at N.J.A.C. 7:7E-8.11(g) in the lead-in to paragraphs (g)1 through 3, and the deletion of N.J.A.C. 7:7E-8.11(g)1, prohibiting onsite public access requirements in excess of those that would be required under this chapter in the absence of an approved Municipal Public Access Plan, to ensure that municipalities will not impose a requirement to provide public access at the local level for a type of activity that was exempted at the State level. The Department is adopting changes proposed in the notice of substantial changes to recodify N.J.A.C. 7:7E-8.11(g)2 to N.J.A.C 7:7E-8.11(g)1 and modify it to provide that Municipal Public Access Plans shall not require public access along the Hudson River in the Hudson River Waterfront Area that is

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inconsistent with N.J.A.C. 7:7E-3.48(e) (that is, the provisions regarding the Hudson Waterfront Walkway) but that elsewhere in the Hudson River Waterfront Area public access is governed by the standards in the public access rule at N.J.A.C. 7:7E-8.11. The Department is adopting changes proposed in the notice of substantial changes to recodify N.J.A.C. 7:7E-8.11(g)3 to N.J.A.C. 7:7E-8.11(g)2 with a change to harmonize the syntax with the change to the lead-in phrasing at paragraph (g). N.J.A.C. 7:7E-8.11(g)4 is recodified to N.J.A.C. 7:7E-8.11(g)3, with the same change to harmonize the syntax. The Department is adopting new N.J.A.C. 7:7E-8.11(g)5 through 8, proposed in the notice of substantial changes, to complete the list of categories of development for which a Municipal Public Access Plan shall not require public access. These are existing commercial development; existing residential development or new residential development that consists only of a single family home or duplex not in conjunction with prior development; existing industrial or public development; existing homeland security facilities; and existing or new ports. Each provision in the list directs the reader to the applicable provision of the public access regulation at N.J.A.C. 7:7E-8.11 that governs public access at the specific type of development.

Public access requirements in municipalities without Municipal Public Access Plans

(N.J.A.C. 7:7E-8.11(n))

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121. COMMENT: Proposed N.J.A.C. 7:7E-8.11(n)3 explains that if a developer can prove they cannot provide access on their site, and then prove that they cannot provide offsite access within the municipality, they can provide access along the same waterway within a different municipality, as long as the Municipal Public Access Plans are consistent. The rule lists the factors the Department will use to determine if the proposed offsite access is equivalent to the one required onsite, including type, cost, and environmental impact/benefit. It is suggested that these exceptions be removed and replaced with clear, stringent requirements that put the burden on the developer to prove they cannot provide the public's right to waterfront access. Coordination within the municipality to create consistent local requirements is difficult enough; it will be next to impossible to do so with a neighboring municipality. (38)

RESPONSE: The rule as originally proposed recognizes that there may be situations where onsite access is not feasible, and identified the factors that may justify access being provided offsite. Particularly, offsite access in lieu of onsite access will be allowed where it is demonstrated by the applicant that onsite access is not feasible based on the size of the site, the character of the waterway (such as strong currents or other circumstances that make onsite access undesirable), or that there are less environmental impacts or there are environmental benefits to offsite access. The Department believes that these standards that must be proven by the applicant to justify provision of public access offsite are appropriate and notes that the

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commenter has not suggested any alternate factors that should be considered. As indicated by the commenter, the rule additionally specifies the factors that the Department will utilize if the applicant has proven that onsite access is not feasible to determine if proposed offsite access is equivalent to the access that would have been required onsite. The Department believes that the factors it has identified in the rules as proposed accurately express the type of analysis the Department will conduct to determine if the proposed access is equivalent and that removal of this list of factors that the Department will utilize to make the equivalency determination, as suggested by the commenter, would be inappropriate. However, the Department is adopting changes proposed in the notice of substantial changes at N.J.A.C. 7:7E-8.11(n)2iii(2), (n)2iii(3), (n)3iii and (n)4ii to remove “cost” as one of the factors the Department will consider when determining whether the proposed offsite public access is equivalent to that which would have been required onsite. The Department believes this change is warranted because the cost of a public access project can vary widely and inexpensive access can be as suitable as an expensive project; therefore, the Department has determined that “cost” is not a relevant factor in determining whether or not a proposed public access project is acceptable.

Proposed N.J.A.C. 7:7E-8.11(n)3iv states that if an applicant demonstrates to the Department that offsite public access within the same municipality is not feasible because there are no sites available upon which to provide public access, equivalent offsite access shall be provided on the same waterway within a neighboring municipality where access is consistent

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with the neighboring municipality's Municipal Public Access Plan. This subparagraph does not require municipalities to coordinate with neighboring municipalities.

Public access at ports

122. COMMENT: It appears that there is a technical oversight with regard to the public access requirements for port facilities. In the proposal Summary, the Department states, "Since port activities are already providing water access for navigation and commerce, neither existing nor new ports are required to provide public access unless the proposed activities or new port would eliminate existing public access." (See 43 N.J.R. 780, April 4, 2011.) However the rule text at proposed N.J.A.C. 7:7E-8.11(n)5 only addresses existing port facilities. This section should be clarified to provide that both existing and new ports shall not be required to provide public access unless an activity or a new port would eliminate public access. (28)

123. COMMENT: The rule Summary clearly indicates the Department's intent as it pertains to public access at ports. Specifically it states, "Since port activities are already providing water access for navigation and commerce, neither existing ports nor new ports are required to provide public access unless the proposed activities or new port would eliminate existing public access." (See 43 N.J.R. 780, April 4, 2011.) However the language of the rule is somewhat confusing.

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The rule mentions “practicability” of access as a prerequisite of an access requirement while the Summary of the rule is clear and unambiguous. The language of the rule should reflect the Summary. Accordingly, the rule should be revised to provide that access within ports and marine terminals is considered infeasible and is not required unless the activities being regulated would eliminate existing public access. It appears that the language in the rule was unintentionally ambiguous, and the language should be clarified to reflect the Department’s position as outlined in the rule Summary. (5)

RESPONSE TO COMMENTS 122 AND 123: In response to these comments, the Department is adopting changes at N.J.A.C. 7:7E-8.11(n)5 proposed in the notice of substantial changes to clarify that neither existing nor new ports are required to provide public access except that existing ports must maintain any existing access. The Department determined that port activities are already providing water access for navigation and commerce. In addition to the above change, the Department is adopting changes at N.J.A.C. 7:7E-8.11(n)5i(1) proposed in the notice of substantial changes to require that, when onsite access is determined to be infeasible, offsite public access must be provided on the same waterway and within the same municipality as the development. This requirement is consistent with the requirement for other types of development in the rule. The Department is also adopting changes at N.J.A.C. 7:7E-8.11(n)5i(1)

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proposed in the notice of substantial changes to remove cost as one of the factors to be considered (see the Response to Comment 120).

Public access for transportation projects

124. COMMENT: While it is recognized that the Department has attempted to incorporate safety and security concerns into the proposed rule, in order to avoid confusion, it is recommended that the proposed rule clearly recognize that in the case of New Jersey Turnpike Authority highways, public access is restricted by law. Accordingly, the rules should be amended to include a provision which provides that public access to tidal waterways and their shores shall not be required on a superhighway where public access is expressly prohibited by law or regulation. This could be accomplished through the addition of a new paragraph, proposed N.J.A.C. 7:7E-8.11(b)6, which states that “no public access shall be required on superhighways on which public access is restricted by law or regulation.” The term “superhighway” should be defined to include those highways listed at existing N.J.A.C. 7:7E-8.11(b), including the New Jersey Turnpike and the Garden State Parkway. Alternatively, the rule could state that “no public access shall be required in areas restricted by law or regulation, including but not limited to limitations on the use of roadways pursuant to the New Jersey Turnpike Authority regulations at N.J.A.C. 19:9-1.9.” (58)

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125. COMMENT: It is requested that for new public developments, N.J.A.C. 7:7E-8.11(n)3ii be clarified to confirm that no onsite public access is required if public access is prohibited by law, such as the New Jersey Turnpike Authority's prohibition on pedestrian access on the New Jersey Turnpike and Garden State Parkway. It is suggested that this can be accomplished by adding the following phrase at the end of the first sentence of this paragraph: "or where access by the public or pedestrians is prohibited by any law, rule or regulation, including but not limited to N.J.A.C. 19:9-1.9."

In addition, it is requested that the following sentence be added to the end of N.J.A.C. 7:7E-8.11(n)3iii: "onsite access shall not be required where access by the public or pedestrians is prohibited by any law, rule, or regulation, including but not limited to N.J.A.C. 19:9-1.9." (58)

126. COMMENT: Pedestrian access is precluded by regulation for some types of roadways such as interstate highways and bridges. Although the proposed rule does not require public access be provided for rehabilitation or expansion of existing development that remains within the parcel containing the existing development if there is not existing public access, public access would be required for expansion beyond the parcel or for new public development. It does not seem appropriate for a public transportation agency to be required to purchase additional rights-of-way

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to provide offsite access elsewhere for a roadway that did not allow public access in the first place. (19)

127. COMMENT: There should be an exception to the requirement to provide any public access either onsite or offsite for roadways with controlled access that is, limited access highways such as interstates, freeways, parkways, expressways and other major arterials, since direct access to the transportation facility is limited or controlled as described below:

Control of access: The condition where the rights of owners, occupants or other persons of land abutting a highway to access, light, air or view in connection with the highway are fully or partially controlled by a public agency.

Full control: The condition under which the authority to control access is exercised to give preference to through traffic to a degree, but in addition to interchange connections with selected public roads there may be some intersections at grade.

Partial control: The condition under which the authority to control access is exercised to give preference to through traffic to a degree that, in addition to access connections with selected public roads, there may be some crossings at grade and some private driveway connections. (19)

128. COMMENT: Transportation projects should not be considered “development” but rather as infrastructure improvement projects. These projects should not be grouped together under the

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larger category of “development”; this has been a problem in all of the rules. Transportation facilities are different than other types of development and should be treated differently.

Roadways are linear facilities with limited rights-of-way (typically narrow corridors) and are subject to more physical constraints than most development projects. New Jersey Department of Transportation money is limited; schedules are well-defined to take advantage of Federal funding; real estate is costly; and taxpayers’ money is being utilized. Most projects involve improvements to existing roadways and bridges. Public transportation infrastructure projects are implemented for the benefit and safety of the traveling public; there is no “profit factor” as is the case with development projects. Another example of why it is not appropriate to include transportation projects with development projects can be found at proposed N.J.A.C. 7:7E-8.11(n)3ii, which refers to providing public access “during normal operating hours.” A roadway or a bridge does not have “normal operating hours” and thus this provision does not apply. (19)

RESPONSE TO COMMENTS 124 THROUGH 128: The Department does not agree that linear transportation projects should be exempt from public access requirements. While it is true that onsite public access may not always be possible, as recognized in the April 4, 2011 proposal, it is appropriate that linear projects provide public access opportunities in some manner. However, the Department does agree that public highways are a unique type of development that should be addressed separately from other forms of public development. Accordingly, the Department

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proposed changes as part of the March 19, 2012 Notice of Substantial Changes to N.J.A.C. 7:7E-8.11 to create a separate paragraph at N.J.A.C. 7:7E-8.11(n)6 to address public access requirements for public highways, including superhighways such as the New Jersey Turnpike and the Garden State Parkway. Please note that the Department made further amendments as part of an additional notice of substantial changes proposed on July 2, 2012, (see 44 N.J.R. 1864(a)), including recodification of N.J.A.C. 7:7E-8.11(n)6 to N.J.A.C. 7:7E-8.11(o)). Other changes impacting this response to comment are note as applicable below.

The Department additionally proposed in the March 19, 2012 notice of substantial changes to address public access requirements for superhighways at N.J.A.C. 7:7E-8.11(n)6i and the requirements for public highways other than superhighways at N.J.A.C. 7:7E-8.11(n)6ii. In the public access rule prior to the amendments being adopted at this time at N.J.A.C. 7:7E-8.11(f)3, which was proposed for deletion, “superhighway” was defined to mean the Garden State Parkway, New Jersey Turnpike, Atlantic City Expressway, and Interstates 76, 78, 80, 95, 276, 278, 195, 295, and 676. This definition of superhighways was proposed to be restored at N.J.A.C. 7:7E-8.11(n)6i (adopted N.J.A.C. 7:7E-8.11(o)1) as part of the March 19, 2012 notice of substantial change. For both superhighways and public highways other than superhighways, the proposed change allowed maintenance or rehabilitation within the existing paved constructed development to be conducted without the need to provide additional public access. The Department subsequently determined that it would be more appropriate to amend this provision

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for consistency with requirements applicable to commercial, industrial, and other public development to allow maintenance or rehabilitation within the existing right-of-way (as opposed to the paved area) to be conducted without the need to provide additional public access as discussed in the July 2, 2012 notice of additional substantial changes at 44 N.J.R. 1864. Both before and after the latter amendment to what was initially proposed, existing public access is required to be maintained; if it cannot be maintained, it must be replaced. If there is no existing public access onsite, no public access is required for superhighways or other public highways. This continues to be the case in the adopted rule.

For superhighways, the April 4, 2011 proposal at N.J.A.C. 7:7E-8.11(n)6i(2) and (3) required that expansions of superhighways must provide public access. However, in recognition that new public access on these roadways may be restricted from either a regulatory or practical standpoint, the March 19, 2012 notice of substantial changes proposed that when public access was required for superhighways, the applicant was not required to look onsite to construct public access facilities. Instead, the applicant was required to either provide offsite public access in the same municipality along the same waterway or, if it demonstrated that public access within the same municipality was not feasible because of the lack of any alternative sites in that municipality, offsite access on the same waterway within a neighboring municipality. The March 19, 2012 notice of substantial changes provided that public access for superhighways

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could be satisfied through a DEP approved Municipal Public Access Plan if one existed or, if one did not exist, public access was required to be provided in accordance with the public access goals at N.J.A.C. 7:7E-8.11(b) where the list of public access options can be found. The Department subsequently determined that it would be appropriate to amend this provision to allow and encourage transportation agencies and counties to develop and seek Department approval of Transportation Public Access Plans, similar to Municipal Public Access Plans. As a result, adopted N.J.A.C. 7:7E-8.11(o)1ii(1) requires superhighways to provide public access in accordance with either a Department-approved Transportation Public Access Plan; a Department-approved Municipal Public Access Plan; funding to the Department or municipality ; or offsite on the same waterway.

For public highways other than superhighways, as indicated above, the Department proposed that a maintenance or rehabilitation activity that remains entirely within the paved constructed development could be conducted providing existing public access is maintained or, if such public access cannot be maintained, it must be replaced. However, as the same types of restrictions applicable to superhighways are generally not applicable to these roadways, the Department proposed at N.J.A.C. 7:7E-8.11(n)6ii(2) that new public highways, including expansions outside the paved constructed development, (subsequently amended to maintenance or rehabilitation within the existing right-of-way, as indicated above), must provide onsite public access. For these new public highways, offsite public access will only be allowed if the

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applicant demonstrates that onsite public access is not feasible based on the risk of injury from proposed hazardous operations or substantial permanent obstructions, or upon documentation of a threat to public safety due to unique circumstances concerning the subject property, and no reasonable measures can be taken to avert these risks. This requirement reflects the Department's belief that, absent special circumstances, onsite public access is preferable to offsite access. Proposed N.J.A.C. 7:7E-8.11(n)6ii(3) required that, where it has been demonstrated that onsite public access is not feasible, equivalent public access must be provided offsite on the waterway(s) and within the municipality(s) where the development is located. The proposed offsite access must be consistent with the Municipal Public Access Plan of the municipality in which the development is occurring or, if there is no Municipal Public Access Plan, the access must be located and designed in accordance with N.J.A.C. 7:7E-8.11(b). State and Federal highways are not subject to municipal review; therefore, municipalities cannot impose requirements inconsistent with the rule. As discussed above, based on comments received on the notice of substantial changes, the Department proposed additional substantial changes to the proposed amendments discussed above on July 2, 2012 (see 44 N.J.R. 1864).

Finally, similar to proposed N.J.A.C. 7:7E-8.11(n)6i(3) for superhighways, proposed N.J.A.C. 7:7E-8.11(n)6ii(4) recognized that there may be situations where an applicant for a public highway other than a superhighway may not be able to provide offsite public access within the same municipality as where the development is conducted. Where it has been

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demonstrated that there are no sites available in the same municipality as the project and on the same waterway, proposed N.J.A.C. 7:7E-8.11(n)6ii(4) required that equivalent offsite public access must be provided on the same waterway(s) within a neighboring municipality. Such public access must be consistent with the neighboring municipality's Municipal Public Access Plan or, if there is no Municipal Public Access Plan, the access must be located and designed to be consistent with N.J.A.C. 7:7E-8.11(b). As discussed above, based on comments received on the notice of substantial changes, the Department proposed additional substantial changes to the proposed amendments on July 2, 2012 (see 44 N.J.R. 1864).

129. COMMENT: In certain circumstances, the proposed rule at N.J.A.C. 7:7E-8.11(n)3 and 4 requires public development and homeland security facilities to provide both physical and visual public access. It is suggested that some flexibility be allowed regarding this requirement. It would be beneficial in some cases to have the option of providing visual "and/or" physical access rather than both as currently proposed. To the extent that is possible, the rules should provide the opportunity on a case-by-case basis for the reviewer to exercise flexibility based on engineering, adequate justification, practicality and common sense. The Coastal Permit Program rules at N.J.A.C. 7:7-1.10 provides that "the Department may at its discretion and if consistent with statutory requirements, relax the application of any of the procedures in this chapter when necessary and on the public interest." It is suggested that this language also be included at

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N.J.A.C. 7:7E, at least for public projects. This would allow some flexibility to take into consideration certain circumstances where providing both types of access may not be appropriate or feasible. (19)

RESPONSE: The applicant has flexibility to choose the type of public access proposed as part of the permit application. These options, which were relocated to N.J.A.C. 7:7E-8.11(b), include both physical and visual types of access; therefore, the applicant and the reviewer have flexibility in the types of access provided for a project. The rule supports both physical and visual access. However, it also recognizes through the options at N.J.A.C. 7:7E-8.11(b) that both types of access are not always required. The examples allow the use of a walkway as a public access option. Walkways do not necessarily extend down to the water as in cases where there are steep slopes or sidewalks on bridges.

130. COMMENT: Public access requirements applicable to linear projects should be fulfilled through either payment in lieu of access or offsite access requirements. There should be no onsite public access requirements for any new or existing right-of-way on either the Turnpike or the Garden State Parkway. Should a public access obligation be imposed, such obligation should be fulfilled by establishing offsite access and/or by making a payment in lieu of providing such

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access. A payment in lieu of access which is uniform and dedicated to fulfilling public access requirements within any particular municipality is located is preferred. (58)

RESPONSE: As discussed in the Response to Comments 124 through 128, the Department agrees that new public access is not feasible onsite on either the Turnpike or the Parkway and therefore proposed a new paragraph at N.J.A.C. 7:7E-8.11(n)6 (recodified to N.J.A.C. 7:7E-8.11(o)) and modified in the July 2, 2012 notice of additional substantial changes) that public access requirements for projects on superhighways may be fulfilled by establishing offsite access and/or by making a monetary contribution if an approved Municipal Public Access Plan with a fund is available. The Department acknowledged that a Statewide Public Access Fund for State agencies modeled after the fund created by the No Net Loss Restoration Act could be a beneficial means to further enhance public access on a municipal, regional, and Statewide basis. Please note that the Department explored the feasibility of a separate State fund for payments from State agencies and determined that it was appropriate to provide that when the issuance of any permit to the NJDOT under this chapter requires new or enhanced public access and the Department and NJDOT determine that it is appropriate for the Department or the municipality to undertake the public access project, the NJDOT may provide funding for such access project to the Department or the municipality pursuant to an agreement between NJDOT and the

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Department. Therefore, the Department is adopting changes proposed in the notice of additional substantial changes to include this provision. (see 44 N.J.R. 1864(a)).

Marinas

131. COMMENT: Proposed N.J.A.C. 7:7E-8.11(o)2 defines a new marina for the purposes of this section. The phrase “or, if the marina was not previously permitted because a coastal permit was not required, includes development on a lot or lots which are purchased after April 4, 2011” could create confusion or be misinterpreted as to require public access for existing marinas that are applying for their first permit. For example, public access should not be required at a marina that has been in operation for decades which is applying for its first coastal permit. It is requested that the term new marina development under this section be defined and listed separately as follows:

For new marina development, public access shall be provided onsite during normal operating hours. For the purposes of this subsection, “new marina development” includes:

1. Any change in the existing development that would result in greater than a cumulative 50 percent increase in the area covered by buildings, asphalt, or concrete paving;
2. Proposed development of areas not within the parcel containing the existing development for which a coastal permit was obtained; or

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3. If the marina was not previously permitted because a coastal permit was not required, include development on a lot or lots which are purchased after April 4, 2011. (9)

RESPONSE: Based on this comment, the Department is adopting changes to N.J.A.C. 7:7E-8.11(p)2 (proposed as N.J.A.C. 7:7E-8.11(o)2), proposed in the notice of substantial changes to not differentiate between properties that have previous permits and those that do not. The Department determined that this change is consistent with the changes to the definition of “parcel” as discussed in the Response to Comment 56.

132. COMMENT: Proposed N.J.A.C. 7:7E-8.11(o)5 provides that a change in a marina’s operating hours needs to be approved by the Department. It is requested that this section be amended to remove the requirement for approval from the Department and instead require the marina to update its public access plan onsite and provide conspicuous notice of any changes in the normal operating hours for the marina. There may be a situation or an event that could potentially change the operating hours for the marina, but would be highly unlikely to have an impact on the general public. Marinas, by the nature of their operations, must be open and accessible to their own customers. It would, however, be extremely difficult for the marina to efficiently operate its business, especially during the boating season and the time of year when

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the public would most likely want to access the marina, if it needed to wait for Department approval to change or update operating hours. (9, 56)

RESPONSE: Based on the above comments, the Department is adopting changes at N.J.A.C. 7:7E-8.11(p)5 (proposed as N.J.A.C. 7:7E-8.11(o)5) proposed in the March 19, 2012 notice of substantial changes to remove the requirement for marinas with Department-approved public access plans to obtain approval from the Department to change operating hours. Under the originally proposed rule, marinas would be required to provide public access during normal operating hours. However, the Department recognizes that there may be a situation or event that could temporarily change the operating hours for the marina, and it would not be practicable or feasible for the marina operator to wait for review and approval from the Department. The Department also recognizes that it is in the best interest of marinas to be open and accessible to their customers, especially during the boating season. Accordingly, the Department believes that removing this requirement from the rule will not have a significant impact on the “normal operating hours” of marinas, and thus public access opportunities, except on rare occasions.

Agency-Initiated Changes to the Rule Proposal

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In addition to changes made in response to comments received by the Department, several agency-initiated changes were included in the March 19, 2012 Notice of Substantial Changes to the Proposed Rule Amendments and are summarized below:

The Department is adopting changes to the rules for the coastal general permits governing development activities related to single-family homes or duplexes at N.J.A.C. 7:7-7.8(g)1, 7.9(g)1, 7.11(c)1, 7.12(c)1, 7.14(b)2, and 7.18(a)11i proposed in the notice of substantial changes to delete provisions that stated that the Department will not require public access for developments under these general permits so long as 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. The deletion is necessary because the provision is not consistent with N.J.A.C. 7:7E-8.11(n)2, which governs public access for residential development and provides that for activities at existing residential development any existing public access must be maintained and that for new residential development consisting of a single family home or duplex not in conjunction with a previous development no public access is required.

The Department is adopting changes to the rules for the coastal general permits for development activities relating to single family homes or duplexes at N.J.A.C. 7:7-7.8(g), 7.9(g), 7.11(c), 7.12(c), and 7.18(a)11, proposed in the notice of substantial changes, to add a reference

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to N.J.A.C. 7:7E-3.50, Lands and waters subject to public trust rights, consistent with the public access provisions in all other coastal general permits at N.J.A.C. 7:7.

The Department is adopting changes at N.J.A.C. 7:7E-8.11(b)4 proposed in the notice of substantial changes to eliminate a comma to make clear the Department's intent that access could be restricted for swimmers because of strong currents for public safety reasons; however, fishermen could still fish in strong currents.

Originally proposed N.J.A.C. 7:7E-8.11(c)2 provides that in municipalities from which the Department has not received a resolution incorporating a Department-approved Municipal Public Access Plan in the municipality's Master Plan on or before the date of receipt of a permit application by the Department, access shall be provided in accordance with N.J.A.C. 7:7E-8.11(n) for commercial, residential, industrial and public development, and for homeland security facilities. The Department is adopting the change proposed in the notice of substantial changes to add "ports" to this list of development types. Ports were added to reflect the Department's intention that these facilities be included in the list of types of facilities falling under this paragraph.

At N.J.A.C. 7:7E-8.11(d), the phrase, "Municipalities are encouraged to develop and submit to the Department an application for approval of a Municipal Public Access Plan complying with the requirements of (e) through (m) below," is deleted from this subsection and the phrase, "Municipalities are encouraged to develop and submit to the Department an

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application for approval of a Municipal Public Access Plan” is added to N.J.A.C. 7:7E-8.11(c).

The Department has determined that this statement should be at the beginning of the subsection addressing Municipal Public Access Plans, instead of in the middle of the subsection.

As a clarifying change, the Department is adopting changes proposed in the notice of substantial changes that relocated the sentence, “Municipal Public Access Plans shall not provide for access that is contrary to any requirement contained in this chapter (for example, access that encroaches upon threatened or endangered species habitat or is violation of the dunes rules)” from N.J.A.C. 7:7E-8.11(d) to N.J.A.C. 7:7E- 8.11(d)4. N.J.A.C. 7:7E-8.11(d)1 through 4 specify general conditions applicable to Municipal Public Access Plans. The Department determined that this standard is most appropriately included as a listed requirement, rather than as part of the lead-in language for this subsection.

The Department is adopting the change proposed in the notice of substantial changes that relocates the second sentence in N.J.A.C. 7:7E-8.11(e)3iii to the last sentence of the paragraph as a clarifying change. The first sentence of the paragraph requires a municipality seeking approval of a Municipal Public Access Plan to consider existing practical limitations to public access and the third sentence lists examples of practical limitations. The Department determined that the examples should be listed immediately after the statement requiring the municipality to address practical limitations.

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N.J.A.C. 7:7E-8.11(e) provides the requirements for a Municipal Public Access Plan implementation strategy. As originally proposed, N.J.A.C. 7:7E-8.11(e)5iii stated that a Public Access Fund established in accordance with N.J.A.C. 7:7E-8.11(f) is to be used solely for the development and maintenance of public access, and the development of other municipal programs that ensure reasonable access to the water, and water-dependent and water-oriented activities along all tidal waterways and their shores. The Department's goal is for Public Access Funds to be used for the development of new access and the enhancement of existing access facilities, not for maintenance. Therefore, the Department is adopting the change proposed in the notice of substantial change that replaces "maintenance" with "enhancement" at N.J.A.C. 7:7E-8.11(e)5iii. Similar changes are being adopted at N.J.A.C. 7:7E-8.11(f).

The Department is adopting changes made in the March 19, 2012 notice of substantial changes to clarify the language of the rule without changing the intent of what was originally proposed. Changes include reorganization of wording within a section, providing descriptive wording to assist a rule user in understanding cross-references and other changes. These modifications are at adopted N.J.A.C. 7:7E-8.11(e)5v, (i), (l) and (n)1ii.

The Department is adopting the change proposed in the March 19, 2012 notice of substantial changes to add "land" to the term "equalized assessed value" at N.J.A.C. 7:7E-8.11(f)1ii and iii for consistency with the term "equalized assessed land value" used in the

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example calculation contained in this subsection. The contribution calculated under this subsection is based upon the value of land without improvements.

The Department is adopting the change proposed in the March 19, 2012 notice of substantial changes to amend originally proposed N.J.A.C. 7:7E-8.11(f)1iii to change the term "water frontage" to "length of the waterfront portion of the property" for consistency with terminology in adopted N.J.A.C. 7:7E-8.11(f)1i. A similar change is being adopted at N.J.A.C. 7:7E-8.11(f)iii, where the term "access parallel to shore" which similarly describes the waterfront portion of the property, is changed to "waterfront portion of the property" for consistency.

The Department is adopting a change proposed in the March 19, 2012 notice of substantial changes at N.J.A.C. 7:7E-8.11(h) to change "municipality" to "one or more municipalities" to make clear that if more than two municipalities wish to partner on a joint public access project in their Department-approved Municipal Public Access Plans, that would be allowed under the rules.

The Department is adopting several changes proposed in the March 19, 2012 notice of substantial changes to originally proposed N.J.A.C. 7:7E-8.11(i). The adopted changes include the removal of the terms "the draft" and "and supporting documents" and the addition of the term "application for approval" which describes both the proposed "draft" Municipal Public Access Plan and the documents submitted in support of it. The term "application for approval" is consistent with how these materials are referred to in other Department submittals. The

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Department is also adopting the insertion of the phrase “the broad coastal goals described at” to make clear what is described in N.J.A.C. 7:7E-1.1(c). Finally, the Department is adopting changes proposed in the March 19, 2012 notice of substantial changes that removed the words “standards and” because the contents of originally proposed N.J.A.C. 7:7E-8.11(b) are better described as goals.

The Department is adopting the change proposed in the March 19, 2012 notice of substantial changes at N.J.A.C. 7:7E-8.11(k) to change the reference to “Department permit” to “coastal permit.” This change better describes public access requirements contained in this chapter as applicable to coastal permits, not all Department permits.

To make clear that the relocation of this list of public access options from N.J.A.C. 7:7E-8.11(n) in no way reduces the applicability of this list to public access provided in accordance with that subsection, the Department is adopting a change proposed in the March 19, 2012 notice of substantial changes to add a sentence cross-referencing N.J.A.C. 7:7E-8.11(b)3 at N.J.A.C. 7:7E-8.11(n).

It is important that the proposed public access specify both an appropriate type of access for the area and that a sufficient level of access be provided (for example, if fishing access is determined to be an appropriate way to satisfy the public access requirement, the Department will additionally need to determine if the size of the access area proposed is adequate). Accordingly, the Department is adopting changes proposed in the March 19, 2012

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notice of substantial changes at N.J.A.C. 7:7E-8.11(n) to make clear that both the type of access and the amount of access will be part of its review. This change will make this section consistent with changes made at N.J.A.C. 7:7E-8.11(p) (proposed as N.J.A.C. 7:7E-8.11(o)).

The Department is adopting amendments proposed in the March 19, 2012 notice of substantial changes to various proposed provisions to emphasize that no public access is required for maintenance, rehabilitation, renovation, redevelopment, or expansions. This change was made at N.J.A.C. 7:7E-8.11(n)1i, 2i, 3i, and 4i, and N.J.A.C. 7:7E-8.11(p)1 .

It was the Department's intent to exempt all single family homes and duplexes from the requirement to provide public access. Some readers interpreted the proposed language at N.J.A.C. 7:7E-8.11(n)2iii and iv to require public access for the conversion of an existing non-residential use to one single family home or duplex. Therefore, the Department is adopting changes proposed in the March 19, 2012 notice of substantial changes to add the clarifying phrase "consisting of more than one single family home or duplex" to N.J.A.C. 7:7E-8.11(n)2iii and iv. The term "total combined water frontage" was changed to "total frontage" as water frontage may include areas not subject to public trust rights such as non-tidal waters.

The Department is adopting changes proposed in the March 19, 2012 notice of substantial changes to add the following language to the criteria used to determine if onsite public access is not practicable, at N.J.A.C. 7:7E-8.11(n)3ii and iii relating to industrial and public development, at N.J.A.C. 7:7E-8.11(n)5i(1) relating to ports, and at N.J.A.C. 7:7E-8.11(p)4i (proposed as

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N.J.A.C. 7:7E-8.11(o)4i) relating to marinas, “or upon documentation of a threat to public safety due to unique circumstances concerning the subject property.” This change is similar to the exception language in the original proposal at N.J.A.C. 7:7E-3.48(e)1 relating to the Hudson River walkway and will make the exceptions consistent for all types of development and in all areas of the State.

The Department is adopting changes proposed in the March 19, 2012 notice of substantial changes at N.J.A.C. 7:7E-8.11(n)5i(1) to make the example provided of factors considered in determining equivalent public access more directly applicable to port facilities. As it is unlikely that existing onsite public access at a port facility will include swimming, the Department changed the example to existing linear or visual access.

As discussed in response to concerns regarding lack of standards for Municipal Public Access Plans at the Response to Comments 33 through 43, the adopted amendments lay out a framework with requirements that must be met both in municipalities with Department-approved Municipal Public Access Plans and those without. Therefore, at N.J.A.C. 7:7E-8.11(p) (proposed as N.J.A.C. 7:7E-8.11(o)), the Department is adopting changes proposed in the March 19, 2012 notice of substantial changes to reference N.J.A.C. 7:7E-8.11(b)3 to ensure that the public access options are consistently applied throughout the State. However, recognizing that “one size does not fit all,” the Department is adopting changes proposed in the March 19, 2012 notice of substantial changes to incorporate language regarding the appropriate access for a site

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taking into consideration the compatibility of the proposed public access with the applicant's proposed use of the site, square footage of access area, and environmental impact or benefit.

This language is consistent with N.J.A.C. 7:7E-8.11(n). The Department believes these same factors utilized for the types of development addressed in subsection (n) are equally applicable to marinas.

In N.J.A.C. 7:7E-8.11(q) (proposed as N.J.A.C. 7:7E-8.11(p)), the Department is adopting changes proposed in the March 19, 2012 notice of substantial changes to list all paragraphs contained in N.J.A.C. 7:7E-8.11(n). With the change adding a new paragraph 6 to subsection (n), rather than adding "6" to the string of paragraph numbers contained in subsection (n), the Department is more generally referring to all of subsection (n) by deleting the list of paragraphs.

Comments Received During Comment Period of Proposed Substantial Changes upon Adoption to Proposal of Amendments, Giving Rise to Additional Substantial Changes to Proposal upon Adoption

In response to some of the comments received during the public comment period after publication of the Notice of Substantial Changes upon adoption on March 19, 2012, the Department proposed to make additional substantive changes to the proposal, subject to

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additional notice and public comment, in accordance with regulatory procedures codified at N.J.S.A. 52:14B-4.10. The proposed additional substantial changes upon adoption, and the comments prompting them, were published in a notice of proposed additional substantial changes to proposed amendments, in the July 2, 2012 New Jersey Register, and are summarized below. The proposed substantial changes that were included in the notice addressed the public access requirements for public highways.

Comments were received from:

1. Elkins Green, New Jersey Department of Transportation
2. John G. Valeri, Jr., Wolff & Samson PC on behalf of the New Jersey Turnpike Authority

The number(s) in parentheses after each comment identifies the respective commenter(s) listed above.

133. COMMENT: In order to utilize N.J.A.C. 7:7E-8.11(n)3i as a uniform method of determining access requirements that is consistent with the manner in which right-or-way projects are developed, it is requested that the public access exception for existing development be expanded to include rehabilitation, renovation, and expansion projects that are both wholly

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within existing rights-of-way and those that would take place on additional properties later designated as rights-of-way. This revision can be effected by amending the last sentence of proposed N.J.A.C. 7:7E-8.11(n)3i to read: “If there is no existing public access on site, within an existing right-of-way or on property to be added to an existing right-of-way, or if access by the public or pedestrians are prohibited by any law, rule or regulation, including but not limited to N.J.A.C. 19:9-1.9.” (2)

RESPONSE: While the Department continues to believe that linear transportation projects should not be exempt from public access requirements when development that crosses or proposes fill in a tidal waterway extends beyond the existing right-of-way, upon further consideration of this comment, the Department determined, as discussed above, that transportation projects should not be subject to stricter requirements than commercial, industrial, or other public development. Therefore, the Department is adopting changes proposed in the July 2, 2012 notice of additional substantial changes that modify the public access requirements for public highways, including superhighways, to allow for maintenance, rehabilitation, reconstruction, or expansion to occur entirely within the right-of-way existing as of (the effective date of the amendments), without providing additional public access as long as any existing public access is maintained. This change is consistent with the requirements placed on commercial, industrial, and other public developments where, for existing developments, except

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for existing developments that are considered new developments, where the proposed activity consists of maintenance, rehabilitation, renovation, redevelopment, or expansion that remains entirely within the parcel containing the existing development, no public access is required if there is no existing public access onsite. The parcel for public highways is the right-of-way. In addition, the Department is adopting the change proposed in the notice of additional substantial changes to clarify that public access is only required for public roadway projects when the new road or expansion crosses or proposes fill in a tidal waterway.

134. COMMENT: Where public access is required, a State agency should have the option of selecting one of the available options under N.J.A.C. 7:7E-8.11(n)3. A State agency should be able to determine the most expedient and cost-effective expenditure of public monies. (1)

RESPONSE: The Department is adopting changes, proposed in the July 2, 2012 notice of additional substantial changes, at N.J.A.C. 7:7E-8.11(o)1ii (proposed as N.J.A.C. 7:7E-8.11(n)6i(2) in the March 19, 2012 notice of substantial changes). The provision proposed on March 19, 2012 stated that for superhighways where the proposed activity was an expansion outside the paved constructed development, public access shall be provided offsite on the waterway(s) and within the municipality(s) where the development was located. The adopted rule allows superhighways, where the proposed activity is an expansion outside the right-of-way

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existing as of (the effective date of the amendments) and the expansion crosses or proposes fill in a tidal waterway, to provide public access in accordance with one of the following: a Department-approved Transportation Public Access Plan; an approved Municipal Public Access Plan; funding to the Department or municipality pursuant to an agreement between the New Jersey Department of Transportation and the Department to be used to provide new or enhanced public access; or offsite on the waterway(s) and within the municipality(s) where the development is located. These changes, except for the option for NJDOT to provide funding to the Department or municipality, are consistent with when public access is required for new commercial, industrial, and other public development when the development is outside the parcel containing the existing development. The Department is adopting the provision in this paragraph as well as in N.J.A.C. 7:7E-8.11(o)2iii (proposed as N.J.A.C. 7:7E-8.11(n)6ii(3) in the March 19, 2012 notice of substantial changes) to allow public transportation agencies to choose to satisfy their public access requirements in accordance with a Transportation Public Access Plan since many of these agencies have established comprehensive policies, procedures, and standards by which transportation projects are developed. Those policies, procedures, and standards are intended to address many environmental, socioeconomic, and community issues, including public access, when transportation projects are advanced by these agencies. The Department is adopting the change proposed in the notice of additional substantial changes to allow NJDOT to provide funding to the Department or municipality for their public highway projects because, as

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discussed in the Response to Comment 130 above, the Department agrees that new public access is not feasible onsite on superhighways, such as the Turnpike or the Parkway, and therefore public access requirements for projects on superhighways may be fulfilled by establishing offsite access and/or by making a monetary contribution if an approved Municipal Public Access Plan with a fund is available. The Department is adopting the change proposed in the July 2, 2012 notice of additional substantial changes on adoption to allow NJDOT to provide funding to the Department or municipality to be used to provide new or enhanced public access. For example, where legislative appropriations allow NJDOT trust dollars to be directed to the Department's Green Acres Program to provide new or enhanced public access in that municipality, the NJDOT would then have the statutory authority to provide funding. In order to allow NJDOT to provide funding to the Department, the Department proposed to insert an exception for NJDOT at N.J.A.C. 7:7E-8.11(f)2 to provide for that option.

This public access fund would be used by the Department or the municipality to provide additional or enhanced public access. The ability for NJDOT to provide funding when it is in the best interest of the public access project allows a common sense approach to satisfying public access requirements.

Requirements for public access on public highways are adopted at N.J.A.C. 7:7E-8.11(o) so that they can appear with provisions applicable to applications for and Department review of proposed Transportation Public Access Plans. As a result of that recodification, public access

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requirements for marinas which were proposed at N.J.A.C. 7:7E-8.11(o) and which were not proposed to be amended in the March 19, 2012 notice of substantial changes, are adopted at N.J.A.C. 7:7E-8.11(p). The Department is also adopting changes proposed in the July 2, 2012 notice of additional substantial changes on adoption to recodify proposed N.J.A.C. 7:7E-8.11(q) through (z) as N.J.A.C. 7:7E-8.11(r) through (aa), respectively, with all cross-references updated to reflect the recodification.

Comments Received During Comment Period of Proposed Additional Substantial Changes upon Adoption to Proposal of Amendments Not Giving Rise to Additional Changes in the Rule Proposal

The Department received 12 comments during the comment period for the July 2, 2012 Notice of Proposed Additional Substantial Changes upon Adoption to Proposal of Amendments.

Comments were received from:

1. Tim Dillingham, American Littoral Society, C.R.A.B., Hudson River Fishermen's Association, Environment New Jersey
2. Marshall Rowbear
3. Jeff Tittel, Director, New Jersey Chapter, Sierra Club

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A summary is provided below of the comments and the Department's responses. The comments have been sequentially numbered to continue from the comments reproduced in the sections above, to provide clarity. The number(s) in parentheses after each comment identifies the respective commenter(s) listed above.

135. COMMENT: The additional substantial changes are opposed because roads block public access and the proposed changes further minimize access to tidal waters in the State. It is bad policy to treat public highways differently than private development. (1, 3)

RESPONSE: While roadways present unique circumstances that must be taken into account in determining appropriate public access, the Department believes that roadways can be designed and managed in such a way as to encourage enhanced public access to tidal waterways. That is the foundation of the requirements for public access by transportation agencies in this rule. Consistent with the Department's belief that public access and roadway projects can co-exist, N.J.A.C. 7:7E-8.11(o)1i and 2i, provide that, where a transportation project consists of maintenance, rehabilitation, reconstruction, or expansion within the right-of-way existing as of the effective date of these amendments, existing public access must be maintained or equivalent public access be provided. In addition to protecting existing public access where the project is limited to maintenance, rehabilitation, reconstruction, or expansion within the right-of-way, as

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provided at N.J.A.C. 7:7E-8.11(o)1ii and 2ii, if the transportation project extends beyond the existing right-of-way as of the effective date of these amendments, and crosses or proposes fill in a tidal waterway, public access must be provided. Further, consistent with requirements applicable to Municipal Public Access Plans, pursuant to N.J.A.C. 7:7E-8.11(o)3, Transportation Public Access Plans are required to satisfy the goals specified at N.J.A.C. 7:7E-8.11(b) with further requirements specified in N.J.A.C. 7:7E-8.11(o)3i-ii.

The rules do not exempt public roadways or other linear transportation projects from public access requirements. While the rules do recognize that public highways are a unique type of development and adjustments have been made to recognize the unique nature of this development on rights-of-way rather than the type of parcel typically occupied by other forms of development and safety concerns that may be applicable to public access on certain high speed roadways, the requirements for public access are similar to the requirements applicable to commercial, industrial and other public development.

136. COMMENT: The rule changes are opposed. Because the Department weakened access requirements for other types of development such as marinas, commercial development, and industrial development, is not a reason to weaken access requirements for public highways. (3)

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RESPONSE: The rules have not been weakened for the types of developments stated. Rather they have been customized to meet the requirements for public access created by these types of developments. As indicated in the April 4, 2011 proposal, this rulemaking was undertaken to restructure how and when public access to the State's tidal waters and their shorelines is accomplished. The adopted changes reflect the Department's belief that public access can be more effectively provided through a comprehensive process working with local governments, eliminating unnecessary burdens on residents, businesses and governmental entities and bringing resources to bear to achieve results. The changes adopted at this time reflect that belief, taking into account the Appellate Division's decision in *Borough of Avalon v. New Jersey Department of Environmental Protection*, 403 N.J. Super. 590 (App. Div. 2008) and legislation regarding public access at marinas. The Department believes that the adopted amendments, including those regarding public highways, will provide enhanced public access recognizing the different geographies of the State and the differing needs of the public.

137. COMMENT: NJDOT is a public agency that should be concerned about providing public access. NJDOT needs to look at other states and what they are doing to their coastal highways to attract tourists. Instead of the Department using NJDOT to increase the amount of access in the state, it is doing the opposite. NJDOT keeps walling off access. (3)

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RESPONSE: The Department agrees with the commenter that as a public agency the NJDOT should address public access requirements in their roadway projects that cross tidal waterways. While attracting tourists to coastal areas is certainly a by-product of improved transportation facilities along coastal highways, the Department understands that this is not the NJDOT's primary mission. Rather, the NJDOT's mission is to provide a safe, reliable and efficient multi-modal transportation network which serves the mobility needs of residents, commerce and visitors alike. The Department does not believe that the highways under the jurisdiction of the NJDOT are designed to be barriers "walling off access" to tidal waterways as suggested by the commenter, and recognizes that these highways must address the needs of motorists and pedestrians alike in a safe and efficient manner. Because of this need to accommodate both vehicles and pedestrians in its transportation projects, the Department recognizes that it is not always possible to allow unobstructed access from a highway to a tidal waterway, particularly where the safety of the pedestrians or travelling public may be compromised. Where access from a roadway is not possible due to safety concerns, the rules provide at N.J.A.C. 7:7E-8.11(o)2iii, alternative means to provide public access to the waterbody. The Department believes that the rules adopted at this time allow the necessary flexibility for transportation projects to be designed and constructed taking into consideration the use of the highway facility by both vehicles and the pedestrians that may want to access the tidal waterways.

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138. COMMENT: Only requiring public access when a transportation agency is developing outside the existing right-of-way and crossing a waterway is too limited and will minimize the creation of new access. (1)

RESPONSE: The Department's adopted amendments requiring additional public access only when a transportation project is being constructed outside the existing highway right-of-way, are consistent with additional public access requirements for commercial, industrial, or other public development. Consistent with the requirements applicable to other forms of development, existing public access must be maintained or equivalent public access provided where the project consists of maintenance, rehabilitation or expansion within the existing right-of-way as of the date of publication of this adoption.

139. COMMENT: Only requiring public access when developing outside of an existing right-of-way is concerning. NJDOT will go out and purchase rights-of-way before they apply for coastal permits so that they can avoid having to provide public access. (3)

RESPONSE: The Department agrees that it would be inappropriate to allow the public access requirements to be avoided in the manner suggested by the commenter and has addressed this concern in the rules. Particularly, at N.J.A.C. 7:7E-8.11(o)1i and 2i (for superhighways and

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public highways other than superhighways respectively) provide that only an expansion that remains entirely within the right-of-way existing as of the effective date of these amendments is covered by this provision. Where the proposed activity is an expansion outside of the right-of-way existing as of the effective date of the amendments (which would include any right-of-way purchased after the publication date of this adoption) and the expansion crosses or proposes fill in a tidal waterway, public access must be provided as specified in N.J.A.C. 7:7E-8.11(o)1ii or (o)2ii, as applicable.

140. COMMENT: NJDOT does not do anything voluntarily. They are not going to provide good public access unless the Department requires it. A good example is Route 35. The Department required some good public access for that project that NJDOT would not have done on their own. Bridges are locations where access is needed. (3)

RESPONSE: The Department is aware that the NJDOT develops its transportation projects to meet many needs, some of which may at times be conflicting. NJDOT is one of only ten state transportation agencies to make Complete Streets an official internal policy. The policy requires that future roadway improvements include safe accommodations for all roadway users, including bicyclists, pedestrians, transit riders and the mobility impaired, through the planning, design, construction, maintenance and operation of new or rehabilitated transportation facilities. The

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policy also requires NJDOT to address the needs of the community in which it is located, and the Department anticipates that issues related to public access to the waterways will be identified through NJDOT's public process during the project development. Although the Department anticipates that public access will be addressed by NJDOT through their policies prior to submitting an application to the Department for a coastal permit, the Department will be responsible for determining the appropriateness of public access proposed by NJDOT through a Transportation Public Access Plan or an individual project after careful review of NJDOT's proposal. In particular, N.J.A.C. 7:7E-8.11(o)3 requires that Transportation Public Access Plans satisfy the goals specified at N.J.A.C. 7:7E-1.1(c), the public access goals at N.J.A.C. 7:7E-8.11(b) and the requirements at N.J.A.C. 7:7E-8.11(o)3i through iii. If a Department-approved Transportation Public Access Plan does not exist, public access must be provided onsite unless it can be demonstrated that public access is not practicable onsite because of safety concerns. If the Department agrees that onsite access is not feasible, access must be provided offsite.

Finally, the Department agrees that bridges are important locations for access, especially for fishing, where access can be safely provided. Accordingly, the rules require that Transportation Public Access Plans incorporate fishing access and associated amenities where appropriate. Where a Transportation Public Access Plan does not exist, fishing access must be provided to the maximum extent practicable.

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141. COMMENT: Transportation Public Access Plans are a good idea, however the rule does not require them and therefore counties are not going to put their limited resources into preparing Transportation Public Access Plans. (1)

RESPONSE: The commenter is correct that, as they are voluntary, counties may decide not to prepare Transportation Public Access Plans. Transportation Public Access Plans, similar to Municipal Public Access Plans, are tools that the Department has provided to allow other governmental entities to have more input as to how public access is provided taking into account the unique circumstances in the area in which projects are anticipated. However, the Department does not believe that these tools should be mandatory. Where the county or other public body chooses not to utilize this optional tool, the other provisions of this regulation will assure that appropriate public access is provided.

142. COMMENT: The rule does not contain any standards for how the Department and NJDOT will determine the appropriateness of Transportation Public Access Plans. (1, 3)

RESPONSE: The NJDOT will not be determining the appropriateness of any proposed Transportation Public Access Plan; it will be the Department's responsibility to make that determination after careful review of the NJDOT's proposed plan for its consistency with these

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regulations. In particular, N.J.A.C. 7:7E-8.11(o)3 requires that Transportation Public Access Plans satisfy the goals specified at N.J.A.C. 7:7E-1.1(c), the public access goals at N.J.A.C. 7:7E-8.11(b) and the requirements at N.J.A.C. 7:7E-8.11(o)3i through iii.

143. COMMENT: This Notice of Additional Substantial Changes is an error because the rule was adopted when the first substantial change was completed. The Department cannot reopen a part of the rule that has already been adopted. That was not the intent of the changes to the Administrative Procedures Act. (3)

RESPONSE: In accordance with amendments to the Administrative Procedure Act (APA) codified at N.J.S.A. 52:14B-14.10, “where, following a notice of proposal and upon conclusion of the public comment period, an agency determines that it would be appropriate to make substantial changes to the proposed rule upon adoption, the agency may follow the procedure set forth in this section instead of filing a new notice of proposal.” N.J.S.A. 52:14B-14.10.1a.

As indicated in the Statement to A2720 (2010), the legislation that created the notice of substantial change on adoption process, prior to the amendments contained in this bill “where, following the notice of proposal, an executive branch agency determines to make changes in the proposed rule which are “so substantial that the changes effectively destroy the value of the

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original notice,” the agency is required to start the rule-making over from the beginning by issuing a new notice of proposal. This bill would provide the ability for an agency to make substantial changes upon adoption through the issuance of a public notice and a 60 day public comment period, without starting the rule-making process over with a new notice of proposal.”

The amendments to the APA providing for the option of proposing further substantive changes to an outstanding proposal by notice do not affect the process required by the APA to adopt any proposed amendments to rules. Instead, the amendments simply provided that an agency may propose further amendments as part of that rulemaking without the need to initiate an entirely new rulemaking process. A notice of substantial change does not result in any previously proposed amendments being adopted; only an adoption complying with the requirements of the APA can accomplish that.

144. COMMENT: There are no criteria for how much money NJDOT should spend when providing access offsite because there is no formula in the rule to calculate how much should be contributed. (3)

RESPONSE: Where legislative appropriations allow NJDOT trust dollars to be directed to the Department or municipality to provide new or enhanced public access, in accordance with

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N.J.A.C. 7:7E-8.11(o)1i(3) and 2iii(2) if it is determined that a monetary contribution is the appropriate means to provide offsite public access, the amount of contribution will be determined through an agreement between the NJDOT and the Department specifying the payment of funds to be used to provided new or enhanced public access. The Department believes that an appropriate formula for calculating a sufficient contribution amount to be used to provide new or enhanced public access can be determined at that time through the design and approval process.

145. COMMENT: The rule amendments that allow for transportation agencies to develop Transportation Public Access Plans are supported. However the Department must be aware that whether to allow pedestrian traffic on highways and bridges is a decision that should be made by a professional engineer. (2)

RESPONSE: The Department acknowledges this comment in support of Transportation Public Access Plans. The Department understands that road improvements must include safe accommodations for all roadway users including pedestrians. Engineers within the Department's Division of Land Use Regulation's, Transportation Unit, are responsible for reviewing coastal applications for transportation projects which include public access designs. The Department believes that in working cooperatively with NJDOT staff engineers, that the need for public

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access to New Jersey waterways will be addressed while taking into account the safety of those vehicles utilizing the bridge or roadway, as well as pedestrians trying to access the waterway.

146. COMMENT: Allowing NJDOT to provide funding to the Department or the municipality to satisfy their public access obligation is supported. (2)

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

Comments Received During Comment Period of Proposed Substantial Changes upon Adoption to Proposal of Amendments, Not Giving Rise to Additional Changes in the Rule Proposal

In response to the March 19, 2012 publication of the proposed substantial changes upon adoption, the Department received a number of comments that did not give rise to modifications to the rule proposal. Comments were received from:

1. Robert Anderson
2. Glen Arthur, New Jersey Council of Diving Clubs
3. Thomas R. Beaton, David Beaton & Sons, Inc.
4. Mike Beck, Mayor, Lower Township
5. Alex Betser
6. Edward R. Bonanno, Esq. on behalf of NY/NJ Baykeeper and Hackensack Riverkeeper
7. Roger Bright, Shore Point Marina & Yacht Sales
8. Allen Brown, Brown's Boat Yard, Inc.

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9. David Brown, Thompson Marine and Engine, Inc.
10. Pamela Brown
11. Frank Cadden
12. Jim Cerruti, Owner of Fairhaven Yacht Works
13. Kyle Cecchini, American Littoral Society
14. Bernie Christopher, Pennsauken Surf Fishing Club
15. Ralph Coscia, Citizens' Right to Access Beaches
16. Melissa Danko, Marine Trades Association of New Jersey
17. Karen Davidson, Green Cove Marina
18. Joseph Della Fave, Ironbound Community Corporation
19. Margaret Dessau
20. David Dickerson, National Marine Manufacturers Association
21. Tim Dillingham, American Littoral Society
22. Tim Dillingham, Hudson River Fisherman's Association
23. Vincent Domidion II, Chairman of Monmouth County Planning Board
24. Stephanie Downey
25. Michael A. Egenton, New Jersey Chamber of Commerce
26. William Feinberg, Asbury Park Fishing Club; International Game Fish Association
27. Brian Fischer
28. David Foulkrod, Marine Retailers Association of the Americas
29. Adelaide Franklin, Main One Marina, Inc.
30. Jack Fullmer, New Jersey Council of Diving Clubs
31. William Galestok
32. Tovah Gidseg
33. Molly Greenberg, Ironbound Community Corporation, NJ Environmental Justice Alliance
34. Joe Grottola, Eastern Surfing Association, Southern NJ District
35. Matt Gruhn, Marine Retailers Association of the Americas
36. Brian Hall, Dillons Creek Marina
37. Paul Harris, New Jersey Beach Buggy Association
38. Ed Harrison
39. Krissy Hawkes, Surfrider Foundation, South Jersey Chapter
40. Gil Hawkins, Hudson River Fisherman's Association
41. Gregory Hueth, Save the Summer Flounder Fishery Fund; Shark River Surf Anglers
42. Dorothy Jedziniak
43. Dona Kozlowski, Morrison's Marina
44. Wendy Larimer, Association of Marina Industries
45. Thomas Leaming, Leaming's Marina

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46. Richard Lee, Surfers' Environmental Alliance
47. Chris Len, Esq., NY/NJ Baykeeper and Hackensack Riverkeeper
48. Vincent Lepore
49. Ed Lippincott, Shark River Cleanup Coalition
50. Ryck Lydecker, Boat U.S. Government Affairs
51. Helen Manogue, Hudson River Waterfront Conservancy of NJ
52. Debbie Mans, NY/NJ Baykeeper
53. Caitlin Mawhinney
54. Michelle McBean, Future Cities Incorporated
55. Debbie Mooers, Owner, Grassy Sound Marina
56. Michael Moore
57. Harvey Morginstin, Passaic River Boat Club
58. Arthur Nelson
59. Sandra O'Byrne
60. Joe Pallotto, Asbury Park Fishing Club
61. Nancy Papa
62. Chris Parlow, Administrator, Borough of Loveladies
63. William Parsons, Dredge Harbor Boat Center, LLC
64. Tammy Parsons Savidge
65. Sam Pesin, Friends of Liberty State Park
66. Joe Reynolds, Bayshore Regional Watershed Council
67. Dan Ritter
68. Kersten Roehsler, Viking Terminal Marine
69. Lisa Roselli, Eastern Surfing Association, Southern NJ District
70. Bill Rosenblatt
71. Scott Ross, New Jersey Petroleum Council
72. Phyllis Salowe-Kaye, New Jersey Citizen Action
73. Bill Schultz, Raritan Riverkeeper
74. Nicky Sheats, New Jersey Environmental Justice Alliance
75. Captain Bill Sheehan, Hackensack Riverkeeper
76. Kimberly Sherwood
77. Robert Siegel, Edison Wetlands Association; Elizabeth River/Arthur Kill Watershed Association
78. Ray Slaman
79. Vincent Spadafora, Long Key Marina
80. Paul Terzian
81. Scott Thompson, PADDLEOUT.ORG
82. Jeff Tittel, New Jersey Sierra Club

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83. Douglas M. Tomson, Director of Government Affairs NJ Association of Realtors
84. Rick Traber, Pier 47 Marina
85. Joseph Turpin, Secretary, Concerned Citizens Coalition of Long Branch
86. Roy D. Voss, Sr., Good Luck Point Marina, Inc.
87. Paul Walter
88. John Weber, Surfrider Foundation
89. David Wheeler, Wild New Jersey
90. Joe Woerner, Surfrider, NJ Shore Chapter
91. Bill Wolfe, New Jersey Public Employees for Environmental Responsibility
92. John Wroblewski

General

147. COMMENT: The schedule of public hearings included in the Notice of Substantial Changes to the Public Access Rules is opposed. The Department scheduled only two hearings, both on the same day and both in coastal towns far from New Jersey's urban population centers, reflecting the Department's apparent belief that public access rules should primarily benefit residents in wealthy communities. The Department should schedule hearings in major northern cities, in the evening, when working people might attend. (2, 14, 15, 18, 21, 32, 33, 37, 39, 40, 46, 47, 49, 51, 52, 54, 60, 65, 66, 71, 73, 74, 75, 77, 82, 89, 90, 91)

148. COMMENT: There should be a public hearing in Trenton at the Department's offices so that people who live in the rest of the State or the region can come to comment. (82)

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149. COMMENT: The Department should extend the public comment period and offer more accessible public hearings at dates and times that are appropriate for meaningful public participation. (33)

150. COMMENT: The Department should have invited everyone to the table to negotiate these rule changes, not just individual groups. (90)

RESPONSE TO COMMENTS 147 THROUGH 150: The Department agrees that provision of opportunity for public input is an important component of the rulemaking process. Reflective of that belief, the Department determined that it was appropriate to hold several public hearings throughout the affected areas of the State and has sought to provide ample opportunity for public comment throughout this rulemaking. Accordingly, after the initial proposal in April of 2011, the Department held four hearings on the proposal between May 12 and June 1, 2012, in Jersey City, Hudson County; Pomona, Atlantic County; Seaside Heights, Ocean County and Long Beach Township, Ocean County. In light of the comments it received on the proposal, the Department proposed substantial changes to the rule in the March 19, 2012 notice on which these comments were made. As with the original proposal, the Department determined that it would be appropriate to provide the public with the opportunity to provide oral comments on the proposed substantial changes on adoption at a public hearing. Therefore, the Department held

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two additional public hearings along the coast in Avalon, Cape May County, and Long Branch, Monmouth County on April 18, 2012 at Noon and at 6:00 in the evening. Furthermore, when additional changes were determined to be appropriate in the area of public access requirements applicable to linear transportation projects, through the July 2, 2012 notice of proposed additional substantial changes, the Department held another public hearing at its offices in Trenton on July 31, 2012. These opportunities for oral public comment were provided in addition to the 60 day periods provided for written comment on the original proposal, the March 19, 2012 notice of proposed substantial changes on adoption to proposed rule amendments and the July 2, 2012 notice of proposed additional substantial changes on adoption to proposed amendments. The seven public hearings and three public comment periods provided the public with ample opportunity for participation, as evidenced by the hundreds of public comments (both written and oral) that the Department received.

151. COMMENT: The Department needs to be thanked for meeting with concerned citizens so many times over the past year and a half and listening to our objections. (2, 37)

RESPONSE: The Department acknowledges the commenter's support of its stakeholder process.

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152. COMMENT: The Department failed to respond to many comments received on the original public access rule amendment proposal. These comments were uniformly opposed to the proposed rules, many of them on the grounds that the proposed rules effectively eliminate all hope of access to navigable rivers in many urban communities. (2, 14, 15, 18, 21, 37, 39, 40, 46, 47, 49, 51, 52, 54, 60, 65, 66, 72, 73, 74, 75, 77, 82, 89, 90, 91)

153. COMMENT: Why did the Department not respond to public comments on urban waterfront access? The lack of transparency and honesty is discouraging. (32)

154. COMMENT: A number of comments submitted were not included in the Notice of Substantial Change on Adoption document. (23)

155. COMMENT: The Department did not respond to all comments received on the original proposal including a thousand handwritten postcards to a member of the Governor's staff and a thousand emails to the Governor and the Commissioner from people opposed to this rule. (88)

RESPONSE TO COMMENTS 152 THROUGH 155: As indicated above, these comments were received in response to the March 19, 2012 notice of proposed substantial changes on adoption to

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proposed amendments, which was published in accordance with the Administrative Procedure Act (APA) at N.J.S.A. 52:14B-4.10. As set forth in the APA at N.J.S.A. 52:14B-4.10b(4), “the public notice shall include: ... (4) a report listing all parties submitting comments on the originally proposed rule provisions subject to the proposed additional changes, summarizing the content of the submissions on those provisions, and providing the agency's response to the data, views and arguments contained in the submissions.” Comments that are not related to the substantial changes contained in the notices, but that relate to other provisions of the proposal are not responded to in the Notice of Substantial Changes upon Adoption. Instead, those comments are responded to as part of the subsequent adoption of the rulemaking.

156. COMMENT: The proposed rule amendments to improve and enhance public access to New Jersey’s waterways are supported. The rule changes seek to maintain access to coastal and tidal waters in a reasonable, planned manner through a comprehensive, yet flexible, public access plan for the entire State. (71)

157. COMMENT: The new direction and “common sense” approach contained in the proposed revisions to the public access rule are supported. The revised rule seeks to maintain and enhance the public’s access to coastal and tidal waters in a reasonable, planned manner. (25)

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158. COMMENT: The substantial changes to the public access rule amendments still maintain an appropriate balance between rights of homeowners and the rights of those seeking to enjoy New Jersey's many waterways and beaches. (83)

159. COMMENT: The proposed rule changes are supported. (4, 42)

RESPONSE TO COMMENTS 156 THROUGH 159: The Department acknowledges these comments in support of the adopted rules.

160. COMMENT: The amendments are supported as long as they do not negatively affect the environment. (53)

RESPONSE: The Department acknowledges this comment in support of the adopted rules. As set forth in the Environmental Impact statement (43 N.J.R. at 772(a)), the Department anticipates that the adopted rules will have a neutral environmental impact.

161. COMMENT: Some of the changes are supported; however municipalities will still have too much control of public access and they cannot be trusted. (2)

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RESPONSE: The Department disagrees with the commenter that municipalities will have too much control of public access. As stated in response to comments 33 through 43, the rules do not give municipalities the ability to establish public access standards without having to meet State standards and without Department oversight. The adopted rules require a municipality to obtain approval of its Municipal Public Access Plan from the Department in order for the plan to be operational. The Department will work with the municipalities on development of their access plan, in order that the plans meet the goals of the public access rules. The adopted rules require various analyses through which the municipality is required to review and itemize existing public access, identify public access needs that are not being met by existing facilities, formulate a plan for providing public access, and demonstrate that the public access proposed will meet the identified public need. As summarized in the response to comments 30 through 32 above, the adopted rules will increase notice to the public of the filing of proposed Municipal Public Access Plans and opportunities for public input to assure that the public access proposed in a Municipal Public Access Plan truly satisfies a local public access need and satisfies the goals and requirements of the Coastal Zone Management rules. Specifically, under N.J.A.C. 7:7E-8.11(i), the Department will provide a 30-day public comment period on applications for approval of Municipal Public Access Plans, post the proposed plans on the Department's website, e-mail individuals who have requested notice of the applications, and publish notice in

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the DEP Bulletin. Consequently, each Municipal Public Access Plan is a cooperative effort involving the municipality, the Department, and the public.

162. COMMENT: The efforts made by the Department to address some of the concerns expressed on the original proposal is appreciated; however, the amendments will most likely not have positive impacts on “real world public beach access.” The amended rules are not supported as written. (15)

163. COMMENT: The proposed substantial changes are insufficient to correct conceptual and technical deficiencies of the proposal rule. While the Department may intend for the proposed rule to contain more comprehensive and more flexible public access requirements than the existing public access rule, the rulemaking falls short in numerous respects and will result in less public access to the waterfront. Accordingly, and notwithstanding the proposed substantive changes, the proposed “(No) Public Access Rule” is firmly opposed. (2, 15, 21, 22, 34, 37, 40, 41, 46, 47, 60, 66, 67, 69, 73, 81, 82, 88)

164. COMMENT: Even as “substantially” amended, the proposed rule represents an abdication of the State’s responsibility to provide open and meaningful public access to and use of the tidal waters of our State. This proposal signifies the deregulation of the public’s right to

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access and use tidal waters and the destruction of the present regulatory scheme intended to preserve and protect those rights. (2, 15, 21, 34, 37, 40, 41, 46, 60, 66, 69, 73, 81, 82, 88)

165. COMMENT: The proposed rule changes are not supported. (85)

166. COMMENT: The rule changes do not address anything other than relatively minor points. The core issues of beach access for the public and how that access would be protected were ignored. (26)

167. COMMENT: These changes do not address the commenter's broader concerns with the impacts this rule will have on limiting public access to our beaches and urban waterfronts. These rules still violate the Public Trust Doctrine and limit the public's right to access beaches, bays, and waters ways. The changes did not make the rule better. The rule still does not have clear guidelines and standards to ensure that the public has access to tidal waterways and waterfronts. (82)

RESPONSE TO COMMENTS 162 THROUGH 167: The adopted rule at N.J.A.C. 7:7E-8.11(a) states 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 in accordance

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with N.J.A.C. 7:7E-3.50. The adopted rule further reinforces the Department's commitment to providing public access by laying out a framework with requirements that must be met both in municipalities with Department-approved municipal public access plans and those without. The adopted rule provides universal goals for public access including that public access be on a non-discriminatory basis and that all existing access must be maintained to the maximum extent practicable, and guidance on the types of activities that will be considered to provide public access.

If there is a Department-approved Municipal Public Access plan, in accordance with N.J.A.C. 7:7E-8.11(b), public access proposed by an applicant may include one or any combination of the following: a public accessway; a boat ramp, pier, fishing or otherwise direct access to the waterway; a waterfront pocket park; public restroom; or additional public parking. If there is no Department-approved Municipal Public Access Plan, the adopted rules at N.J.A.C. 7:7E-8.11(n) further require the Department to consider factors such as type of public access available, the compatibility of the proposed public access with the applicant's proposed use of the site, square footage of access area and environmental impact or benefit. This assessment is similar to the analysis required to be submitted by a municipality when submitting an application to the Department for approval of a Municipal Public Access Plan.

As discussed at response to comments 33 through 43 above, the adopted rules establish goals and basic requirements for public access and are intended to encourage municipalities to

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take an active role in designing and ensuring public access to beaches and tidal waters in ways that will work best for their respective circumstances. As further discussed in response to comments 33 through 43 above, the adopted rules require various analyses through which the municipality is required to review and itemize existing public access, identify public access needs that are not being met by existing facilities, formulate a plan for providing public access, and demonstrate that the public access proposed will meet the identified public need.

Therefore, the rules will not limit or reduce public access to the waterfront. Instead, the adopted rules will at a minimum maintain existing public access as well as enhance the public's enjoyment of and use of the beaches, ocean, bays and other tidal waterways in coastal municipalities with or without approved municipal public access plans.

Legislative authority

168. COMMENT: The public access rule, even with the proposed substantial changes, is unlawful and will not withstand judicial scrutiny. The Legislature has not empowered the Department under the Coastal Area Facility Review Act (CAFRA) or any other statute to manage or regulate how the public gains access to Public Trust lands and waters. The Department should know that it lacks authority because of the clear holding of *Borough of Avalon v. New Jersey Department of Environmental Protection*, 403 N.J. Super.590, 606-607 (App. Div. 2008), cert. denied 199 N.J. 133 (2009). The Legislature has not “delegated any

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authority to the Department to preempt or supervise a municipality's operation of its beaches.”

Id. At 599. The Department's effort to regulate in this area is without stated or implied legislative authorization. Specifically, the Legislature has not empowered the Department to regulate when a landowner must provide vertical access to public trust property, nor to limit municipalities' power to require it. Moreover, the Legislature has not authorized the Department to impose any requirements upon a municipality to adopt a public access plan that would be included in the municipality's master plan or to direct a municipality to create and maintain a public access fund. The Department must work with the Legislature to develop legislation that would give DEP the authority to ensure that the public has the access to which it is entitled under the Public Trust Doctrine, rather than proceed with rules that will be struck down by the courts.

In the *Borough of Avalon*, 403 N.J. Super. At 608, the Court invalidated the challenged portions of the public access rules. Specifically, the *Avalon* court found two provisions invalid: first, a requirement that a municipality must allow public access to tidal waterways and their shores “at all times” absent the Department's permission to close the area; second, the requirement that a municipality that seeks an appropriation from the Shore Protection Fund to enter into a State Aid Agreement requiring the municipality to provide additional parking and restroom facilities. The Court rejected these provisions because, inter alia, they were outside the Department's authority.

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The Court found that the “at all times” rule infringed on the broad general police powers that the Legislature had delegated to municipalities. *Id.* at 598 (citing *McGovern v. Borough of Harvey Cedars*, 401 N.J. Super. 136 (App. Div. (2008))). The Court noted that under the police powers granted to municipalities by the legislature in N.J.S.A. 40:48-2, “a municipality may exercise its police powers to ‘legislate for the ...protection of its residents and property owners’ and such regulation will not be preempted absent a clear legislative intention.” Referring to N.J.S.A. § 40:61-22.20 (municipal control over beaches), the Court found that this general police power extends to municipally owned beaches just as it would to other municipally owned property. *Borough of Avalon*, 403 N.J. Super. At 599. The Court concluded, “In contrast to the express legislative delegation of broad general powers to municipalities to exercise exclusive control over municipally owned beaches, the Legislature has not delegated any authority to the Department to preempt or supervise a municipality’s operation of its beaches.” *Id.* At 599.

The Court held that CAFRA, which authorizes the Department to regulate certain land uses within the coastal zone, does not empower the Department to impose whatever obligations it deems appropriate to facilitate public access. *Id.* At 607. In CAFRA, the Legislature did not give the Department sweeping powers to regulate the public’s access to public trust lands; *Borough of Avalon*, 403 N.J. Super. At 601, 607; those powers remain with the municipalities and ultimately the New Jersey Legislature.

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The *Avalon* court carefully considered the delegation of authority made by the legislature under CAFRA and found that it did not extend to regulation of beach access beyond oversight of beach fees. *Borough of Avalon*, 403 N.J. Super. at 606. The Legislature’s findings for CAFRA state,

The Legislature finds that ...certain portions of the coastal area are now suffering serious adverse environmental effects resulting from existing development activity impacts that would preclude or tend to preclude 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, and that therefore, it is in the interest of the people of the State that all of the coastal area should be dedicated to those kind of land uses which promote public health, safety, and welfare, protect public and private property and are reasonable, consistent and compatible with the natural laws governing the physical, chemical and biological environment of the coastal area.

N.J.S.A. §13:19-2.

CAFRA lists certain factors that the Department should consider when reviewing an application. See N.J.S.A. § 13:19-10a. The items on this list all address issues relating to protection of the environment and public health. None mentions public access. As the New Jersey Appellate Division has stated in the *Matter of Cetex Homes*, 411 N.J. Super. 244,251 (App. Div. 2009), “An agency’s regulation may not under the guise of interpretation give the

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statute any greater effect than its language allows.” While powers that are incidental to expressly granted powers may be implied, important policy questions lie in the legislative domain and should be resolved there. *Borough of Avalon*, 403 N.J. Super. At 607; *Centex Homes*, 411 N.J. Super. At 252.

As the Avalon court noted, “whether to impose such requirements (i.e. parking and restroom) upon municipalities, and if so, how to determine the magnitude of the obligation and the manner in which it should be satisfied, implicated important policy questions that...are within the exclusive province of the Legislature. The Legislature could, of course delegate authority for making these decisions to the Department. However CAFRA does not contain such a delegation of authority.” The Department, in assuming authority that the legislature never granted it to provide public access to lands held in the public trust, has breached that duty by failing to ensure that all New Jersey residents, particularly those in urban areas, have the rights to which they are entitled. (6, 47)

RESPONSE: The Department disagrees with the commenters’ assertion that the Department lacks the authority to adopt the new public access rules based on the decision in *Borough of Avalon v. New Jersey Department of Environmental Protection*, 403 N.J. Super. 590 (App. Div. 2008). In *Avalon*, the Appellate Division held that the Department could not require municipalities to keep their beaches open at all times, and that the Department could not

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condition State aid for shore protection upon a municipal agency agreeing to provide additional public parking and restrooms. The court found that the Department did not have the authority to impose these requirements on municipalities, particularly because such requirements infringed upon municipal authority over public health and safety and local zoning. The court, however, did not hold that the Department has no authority to regulate public access to tidal waterways and their shores, but found only that the Department did not have the authority to prescribe the specific requirements at issue in that case. The Department's new public access rule follows the *Avalon* decision and is consistent with it.

In addition, the *Avalon* court recognized the Department's authority to regulate "well-established component(s)" of the Public Trust Doctrine. This authority, in and of itself, gives the Department substantial authority to regulate access to tidal waterways and their shores. At its core, the Public Trust Doctrine acknowledges that the ownership, dominion, and sovereignty over lands flowed by tidal waters is vested in the State in trust for the people. The public's right to use the tidal lands and water encompasses the historic needs of navigation and fishing as well as the modern need for recreational uses. *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 309 (1972). The doctrine also recognizes that the public's right to use public trust lands also may require access to uplands areas. *Matthews v. Bay Head Improvement Association*, 95 N.J. 306, 323 (1984). Courts have held that the public's right over upland areas is not unlimited and will depend on the circumstances. The *Matthews* Court held that factors to

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be considered are the location of the upland to the public trust lands, the extent and availability of publicly owned lands, the nature and extent of the public demand, and the usage of the upland by the property owner. *Id.* at 365.

Here, the Department's new public access rule properly reflects an appropriate site- and circumstances-specific assessment of public trust rights. The rule accomplishes this in a number of ways. For example, the rule recognizes that some proposed uses are more compatible to public access than others by differentiating between different categories of proposed development and imposing different access requirements for each category. See, e.g., N.J.A.C. 7:7E-8.11(n)1 (public access requirements for commercial development); N.J.A.C. 7:7E-8.11(n)2 (public access requirements for residential development) N.J.A.C. 7:7E-8.11(n)5 (public access requirements for ports); N.J.A.C. 7:7E-8.11(p) (public access requirements for marinas); N.J.A.C. 7:7E-8.11(q) (public access requirements for piers). In addition, the rule requires an evaluation of other onsite conditions, including the current usage of a site, including whether public access is provided, and whether the proposed development is the continuation of an existing use or whether it is new development. See, e.g., N.J.A.C. 7:7E-8.11(n)1(i), N.J.A.C. 7:7E-8.11 (n)2, N.J.A.C. 7:7E-8.11 (n)3. In addition, where an applicant is required to provide public access, the rule identifies additional criteria that the Department will use to evaluate the sufficiency of an applicant's proposed public access based on site-specific circumstances. See N.J.A.C. 7:7E-8.11(n) (requiring an assessment of applicant's proposed use of the site, square

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footage of access area, and environmental impact or benefit). Finally, the rule encourages adoption of Municipal Public Access Plans, under which a municipality will develop a comprehensive, yet localized, approach to public access based on the characteristics, needs, and goals of each municipality.

Taken together, these requirements reflect an appropriate exercise of the Department's authority to regulate coastal development consistent with the Public Trust Doctrine. In addition, these requirements, and the other provisions of the rule, reflect an appropriate exercise of the Department's broader regulatory authority over public access pursuant to CAFRA, the Federal Coastal Zone Management Act of 1972, and the Department's comprehensive coastal zone management policies.

Moreover, the Department's new public access rule, and particularly its encouragement of the adoption of Municipal Public Access Plans, also addresses the *Avalon* court's concern about the potential infringement on municipal authority over control of its beaches and local zoning. Unlike the rule at issue in *Avalon*, the new rule does not require that public access be provided "at all times." Instead, N.J.A.C. 7:7E-8.11(b)4 provides that: "[p]ublic access to tidal waterways and their shores shall be provided in such a way that it shall not create conditions that may be reasonably expected to endanger public health or safety, or damage the environment. To that end, public access may be restricted seasonally, hourly, or in scope" In addition, the new rule does not mandate that municipalities provide parking, restrooms, or other specific

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amenities. Rather, the rule encourages municipalities to adopt public access plans, to ensure that the required public access is provided consistent with circumstances, needs, and goals of each municipality. Thus, any concerns about the Department infringing on municipal authority are unfounded.

Thus, the Department's new public access rule is consistent with the Appellate Division decision in *Avalon*, and with federal and State law, and it implements the Department's long-standing authority to regulate public access and impose appropriate access requirements based on the site-specific circumstances of proposed development.

169. COMMENT: The Legislature has not authorized municipalities to create public access funds, as providing in the proposed public access rules. The Legislature has authorized the creation of a myriad of special funds, including certain types of municipal funds. It has also authorized municipalities to collect beach fees, recreation fees, and certain types of developer fees. However the Department cannot allow municipalities to create public access funds without any Legislative authority. The proposed rules are *ultra vires* and invalid. (6, 47)

RESPONSE: The Department disagrees with the commenters' contention that municipalities are not authorized to create public access funds and that the provision for such funds renders the

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rules invalid. It should be noted that the Department has not mandated that any municipality create a public access fund as part of a Municipal Public Access Plan. Rather, the new public access rule provides that a municipality may include in its Municipal Public Access Plan requirements that allow permit applicants to satisfy their public access obligations through a monetary contribution deposited into a Municipal Public Access Fund in lieu of onsite or offsite physical access. (N.J.A.C. 7:7E-8.11(f)). The Department included these provisions as an alternative means of compliance for permit applicants who have a public access obligation pursuant to a Department-issued permit.

The Department developed the rule's provisions allowing municipalities to include requirements for monetary contributions following extensive consultation with municipalities. These provisions are consistent with past Department practice, by which the Department allowed permittees with public access obligations to satisfy those obligations with monetary contributions to municipalities for the construction of specific public access amenities. The Department also developed these provisions to address the *Avalon* court's concern about infringement upon municipal authority by providing individual municipalities with the flexibility to plan and manage public access opportunities consistent with local circumstances and consistent with municipal authority. To that end, the Department also has provided municipalities with flexibility to determine "the circumstances in which such contribution will be required" based on the location and type of use. (N.J.A.C. 7:7E-8.11(f)).

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The Department also notes that the Legislature has delegated substantial authority to municipalities to acquire and operate recreational and other public facilities. For example, N.J.S.A. 40:61-1 provides:

The governing body of any municipality may:

Parks, playgrounds, beaches and resorts. a. Acquire, lay out, improve, embellish and maintain, within and without the municipality, such public parks, squares, open spaces, playgrounds, beaches, water fronts and places for public resort and recreation, and also streets, avenues, boulevards and parkways leading to and connecting the same, as it may deem advisable, and extend and enlarge the same, or any of them; and for such purposes, acquire, in fee or less estate, and by gift, devise, purchase or condemnation, any real estate, improved or unimproved, or interest therein, within or without the municipality, suitable therefor.

.....

Recreation piers. c. Acquire, by lease, gift, devise, purchase or condemnation, one or more docks, wharves or piers within the municipality to be used for public recreation, in whole or part; construct docks, wharves or piers for such purpose and use, and acquire the real estate and rights necessary therefor, by gift, devise, purchase or condemnation. . . .

Similarly, N.J.S.A. 40:61-22.30 provides:

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The body or authority having control of any public park, playground or other public place or property in any municipality may enter into an agreement with any person for the construction by said person of any facility within said public park, playground or other public place that said body or authority is itself authorized by any law to construct, subject to the approval by said body or authority of the plans, specifications and location of such facility, and may accept as a gift any such facility.

The Department anticipates that municipalities that elect to include requirements for monetary contributions to satisfy Department-imposed public access obligations will conform these plans to applicable law. At a minimum, the Department would expect that any municipality that elects to include monetary-contribution requirements in a Municipal Public Access Plan would identify specific public-access amenities that would be built with those monetary contributions so that any funds received would be dedicated to that specific purpose and would directly further the goals of the Municipal Public Access Plan.

Municipal Land Use Law

170. COMMENT: The proposed rules as amended violate municipal land use law (MLUL). Under N.J.S.A. Const. Art. 4, section 6, par. 2, zoning is a police power that is vested in the

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legislative branch. See *Rumson Estates, Inc. v. Borough of Fair Haven, et al.*, 177 N.J. 338, 349 (2003). The New Jersey Constitution authorizes the Legislature to delegate to municipalities the power to adopt zoning ordinances and the Legislature has delegated that power to municipalities in the Municipal Land Use Law (MLUL), N.J.S.A. § 40:55D-1 et seq.

The MLUL authorizes the municipal planning board to adopt a Master Plan. See N.J.S.A. § 40:55D-28. Municipal zoning ordinances must be consistent with the Master Plan. See N.J.S.A. § 40:55D-62. A Master Plan must contain at least these two elements:

1. A statement of objectives, principles, assumptions, policies and standards upon which development proposals are based; and
2. A land use element that takes into account and states its relationship to the statement of objectives and to the other elements set forth in that provision, including the housing plan element, circulation plan element, recreation plan element, historic preservation element, and green buildings and environmental sustainability plan element.

In its list of Master Plan elements, the Legislature does not list a public access plan. Since the MLUL was enacted in 1976, the Legislature has added new elements that are to be included in the Master Plan such as storm water management plans and a farmland preservation element. Public access plans have not been added as an element; therefore the Legislature in the MLUL did not authorize the Department to compel municipalities to do so. If agencies such as the DEP are able, on their own, without legislative authority, to regulate zoning in this way, the

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Legislature's goal of creating uniform, efficient municipal zoning procedures through the MLUL will be totally undermined. The Department through this rule is trying to avoid establishing a "one size fits all" approach to public access which is a violation of the Legislature's municipal zoning goals and the concept that all public trust lands are equally parts of the corpus and that all citizens are equally entitled to the benefits of the trust. (6, 47)

RESPONSE: The Department disagrees with commenters' assertion that the rule's provisions concerning Municipal Public Access Plans violate the MLUL because the Legislature has not authorized municipalities to incorporate public access plans in their master plans. Under the MLUL, the Legislature identified two required elements for municipal Master Plans and numerous optional elements. N.J.S.A. 40:55D-28b. The second required element for municipal Master Plans is a "land use plan element," which includes a showing of "the existing and proposed location, extent and intensity of development of land to be used in the future for varying types of residential, commercial, industrial, agricultural, recreational, educational and other public and private purposes or combination of purposes; and stating the relationship thereof to the existing and any proposed zone plan and zoning ordinance." N.J.S.A. 40:55D-28b(2). In addition, the optional elements for municipal master plans include a "recreation plan element showing a comprehensive system of areas and public sites for recreation." N.J.S.A. 40:55D-28b(7). A Municipal Public Access Plan, in which the municipality identifies a comprehensive

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approach to providing and ensuring public access to the water and to water dependent and water oriented activities along all tidal waterways and their shores within the municipal boundaries, falls squarely within these master plan elements authorized by the Legislature under the MLUL.

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

171. COMMENT: Creating a three-year window for municipalities that do not have an operational Municipal Public Access Plan to continue to receive general coastal permits for beach and dune maintenance may dissuade municipalities from acting promptly. The Department has been promoting Municipal Public Access Plans for several years now. In fact, Department officials have been repeatedly quoted in the media as already working with many municipalities on the development of Municipal Access Plans. Accordingly, municipalities have had adequate notice of this concept and should not reasonably require another three years. Particularly in light of the rate at which municipalities can generate redevelopment plans (three to six months), a 12 or 18 month window should be sufficient. (2, 15, 21, 34, 37, 40, 41, 46, 60, 66, 69, 73, 81, 82, 88)

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RESPONSE: The adopted rules are intended to provide municipalities with time to prepare the necessary design and planning elements of their public access plan before restricting use of the general permit for beach and dune maintenance activities to those municipalities that have Municipal Public Access Plans. Although the Department is currently assisting several municipalities with preparing their Municipal Public Access Plans, the Department understands that there may be some communities that do not have the resources to immediately undertake efforts to develop a plan and therefore believes that it is appropriate to adopt changes at N.J.A.C. 7:7-7.6 to provide those municipalities with a three-year period to develop a Municipal Public Access Plan during which time, municipalities without plans can continue to apply for and obtain authorization under the coastal general permit for beach and dune maintenance activities.

172. COMMENT: The existing rule requires all municipalities seeking beach and dune maintenance permits to provide public access as a condition of the permit. The proposal exempts municipalities with approved public access plans from having to obtain such a permit. Moreover, the proposed rule does not require any new access as a permit condition for towns without such a plan. If there is presently no access, none must be created. (2, 15, 21, 34, 37, 40, 41, 46, 60, 66, 69, 73, 81, 82, 88)

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RESPONSE: The adopted amendments to the coastal general permit for beach and dune maintenance activities do not exempt municipalities with approved Municipal Public Access Plans from the requirement to obtain this general permit. Under the rules as originally proposed, a municipality could not obtain authorization under the general permit if it did not have an approved and operational Municipal Public Access Plan. Adopted N.J.A.C. 7:7-7.6(c) provides a three-year grace period before it restricts the general permit to those municipalities that have Department-approved Municipal Public Access Plans. Therefore, during the three-year period municipalities without plans can continue to apply for and obtain authorization under the coastal general permit for beach and dune maintenance activities. At the end of the three-year period, only those municipalities with approved and operational Municipal Public Access Plans are eligible for the general permit. Those municipalities without operational Municipal Public Access Plans must obtain an individual permit for beach and dune maintenance activities. Both the coastal general permit for beach and dune maintenance and the individual permit require applicants to provide access to the beach in accordance with the lands and waters subject to the public trust rights rule, N.J.A.C. 7:7E-3.50, and the public access rule, N.J.A.C. 7:7E-8.11.

N.J.A.C. 7:7E-8.11 Public access

N.J.A.C. 7:7E-8.11(b)

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173. COMMENT: The provision that requires that public access must incorporate, to the maximum extent practicable, fishing access and associated amenities is supported. (30)

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

174. COMMENT: The substantial change proposed at N.J.A.C. 7:7E-8.11(b)3ii, which provides that fishing access and associated amenities, including parking that accommodates nighttime fishing for a reasonable duration of time, is supported. (31)

RESPONSE: The Department acknowledges this comment in support of the substantial change at N.J.A.C. 7:7E-8.11(b)3ii.

175. COMMENT: At proposed N.J.A.C. 7:7E-8.11(b) which states, “All existing public access to and along tidal waters and their shores shall be maintained to the maximum extent practicable,” the term “maximum extent practicable” should be removed. The term allows municipalities the opportunity to change and eliminate access when they submit their public access plan to the Department. (37)

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176. COMMENT: The term “maximum extent practicable,” is way too open of a standard and will allow for waiving of more access. (82)

177. COMMENT: The substantial changes to the public access rule fail to address the basic problems with the original proposal, which is that the rule lacks standards for the approval of Municipal Public Access Plans and will result in a patchwork of access rules. The rules do not encourage or require expanded access and they protect existing access only to “the maximum extent practicable,” with no definition of what that means. (11, 15, 19)

RESPONSE TO COMMENT 175 THROUGH 177: The term “maximum extent practicable” is used in both statutory and regulatory language, and exists in the current Coastal Zone Management (CZM) rules (N.J.A.C. 7:7E), the Freshwater Wetland Protection Act rules (N.J.A.C. 7:7A), as well as many other Department rules. One court, in looking at the Department’s high rise structure rule, part of the CZM rules at N.J.A.C. 7:7E-7.14, stated:

The DEP's high-rise regulations undoubtedly embrace a goal of protecting scenic views of the waterfront. However, that protection is qualified in N.J.A.C. 7:7E-7.14 by the phrase "to the **maximum extent practicable.**" That qualification reflects a balanced

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regulatory sensitivity to the physical, economic, and other pragmatic constraints that affect waterfront construction.

In re Riverview Dev., LLC, Waterfront Dev. Permit No. 0908..., 411 N.J. Super. 409. (App. Div. 2010)

The Department's evaluation of the practicability of fishing access will include an assessment of the physical, economic, and other pragmatic constraints of providing such access, consistent with the provisions of the rule and the Public Trust Doctrine.

178. COMMENT: The Department's claim that fishermen have benefitted from the Notice of Substantial Changes to the public access rule proposal are not supported by the language of the rules and the rollback of access protection afforded fishermen in the proposal, is not offset by the partial givebacks in the substantial changes. (21, 22)

RESPONSE: Prior to adoption of these amendments, N.J.A.C. 7:7E-8.11(l) provided that "Development on or adjacent to tidal waterways and their shores shall incorporate fishing access and associated amenities to the maximum extent practicable within the area provided for public access. In the case of a beach, fishing access shall not be required in areas designated for swimming during hours designated for swimming." Adopted N.J.A.C. 7:7E-8.11(b)3ii, as

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amended by the March 19, 2012 Notice of Substantial Changes, provides “ii. Public access proposed by an applicant shall incorporate, to the maximum extent practicable, fishing access and associated amenities, including parking that accommodates nighttime fishing for a reasonable duration of time, on or adjacent to tidal waterways and their shores. In the case of a beach, fishing access shall not be required in areas designated for swimming during hours designated for swimming.”

The adopted rules do not rollback public access afforded to fishermen. Instead they continue the protections provided in the prior rule and make clear that “associated amenities” referenced in both the adopted rule and the prior rule includes parking that accommodates nighttime fishing.

Furthermore, as discussed in response to response to Comment 86, the Department is adopting the change proposed in the notice of substantial changes at N.J.A.C. 7:7E-8.11(e)3iii to make clear that practical limitations to public access include not only a lack of parking, but also restrictions on parking availability, which could limit the public’s access to tidal waterways.

Municipal Public Access Plans

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179. COMMENT: The change that provides the public with a 30-day public comment period to review and comment on proposed Municipal Public Access Plans is supported. The change that requires the Department to notify by e-mail individuals who have requested notice of Municipal Public Access Plan applications is also supported. (30)

180. COMMENT: The change requiring the Department to post on its website applications for approval of Municipal Public Access Plans is supported. (31)

181. COMMENT: The changes to the Municipal Public Access Plan section of the rule are supported. (62)

RESPONSE TO COMMENTS 179 THROUGH 181: The Department acknowledges these comments in support of the rule regarding the Municipal Public Access Plan application review process.

182. COMMENT: Stakeholders should be involved in the review of applications for Municipal Public Access Plans because local stakeholders may have a better insight on where access should be. (46)

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RESPONSE: The adopted rules provide for the review and approval process of proposed Municipal Public Access Plans at N.J.A.C. 7:7E-8.11(i) through (l). Under N.J.A.C. 7:7E-8.11(i), the Department will provide a 30-day public comment period on an application for approval of a Municipal Public Access Plan, post the proposed plan on the Department's website, e-mail individuals who have requested notice of Municipal Public Access Plan applications, and publish notice in the DEP Bulletin. Furthermore, the adopted rules at N.J.A.C. 7:7E-8.11(j) requires a municipality to notify the Department two weeks in advance of the dates and times of any scheduled public meetings on the Department-approved Municipal Public Access Plan so the Department can post the meeting information on its website and notify by email individuals who have requested notice of applications for approval of Municipal Public Access Plans. Therefore, Department believes that the rules provide ample opportunity for stakeholders, whether they be from the local community or people from anywhere else that enjoy public access in that community, to provide valuable input into the review process.

183. COMMENT: A new provision should be added to the rule encouraging municipalities to consult with their county prior to submitting an application for approval of a Municipal Public Access Plan, in order to prevent potential negative impacts to county infrastructure and to determine consistency with the county master plan. (23)

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RESPONSE: N.J.A.C. 7:7E-8.11(h) requires a municipality filing an application for approval of a Municipal Public Access Plan to the Department to also provide a full copy of the submittal to the appropriate county planning board, as well as to any regional planning entities with jurisdiction over any portion of the municipality affected by the Municipal Public Access Plan. Therefore, counties will have the opportunity to review and provide comment on the proposed Municipal Public Access Plan.

184. COMMENT: The rule as proposed to be amended in the Notice of Additional Substantial Changes on Adoption goes further than the initial proposal to ensure that Municipal Public Access Plans will, to the greatest degree possible, be subject to transparency and public involvement. This will help to ensure that the residents of municipalities will have an opportunity to participate in the process and comment on the plans before they become operational. The Department should be commended for their work on this rule. (83)

RESPONSE: The Department acknowledges this comment in support of adopted substantial changes to the review process of Municipal Public Access Plans.

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185. COMMENT: After reviewing the Notice of Substantial Change on Adoption, allowing municipalities the ability to develop their own Municipal Public Access Plan is still supported. (23)

RESPONSE: The Department acknowledges this comment in support of the adopted rules regarding Municipal Public Access Plans.

186. COMMENT: Proposed new N.J.A.C. 7:7E-8.11(d)3, which provides that Municipal Public Access Plans must require the installation and maintenance of appropriate public access signage, is supported. (88)

RESPONSE: The Department acknowledges this comment in support N.J.A.C. 7:7E-8.11(d)3.

187. COMMENT: Municipalities should be able to add new public access points or facilities to their Municipal Public Access Plan without Department approval; however, approval of any restriction to public access should require approval from the Department. (30)

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RESPONSE: The adopted rules require a municipality to submit a report detailing the status of all projects undertaken in accordance with the Department-approved Municipal Public Access Plan as well as any problems encountered in pursuit of the plan's objectives and goals, five years after the adoption of the approved plan into the municipal Master Plan and every five years thereafter. The rules also require that the report include proposed remedies to assure the objectives and goals of the plan are met. The adopted rules require this communication which may indeed result in the need to make a change to an approved Municipal Public Access Plan. However if a municipality is proposing a change to an approved Municipal Public Access Plan that impacts the location or type of access to be provided, that change must in accordance with N.J.A.C. 7:7E-8.11(l) be review and approval by the Department. Therefore, the Department needs to be informed of all changes to Municipal Public Access Plans so that the plans remain accurate and up-to-date for the Department and the public.

188. COMMENT: The proposed rule changes still allow some towns to deny public access to the beaches and tidal waterways. Certain towns are only interested in their property owners. The State should look after the right of public access for all its citizens, not municipalities who are only concerned with its own residents. (30, 70)

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RESPONSE: The adopted rules provide goals for public access at N.J.A.C. 7:7E-8.11(b), including that public access be on a non-discriminatory basis, and that all existing public access must be maintained to the maximum extent practicable. These goals will be utilized by the Department in determining whether a proposed Municipal Public Access Plan should be approved. Accordingly, a proposed Municipal Public Access Plan that favors residents and limits access to non-residents would not be compliant with the rules and would not be approved.

189. COMMENT: Under the proposed changes, public access proposed by an applicant may include any one or combination of five enumerated types of public access amenities. Yet, the proposed rule does not contain any language or standard as to the appropriateness or sufficiency of public access proposed by an applicant. This is not acceptable. Construed strictly, this standard might allow an applicant to provide a single amenity that is ill-suited for the type of access needed. The Department should improve N.J.A.C. 7:7E-8.11(b)(3)(i) by incorporating the following language from 7:7E-8.11(n) and (o): “When determining whether proposed public access is appropriate and/or sufficient, the Department shall consider factors such as type of public access available, the compatibility of the proposed public access with the applicant’s proposed use of the site, square footage of access area, and environmental impact or benefit.” (2, 15, 21, 34, 37, 40,41, 46, 60, 66, 69, 73, 81, 82, 88)

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RESPONSE: N.J.A.C. 7:7E-8.11(n) includes the public access standards for municipalities that do not have approved Municipal Public Access Plans, and requires the Department to consider factors such as type of public access available, the compatibility of the proposed public access with the applicant's proposed use of the site, square footage of access area, and environmental impact or benefit. N.J.A.C. 7:7E-8.11(i) requires the Department to review an application for approval of a Municipal Public Access Plan to determine whether the plan is consistent with the broad coastal goals described at N.J.A.C. 7:7E-1.1(c), the goals for public access at (b) and all other requirements of N.J.A.C. 7:7E-8.11. The Department anticipates that many municipalities may elect to develop Municipal Public Access Plans that include provisions for public access funds into which applicants would be required to satisfy their public access obligation by making a contribution amount consistent with the formula located at N.J.A.C. 7:7E-8.11(f). In cases when an approved Municipal Public Access Plan does not include a fund, the Department will consider the factors at N.J.A.C. 7:7E-8.11(n) to determine whether public access is appropriate and sufficient.

190. COMMENT: While the new rules put forward goals for the Municipal Public Access Plans, there are no enforcement standards if the goals are not achieved and the development of a Municipal Public Access Plan is not mandatory for all communities bordering tidal waters. In

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addition, any denial by the Department of an Municipal Public Access Plan would be arbitrary and capricious under these rules. (82)

RESPONSE: The rules provide standards that must be met by municipalities with Department-approved Municipal Public Access Plans. In addition to satisfying the goals specified at N.J.A.C. 7:7E-1.1(c) and the public access goals at N.J.A.C. 7:7E-8.11(b), Municipal Public Access Plans shall additionally meet the requirements at N.J.A.C. 7:7E-8.11(d) 1 through 4. The rules can be enforced in the same manner as any other Department approval under the Coastal Zone Management rules pursuant to the Coastal Permit Program rules (N.J.A.C. 7:7-8), including imposition of monetary penalties.

The Department's decisions on applications for approval of a proposed Municipal Public Access Plan will be made in accordance with the process and standards specified in the rules and will not be either arbitrary or capricious. As discussed above in the response to Comment 189, the rules provide adequate standards for the Department in determining if the Municipal Public Access Plan meets the rules' requirements.

191. COMMENT: It is not clear whether, after plan approval, the Department or the municipality determines whether access proposed by a given applicant is appropriate and/or

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sufficient. The proposed rule provides that once a plan is approved, “public access required to satisfy the conditions of a coastal permit for development . . . shall be provided in accordance with the Municipal Access Plan.” However, the proposed rule does not state whether the State or municipality makes the determinations as to whether the proposed public access is being provided “in accordance with” the plan. Indeed, the proposed rules suggest that the Department’s involvement is limited to (1) initial plan approval (N.J.A.C. 7:7E-8.11(i)), (2) a review/renewal process every five years (N.J.A.C. 7:7E-8.11(j)(4)), (3) revocation for noncompliance based upon an unspecified trigger (N.J.A.C. 7:7E-8.11(m)), and (4) review of any plan changes (N.J.A.C. 7:7E-8.11(l)). It would be substantially detrimental to the cause of public access, and a serious abdication of its statutory and Public Trust Doctrine duties, if the Department left determinations as to the appropriateness and sufficiency of the public access proposed by applicants to municipalities. (2, 15, 21, 34, 37, 40, 41, 46, 60, 66, 69, 73, 81, 82, 88)

RESPONSE: The Department anticipates that many municipalities may elect to develop Municipal Public Access Plans that include provisions for monetary contributions to be used to provide new or enhanced public access along the same waterway as the development. In those cases, a formula for determining the amount of the contribution is provided at N.J.A.C. 7:7E-8.11(f) which the municipality must use. If an Municipal Public Access Plan does not contain a public access fund, but instead requires applicants to provide access onsite or offsite in

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accordance with the approved plan, it will be up to the Department as part of its review of a permit application for the proposed project to ensure that any public access required by a coastal permit is appropriate and in accordance with the Department-approved Municipal Public Access Plan. While the commenter is correct that the rule provides that the municipality must provide information to the Department every five years which the Department will review to assure that the Department-approved plan is being satisfied, Municipal Public Access Plans do not require renewal.

192. COMMENT: The proposed changes to N.J.A.C. 7:7E-8.11(e) regarding the public needs assessment and implementation strategy to be included in an application for a Municipal Access Plan does not cure a perceived disconnect between identified public access needs and the measures to be implemented through a plan. Under N.J.A.C. 7:7E-8.11(e)(5), plans would include an implementation strategy that “describes the forms of public access proposed in order to satisfy the need for public access as determined by the public access needs assessment.” However, neither this provision nor any other appears to create an affirmative duty upon a municipality to address all of the needs for public access as determined by the public access needs assessment. Without such an obligation, municipalities are likely to select easily attainable goals and defer more critical ones, like providing new public accessways to waterfront areas that

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are publicly inaccessible, off and on-street parking, and public restrooms. (2, 15, 21, 34, 37, 40, 41, 46, 60, 66, 69, 73, 81, 82, 88)

RESPONSE: The adopted rules require the municipality to include in its application all existing and proposed access points and a complete needs assessment. N.J.A.C. 7:7E-8.11(e) provides clear standards as to what must be evaluated in a public access needs assessment. The Department will evaluate the application to ensure that the assessment meets those standards. In addition, in accordance with N.J.A.C. 7:7E-8.11(i), the Department will provide a 30-day public comment period on applications for approval of Municipal Public Access Plans, during which time interested members of the public can review and comment on the appropriateness of the needs assessment.

N.J.A.C. 7:7E-8.11(j)

193. COMMENT: The April 4, 2011 proposal included a six-year review requirement intended to be concurrent with municipal Master Plan review. On May 2, 2011, the Municipal Land Use Law (P.L. 1975, c.291) was amended extending the Master Plan review cycle to a 10-year maximum. The substantial change at N.J.A.C. 7:7E-8.11(j)4 changed the Municipal Public

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Access Plan review cycle to five years. Municipal Public Access Plans are intended to be adopted as an element of the Municipal Master Plan. If the Legislators determined that Master Plan review for such important elements as Land Use, Housing, Circulation, Utility, and Open space, should be extended from six to 10 years, the Municipal Public Access Plans should not be singled out for more frequent review. The proposal must be revised to recognize and be consistent with the legislated Master Plan review process. (23)

RESPONSE: The rules as proposed provided that Municipal Public Access Plans would expire after a six-year period, at which time municipalities would have to renew their Municipal Public Access Plan. The adopted rule requires reporting on the status of Municipal Public Access Plans every five years, in accordance with N.J.A.C. 7:7E-8.11(j)4. Municipal Public Access Plans do not expire; therefore, they do not have to be renewed. Accordingly, the adopted rules are not inconsistent with the Master Plan review process.

Revocation of Municipal Public Access Plans (N.J.A.C. 7:7E-8.11(m))

194. COMMENT: The proposed rule now includes the ability for the Department to revoke approved Municipal Public Access Plans for, among other reasons, failure to implement the

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Municipal Public Access Plan strategy. There could be many valid reasons why a plan might not be fully implemented based on the originally proposed schedule, which the Department may not consider acceptable. Examples include unexpected cost increases, unavailability of waterfront property, or an unexpected permit denial. Furthermore, the municipality is only given 30 days to respond to a notice of revocation and if the municipal remedy or explanation is not accepted by the Department, the municipality only has 10 days to request a hearing. This substantial change is unreasonable and the timeframe is too short for municipal action. At a minimum the timeframe should be expanded to at least 90 days. (23)

RESPONSE: The Department anticipates most if not all, municipalities that have voluntarily sought approval of a Municipal Public Access Plan will comply with that plan. However the Department understands that there could be valid reasons why a plan cannot be implemented as approved by the Department. In such cases, the Department anticipates that the municipality will notify the Department of such implementation issues as they arise so that the Department and the municipality can work together to resolve the issues. N.J.A.C. 7:7E-8.11(j)4 requires municipalities to report on the status of their Department-approved Municipal Public Access Plan every five years after the date of adoption of the Municipal Public Access Plan into the municipal Master Plan, including any problems encountered in pursuit of the plan's objectives and goals and proposed remedies to assure the objectives and goals of the plan are met. The

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Department's goal is to work in a cooperative manner with any municipality that encounters plan implementation issues and therefore municipalities will have some notice of perceived problems prior to issuance of a formal revocation. Therefore in, what the Department believes will be rare occasions when the Department notifies a municipality of its intent to revoke the Department's approval of the Municipal Public Access Plan, the Department has determined that 30 days is sufficient time to either remedy the noncompliance, provide an explanation of why such noncompliance cannot be remedied, offer a plan to remedy such noncompliance, or demonstrate to the Department that good cause for revocation does not exist.

Existing development (commercial; industrial and public development; marinas (N.J.A.C. 7:7E-8.11(n)1i, 3i and 4i and N.J.A.C. 7:7E-8.11(o)1))

195. COMMENT: With respect to existing commercial development, industrial development, public development, and marinas, public access is not necessarily triggered by "redevelopment" that changes the existing use. This would potentially create a major loophole for municipalities and redevelopers to exploit to the detriment of waterfront users.

The Department should be mindful that "redevelopment" is a term of art, which, under the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq., describes new

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development that replaces an existing development and/or use on a blighted tract. By way of example, a long defunct commercial building may be replaced by or retrofitted as a mixed-use building featuring ground level retail stores and a substantial number of multifamily housing units. The proposed rule generally exempts redevelopment from triggering public access requirements, unless the activity results in a “new” type of development that is subject to those requirements. The proposed rules further do not expressly address mixed-use developments.

All forms of redevelopment should be subject to public access requirements, and the proposed rule should be amended to clarify the treatment of mixed-use development. (2, 15, 21, 34, 37, 40, 41, 46, 60, 66, 69, 73, 81, 82, 88)

RESPONSE: Redevelopment as defined at N.J.A.C. 7:7E-1.8 means “the development of a previously developed site that has been inactive, underutilized, or abandoned for five years or less.” Therefore, any previously developed site that has been inactive, underutilized, or abandoned for more than five years, must comply with the public access requirements of the adopted rules. For example, if an industrial site has been abandoned for six years and a developer wishes to change the use to commercial, the public access requirements for commercial development at N.J.A.C. 7:7E-8.11(n)1 would apply. The Department believes that it should encourage redevelopment of inactive and under-utilized waterfront facilities and therefore is adopting the amendments relating to redevelopment.

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The rules provide that a change in use of a property is considered new development and therefore, except for new ports, additional public access would be required in accordance with the adopted rules. All existing access must be maintained or replaced. In addition, the Department would apply all appropriate standards for the types of development proposed. For example, if an applicant proposes residential and commercial development on a site, the applicant would be required to meet the public access standards for residential and for commercial developments. Further as provided at N.J.A.C. 7:7E-8.11(n), when determining whether proposed public access is appropriate and/or sufficient, the Department will consider factors such as type of public access available, the compatibility of the proposed public access with the applicant's proposed use of the site, square footage of access area, and environmental impact or benefit.

Ports (N.J.A.C. 7:7E-8.11(n)5ii)

196. COMMENT: The substantive change that would exempt new port facilities from public access requirements is opposed. A new port may continue to wall off the public from the waterfront, or worse, destroy existing access. The Department states in the notice of substantial change that ports "already provide water access for navigation and commerce." This is not the type of access required by the Public Trust Doctrine. The courts have made clear that all lands in

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New Jersey covered by tidal waters belong to the State to be held, protected and regulated for the common use by and benefit for “all the people.” The Department would appear to be seriously misconstruing the Public Trust Doctrine as protective of any water dependent use, including those that exclude the public. (2, 15, 21, 34, 37, 40, 41, 46, 60, 66, 69, 73, 81, 82, 88)

RESPONSE: Ports are a unique type of development that should be treated differently than other types of development, such as commercial and residential and, therefore, warrant modification of public access requirements. Port activities provide water access for navigation and commerce and generally do not provide a safe environment for activities such as swimming or recreational boating. In accordance with N.J.A.C. 7:7E-8.11(n)5i, any existing public access must be maintained or equivalent access provided onsite, or if it is demonstrated to the Department’s satisfaction that onsite access is not practicable based on the risk of injury or upon documentation of a threat to public safety due to unique circumstances, access must be provided offsite on the same waterway as the development. As explained in the Response to Comment 168, the Public Trust Doctrine allows for consideration of whether public access to upland areas is appropriate in light of site-specific circumstances. The Department views the public access requirements for ports as consistent with the Public Trust Doctrine and appropriate in light of the unique characteristics of port facilities.

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Public highways N.J.A.C. 7:7E-8.11(o) (proposed as N.J.A.C. 7:7E-8.11(n)6 in the notice of substantial changes)

197. COMMENT: The Department must recognize the need to allow for a balance between waterfront access and traffic safety. The Department should coordinate their public access reviews on road and bridge projects with the New Jersey Department of Transportation (NJDOT). In cases where an applicant's design professional believes that public access required by the Department may impact public safety and the Department disagrees, the Department should be required to provide written finding by a NJDOT staff licensed Professional Engineer having expertise in traffic safety engineering. Untethered decision-making by the Department on projects that may impact public safety on roadways and bridges without consideration of potential tort claims and liabilities resulting from waterfront access improvements that conflict with traffic safety standards and design is opposed. (23)

RESPONSE: The adopted rules recognize that public highways are a unique type of development and allow for a balance between waterfront access and traffic safety. By allowing and encouraging transportation agencies and counties to develop and seek Department approval of Transportation Public Access Plans, similar to Municipal Public Access Plans, transportation agency engineers will be able to incorporate their comprehensive policies, procedures, and

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standards intended to address many environmental, socioeconomic, and community issues, including public access and public safety into the Transportation Public Access Plan. The Department anticipates that by working with the professional engineers from transportation agencies in developing Transportation Public Access Plans, public access can be accomplished while taking into consideration concerns for public safety.

198. COMMENT: The proposed substantial changes for public highways will create an undue economic burden for Monmouth County, which has a substantial amount of waterfront. The cost of public traffic safety projects will be significantly increased. Additional costs to these projects were correctly identified in the Economic Impact in the April 4, 2011 proposal. The public access requirements for public highways in the Notice of Substantial Changes on Adoption will impose added cost to county road and bridge projects that may include one or all of the following: the preparation of public access proposals; land acquisition; construction costs associated with building public access; the materials and amenities associated with the type of public access proposed; the cost of maintaining the public access; and the cost to obtain a riparian lease or license. Ultimately, the unilateral application of these requirements on impacted road and bridge projects will create increased total project costs and burden taxpayers without considering a cost/benefit analysis that evaluates the reasonableness of including the contemplated access improvements at a given location or project. (23)

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RESPONSE: The adopted rules include amendments to make public access requirements applicable to linear transportation projects similar to the requirements applicable to commercial, industrial, and other public development. These modifications were set forth in the Notice of Additional Substantial Changes on Adoption (see 44 N.J.R. 1864(a)). For these other forms of development, existing developments (except for existing developments that are considered new developments because they result in a change of use, expansion outside the existing parcel, or in the case of commercial developments, where greater than a cumulative 50 percent increase in the area covered by buildings, asphalt, or concrete paving is proposed), are not required to create new public access, where the proposed activity consists of maintenance, rehabilitation, renovation, redevelopment, or expansion that remains entirely within the parcel containing the existing development. The Department is adopting changes proposed in the notice of additional substantial changes at N.J.A.C. 7:7E-8.11(o)1 and 2 to clarify that public access is required for public roadway projects only when the new road or expansion crosses or proposes fill in a tidal waterway.

Marinas (N.J.A.C. 7:7E-8.11(o))

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199. COMMENT: The proposed changes to the public access rules that apply to marinas are supported and the public access rule must be adopted immediately. The proposed rules represent a realistic and sensible approach to enhancing public access to waterways. (3, 7, 8, 9, 12, 16, 17, 20, 27, 28, 29, 35, 36, 38, 43, 44, 45, 50, 55, 56, 63, 64, 68, 79, 80, 84, 86)

200. COMMENT: The proposed amendments represent a reasonable and balanced approach to public access at marinas. Marinas are unique because in addition to providing a gateway to the waterfront, they provide slips, public boat ramps, fuel, fishing supplies, boat maintenance and service, restaurants and more. When the Coastal Zone Management rules on public access were promulgated in 2007, they imposed serious mandates on marina owners by forcing them to provide unlimited public access on their properties without taking into consideration the access and services they already provide. Under the existing rules, any marina seeking a permit to improve or expand their facility is required to provide access to the marina and waterfront to anyone 24 hours a day, seven days a week, 365 days of the year. The rules also require a permanent walkway across the entire waterfront of the property despite the configuration or operation of the marina. The existing rules increase security concerns, reduce revenues, and increase costs beyond the financial ability of most marinas to support. The proposed changes to the rules for marinas will ensure the future health and growth of the recreational boating industry, the businesses that support it, the thousands who work in it, and the citizens who

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depend on it. New Jersey needs more marinas to provide more opportunities to access and enjoy our waterways, not less. The proposed rules must be adopted as soon as possible. The commenter thanked the Department for working with the marina industry on these rules. (16)

RESPONSE TO COMMENTS 199 AND 200: The Department acknowledges these comments in support of the adopted amendments as they apply to marinas.

Comments Received during Comment Period of Initial Proposal of Amendments, Not Giving Rise to Additional Changes in the Rule Proposal

In response to the April 4, 2011 publication of the initial proposal, the Department received a number of comments that did not give rise to modifications to the rule proposal.

Comments were received from:

1. Steve Acropolis, Mayor Brick Township
2. Mark Akus
3. Bruce Allen
4. Donna Arvelo
5. Rachel Avenia-Prol
6. Stanley Baguchinsky, Surfrider Foundation and SAVE
7. Dr. Ana Baptista, Ironbound Community Corp. & NJ Environmental Justice Alliance
8. Vincent R. Barella, Mayor, Point Pleasant Beach
9. M. Virginia Barta

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10. Randall S. Bauer
11. Andrew Bednarek, Borough of Avalon
12. Ron Bernknopf, Berkley Striper Club
13. Alex Betser
14. Reid Betz
15. Victoria Bingham, Statewide Conservation Adovcacy Network of Wildwood NJ
16. Ray Bogan, Marine Trades Association
17. Jim Brennan
18. Kevin J. Broderick
19. David Brogan, New Jersey Business and Industry Association
20. James Brower
21. Susan Brown Reitz
22. Fred Brueggemann
23. Jeremy Bryan
24. Tim Burden, New Jersey Beach Buggy Association
25. Thomas Burkholder
26. Dave Cavagnaro
27. Lance Carsillo
28. Al Carusi, Councilman, Stone Harbor
29. Kyle Cecchini
30. Jim Cerruti, Fair Haven Yacht Works
31. James Cobb, NY Shipping Association, Inc.
32. Ralph Coscia, Citizens' Right to Access Beaches (C.R.A.B.)
33. John Connor, Surfers Environmental Alliance
34. Robert R. Crelin, Jr.
35. Rosemary Cunniffe
36. Bill Curtis, Mayor of Bay Head
37. Joseph Curto, New York Shipping Association, Inc.
38. Nicole Dallara
39. Stephanie Daniels, The Historic Paulus Hook Association
40. Melissa Danko, Marine Trades Association
41. Karen Davidson, Green Cover Marina
42. Pete D'Alessio, New Jersey Beach Buggy Association
43. Jason DeCarlo
44. Laura Deeks, Rutgers School of Law-Newark
45. Tom DeGise
46. Peter DePaul
47. Tim Dillingham, Executive Director of the American Littoral Society

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48. Al Dolce, Ocean County Federation of Sportsman
49. Pamela Dugan
50. Paul and Cathy Dunne
51. April Elsasser
52. Michael Egenton, VP New Jersey State Chamber of Commerce
53. Hugh L. Evans
54. Stewart Farrell, Coastal Research Center, Richard Stockton College
55. Mary Brown Fee
56. William M. Feinberg, Feinberg, Dee & Feinberg Counselors at Law, Asbury Park Fishing Club, Trustee American Literal Society, Clean Ocean Action
57. Bill Figley
58. Albert and Jean Fillman
59. Ryan Firkser
60. Brian Fischer, Marine Trades Association
61. Tom Fote, Jersey Coast Anglers Association and the New Jersey State Federation of Sportsman Clubs
62. Adelaide S. Franklin, Main One Marina
63. Jack Fullmer, New Jersey Council of Diving Clubs
64. Anthony Gallagher
65. Kathleen Gasicica, American Littoral Society
66. Honorable Richard J. Gerbounka, Mayor City of Linden
67. Elizabeth George-Cheniara, Esq., New Jersey Builders Association
68. Honorable Gary Giberson, Mayor City of Port Republic
69. Victoria Gillen
70. Stephen Gillooly
71. D'Arcy Green
72. Elkins Green, Director Division of Environmental Resources, New Jersey Department of Transportation
73. Honorable Carl H. Groon, Mayor Borough of Wildwood Crest
74. Patricia Guida
75. Brian Hall, Dillan's Creek Marina
76. Paul Haertel, Berkley Striper Club
77. Linda Haertel, Berkley Striper Club
78. Dale Hardman
79. Amy S. Hardy
80. Lisa M. Hardy
81. Paul Harris, President of the NJ Beach Buggy Association
82. Ed Harrison, Baywood Marina

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83. Michael Heanue
84. Gil Hawkins, Hudson River Fishermen's Assoc.
85. Honorable Jerramiah T. Healy, Mayor City of Jersey City
86. Lori Heitzman
87. William Heitzman
88. Frank Hendricksen
89. Helen Henderson, American Literal Society
90. Jim Hill
91. Linda Hill
92. Timothy G. Hill, Interim Borough Administer Borough of Highlands, Director of Parks and Recreation
93. Christopher Hoffman
94. Mary Hogan
95. Paul Hottinger
96. David and Cynthia Hughes
97. Bill Hutson, Lorry's Island End Motel owner
98. Kevin Ingram
99. Dee Ann Ipp
100. Dorothy Jedziniak
101. Roland Johnson
102. Carol Johnston
103. Edward J. Kelly, The Maritime Association of the Port of New York/New Jersey
104. Irene Kelly
105. Jerry Kelly, Shark River Surf Angler's
106. Tina Kirvin
107. Charles J. Koch
108. Margaret A. Kolbe
109. Kent Koping
110. Joe Lachawiec, Mayor, Township of Ocean (Waretown)
111. Bob Lange
112. Michael O. Lavitt
113. Jon Lazarus
114. Tom Leaming, Leaming's Marina, Inc.
115. Edwin Leggoe
116. Christopher Len on behalf of the Hackensack Riverkeeper and NY/NJ Baykeeper
117. Ellis Levin
118. Robert E. Lick
119. Leslie Logel

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120. Peter L. Lomax, The Lomax Consulting Group, LLC
121. Joe Loreti, President NJ Chapter Striper Coast Surf Casters Club
122. Jay Lynch, Toms River Township Planner
123. Vincent Mackiel
124. H.W. Mahlmann, President, United New York Sandy Hook Pilots Benevolent Association
125. Roderick MacKenzie
126. Mayor Mancini, Mayor Long Beach Township
127. Beth Mane
128. Helen Manogue
129. Don Marantz, New Jersey Coast Anglers Association
130. Stephen Marks, Hudson County Planning Director
131. Tanya R. Marione-Stanton on behalf of Jersey City Division of Planning
132. Tanya R. Marione-Stanton on behalf of Jersey City Environmental Commission
133. Amy Martin, PSEG Services Corporation, on behalf of Public Service Electric & Gas and PSEG Fossil LLC
134. Eric Martindale
135. Jason Martucci, Councilman Borough of Seaside Park
136. Bonnie McCay, Rutgers State University
137. A.W. McGovern, President, United New Jersey Sandy Hook Pilots Benevolent Association
138. Kathleen McGrath
139. David J. McKeon, Ocean County Planning Director
140. Brian McMorrow, Bohler Engineering
141. Timothy McMillen
142. Marie S. Mease, Ocean Gate Yacht Basin
143. Maureen Meenaghan
144. Ray Menell, Asbury Park Fishing Club
145. Rose Miller
146. Kate Millsaps, Program Assistant for NJ Chapter of the Sierra Club
147. Harvey Morginstin
148. Barbara Mroz
149. Margaret Mroz
150. Marianne Mulcahey
151. Shawn P. Murphy, D&S Marine Service, LLC
152. Mayor Neble, Mantoloking
153. Captain Adam Nowalsky, Chairman, recreational Fishing Alliance
154. Margaret O'Brien, Jingle Bait and Tackle

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155. Greg O'Connell, NJ Chapter of the Recreational Fishing Alliance
156. Jon Oldham, Mayor Harvey Cedars
157. Margo Pellegrino
158. Sam Pesin, President of the Friends of Liberty State Park
159. Claudine Piccioni
160. Tom Pluta
161. Andrew J. Provence, Esq., Ansell Grimm & Aaron, on behalf of the American Littoral Society, Bayshore Regional Watershed Council, Citizens Rights to Access Beaches, Edison Wetlands Association, Elizabeth River/Arthur Kill Watershed Association, Environmental New Jersey, Future City, Inc., Hackensack Riverkeeper, Manasquan Fishing Club, New Jersey Environmental Lobby, PaddleOut.org, Public Employees for Environmental Responsibility New Jersey Chapter, New Jersey Sierra Club, and Sunrise Bay Anglers
162. Jean Public
163. Eugene Pumphrey
164. Thomas J. Reilly, Sr.
165. Bruce and Susan Reitz
166. Susan Brown Reitz
167. Kris Renart
168. Kurt Renart- Beach Buggy Association
169. Joseph Rettagliata, Chairman Monmouth County Planning Board
170. Joseph S. Reynolds, Co-Chair Bayshore Regional Watershed Council
171. Thomas E. Robb
172. Claudia E. Rocca, Bohler Engineering
173. Dennis Rochford, President Maritime Exchange for the Delaware River and Bay
174. Kersten Roehsler, Viking Terminal Marine
175. Scott J. Ross, New Jersey Petroleum Council
176. Harvey Rude
177. Elizabeth Ruebman, NY/NJ Baykeeper
178. William and Joan Saidel
179. Charles L. Salisbury
180. Charles Santoro
181. Honorable Carl F. Schupp, Mayor Borough of Cape May Point
182. John Seborowski
183. Nicky Sheats on behalf of the New Jersey Environmental Alliance
184. Bill Sheehan
185. Paul Shelly, Jersey Shore Chapter of the Surfrider Foundation
186. Mike Sicilia
187. Thomas Siciliano

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188. David Sikorski
189. Sandra Sobanski, Hoboken Cove Community Boathouse
190. Bruce Smith
191. David Southwick, Southwick's Marina
192. Dan Statile, NuStar Paulsboro Asphalt Refinery
193. Teresa Stimpfel
194. Doug Stuart, Greenwich Township, Gloucester County
195. Douglas Taylor, Jersey Devil Fishing Club of Bellmawr
196. Paul Terzian
197. Jeff Tittel, Director, New Jersey Chapter of the Sierra Club
198. Douglas M. Tomson, New Jersey Realtors Association
199. Rick Traber
200. James J. Truncer, Monmouth County Parks System
201. Paul Shelly
202. R. Van Strien
203. John G. Valeri, Jr., Wolff & Samson PC on behalf of the New Jersey Turnpike Authority
204. George M. Ververides, Middlesex County Planning Department
205. Gail Voss, Good Luck Point Marina, Bayville
206. Scott Wahl, Public Information Officer, Borough of Avalon
207. Thomas H. Ward, Ward Shoemaker, LLC., Solicitor for Greenwich Township
208. John L Weber, N on behalf of the Surfrider Foundation, the Jersey Shore Chapter and the South Jersey Chapter
209. Ellen Weiseberg
210. Jillian Weislo, Edison Wetlands Association
211. Thomas Wells, Director of Government Relations, The Nature Conservancy
212. Charles West
213. Henry Whitlock
214. Kristin F. Wildman, The Lomax Consulting Group, LLC
215. Andrew Wilner, Sustainability Solutions
216. Christopher Winkel
217. Chris Witter
218. Joe Woerner, Jersey Shore Chapter of the Surfrider Foundation
219. Bill Wolfe
220. Noah Zakim
221. Christopher Zeppie, Port Authority of NY & NJ
222. **Form letter #1:** The following 14 individuals, listed below, sent in form letters requesting the Department withdraw the proposal.

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Cindy Assini
Alex Balboa
Richard Dawson
Dr. Eva Evers
Ellen Foose
Chris Frost
Dr. Shelia Jacobs-Carey
John Klotz
Della Oliver
Larry Siegel
Cynthia Soroka
Teresa Stimpfel
Dr. Joseph Testa
Bonnie Tillery

223. Form letter #2 some commenters submitting this form letter included additional language indicating that, while they were not registered voters in the State, they will work against politicians that support the rule. Other commenters did not include language indicating that they will work against politicians that support the rule.

Joseph Abbott
Anonymous
Edwin Arias
Issac Ariel
Luke de Araujo
Justin Baker
Thomas J. Bartus
Andrew Bidlingmaier
Steven Blumenfeld
Mark L. Botton
James Bourne
Dan Brodzinski
Benny and Georgette Cammarata
Michael Cammarata
Nicholas F. Cardone
Lance Carsillo
Antonio Cesare
Ralph Chakkalo
James Conroy

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Douglas V. Conroy
Jerome de Jesus
Luke Dellaperute
John Denny
Ash Desai
Peter George Douma
Matthew Dubas
Micheal Dunn
Richard Earely
Walter Engelhardt
Michael Fabiszewski
Richard Galante
Thomas J Gardiner, Jr.
Stephen J, George
James V. Giglio
Allan Gilmurray
Matthew Gogojewicz
Juan Guzman
J. Grace Hagemeyer
David Hershberger
Jim Hill
Tiep Hoang
Fred Hyde
John and Debora Kay
Jeffrey Kellish
Kevin Kennedy
Karl Kjellberg
Chris Kolodziej
John Lapenta
Frederick J. Ledger
Chris LeLong
Craig Lorenz
Joseph Luyber
Timothy J. Lynch
Tom Lynch
John MacKenzie
Steven Manning
Ted Matera

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Robert Mazzei
Alex Melamudov
Fred R. Meyer
Christopher A. Miller
Gerry A. Miller
Matthew Miller
George Milochik
Joe Miro
Harry D. Mitchell
Jason Moritz
Scott Myers
Anthony R. Oliveri
Charles Ryan Palko
Vito Passalacqua
Albert Parker
Harold Patino
Michael Perrette
Josh Peters
Joseph Pfeifer
Jess Pierce
Andrew Ponikowski
Neina Reinert
Brian Roddy
Eva Rucinski
Anthony Salvaggio
Nick Sanaotta
Matthew Santone
Miguel Angel Sardinas
Chad Schorr
Richard Schultz
Lynne Schweizer
Jay Sciullo
Mike Schmidt
Roberty J. Schwarz
Jon-Michael Sereda
Jon Shein
Allan Sherman
Scott Smith

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Vesel Spahiu
Michael J. Spontak
John Stansfield
David Statkus
Barry D. Thomas, Sr.
Scott C. Throckmorton
Nathan Tick
Matthew P. Tomczyk
Matthew Trucks
Paul Wehber
Mark and Karen Whelan
Ed White
David S. Wiggin, Jr.
Robert A. Wilds, Jr.
Steve Wilpieszski
Michael D. Yablonsky, Ph.D

224. Form letter #3

Judith Abel
Matthew Albanese
Maria Alne
Linda F. Alvarez
Mike Antone
Jimmy Armstrong
Sarah Barofsky
Victoria Bas
Chris Beal
Elisabeth Bechmann
Emily Beshlian
Debra Bilous
Victoria Bingham
Charles Bingham, Jr.
Marion Bochner
Brittany Brower
Cindy Brower
Chantal Buslot
Jaime Cammarata
Anthony Capobianco

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Mabel Casagrand
Ann Cawley
Alice Diane Celebre
Janet Chase
Jennifer Chaky
Emily Chang
Haiping Chen
Henry Chien
J. Colon
Robert Cooke
Jean L. Corcoran
Annie Cowling
Edward Craig
Stephanie Crimmins
Maureen Crowley
Cynthia Cuomo
Mary Carol Curcione
Mary Curcione
Carlos Daghetta
Kristen Davies
Darlene Davis
Beatrice De Filippis
Annmarie Devine
Valerie Disle
Hartson Doak
Jean Dowal
Leslie Doyle
Chris Drumright
Patricia Dupas
Dawn Edwards
Paul Egan
Paul Eidman
Alyssa Eppich
Gregory Esteve
Maria F.
Diana Ferreira
Evelyne Flament
Joan Fleming

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Jo Ann Flynn
Armand Fontaine
Susann Franko
Evelyn Fuertes
Rebecca Fulco
Christopher Gagliardi
William George
Ginger Geronimo
Howard Gibson
John Glynn
Kristina Golemanova
Olivier Gomes
Faye Godwin
Brian Gottejman
Heather Graver
Jamie Greer
Paul Haider
Jennifer Hall
Ryan Hasko
William Heitzman
Tony Hiss
Jamie Horneman
Patricia Hudacsko
David Hunter
Laura Iancu
Bernd Jahnke
Edward Janus
Ruth Johnson
Nora Jones
Christine Joseph
Elizabeth Kachur
Aishe Kadiev
Elena Kalmykova
Elizabeth Kelly
Lisa Koehl
Kenneth Knoppik
Lori Korunka
Malgorzata Kostrzewa

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Mary Kostus
Andrew Kurzweil
Denise L.
Edward Laurson
John Leary
Tracey Ann Leary
Jess Leber
Dick Lee
Carlos Leon
Chris Len
Shanan Levin
Inge Lewis
Dotti Lydon
Leigh Mann
Dr. Theodora Manolas
Cristina Margalel
Gia Matullo
Maggie Matullo
Joseph Matullo
Magdalena Mazurek
Alice McGough
Cyndi Mears
Graciela Patron Mederos
Cal Mendelsohn
Michele Mercer
Lea Miller
John Miller
Pam Mistretta
Darren Mitton
Eva Mok
Lynn Munding
Klaudio Negric
James M. Nordlund
Scott, Beth and Vicky No name
Margie O'Brien
Michelle O'Brien
Kathleen O'Boyle
Kim O'Connor

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Andrea Oefinger
Sy Nashiro
Dana Patterson
Nadezhda Peneva
Regina Powell
Gerald J. Preis
Lio Prinz
Frank Puzzo
Kenneth Quigley
Shari Redfox
Mary Lou Resner
Joseph Reynolds
Mary Kelley Richard
James D. Riddle
Lisa Riggiola
A. Ripep
Christian Rodriguez
Dalsy Rodriguez
Edison Wetlands Association
Elisabetta Rossi
Elizabeth Ruebman
Rob Sandberg
Tanwi Sandelwood
Anthony Sandkamp
Lisa Salazar
Dennis Schvejda
John Shay, Jr.
Eva Siegeliski
Jaclyn Siegeliski
Nancy Smalling
Benjamin Smith
Laura Smith
Gregory Snyder
Sandra Sobanski
Theodore Spachidakis
Cynthia Spiegel
Robert Spiegel
Jon Spinac

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Angie Starling
Michael Steele
Paul Stenzel, Jr.
Nancy Sterzel
Erik Streeter
Julie Sudbrink
James Sullivan
Elfmagic Taylor
Natasha Tilakdharry
Jayden Thome
Rick Tonsing
Carlee Trent
Alicja Trzopek
Natalie Van Leelwijck
Julie van Niekerk
J. N. Valente
Michael Vansco
John Viacrucis
Filomena Viana
Susan Warner
James Walker
Lori Weber
Nicole Weber
Jill Weislo
Jeff Weiss
Tanya Willis
Melissa Wise
Kathleen Wissenz
Jake Wolfhart
Heidi Wollum
Dana Wong
Alex Woolery
Jeff Zander

225. Form letter #4

Ernie Abbamonte
Dennis Bravo
James Callahan
Matt Chiccarine

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Jason Cohen
Greg Crossland
John Deering
Tom Farrell
Jacob Freeman
Jason Gribschaw
Daniel Jacobs
John F. Jacoby
Nathaniel Marchetti
Bob Mohr
Jose A. Morel
Chau Nguyen
Chris Nosal
Ulumje Greg Pereborow
Timothy Schipper
Micole Sharlin
Bradley M. String
Ronald Sullivan
Daniel Timmins
Arthur Mark A. Yocum

226. Form letter #5

Michael Cargill
Margaret Roth Fritz
Wayne F. Gerden
Bruce Halstater
Carl Hartmann
David Illegible
Antonio D. Illegible
John Illegible
Kelly L'Heureux
Marc L'Heureux
Boris Maltsev
Kevin B. Mongan
Sergio Rosdissi
Aram Setian
Michelle Ulrich
Alfred White

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Raymond Zampear
227. Form letter #6

Daniel Acker
Manah Acker
Eugene Aiken
Tom Algamo
Sari Alkhjeel
Michelle Ameida
Joaquin Anderson
Joe Araman
Pasquale Attanasio
Ayanna Aviles
Anthony Batlout
Karen Battinger
Zachary Borchuk
Jim Bourne
Justin Bridges
Buncee Brotic
Eryk Brito
Joe Brown
Bruce Buckiewucz
Ed Bunnell
Tim Burden
Chris Burle
Robert Brewer
Luke Cahill
Jonathan Camacho
Lucile Canniggao
W. Cantelmo
Mexico Refugio Capilla
Cathy Carlson
Tyler Carter
Bobby Celli
Maegan Cerruti
A.J. Chivaro
Ryan Church
Gary Coleman

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Chris Color
Jennifer Cook
Amanda Conceica
Dylan Corona
Jose Costa
Nick Costa
Robert Clevenger
Lamayjah D.
Jim D'Annonzio
Dominick Cardella
Zach Christian
Daniella Daly
Kevin David
Dillon Davies
Darrius Raymond Daivs
Joshisona Davis
Kim Davis
Nick DeLisa
Ivan Delafunete
Luke Dellaperute
Joe DeLucia
Jonathon De Silva
Diana Diaz
Roman Divan
Vinny Donisto
P. Dorsi
Kevin Dos Santos
Morgan Downs
Arianna Duncan
Jacob Dresser
Bill Drooks
Derek Drummond
Alex Dunn
Stan Dziuba
Drew Eastwood
Mergene Edgulban
Cassidy Egan
Osi Emele

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Warren Emley
Alejandro Esiobar
Janis Faler
Stephen Farkouh
Gabby Fernandes
Megan Filoramo
Joseph Fields
Fred Fillippone
Ana Fracao
Glenn Frattini
Roi Frazao
Dan Friedman
Joe Fruncillo
Ken Ganz
Thomas Garcia
Hope Gardiner
John Garzon
Eric Geller
Robert Gery
Kevin Gian
Anthony Giglio
Ryan Gillaspie
Sergio Girminaino
Nikki Glassman
Joseph Golubor
Briana Gomes
Nicole Gomez
Charles Goodson
Emily Gottlieb
Pat Grasso
S. Grant
Yaritza Grant
Kathleen Greenwald
Barbara Grossman
Ryan Gundel
Brendan Gutzler
Jim Hanf
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Manuel Hernandez
Michael Hernandez
Emily Hieger
Jackie Horn
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Mike Hunt
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Bill Illegible
Brett Illegible
Cristian Illegible
Donald Illegible
Elton Illegible
Gregory Illegible
Janice Illegible
Jeremy Illegible
Joe Illegible
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Jack Inman
Jessica Isabella
Tony Jackson
Ronnie Jackson
Pete Jaminski
Jane Jasien
Pedro Jimenz
Jittal Jill
Chris Jones
Cameron K.
Chuck Kababick
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Diane Meucracz
Jill Milano
The Milano Family
Terry Miller
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Brett Murphy
Mikaela Muniz
Vinh Nguyen
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Cynthia No Name
Jermaine No Name
Nayeli No Name
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Bob Shoykhet
Eduasdo Sia
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B.J. Sichlor
Ron Sickler
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Richie Smith
Samantha Smith
Marissa Stall
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Robert Staub
Ron Stocktum
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Christine Sturt
Kendra Sullivan
Emily Sutton
Brian Sweeney
Robert E. Tallman, Jr.
Darby Tarrant
Don Tarrant
Adrianna Therstad
Kenny Throckmorlon
Alex Todd
Matt Tomernk
No name Torris
Angelo Tracey
Rob Trimble
Julia Tupy
Darlene Tyler
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Norberto Vagas

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Gene Van Severen
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Nicole Walker
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William Wei
Laura Wessels
Kim Westhead
Sara Wheaton
John Whittaker
Greg Widmaier
Dyamante Williams
Illegible Williams
Grace Wills
John Wills
Chris Witter
Andrea Witter
Richard Wollner
Robert Woods
Junior Yocute
Gabby Yoseiso
Robby Young
Robert Young
Tony Zappolil

A summary is provided below of such comments and the Department's responses thereto.

The comments have been sequentially numbered to continue from the comments reproduced in the section above, to provide clarity. The number(s) in parentheses after each comment identifies the respective commenters listed above.

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Stakeholder and rule process

201. COMMENT: The Department is applauded for convening stakeholder meetings and for incorporating some of the recommendations that were made by stakeholders into the rule. The Department is encouraged to continue such dialogue with the public and address concerns through necessary policy changes and initiatives in other regulatory program areas. (67)

RESPONSE: The Department acknowledges this comment in support of its stakeholder process.

202. COMMENT: The Department's press release announcing the release of the proposed public access rules issued on April 4, 2011 contains a hyper-link to the Department's public access website. The website contains a further link to the draft rules. However, the draft rules to which the web page is linked are dated August 16, 2010. This link should be updated to reflect the April 4, 2011 formal public access proposal. (130)

RESPONSE: While the Department's website did include a link to a prior draft of potential amendments to the rules as they were being developed, the link to the rules from the Department's public access website was updated prior to publication of the proposal on April 4,

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2011 to link to the April 4, 2011 proposed amendments that were published in the New Jersey Register (See 43 N.J.R. 772(a), April 4, 2011).

203. COMMENT: Additional public hearings on the proposal should be held outside of normal work hours so that the public has the opportunity to provide their comments on this issue. (5, 7, 13, 24, 29, 46, 47, 70, 78, 88, 116, 158, 159, 171, 182, 186, 190, 208)

204. COMMENT: A public hearing should be held in Monmouth County at Monmouth University in the evening or on the weekend. This would accommodate the surfers and the fishermen. (144)

205. COMMENT: There should be more public hearings in south Jersey. The people who live in Cape May should have the opportunity to have a meeting in their area (24, 81, 168, 190)

206. COMMENT: Given the announcement of the proposal in the New Jersey Register indicating just two public hearings, how well does the Department feel it had estimated the concern of the public? (171)

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RESPONSE TO COMMENT NUMBERS 203 THROUGH 206: The Department agrees that providing as much opportunity for public comment as possible considering the subject matter of the rulemaking is important. In response to these requests for further opportunity for oral comment on the initial proposal, the Department scheduled two additional public hearings in oceanfront municipalities, one of which was held in the evening, in a further attempt to provide the public with the opportunity to provide oral comments on the proposed rule amendments. In addition to the four public hearings on the original proposal, in accordance with N.J.A.C. 1:30-3.3(a)5, the Department provided a 60-day comment period during which the Department accepted written comments from the public as well as emailed comments. See also response to Comments 147 through 150 above for further opportunities for comment on the subsequent notices of substantial changes to the original proposal. The Department believes that it provided sufficient opportunity for the public to review and comment on the proposed rule throughout the rulemaking process.

207. COMMENT: The State should provide more information at the public hearing for the public to comment on. (187)

RESPONSE: In accordance with the requirements of the Administrative Procedure Act (APA), notice to the public was provided through a variety of means including through the New Jersey

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Register, by posting notice of the rulemaking on the Department's website and by sending direct electronic notice to those expressing an interest in receiving notice of Department rulemaking.

Each of these forms of notice included a citation to the web address where the complete proposal was posted. Sufficient time for interested members of the public to review the factual basis for the rulemaking was provided at each step of the rulemaking process. In addition, as required by the APA, the Department began each public hearing with a summary of the factual information on which the proposal was based. Accordingly, the public was provided ample information on which it could base its comments.

208. COMMENT: The Department has solicited information from many interested sources when drafting the rules, but it has only considered comments from the administration's political allies. The Department should convene a meeting with a cross-section of the groups objecting to the rule proposal and start over (81, 116, 128, 208)

209. COMMENT: The Department had a couple of stakeholder meetings about this rule last year. There were a handful of environmental groups in the room but the other participants in the room were the likes of the New Jersey Realtors Association and Conoco Phillips big oil company. They outnumbered the environmental groups and true public advocates three or four to one. Additional members of the public should have been invited to your stakeholder meeting.

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The commenter offered a list of organizations that the commenter asserts should have been invited to the Department's stakeholder meetings. The Department should start this rulemaking again by sitting down with representatives from these interested organizations and start from scratch to get this rule right. There is a lot to do on public access in New Jersey. (208)

210. COMMENT: The public outreach intended to provide input into the development of the proposed rules was inadequate with respect to urban residents. The rule summary states that the Department sought input from representatives of "marine trades, environmental and recreational interests, business and industry and coastal zone municipalities," but does not indicate that urban community groups or environmental justice organizations were contacted. The New Jersey Environmental Alliance was not contacted. It is recommended that the Department withdraw the proposed public access rules as this would provide the Department with the opportunity to initiate a process that would gather ideas from urban residents and environmental justice organizations and to make needed substantive changes in the proposed rules. (183)

RESPONSE TO COMMENTS 208 THROUGH 210: In developing the rule proposal, the Department held stakeholder meetings on April 27, 2010 and August 18, 2010, at which it sought input from representatives of marine trades, environmental and recreational interests, business and industry and coastal municipalities. Copies of the attendance lists are posted on the

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Departments web page. On August 17, 2010, the Department made draft rules available to the public at large on its website and requested comment in advance of formal rulemaking. In response to the comments received, the Department made several changes to the draft proposal.

In accordance with the requirements of the APA, notice of the proposal was published in newspapers throughout the State, posted on the Department's website and provided to the news media that have press offices at the State House. Further, the Department provided a 60-day public comment period for the proposal and both of the substantial change notices related to the rulemaking. See response to Comments 147 through 150 above regarding opportunities for public comment on the public access rulemaking. The Department believes that it provided significant opportunities for all interested individuals and groups to provide input both in development of the rules and after their initial proposal.

211. COMMENT: There is an administrative process that governs how Department rules and regulations are legally developed. The Department cannot make changes in these rules and still adopt. The Department needs to address the issues that have been raised. The changes would be large and extensive and the process would be a bit bureaucratic, but the current proposed rule needs to be withdrawn. (81)

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212. COMMENT: Commissioner Martin stated that the rules may be subject to change after the public comment period has ended. Consequently, the public has no way of knowing if their comments pertain to a final rule proposal, or merely one of many drafts. The public notice and comment process has been deficient. (116)

RESPONSE TO COMMENTS 211 AND 212: The APA as recently amended allows the Department to make substantial changes to the proposed rules on adoption, provided the Department provides notice to the public and sufficient opportunity for the public to comment on the changes. See N.J.S.A. 52:14B-4.10. The Department published notices of substantial changes on adoption in the New Jersey Register on March 19, 2012 (44 N.J.R. 614(a)) and July 2, 2012 (44 N.J.R. 1864(a)). This adoption document responds to each comment submitted on the proposal and on each of the notices of substantial change.

Department's public access website

213. COMMENT: The map depicted on the Department's public access website only shows the southern portion of New Jersey south of Raritan Bay. For the purposes of clarity and transparency the Department should explicitly state whether public access to the State's northern

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tidal waterfront is included or excluded under the draft rules to avoid future confusion. (45, 74, 130, 184, 208)

214. COMMENT: Prior to adopting the rules the Department is encouraged to add a map that highlights which towns are affected by the rule and add text that lists by county which towns have public access to tidal waterways. (204)

RESPONSE TO COMMENTS 213 AND 214: The public access map depicted on the Department's public access website was the result of a 2004 effort to capture the scope of public access sites on the Atlantic Coast beaches. The project was intended to provide information on beach access, handicap accessibility and amenities, including signage and parking. The public access rules apply to all tidal waterways in the State, including the northern urban waterfront. It is the intent of the Department to continue to update this map to include all tidal waterways in the State.

Economic Impact

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215. COMMENT: The proposal assumes a positive economic impact for all affected municipalities. For non-coastal municipalities, public access areas can create a tax burden associated with maintenance, sanitation and police service costs due to inadequately or unfunded considerations for Department permits. These costs are not represented in the proposal's Economic Impact. (207)

RESPONSE: The adopted amendments to the public access rules which include an opportunity for communities to establish their own public access plans, and specify by development type whether public access is required as well as options for providing public access, are a cost-effective way of achieving an important policy objective, namely the provision of public access to lands and waters subject to public trust rights. The universe of facilities and locations subject to public access is varied, and thus the measures needed to provide such access will depend on the type of facility and the location involved. Hence, no one approach to providing public access would be suitable in all situations.

The adopted rules do not mandate a specific set of measures, but rather provide a range of options, subject to oversight by the Department. For example, N.J.A.C. 7:7E-8.11(b) lists five different measures that can be used to satisfy the public access requirement including: public accessways, boat ramps, piers or other direct access, waterfront pocket parks, public restrooms, and/or additional public parking. These measures have substantially different implementation

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costs. The rules require that municipalities include in their application for approval of a Municipal Public Access Plan, an estimate of the cost of implementing, constructing and maintaining the access facilities proposed in the plan and specify how this cost will be funded. These provisions allow municipalities to consider cost in development of their plans. In addition, Municipal Public Access Plans are voluntary. Accordingly, the rules do not require any municipality to move forward with any proposal that the municipality determines may create short or long-term fiscal obligations that the municipality does not wish to incur.

216. COMMENT: The rules will close the door to the public. The State's tourism industry will suffer because of it. New Jersey's \$48 billion a year tourism industry depends on people getting to the coast. If the State limits that access, they will go somewhere else. The more and better access the State has, the more people will visit the waterways, waterfront communities and beaches. Under the Federal Coastal Zone Management Act, states are supposed to be increasing access to beaches and waterways, not restricting it. These rules violate that Federal legislation.

(38, 146)

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217. COMMENT: In areas that have adequate waterfront access, people go there whether it is to fish, read a book, or boat. When people are at the waterfront, they go into local communities and eat in restaurants and buy things in local shops. They support the economy. It is not right to cut people off from the waterfront and then damage the local economy that is dependent upon the people that are coming to the waterfront. The Department should leave the current rules in place and live up to their mission, which is to protect the environment in New Jersey. (184)

218. COMMENT: There are hundreds of thousands of people that come to the New Jersey coast every year and provide hundreds of millions of dollars of economic revenue and tens of thousands of jobs. Any changes to public access regulations need to take into consideration these economic impacts, both in terms of money and jobs. (153)

RESPONSE TO COMMENTS 216 THROUGH 218: There are currently over 1,000 access point to the State's beaches. The adopted rules will increase the number of access points by encouraging cooperation between the Department and municipalities. N.J.A.C. 7:7E-8.11(b) requires that existing public access must be maintained to the maximum extent practicable. Access points will not be taken away. Further, by requiring Municipal Public Access Plans to be developed in a cooperative manner, the Department anticipates that the rules will result in more public parking, restrooms, and public conveniences.

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The Department recognizes the benefits that tourism brings to the State's economy. Public access to New Jersey's beaches is an important component of that industry, and the adopted amendments will promote and enhance access to the greatest extent practicable and in all reasonable manners.

Social Impact

219. COMMENT: The Red Tape Review Group suggested that the projected reaction to the rule or regulation be included in the proposal's Social Impact. The proposal's Social Impact does not include that information.(171)

RESPONSE: The Red Tape Review Commission examined the administrative rulemaking process as it exists now, summarized the different requirements of the process specified by the Administrative Procedure Act (APA), and made recommendations on areas that should be improved. With reference to the social impact of a rulemaking, the APA provides that each notice of proposed rulemaking include, among other things, "a description of the expected socio-economic impact of the rule." (N.J.S.A. 52:14B-4(a)2) The rules of the Office of Administrative Law further specify that the social impact statement "describes the expected social impact of the

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proposed rulemaking on the public, particularly on any segments of the public proposed to be regulated, and including any proposed or expected differential impact on different segments of the public, including the rulemaking action, and justification therefore.” (N.J.A.C. 1:30-5.1(c)2) The Red Tape Review Commission did not make any recommendations regarding changing the requirements of the APA with reference to the social impact analysis. The Department believes that the Social Impact statement included in the proposal complies with the APA and the rules implementing this provision of the APA.

General

220. COMMENT: The proposed rules are an improvement over the 2007 public access regulations, which treated every site the same whether it was on the bay, the ocean or another tidal waterway. Such a “one size fits all” approach does not work because every site in the State is different, and because there are so many municipalities in the State that have different concerns and different needs for public access. (11, 28, 67, 71, 52, 66, 68, 73, 82, 97, 99, 122, 133, 135,139, 156, 206)

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221. COMMENT: The proposed rule is rational, and provides for reasonable access to the tidally flowed waters of the State, consistent with the Public Trust Doctrine. It takes into account the current uses of land and facilities, the liability associated with providing access, the safety of the public, the real world implementation problems associated with access at certain facilities, and the impact to municipalities. The 2007 rule did very little to expand public access, but it did much to exacerbate the anti-business perception that most people associate with New Jersey. The 2007 rule was much less focused on providing public access than it was on making New Jersey companies repeatedly pay exorbitant fees for permitted activities. The new proposal takes a holistic approach toward public access, ensuring that existing facilities maintain access where it currently exists and new facilities or those facilities that expand beyond the current parcel provide access onsite or pay for access offsite. The number of access points will only increase under. Further, there is more transparency and accountability under the proposed rule. The rules make common sense changes that enhance access for the public, without creating an anti-business climate in New Jersey. (19, 52, 175)

222. COMMENT: The proposed rules will make New Jersey more economically competitive with its neighbors, protect the rights of homeowners while also continuing to set aside appropriate public access points that will encourage the use of the Jersey Shore and other tidal

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waterways, and strengthen the Garden State's tourism industry. The Department's efforts to revamp these regulations are supported. (140, 172 , 198)

223. COMMENT: Municipalities are best suited to determine where beach access points should be located and where swimming should be permitted. The common sense approach being taken by the Department makes sense for municipalities and for those who visit New Jersey's beaches and other tidal waterways. (36, 66, 126, 181)

224. COMMENT: It is encouraging that the Department has proposed to allow municipalities to develop and implement Municipal Public Access Plans that are specifically tailored to their communities' planning/infrastructure needs and maintenance requirements. The proposal balances the need for meaningful public access with a common sense approach to limiting public nuisance liabilities and operational impediments to the coastal region's vital tourism industry, waterfront businesses and municipal resource management responsibilities. (120, 140, 172, 196, 214)

225. COMMENT: Under the proposed rules, towns would be permitted to work with the Department and develop realistic plans for public access to the waterfront. The Department retains ultimate approval authority over the access plan. The Department works with the towns

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regularly on plans, such as the open space plans that are done with Green Acres. It is not a violation of the Public Trust Doctrine to permit towns to develop individual plans in concert with the Department. Any plan that proposes to violate the Public Trust Doctrine can and should be denied. Plans must be realistic and implementable. Nothing in these proposed rules allows a town to prevent waterfront access. The prior or potential actions of a few towns should not preclude the ability of developing effective public access plans using local knowledge and input
(139)

RESPONSE TO COMMENTS 220 THROUGH 225: The Department acknowledges these comments in support of the adopted rules.

226. COMMENT: The Borough Avalon has an excellent working relationship with the Department's Engineering and Construction Element, and would not want the new rule to disrupt that in any way. (11)

RESPONSE: The adopted public access rules seek to enhance public access opportunities by working closely with municipalities to develop comprehensive Municipal Public Access Plans.

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Accordingly, it is anticipated the rules will encourage rather than disrupt relationships between municipalities and the Department's programs.

227. COMMENT: The proposed rule should go even further, and the Department should not regulate public access at all. (110)

RESPONSE: While it is anticipated that many municipalities would act to assure public access is provided, it is important that public access be available not just in some municipalities, but in all containing tidal water bodies. The requirements contained in these rules will allow those municipalities that are proactive in providing public access to work with the Department through the Municipal Public Access Plan process to achieve the type of public access most appropriate to that municipality. As a result, public access opportunities may be enhanced. For example, in these municipalities, rather than piecemeal public access projects being required on a project by project basis, the municipality through the Municipal Public Access Plan process could establish a fund to achieve the purpose of a planned waterfront park or boat launch facility. In municipalities where the focus is not on assuring public access, the rules provide standards to be applied in the Department's permit review process to assure that public access is addressed.

It is important for the Department to continue to regulate public access in order to maintain and enhance the public's access to coastal and tidal waters.

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228. COMMENT: The proposed public access rules should not be adopted because they restrict access to New Jersey's beaches and other tidal waterways. (4, 6, 9, 14, 15, 24, 27, 38, 43, 44, 46, 47, 51, 63, 64, 65, 74, 78, 81, 85, 83, 94, 101, 105, 106, 115, 116, 121, 123, 127, 128, 141, 155, 162, 163, 164, 168, 171, 176, 177, 197, 202, 208, 212, 213, 215, 216, 217, 218, 219, 222, 223, 224, 225, 226, 227)

229. COMMENT: Only those amendments that relate to marinas should be adopted. (129, 190)

230. COMMENT: Surf Rider Foundation is putting together a coalition of groups that are against this rule. The commenter read into the record a list of organizations that it indicates oppose the rule: These are your customers and these are the people that are not happy with this rule. The commenter indicated that it has sent almost a thousand e-mails to the Commissioner and to the Governor. The commenter stated that there were 1200 handwritten postcards in the commenter's car from people addressed to the Governor on this issue asking that the rule not be changed. (208)

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231. COMMENT: The Department has frequently stated that one size does not fit all; this is simply incorrect. As with speech, religion, assembly and due process, the right of the citizenry does not wax and wane depending on which town one is in. One size does fit all. This error is another example of the Department applying a common sense solution to a technically complex issue. (47, 116)

232. COMMENT: The proposed rule represents an abdication of the State's responsibility to provide open and meaningful public access to and use of the tidal waters of the State. This proposal represents the deregulation of the public's right to access and use tidal waters and the destruction of the present regulatory scheme intended to preserve and protect those rights. (24, 32, 34, 47, 69, 81, 98, 115, 134, 136, 141, 161, 164, 176, 182, 208, 216, 223, 225)

233. COMMENT: The proposed public access rules will allow municipalities to discriminate against non-municipal residents, or municipal residents who do not own waterfront property. The beach should be open for all people, not just the rich. (2, 3, 6, 49, 65, 116, 134, 218)

RESPONSE TO COMMENT 228 THROUGH 233: Public access to the water is vital to the State's economy and quality of life of its residents. Ocean and water access in large part define New Jersey as a community. The ocean, shore and tidal waterways are also inextricably tied to

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the State's economic health and well-being. As stated in the proposal's Jobs Impact (43 N.J.R. at 772), tourism, mostly tied to the shore communities, is a \$38 billion a year industry. The quality of life in this State is directly linked to its proximity to the Atlantic Ocean and other coastal and tidal waterways. It is in the public's best interest to enhance access to the greatest extent practicable and in all reasonable manners.

The adopted rules are intended to provide a comprehensive means for the public to have broad, diversified, safe and reasonable access to tidal waterways throughout the State. The rules do not limit access to New Jersey's beaches and waterways. The adopted rules recognize the different geographies of the State and the differing needs of the public. In order to strike a better balance between public access rights, public safety and the conduct of various water-dependent uses, the rules allow alternative methods of access based upon the type of use proposed (i.e. commercial, industrial or residential), and whether the development is new or part of an existing development.

There are currently over 1,000 access points to our beaches. The Department anticipates that the rules, through their cooperative approach to Municipal Public Access Plans, will result in more access points, and more public parking, restrooms, and public conveniences. Nothing in the rules will allow the public to be denied access to waterways in violation of the Public Trust Doctrine.

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The rules provide goals for public access at N.J.A.C. 7:7E-8.11(b), including that public access be on a non-discriminatory basis and that all existing public access must be maintained to the maximum extent practicable. These goals, along with the other standards in the rules, will be utilized by the Department in determining whether a proposed Municipal Public Access Plan should be approved. In addition N.J.A.C. 7:7E-8.11(t) states, "Public access must be available on a nondiscriminatory basis." All establishments, including municipalities, counties, marinas, condominium associations, homeowner associations and beach clubs, which control access to tidal waterways and their shores, shall comply with the Law Against Discrimination, N.J.S.A. 10:5-1 et seq." The Department will not approve a Municipal Public Access Plan that provides for public access that is not open to non-residents or that discriminates against a particular user group. The Department is committed to upholding its historical role in protecting and promoting the public's right of access to New Jersey's tidal waters. Nothing in this rule violates citizens' rights under the Public Trust Doctrine.

234. COMMENT: The rules do not create any incentive to go beyond simply providing the walkway required under the rules. This is especially distressing as the proposed rule turns all authority for public access planning over to the municipality and in the past municipalities have eliminated on street parking, closed off access points, and sided with private property owners in public access disputes. Essentially, the regulated community that is causing the problems with

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public access will be given the authority to control public access. The municipalities will not provide more access or infrastructure to augment that access if they can get away with just providing a walkway and claiming anything else is cost prohibitive. The rules must be re-proposed with new standards that will promote and create incentives for municipalities to diversify the recreational opportunities offered at access points and expand public access. (197)

RESPONSE: The adopted rules do not give control of public access to the municipalities. The rules establish goals and basic requirements for public access and are intended to encourage municipalities to take an active role in designing and ensuring public access to beaches and tidal waters in ways that will work best for their respective circumstances. The municipality must obtain the Department's approval of the Municipal Public Access Plan in order for the plan to be operational. Under the rules in place prior to this adoption, the Department evaluated public access only when an applicant applied to the Department for a coastal permit and was required to provide public access under those rules. The adopted rules enhance public access opportunities by encouraging municipalities to work with the Department to develop plans to help ensure that the public's access needs are met in a comprehensive and systematic approach. The Department will work with the municipalities on development of their access plan, and the plan will be required to meet the goals of the public access rules.

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A public access walkway is only one of the specified methods of providing public access under the proposed rule. Also included in the list of options are a boat ramp, pier, fishing access, waterfront pocket park, public restrooms, and/or additional public parking to accommodate public access. The rules require municipalities to conduct a public access needs assessment that evaluates existing practical limitations to public access in the municipality and solutions to address those needs and limitations. Although public access walkways may be appropriate for a particular municipality, the Department will not approve a Municipal Public Access Plan that includes only walkways if it limits access.

235. COMMENT: Municipalities should acquire easements for public access. (217)

RESPONSE: As discussed above in response to comment 192, N.J.A.C. 7:7E-8.11(e), requires a municipality seeking approval of a Municipal Public Access Plan to include in its application a public access needs assessment that evaluates existing access points or locations providing perpendicular access to tidal waterways and their shores within the municipality. Identifying and purchasing access easements may be an option to address the lack of access points in a municipality.

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236. COMMENT: The proposed rule will allow municipalities to eliminate existing access points. (81, 105, 113, 171, 208)

237. COMMENT: The proposed rule will clearly result in fewer new public access points, parking places, and amenities and keep many waterfronts closed to the public. Currently new public access opportunities must be created as a condition. Since 2007, new access points for fishing, surfing, and beach walking have been created. Under this proposal, new public access opportunities would not be required for many types of development projects, particularly those for projects closest to the State's largest cities where most people live. This proposal has strong legal requirements removed. (38, 89, 146)

RESPONSE TO COMMENTS 236 AND 237: Under N.J.A.C. 7:7E-8.11(e), a municipality seeking approval of a Municipal Public Access Plan must include in its application a public access needs assessment that evaluates existing access points or locations providing perpendicular access to tidal waterways and their shores within the municipality. N.J.A.C. 7:7E-8.11(b)1 provides that all existing public access to, and along tidal waterways and their shores shall be maintained (not done away with) to the maximum extent practicable. In municipalities that do not have a Department-approved Municipal Public Access Plan, the rules provide with limited exception that existing public access must be maintained or equivalent onsite public

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access provided. (see, for example N.J.A.C. 7:7E-8.11(n)1i). In limited circumstances where it can be shown that continued public access is not practicable based on the risk of injury from dangers such as proposed hazardous operations or substantial permanent obstructions where no measures can be taken to avert the risks, equivalent public access must still be provided offsite. (see, for example, N.J.A.C.7:7E-8.11(n)3ii) Accordingly, the Department anticipates that the adopted rules will not result in a reduction in public access points.

238. COMMENT: The Department's support of the establishment of restaurants, bars and other recreational and amusement facilities along tidal waterways as a strategy to diversify public access is questioned. An empty bulkhead at the end of a street may provide access for hundreds of fishermen over the course of a year. The construction of a restaurant at the same location would eliminate access to fishermen while creating access for non-fishing interests. The elimination of existing open public access for one active user group for the sole and exclusive benefit of another is not supported. (153, 171))

RESPONSE: The adopted definition of "amusement pier" at N.J.A.C. 7:7-1.3 includes bar and restaurant establishments and entertainment venues because the Department believes that including these uses, as well as entertainment uses, will expand the public's opportunity for both visual and physical access. Under N.J.A.C 7:7-7.5, the Coastal general permit for amusement

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pier expansion, the expansion of an amusement pier cannot eliminate or adversely affect existing, direct public access from the boardwalk to the beach, unless for each access point eliminated or adversely affected another access point is provided immediately adjacent to the expanded amusement pier. Therefore, expansion of an amusement pier will not do away with existing fishing access.

Borough of Avalon v. NJ Department of Environmental Protection court decision and Legislative action (Public Access and Marina Safety Task Force Act, N.J.S.A. 13:19-38 et seq.)

239. COMMENT: In proposing these rules, the Department has completely misinterpreted the *Avalon* decision. There is no need to re-write the existing public access rule completely. Instead the Department should be developing and implementing a clearly outlined and codified point system to meet the requirements of the *Avalon* decision. The point system would create incentives for municipalities to provide more access and better recreational opportunities at those access points. The most points should be awarded to the municipalities that provide the most and diversified access. Municipalities should then qualify for shore protection funding, beach replenishment funding, urban revitalization funding, Green Acres funding and other benefits based on that point or ranking system. This will ensure that the public trust in accessing our

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waterways is not violated and will bolster the \$38 billion dollar a year coastal tourism industry that depends on the ability of tourists and residents to access our waterways and beaches. (197)

240. COMMENT: The rule proposal takes a step back from the Public Trust Doctrine. The 2007 rule was firmly rooted in the Public Trust Doctrine. The courts found no legislative basis for some elements of that rule. The Department could have changed the rule to satisfy the *Avalon* decision while maintaining a rule firmly rooted in the Public Trust Doctrine. Instead, the Department seems to be basing this rule in the authorities given to municipalities through either their police powers or powers to maintain health and safety. The entire purpose of the proposal seems to be for the benefit of municipalities and not the public. (208)

RESPONSE TO COMMENTS 239 AND 240: The Department disagrees that this rule takes a step back from the Public Trust Doctrine. This rule remains rooted in the Public Trust Doctrine and expressly provides that no action can be taken contrary to the Public Trust Doctrine. The Department also disagrees with the commenters' assertion that it has misinterpreted the *Avalon* decision and believes that the adopted rule amendments are an appropriate response to that decision. Moreover, as the Department explained in the proposal Summary (43 N.J.R. at 772(a)), the changes to the public access rule are being adopted for a number of reasons, including the Department's determination that a different approach to public access is desirable.

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The adopted rules transform the Department's public access policy by creating a comprehensive public access program that is beyond merely imposing proscriptive regulatory requirements. The Department's goal is to develop a comprehensive means for the public to have broad, diversified, safe and reasonable access to tidal waterways throughout the State.

The Department agrees with the commenters that municipalities should be encouraged to provide more and better access, and the Department has done so with the adopted provisions that allow and encourage municipalities to develop Municipal Public Access Plans. The Department believes that the rules contain adequate incentives to municipalities to develop and implement Municipal Public Access Plans, although the Department may be willing to consider additional incentives to encourage municipal participation if the Department's experience with implementing the rule indicates that such incentives would be appropriate.

241. COMMENT: The Department has repeatedly cited *Borough of Avalon v. New Jersey Department of Environmental Protection*, 403 N.J.Super. 590, 959 A.2d 1215 (App.Div. 2008) as the impetus for these rules. *Avalon* invalidated limited aspects of the existing rules because they were not delegated by the New Jersey Legislature to the Department, but rather impliedly delegated to the coastal towns. If *Avalon* means the previous rules were ultra vires, there is no reason to believe the proposed rules are proper either. Where is the Legislative authority for any of the provisions for the proposed rules? The *Avalon* court objected that there was no consistent

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method for determining the amount of additionally required parking, noting, the Department may not determine a parking requirement on a case-by-case basis because this “would create a substantial risk of arbitrary decision making.” *Borough of Avalon*, at 1227. Yet these new rules’ “common sense” principle is that “one size does not fit all.” The Department is allowing access plans to be developed on municipality-by-municipality basis. How is that consistent with the *Avalon* decision?

The proposed rules are unjust and illegal, and also unwise. Leaving decision-making to riparian towns will result in decades of litigation. Those towns have no idea what their public trust responsibilities are, and little cause to learn. They have a demonstrated history of imposing illegal restraints on access, which require years of litigation to resolve. Endorsing that mire of litigation is not a common sense solution. If the Department were genuinely interested in common sense solutions, it would seek the legislative authority that the *Avalon* court ruled it lacked. The New Jersey Legislature has made attempts at such legislation for years; with the Department’s support, perhaps it could move forward. Instead, the Department has opted to abdicate the State’s public trust duties. (116)

242. COMMENT: A change of State regulations of this magnitude should only be made in response to new legislation. (134)

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243. COMMENT: The Supreme Court ruling against the Department addressing the public's rights to access and enjoy State waterfront is taxation without representation. The State did not legislate that public access must be provided; instead, it delegated this responsibility to a Department the Courts have determined lacks the authority. State representatives must step up and pass legislation for more access and the facilities necessary for enjoyment by the public.

(115)

RESPONSE TO COMMENTS 241 THROUGH 243: See response to comment 168 above for a discussion of the *Avalon* decision and how the Department's adopted rules follow the court's decision and are consistent with it. In addition, as discussed above in response to comments 239 and 240, the Department believes that the adopted rules are a proper approach to achieve the Department's goal to develop a comprehensive means for the public to have broad, diversified, safe and reasonable access to tidal waterways throughout the State and do not go beyond legislative authority.

Public Trust Doctrine

244. COMMENT: Through the replacement of the term "public trust rights" with "public access rights" throughout the rules, the Department is trivializing the importance of the rights afforded to citizens through the Public Trust Doctrine and its legal precedent. (63, 87, 153, 154)

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245. COMMENT: The Department can take the words "public trust" out of the law, but it cannot eliminate the case law and the legal precedent that's been set at every turn. Judges, and the State of New Jersey have supported the public's right to access the beach. (218)

246. COMMENT: Do not allow the State to remove the references to the Public Trust Doctrine from State law. (32, 64, 98, 115, 121, 141, 155, 216, 223, 225, 227)

RESPONSE TO COMMENTS 244 THROUGH 246: The Department is not changing nor repealing the Public Trust Doctrine. The Department has renamed N.J.A.C. 7:7E-8.11 "public access" because the heading better describes the section's focus on what constitutes public access, and mechanisms to satisfy public access requirements. The Department believes that the rule is fully consistent with the Public Trust Doctrine and, in fact, the rule explicitly provides that no action can be taken that will compromise the doctrine. This renamed section provides that no authorization or approval under N.J.A.C. 7:7E shall be deemed to relinquish public rights of access to and use of lands and waters subject to public trust rights in accordance with N.J.A.C. 7:7E-3.50, Lands and waters subject to public trust rights.

The adopted amendments to N.J.A.C. 7:7E-3.50(a) describe the special area to which public trust rights apply. In addition, the adopted rules describe the types of public access and

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the activities that the public may engage in once they have gained access to the water, including navigation, fishing and recreational activities including swimming, sunbathing, surfing, sport diving, bird watching, walking and boating. The rules are intended to build on the Public Trust Doctrine by developing a comprehensive, yet flexible, public access plan for the entire State.

247. COMMENT: Do not repeal the Public Trust Doctrine. (58, 81, 164, 176, 186)

248. COMMENT: If the Public Trust Doctrine is to be changed, marinas should be in a separate clause. (81)

249. COMMENT: The Public Trust Doctrine is a perfectly good doctrine that has been working for 300 or more years, and now it is being changed. The Department is changing it for economic benefits to towns and industries. (168, 171)

250. COMMENT: Abolishing the Public Trust Doctrine is opposed. The ability to enjoy New Jersey's beaches is the public's right, not just the right of beachfront property owners. (42, 113)

RESPONSE TO COMMENTS 247 THROUGH 250: As set forth in the response to Comments 244 to 246 above, the Department is neither changing nor repealing the Public Trust Doctrine.

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The adopted rules restructure the requirements for public access to tidal waters under the Coastal Permit Program rules (N.J.A.C. 7:7) and the Coastal Zone Management rules (N.J.A.C. 7:7E).

As indicated at N.J.A.C. 7:7E-8.11(b), “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 accordance with N.J.A.C. 7:7E-3.50.”

251. COMMENT: The New Jersey Supreme Court has ruled based on the Public Trust Doctrine that all tidal waters belong to the people of New Jersey and we have a right to access these waterways. These rules clearly violate the Public Trust Doctrine and must be withdrawn. (32, 38, 146, 197, 222)

252. COMMENT: Municipalities are not going to base their plans on the Public Trust Doctrine. Municipalities are going to be challenged by the public, and the Christie administration and the Department are not going to be there fighting the battle. The public will be fighting on its own with its own tax dollars and will most likely end up losing. The people of New Jersey will accept nothing less than new rules that are rooted and grounded in the Public Trust Doctrine and that acknowledge and defend the public’s right to use the State’s waterways and to access the State’s beaches. (218)

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253. COMMENT: Public trust rights are being leveraged out of the hands of not just municipal or New Jersey residents, but people from Pennsylvania or other states who want to come to New Jersey. (171)

RESPONSE TO COMMENTS 251 THROUGH 253: As discussed in the response to Comments 244 through 246 above, the adopted rules do not limit the rights the public has under the Public Trust Doctrine. The rules incorporate options to protect these rights when development is proposed on, and adjacent to the State’s tidal waterways and their shores. In order to strike a better balance between public access rights, public safety and the conduct of various desirable water-dependent uses, the adopted rules allow alternative methods of access based upon the type of use proposed, such as commercial, industrial or residential use, and whether the development is new or part of an existing development.

N.J.A.C. 7:7 COASTAL PERMIT PROGRAM RULES

SUBCHAPTER 1. GENERAL PROVISIONS

7:7-1.3 Definitions

254. COMMENT: The proposed definition of “amusement pier” should include “fishing areas.” Many amusement piers operate only several months of the year and provide public

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access for a limited period. The Department should work with amusement pier owners to explore potential options for providing more fishing related access. Allowing fishing areas on amusement piers could potentially expand their months of operation while providing access during non-traditional times of the year to fishermen. (153)

RESPONSE: The rules are designed to maximize public access, while providing property owners and municipalities with the flexibility to propose to the Department for approval public access that is tailored to the conditions in the municipality or on the individual property. To that end, N.J.A.C. 7:7E-8.11(a) sets forth a range of possible uses that can constitute public access and N.J.A.C. 7:7E-8.11(b)3i provides a list of examples of types of public access that a property owner or a municipal applicant for Department approval of an Municipal Public Access Plan may propose to satisfy public access required by the rules within the limits set forth in the Coastal Rules. In accordance with N.J.A.C. 7:7E-8.11(b)3ii, public access proposed by an applicant shall incorporate, to the maximum extent practicable, fishing access and associated amenities, including parking that accommodates nighttime fishing for a reasonable duration of time, on or adjacent to tidal waterways and their shores. See response to Comment 238 above for a further discussion of the adopted definition of “amusement pier.”

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255. COMMENT: The proposed definition of “amusement piers” appears to be in direct conflict with the Borough of Point Pleasant Beach’s existing ordinance prohibiting expansion east of the Borough’s existing boardwalk. The proposed change, which would allow expansion of the use of the privately owned pier, and which would arguable appear to be in direct conflict with the Borough’s existing ordinance, will not further enhance beach access at all. Access to the privately owned beach will continue to be from the privately owned establishments presently located on the same block and lot, or from the existing boardwalk access points.

Allowing the additional development and/or expansion of these establishments under the guise of “public access” will simply enrich the owners of the privately owned for-profit beaches who are also the owners of the existing bar/restaurant/entertainment facilities, while further burdening the taxpayers of Point Pleasant Beach. The proposed amendments to the regulations dealing with amusement piers should not be adopted, and bars, restaurants and entertainment facilities should continue to be prohibited activities at amusement piers.

To the extent the proposed amendment is in response to a request by a business owner who wishes to construct restrooms on an existing pier, which is prohibited under the existing rules, the proposed rule goes far beyond that request. Rather than expand the definition to include bars, restaurants and entertainment facilities, the amendment should simply provide that the construction of bathroom facilities on “amusement piers” is allowed. The rules should also

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state that they are not intended to affect or preempt local zoning and development ordinances and regulations. (8)

256. COMMENT: The expansion of the definition for amusement piers under N.J.A.C. 7.7-1.3 would allow bars and restaurants as well as other entertainment venues such as stages and band areas and associated seating areas to be included on amusement piers. Point Pleasant Beach has an ordinance that restricts building east of the boardwalk where these piers are located. The proposed amended rule would pre-empt the town's right to manage or control that area. (26)

RESPONSE TO COMMENTS 255 AND 256: The coastal general permit at N.J.A.C. 7:7-7.5 for amusement pier expansion allows expansion only if all requirements of the coastal general permit are met. One of the requirements is that the applicant must obtain all necessary Federal, State and local approvals prior to undertaking a development project. Accordingly, if the municipality prohibits a particular use, the coastal general permit does not override the prohibition. Local zoning ordinances are not affected.

The Department also recognizes that the public enjoys and expects to be able to eat, drink, relax, and recreate along the ocean, bays, and rivers. The adopted amendments recognize as a legitimate public access opportunity the establishment of restaurants, and bars on piers, as part of an overall, balanced strategy to provide comprehensive and diverse opportunities for the

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public to enjoy these resources. The New Jersey shore and riverfront communities are diverse, active lands, where people come to enjoy being in close proximity to the water and where the economy thrives. This is clearly evidenced by the millions of tourists who come to the shore each year, to walk the boardwalks, enjoy the piers and eat and drink along the waterways. Therefore there is a clear public benefit to these features.

257. COMMENT: In the proposal's Social Impact relating to the expansion of "amusement piers," the Department has not taken into account the increased burden on the residents of Point Pleasant Beach. Such an expansion would be a detrimental impact on residents' quality of life. The proposal's Economic Impact makes it clear that the real objective of this regulatory change is not public access, but rather expansion of the State's tourism industry. That goal is based upon the fallacious assumption that further expansion of bars, restaurants and entertainment facilities will provide an economic benefit to Point Pleasant Beach. That is simply not the case since Point Pleasant Beach does not benefit from the tax revenue these types of facilities produce. (8)

RESPONSE: The commenter does not explain how the addition of restaurants and bars to the definition of amusement piers will be an increased burden on the residents of any municipality,

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including Point Pleasant Beach and a detrimental impact on the quality of life in the municipality.

As discussed in response to comments 255 and 256 the amended definition of “amusement pier” to include bars, restaurants, and other entertainment venues can significantly enhance the public’s enjoyment of the ocean and bays by providing additional opportunities for the public to eat, drink, relax and recreate on these piers. The Department does not dispute that these opportunities could benefit tourism to the State and as set forth in the proposal Summary (43 N.J.R. at 772), these uses, as well as entertainment uses, will expand the public’s opportunity for both visual and physical access since the piers would now be viable for year-round use.

258. COMMENT: The definition of mean high water line refers to “a tidal datum that is the arithmetic mean of the high water heights observed over a specific 19-year Metonic cycle.” This definition is impractical, as it cannot be determined in the field or by members of the general public. However, the definition also includes a more practical meaning by indicating that the mean high water line is often referred to as the “ordinary” high water lines, 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. The definition provides that the practical meaning cannot be used for the purposes of determining jurisdiction under CAFRA or the Waterfront Development Law.

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For the purposes of defining parallel access rights along the shore in the upland area above tidally-flowed lands, the Department should change the definition of mean high water line to allow the practical portion of the definition to be used for jurisdictional purposes. In defining ancillary public trust rights in adjacent upland areas, the Department has some flexibility in determining the upland extent of the parallel access. It is suggested that the Department include a margin of error by starting the public access areas at the wrack line, which is readily identifiable by beachgoers and property owners alike. Use of the tidal datum line as the starting point will only mire the Department in many small disputes concerning the location of public access areas and will tie up the agency's technical Geographic Information System's resources. Moreover, in many cases, use of the tidal datum point will fail to provide for sufficient parallel access, as the average is, by definition, under water for significant periods of time. (32)

RESPONSE: The mean high water line is necessary under the rules to determine the location of jurisdictional boundaries for sites located within 150 feet of the mean high water line. Although the location of the wet sand or debris line is one factor that can be used to determine the location of the mean high water line, because the wet sand and debris lines change frequently, especially after storms, the location of the mean high water line to be used for jurisdictional purposes must be the surveyed mean high water elevation as prepared by a

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Professional Engineer or Land Surveyor. Accordingly, the Department has determined that revising the definition of mean high water line is not necessary.

259. COMMENT: A firm definition of normal operating hours at N.J.A.C. 7:7E-8.11(n)3ii is needed. (153)

RESPONSE: “Normal operating hours” will vary, depending on whether a business or development is a commercial, industrial or public development. It may also vary from business to business. Accordingly, a firm definition is not appropriate.

SUBCHAPTER 7. GENERAL PERMITS AND PERMITS-BY-RULE

7:7-7.5 Coastal general permit for amusement pier expansion

260. COMMENT: Since the Coastal General Permit for the expansion of amusement piers at N.J.A.C. 7:7-7.5 applies only to piers in existence since July 19, 1993, will this date remain the standard for consideration of amusement pier expansions or will the date be changed to reflect the date when the definition was changed? Also, what data source will the Department rely upon to document the existence of any pier and is there a requirement that the pier be a legal structure to qualify? (18)

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RESPONSE: The Department is not amending N.J.A.C. 7:7-7.5(a)1; therefore, July 19, 1993 will remain the standard for consideration of amusement pier expansions. The only amendment made to this coastal general permit was at N.J.A.C. 7:7-7.5(a)10 where the cross reference to N.J.A.C. 7:7E-8.11 Public trust rights which was changed to N.J.A.C. 7:7E-8.11 Public access. The amended definition of amusement pier at N.J.A.C. 7:7-1.3 adds bars and restaurants to the list of uses that may be placed on an amusement pier, but does not affect whether it is permissible to expand the pier under this general permit.

The responsibility to demonstrate that a pier was legal and existing and functional as of July 19, 1993 lies with the applicant. N.J.A.C. 7:7-7.5(b)2 requires an applicant to submit as part of an application for approval under the coastal general permit, a compliance statement that demonstrates compliance with all requirements of the general permit. This provision also requires the submittal of any supplemental documents, including maps or surveys, necessary to demonstrate compliance with the general permit. If an applicant is not able to demonstrate compliance with this provision, the applicant would not be eligible for the coastal general permit.

7:7-7.6 Coastal general permit for beach and dune maintenance activities

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261. COMMENT: The idea of allowing municipalities to develop Municipal Public Access Plans is worthy; however; the State should not penalize municipalities that do not have Department-approved plans by withholding general permits for beach and dune maintenance while making general permits available to non-municipal applicants. (92, 169)

RESPONSE: This Department seeks to enhance public access opportunities by working with municipalities to develop comprehensive Municipal Public Access Plans. This will allow for targeted access points and opportunities where the public needs and wants access. Municipalities that adopt Municipal Public Access Plans will have the assistance of the Department's teams of professionals to help plan for public access in their communities. In order to encourage municipalities to develop access plans, N.J.A.C. 7:7-7.6(c) provides that, as of three years from the effective date of the adopted amendments, the Department will not approve authorizations under this general permit to municipalities that do not have an approved and operational Municipal Public Access Plans in accordance with the rules. However, such municipalities will still be eligible for an Individual permit under the rules.

The Department is not penalizing municipalities which do not have a Municipal Public Access Plan. These municipalities will still be able to conduct beach and dune maintenance pursuant to an individual permit if they choose to not prepare a Municipal Public Access Plan. The Department believes that this differential treatment is appropriate to encourage the public

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access benefits that can be achieved through the cooperative planning effort reflected by a Department-approved Municipal Public Access Plan.

262. COMMENT: When describing the changes to the general permit, the Department indicates that the changes will encourage municipalities performing beach and dune maintenance activities to do so within the context of an overall Municipal Public Access Plan. “Encourage” is too weak for describing the Department’s role in ensuring public access in municipalities performing activities authorized under this general permit. The Department must provide specific requirements for beach access to those towns that undergo beach and dune maintenance activities supported through Federal or State tax dollars. (153)

RESPONSE: As discussed in response to comment 261 above, in order to encourage municipalities to develop access plans, N.J.A.C. 7:7-7.6(c) provides that as of three years from the effective date of these amendments, the Department will not approve authorizations under this general permit to municipalities that do not have an approved and operational Municipal Public Access Plan in accordance with N.J.A.C. 7:7E-8.11(c) through (m). Where the municipality chooses to seek Department approval of a Municipal Public Access Plan, existing public access, any limitations on public access and plans to address public access going forward will be specified in the Municipal Public Access Plan approved by the Department which will

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result in enhanced public access tailored to the opportunities available for access in that municipality. Accordingly, the Department believes it is appropriate to encourage development of Municipal Public Access Plans by limiting this general permit to those municipalities that undergo the Municipal Public Access Plan planning process. The general permit specifically requires at N.J.A.C. 7:7-7.6(a)3 that public access to the beach must be provided in accordance with N.J.A.C. 7:7E-3.50 and N.J.A.C. 7:7E-8.11; this requirement has not changed as a result of this rulemaking. If a municipality does not choose to develop and obtain Department approval of a Municipal Public Access Plan, that municipality will be required to obtain a coastal individual permit in order to conduct beach and dune maintenance activities. The individual permit will also require public access.

263. COMMENT: Some private beach associations and homeowners have been able to circumvent a general permit for beach and dune maintenance activities by using a municipality's general permit. By contracting with a town or performing maintenance under the blanket permit, these groups have been able to get around access provisions in the existing rules. This has occurred 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. (32)

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RESPONSE: Municipalities and other applicants are required to submit a site plan showing the specific location(s) of all proposed regulated activities as part of an application for approval of a coastal general permit for beach and dune maintenance activities. If an applicant receives approval to conduct beach and dune maintenance activities under the general permit, the approved activities for beach and dune maintenance are limited to the specific locations depicted on the site plan and approved in the permit. If a permittee performs regulated activities outside the area approved in the permit, the permittee is in violation of that permit under the CZM rules and the Coastal Permit Program (CPP) rules. Further, if a property owner conducts regulated beach and dune maintenance activities without a coastal permit, that property owner is also in violation of the CZM and CPP rules.

If a municipality wants to maintain a beach that is privately owned, it is able to do so as long as it has written permission (the property owner is required to sign the application form that must be submitted with the application to the Department's Division of Land Use Regulation) from the owner of the beach property on which beach maintenance activities are proposed. However, if the municipality does obtain approval under this general permit to conduct beach maintenance activities on a privately owned beach, the municipality is responsible for all conditions of the general permit, including but not limited to N.J.A.C. 7:7-7.6(a)3, which provides that public access to the beach shall be provided in accordance with the lands and

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waters subject to the public trust rights rule, N.J.A.C. 7:7E-3.50, and the public access rule, N.J.A.C. 7:7E-8.11.

As adopted, N.J.A.C. 7:7-7.6(c) provides that, as of three years after the effective date of these rules, the Department shall not approve authorization under this general permit to any municipality that does not have a Department-approved Municipal Public Access Plan. In the application for approval of its access plan, a municipality is required to identify any existing practical limitations to public access which could effectively limit the public's access to tidal waterways and their shores, and how it proposes to address those limitations. The Department believes that by working with municipalities in the development of their access plans, which must include all existing and proposed public access points, will result in more and enhanced public access under this general permit because the public access will be addressed prior to the municipality obtaining the permit. Therefore, the Department believes that the commenter's concern has been addressed by the adopted changes to N.J.A.C. 7:7-7.6.

264. COMMENT: The Department should explain the link between the Municipal Public Access Plan and obtaining future coastal general permits for beach and dune maintenance to all towns affected by the new public access rules. (204)

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RESPONSE: Because beach and dune maintenance activities relate directly to the use of the beach by the public, the Department is limiting the applicability of the coastal general permit for beach and dune maintenance activities (N.J.A.C. 7:7-7.6) to those municipal applicants that develop and obtain approval of a municipal access plan in accordance with the proposed rules at N.J.A.C. 7:7E-8.11(d) through (m). In this way the Department will encourage municipalities performing beach and dune maintenance activities to do so within the context of an overall Municipal Public Access Plan.

Adopted N.J.A.C. 7:7-7.6(c) provides that, as of three years from the effective date of these amendments, the Department will not approve authorizations under this general permit to a municipality that does not have an approved and operational Municipal Public Access Plan. During that three-year period, municipalities without plans can continue to apply for and obtain authorization under the coastal general permit for beach and dune maintenance activities. This three-year grace period will allow municipalities time to prepare the necessary design and planning elements of their public access plan before restricting use of the general permit for beach and dune maintenance activities to those municipalities that have Municipal Public Access Plans. The Department has and will continue to conduct significant outreach to those municipalities with tidal waterways to educate them on the adopted rules and Municipal Public Access Plans, including how they relate to the general permit for beach and dune maintenance activities.

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265. COMMENT: The existing coastal general permit at N.J.A.C. 7:7-7.6 requires all towns seeking such permits to provide public access as a condition thereof. This proposal exempts towns with approved Municipal Public Access Plans from having to obtain such a permit. Moreover, the proposed rule at N.J.A.C. 7:7E-8.11(q) does not require any new access as a permit condition for towns without such a plan; if there is presently no access, none must be created. The Department may intend to punish municipalities who do not provide sufficient public access, but the proposed rule does not contain any requirements, standards or criteria for such action. (161)

RESPONSE: The commenter is incorrect in stating that the amendments to the coastal general permit for beach and dune maintenance activities (N.J.A.C. 7:7-7.6) exempt municipalities with approved Municipal Public Access Plans from the requirement to obtain this general permit. The adopted rules provide at N.J.A.C. 7:7-7.6(a) that the Department will not approve authorizations under this general permit to a municipality that does not have an approved and operational Municipal Public Access Plan as of three years from the effective date of these amendments. Instead, those municipalities without operational Municipal Public Access Plans as of three years from the effective date of these amendments will be required to obtain an individual permit for beach and dune maintenance activities. Individual permits can be more

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costly because they require a higher application fee, additional public notices, and higher application preparation costs. For example, the application fee alone, without notices or consultant/engineering fees for a general permit is currently \$600.00 whereas the fee for an individual permit starts at a base fee of \$3,500.00 plus 1.2 percent of construction costs. The higher costs can be avoided if the municipality obtains an approved municipal public access plan.

N.J.A.C. 7:7-7.6(a)3 requires that public access to the beach be provided in accordance with the lands and waters subject to the public trust rights rule, N.J.A.C. 7:7E-3.50, and the public access rule, N.J.A.C. 7:7E-8.11. Therefore adopted N.J.A.C. 7:7E-8.11(r) (proposed as N.J.A.C. 7:7E-8.11(q)) is applicable to both the general permit for beach and dune maintenance activities and an individual permit.

7:7-7.26 Coastal general permit for the construction of certain structures related to the tourism industry at hotels and motels, commercial development and multi-family developments over 75 units

266. COMMENT: Allowing underground utilities, floor decking, open drink and food concession stand shells, and stage shells to remain in place on a year-round basis should be

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expanded to include public park property. Public parks, although not-for-profit, are a key component of the coastal tourism industry and should benefit from the same relief offered to for-profit entities through the proposed amendment to N.J.A.C. 7:7-7.26. (200)

RESPONSE: There are two coastal general permits at issue in the comment. The general permit at N.J.A.C. 7:7-7.26 applies to the construction of certain structures related to the tourism industry at hotels and motels, commercial development and multifamily developments over 75 units. It does not apply to public parks. N.J.A.C. 7:7-7.17, which remains substantively unchanged in the adopted rules, applies to construction of recreational facilities at public parks and does not include a provision that requires recreational facilities to be removed for the winter months, therefore a modification to that general permit is not necessary.

267. COMMENT: Allowing for year-round placement of utility lines, floor decking, open drink and food concessions on the beach seems reasonable given the structures are generally small enough to move should the National Weather Service alert the municipality of a severe weather alert. However, the year-round placement of larger structures is not supported as the practicality of removing the larger structures before a storm arrives would be difficult. (18)

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RESPONSE: N.J.A.C. 7:7-7.26(a)1i allows only underground utilities, floor decking, concession stand shells and stage shells to remain in place on a year-round basis. All other structures must be removed during the period November 1 through April 30. Under the prior rule, no structure could remain in place during this period.

268. COMMENT: The amendment allowing certain structures to remain on an open beach year-round is unacceptable. The allowance of certain structures on a public beach amounts to the privatization of that beach. Therefore, the Department must clarify whether the public is allowed to sit or lay on the beach in areas where these structures are located, and whether they are under any obligation to purchase a ticket, membership, drink or food to use the beach in these areas. It is unrealistic to believe that a hotel or other entity subject to this coastal general permit will have enough time to remove such structures where a tornado warning is issued. Similarly, it is unrealistic to believe that these entities would remove these structures where a hurricane is approaching. (208)

RESPONSE: The Department disagrees with the commenter's statement that allowance of certain structures on a public beach amounts to the privatization of that beach. Any structure that is covered by the coastal general permit at N.J.A.C. 7:7- 7:26 must be open to the public. See

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N.J.A.C. 7:7-7.26(a)9. This condition prohibits an entity from requiring the public to purchase a ticket, membership, drink or food to use the beach in these areas.

As discussed in the proposal Summary (43 N.J.R. at 772(a)) , there have been various legislative initiatives seeking to amend the coastal general permit for the construction of certain structures related to the tourism industry at hotels, motels, commercial developments and multi-family residential developments of 75 units, to allow for certain structures to remain in place on a year-round basis. The Department has reviewed the rationale for removing structures and determined that allowing certain types of development to remain in place during non-emergency periods will not pose serious adverse impacts to the beaches and shoreline, since all of the other standards for the development remain in the general permit.

As the removal of these structures will be condition of the general permit and failure to remove the structures would subject the permittee to potential enforcement action, the Department anticipates that a hotel or other entity will remove structures from the beach if a storm is approaching. In addition, modern forecasting provides, in most cases, ample advance warning that severe weather is anticipated. Accordingly, the entity will have time to remove the most vulnerable of the structures. In light of the for-profit nature of the entities subject to the general permit, financial interests would encourage them to prevent damage to the structures, if possible.

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269. COMMENT: Anglers should not be excluded from access points during construction of facilities subject to this general permit. (153)

RESPONSE: As discussed in response to comment 268 above, in order for an entity to be eligible for this general permit, the beach must be open to the public. In addition, in accordance with adopted N.J.A.C. 7:7-7.26(a)8, if the structure is proposed on a beach, the structure must not unreasonably conflict with ocean views or other beach uses. Thus, if the beach was appropriate for anglers prior to the development, it must remain appropriate for anglers after development.

Enforcement

270. COMMENT: Meaningful public access requires strict enforcement. Walkways, trails and fishing piers that state “residents only” should not be tolerated. Public parking and restrooms should be free, accessible and readily identifiable. (130)

RESPONSE: As indicated at N.J.A.C. 7:7E-8.11(b)1, all levels of government are to create opportunities for public access on a non-discriminatory basis. Accordingly, the Department will

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not approve a Municipal Public Access Plan that provides for public access that is not open to the public. In addition N.J.A.C. 7:7E-8.11(t) states, “Public access must be available on a nondiscriminatory basis.” Therefore public access that is proposed by an applicant to satisfy a coastal permit requirement under this chapter must not discriminate against non-residents.

Adopted N.J.A.C. 7:7E-8.11(e) which lists the elements required to be submitted by the municipality in its application to the Department for approval of a Municipal Public Access Plan, includes at N.J.A.C. 7:7E-8.11(e)3, a public access needs assessment. This needs assessment must include existing practical limitations to public access in the municipality such as a lack of restrooms or parking, including restrictions on parking availability and duration, which could effectively limit the public’s access to tidal waterways and their shores. The needs assessment must also include alternatives to address any limitations determined to exist. In addition, included in the list of public access options to be proposed by an applicant at N.J.A.C. 7:7E-8.11(b)3, are public restrooms to utilize those utilizing public access, additional public parking to accommodate those utilizing public access and parking that accommodates nighttime fishing for a reasonable duration of time. The Department believes that these provisions will result in improved public access in the State including public parking and restrooms.

N.J.A.C. 7:7E

SUBCHAPTER 1. INTRODUCTION

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7:7E-1.8 Definitions

271. COMMENT: The proposal Summary states that the New Jersey Department of Transportation refers to its homeland security concerns using the term “critical infrastructure,” while other agencies refer to “homeland security facilities.” The New Jersey Department of Transportation is not the only agency that uses the term “critical infrastructure.” Many, if not all agencies use “critical infrastructure” in coordination with “key resource” rather than the term “homeland security facility.” Rather than using the term “homeland security facility” in the rules, the Department should use the term “critical infrastructure site/key resource site.” (72)

RESPONSE: The definition in the proposed rules provides that homeland security facilities are those deemed to be critical in nature or a key resource by the New Jersey Office of Homeland Security and Preparedness, or the United States Department of Homeland Security. Since the adopted definition of homeland security facility includes the terms “critical infrastructure” and “key resource,” the Department does not believe that it is necessary to modify the term “homeland security facility.”

272. COMMENT: It is not clear how the Department is going to discern what is a homeland security facility. (7)

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RESPONSE: A “homeland security facility” is one that the Department deems critical in nature or a key resource. The determination is made in consultation with the New Jersey Office of Homeland Security and Preparedness, or the United States Department of Homeland Security. These agencies have the expertise in applying their risk assessment models to specific situations in order to determine if a facility, including critical infrastructure, is a homeland security facility.

273. COMMENT: The proposed definition of “homeland security facility” includes a number of examples, such as metallurgical industrial facility and certain energy facilities, and concludes that the Federal Office of Homeland Security will assist the Department in determining which facility meets this definition. Some of the examples provided overlap with the proposed development of “industrial development,” which leaves the applicant and regulator without a clear distinction. The Department should utilize the definitions and classifications that have already been determined by the Department of Homeland Security and the North American Industry Classification System. The property should meet one of those predetermined definitions and or levels of concern in order to be classified by the Department. This will also avoid the need for the Department to constantly update its regulations as it will be controlled by the Federal agency. (131)

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274. COMMENT: The examples of what may be considered a homeland security facility provided in the proposed definition do not fully incorporate the variety of the facilities in the Port District that will be impacted by the rule. It is suggested that the rule be clarified to provide that “homeland security facility” or “critical infrastructure” be defined as a facility “that is regulated by the United States Coast Guard in accordance with CFR Part 33, Navigation and Navigable Waters, specifically: Part 101, Maritime Security: general; Part 103, Maritime Security: Area Maritime Security; and Part 105, Maritime Security Facilities.” (37, 104, 173, 192, 221)

275. COMMENT: The definition of “homeland security facility” should be clarified to define such facilities as ones regulated pursuant to the Maritime Transportation Security Act of 2002, 46 U.S.C. § 7010, and 333 C.F.R. Parts 101 through 105. This change is necessary because the New Jersey Office of Homeland Security and the United States Department of Homeland Security use specific parameters for determining which facilities constitute critical facilities, key resource facilities, or critical infrastructure. Lists of these facilities will change as the risk environment changes or countermeasures are either put in place or compromised. This means that any given maritime facility could be on the list one year and off the next. Even though the maritime facility is regulated by the United States Coast Guard as a homeland security facility, and thus required to prepare and submit to the Coast Guard a plan, it should be considered a homeland security facility for the purposes of these regulations. (37, 104, 124, 137)

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276. COMMENT: The definition of “public development” should be revised to provide that public development projects may include the development or redevelopment of a critical infrastructure/key resource site that has been designated as such by the New Jersey Office of Homeland Security and Preparedness. Should any portion of a public development project be considered a critical infrastructure/key resource site, the decision to provide public access should be made in consultation with the New Jersey Office of Homeland Security and Preparedness.
(72)

RESPONSE TO COMMENTS 273 THROUGH 276: Both the State and Federal government have enacted laws and implemented protective measures to address homeland security. These laws may require measures at certain facilities to protect against potential terrorism which may impact an applicant’s ability to provide onsite public access. In recognition of these State and Federal laws and as discussed in response to comment 272 above, the definition in the adopted rules provides that homeland security facilities are those deemed to be critical in nature or a key resource by the Department, in consultation with the New Jersey Office of Homeland Security and Preparedness, or the United States Department of Homeland Security. These agencies have the expertise in applying their risk assessment models to specific situations in order to determine if a facility, including critical infrastructure, is a homeland security facility. The Department, in

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consultation with these agencies, will be making the determination as to whether or not a facility is either critical in nature or a key resource. It was not the Department's intent, nor does it believe it is necessary, to list every type of facility or infrastructure that may be critical in nature or a key resource. The list of types of development that may be determined to be homeland security facilities in the definition are only examples and is not intended to be an inclusive list.

277. COMMENT: A definition of "maritime facility" should be added and defined, as those facilities that are regulated by the United States Coast Guard at 33 C.F.R. Parts 101, 103 and 105. (72)

RESPONSE: The second sentence of the definition of "homeland security facility" provides a list of examples of the types of facilities that may be classified as homeland security facilities under the Coastal Zone Management rules. The list is for illustrative purposes only; it is neither all-inclusive, nor is it intended to indicate that all facilities that fall within the categories listed will necessarily qualify as a "homeland security facility" under this chapter. Instead, homeland security facilities are classified as such based upon the determination specified in the first sentence of the definition – that the facility is either critical in nature or a key resource, as determined by the Department in consultation with the New Jersey Office of Homeland Security and Preparedness or the United States Department of Homeland Security. Accordingly, as

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classification as a maritime facility does not necessarily result in the facility being considered a homeland security facility, definition of the term maritime facility is not necessary.

278. COMMENT: Natural areas are defined too narrowly since woody vegetation or rare or endangered plants are not necessary for an area to be considered natural. Natural areas such as coastal wetlands, wetland bogs or early succession fields could also be considered natural areas and should be included in the definition. (18)

RESPONSE: "Natural areas" are defined 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. The Coastal Zone Management rules for wetlands (which would include a wetland bog), N.J.A.C. 7:7E-3.27, endangered and threatened wildlife and plant species habitat, N.J.A.C. 7:7E-3.38, critical wildlife habitats, N.J.A.C. 7:7E-3.39 and public open space, N.J.A.C. 7:7E-3.40 (including State parks and wildlife management areas), will apply in such areas. Accordingly, it is unnecessary to add these terms to the definition of natural area. In addition, an early successional field often contains woody vegetation and therefore it would be considered a natural area.

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279. COMMENT: The proposal of five years being the maximum time a property can be abandoned and still be considered to meet “redeveloped” criteria is a disincentive for Brownfield redevelopment at industrial waterfront properties. This timeframe does not realistically consider that remediation projects directed by the Department and United State Environmental Protection Agency may exceed 25 years and still fail to achieve a satisfactory remediation status. To sincerely promote commercial and industrial resurgence of these properties, the rule provisions should be modified to exempt any public access requirements for such redevelopment which would be expected to produce jobs and stabilize weakened municipal and State budgets. (207)

280. COMMENT: The redevelopment of inactive or underutilized properties is supported. However an unintended consequence of the definition of “redevelopment” in the rule is that it could inadvertently add costs to sites currently undergoing remediation, and ultimately act as a disincentive toward remediation. For example, complex remediation, such as those with significant contamination or multiple sources of contamination, can take years and sometimes decades to complete. These remediations are by nature, very expensive. It is in the State’s interest and the public’s to encourage such cleanups. The five-year look back could be creating a hurdle to remediation by inadvertently adding unnecessary and unwarranted costs to property owners who are taking steps to cleanup a property by imposing public access fees. It is recommended that an exemption be provided for those in the process of conducting a

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remediation. This would include preliminary assessments, site investigations, remedial investigations and any other remedial activity. An exemption will ensure that the sites laying fallow, which should be targets of the Department, remain a priority and contaminated sites that are being remediated are not unfairly targeted. (19, 175)

281. COMMENT: “Redevelopment” is defined as the development of a previously developed site that has been inactive, underutilized or abandoned for five years or less. The quantification of five years or less is not reasonable. Although this definition is in alignment with the Freshwater Wetlands Protection Act rules, N.J.A.C. 7:7A, regarding the length of time a “disturbed area” is generally considered by the Department to have been revegetated or naturalized, it does not seem reasonable to apply this finite time period to the definition of redevelopment. While five years may be a reasonable amount of time for a farm field or other pervious area to naturally revegetate, there are previously developed sites with impervious surfaces that have been abandoned more than five years that have not become revegetated or in any way naturalized. The definition should not include a particular timeframe. If a site contains impervious surfaces or disturbances that have not revegetated or become naturalized, development on that site should be considered redevelopment. This scenario is consistent with the Department’s related definition of a “natural area” where vegetation exists, excluding any impervious or previously developed areas. (140,172,194)

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282. COMMENT: The timeframe of five years should either be increased, or the term “underutilized” be removed from the definition of redevelopment. In the past several decades, there has been a shift away from traditional maritime uses along waterfronts to non-maritime uses. In particular, marina, tackle shops, and delivery services that are critical components of the recreational fishing infrastructure have been redeveloped with a reduced emphasis on fishing. These traditional businesses should be given some latitude with redevelopment. The recreational fishing industry in general has softened in recent years and, therefore, some of these businesses may not have had the financial means to expand or make improvements. It is suggested that redevelopment be extended to 10 years for marinas. (153)

RESPONSE TO COMMENT 279 THROUGH 282: As discussed in the proposal Summary, the Department has not previously defined “redevelopment,” although it is used throughout the CZM rules. The term is frequently coupled with the term “development.” (43 N.J.R. at 775). The adopted definition of “redevelopment” means that development of a previously developed site that has been inactive, underutilized, or abandoned for five years or less. The CZM rules state that the Department should encourage “redevelopment of inactive and under-utilized waterfront facilities for port, water-dependent and maritime uses” (N.J.A.C. 7:7E-1.1(c)4ii), and manage coastal activities and foster well-planned communities and regions that encourage “mixed-use

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redevelopment of distressed waterfront communities including underutilized, abandoned and contaminated sites” (N.J.A.C. 7:7E-1.1(6)i(1)).

The Department believes that the definition of redevelopment properly encourages the maximum utilization of coastal resources consistent with the Department’s coastal management policies, while recognizing that public access is an important part of those management policies. The Department supports the remediation of contaminated sites and recognizes that, in some instances, such projects may take many years to complete. The Department’s coastal rules also encourage water-dependent uses such as marinas and does not believe that the definition of redevelopment will adversely impact such uses. In each case, public access requirements will be evaluated on a site-specific basis.

283. COMMENT: The definition of “redevelopment” appears appropriate, with the exception of the term “underutilized.” How is “underutilized” defined? If a site generates more income from housing than a marina, does that make the marina site “underutilized?” (18)

RESPONSE: See response to Comments 279 to 282 for a discussion of “inactive” or “underutilized” in the context of redevelopment. Generally, an underutilized site means a site not fully utilized for its intended use. With regard to the commenter’s example, a marina site that could generate more income from housing or another use would typically not qualify under

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this definition. In addition, conversion of a waterfront site being utilized for a water-dependent use such as a marina would be discouraged under the Coastal Zone Management rules.

Conversion of a waterfront site being utilized for a water-dependent use such as a marina would be discouraged under the Coastal Zone Management rules and it is not anticipated that conversion to a non-water-dependent use would qualify under this definition.

284. COMMENT: The definition of “redevelopment” is going to take many activities that are required to provide public access now, out of the game. Large sections of places that exist now are going to continue to be unavailable and not have access provided to them. (47)

RESPONSE: See responses to Comments 278 through 281 for a discussion of the definition of “redevelopment.” The Department believes that the activities included within the adopted definition of redevelopment are those necessary to encourage redevelopment of these sites consistent with the goals of the CZM rules. Sites that have been inactive, under-utilized or abandoned for longer than five years do not qualify as redevelopment sites and would need to provide public access.

285. COMMENT: The definition section of the existing public access rule at existing N.J.A.C. 7:7E-8.11(b) is proposed for deletion. The proposal does not include these definitions

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in the general definition section of the CZM rules at N.J.A.C. 7:7E-1.8. Is this intentional or an oversight? (131)

RESPONSE: The Department deleted N.J.A.C. 7:7E-8.11(b), which contained the definitions, because all definitions relating to public access are now contained in the definition section at N.J.A.C. 7:7E-1.8. With the exception of the term “natural area”, which has been included with other definitions at N.J.A.C. 7:7E-1.8, all the former definitions were deleted since those terms are not used in the adopted rules.

SUBCHAPTER 3. SPECIAL AREA RULES

7:7E-3.23 Filled water’s edge

286. COMMENT: Under the existing rules, filled water’s edge sites require a water dependent use adjacent to the water’s edge. Where a water dependent activity is no longer practicable, either a 100 foot wide strip adjacent to the water must be reserved for future water dependent uses or, as the rule has been historically applied, a walkway must be provided. A walkway easement of 30 feet has been deemed sufficient to satisfy the rule, because the walkway is considered a water dependent use. However, with the exception of the Hudson River

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Waterfront Walkway, proposed N.J.A.C. 7:7E-3.23 has down sized the width of all walkways adjacent to the water's edge. Without changing the requirements of the filled water's edge rule, how does the Department propose to satisfy the rule? Will the Department now accept a 10 foot walkway? (18)

RESPONSE: An applicant who proposes development on a filled water's edge site must comply with both the filled water's edge rule at N.J.A.C. 7:7E-3.23 and the public access rule at N.J.A.C. 7:7E-8.11, as well as all other applicable sections of the CZM and CPP rules. In accordance with N.J.A.C. 7:7E-3.23(f), in waterfront areas located outside of the CAFRA zone, the water dependent use may be a public walkway, provided the upland walkway right-of-way is at least 30 feet wide, unless there are existing onsite physical constraints that cannot be removed or altered to meet this requirement. If a walkway is accepted as the water dependent use in order to comply with the filled water's edge rule, a 30 foot wide easement would be required.

7:7E-3.48 Hudson River Waterfront Area

287. COMMENT: The Hudson River Waterfront Walkway was always contemplated as an urban sidewalk where various uses such as walking, running and biking could occur

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simultaneously. Where obstructions such as the Hess and Maxwell Coffee facilities were present, the walkway was constructed around such facilities, with the idea that should the property be redeveloped in the future with a use not contrary to public health and safety, the Hudson River Waterfront Walkway would then be constructed. The proposed rule's provision allowing portions of the walkway to be opened on a less than 24-hour basis is detrimental to the original intent of the plan. The hours of operation issue has been vetted and litigated and access 24 hours a day seven days a week has been found appropriate. No changes should be made to the rule as the current rule already allows for emergency closure when necessary. Access to the Hudson River Waterfront Walkway should not be for the exclusive use of any development adjacent to the river. (18, 46,53,84, 128, 182)

288. COMMENT: Security is not an issue in Edgewater. When there are walkways, more people walk there, making the area more secure. It is only in areas where access is blocked off that have security issues. Limiting access to the Hudson River in Edgewater is not appropriate, since the town is only three and a half miles long. (94)

289. COMMENT: The Department should not make changes to the 24-hour access requirements for the Hudson River Walkway. Safety and potential injury assessments should be made by the individual not the Department. (153)

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RESPONSE TO COMMENTS 287 THROUGH 289: The exception to the 24-hour access requirement (see N.J.A.C. 7:7E-3.48(e)1) would apply only in limited circumstances, when it can be demonstrated that providing public access is not practicable based on the risk of injury from substantial permanent obstructions or proposed operations, or upon documentation of a threat to public safety due to unique circumstances concerning the subject property. The amendment is consistent with the amendments to all types of public access, which allow the Department to consider site-specific circumstances when determining whether or not, and to what extent, public access is required. Public safety is an important consideration in the Department's review of any form of potential public access. The Department has long administered an exception to the 24-hour access requirement based on risk of injury (see N.J.A.C. 7:7E-8.11(f) of previous rules). Property owners must have the right to prevent injuries from unavoidable dangerous conditions on their land. Not only does this protect the public from injury, it protects landowners from potential liability for preventable injuries to those who pass through the property.

290. COMMENT: Changing the rule so that existing businesses do not have to contribute to public access along the Hudson River is a terrible idea. (189)

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RESPONSE: In accordance with N.J.A.C. 7:7E-8.11(n)1i, existing commercial development is only exempt from providing additional public access where the proposed activity consists of the maintenance, rehabilitation, renovation, redevelopment, or expansion that remains entirely within the parcel containing the existing development. Any existing public access must be maintained or equivalent public access provided onsite. In accordance with N.J.A.C. 7:7E-8.11(n)1ii, additional public access is required for existing commercial development where the project involves the conversion of any existing non-commercial use to a commercial use or any change that would result in either greater than a cumulative 50 percent increase in the area covered by buildings, asphalt, or concrete paving, or where the development expands outside the parcel containing the existing development.

As discussed in the proposal Summary (see 43 N.J.R. 772(a)), it has been the Department's experience that applicants have hesitated to do needed renovations or to rehabilitate dilapidated facilities, since doing so under the existing rules would trigger potentially cost prohibitive public access. Therefore, the Department believes that if there is no public access currently, it would be very difficult and costly for many applicants, without the acquisition of additional land, to provide new public access when a site is being rehabilitated or renovated or expanded within the existing parcel that contains the development.

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291. COMMENT: The following should be incorporated into N.J.A.C. 7:7E-3.48(e)1:

“During such circumstances as a State or national state of emergency, under a declaration of the Governor of the state of New Jersey, either the Director of the New Jersey Office of Homeland Security and Preparedness or the Director of the New Jersey Office of Emergency Management, will be relieved of the burden of demonstrating the curtailment of the hours of public access.”

For example, if the above officials were to deem it necessary to have the walkway remain open or closed for 24 hours for public safety reasons, they would not have to provide documentation to the Department that a threat to public safety exists. This should also be applied to other tidal locations designated by the Director of New Jersey Office of Homeland Security and Preparedness or the Director of the New Jersey Office of Emergency Management. (72)

RESPONSE: If the Governor declares a state of emergency, the State officials that the commenter describes would have the authority to close or open the walkway as necessary for safety in accordance with the authority afforded to them under the appropriate State and Federal laws.

7:7E-3.50 Lands and waters subject to public trust rights

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292. COMMENT: The amendments to N.J.A.C. 7:7E-3.50 that better describe the activities that the public may engage in once they have gained access to the water including swimming, fishing, sport-diving and walking are supported. (63)

293. COMMENT: The deletion of N.J.A.C. 7:7E-3.50(c) which imposed a moratorium on implementing public access requirements is supported because public access concerns raised by the New Jersey Marine Trades Association are addressed in the rule proposal. Further, appointments to the Public Access and Marina Safety Task Force Act were never made and therefore, no report was produced. (153)

RESPONSE TO COMMENTS 292 AND 293: The Department acknowledges these comments in support of the amendments to N.J.A.C. 7:7E-3.50.

294. COMMENT: The Department is proposing to delete N.J.A.C. 7:7E-3.50(b), which provides that development that adversely affects lands and waters subject to public trust rights is discouraged. This language must remain in the rule in order to prevent development that limits access. There are many examples of areas that have been developed and public access lost. However, in these cases the Department claims that access was required through the issuance of a CAFRA permit. Regardless, there is always a net loss of access. Leaving this language in the

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rule will help stop development that limits access. This language is critical as New Jersey becomes built out and open space reduced. (208)

RESPONSE: Although this language has been deleted and is no longer a stand-alone subsection as it was in the prior rule at N.J.A.C. 7:7E-3.50(b), the language has been incorporated as part of adopted N.J.A.C. 7:7E-3.50(d), which provides, “Development that does not comply with N.J.A.C. 7:7E-8.11, public access, is discouraged in lands and waters subject to public trust rights.”

295. COMMENT: Please explain how it is that the Department may redefine what public trust access is. (171)

RESPONSE: The rules define areas subject to public access requirements under this chapter. The rules recognize that findings under the rules do not eliminate access rights otherwise held by the public. Particularly, N.J.A.C. 7:7E-8.11(a) 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 in accordance with N.J.A.C. 7:7E-3.50.”

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296. COMMENT: Did the Department peruse a previously prepared report, “Public Access in New Jersey: The Public Trust Doctrine and Practical Steps to Enhance Public Access” before proceeding in the development of these proposed amendments? (171)

RESPONSE: Although the document the commenter speaks of was not used in development of the adopted rules, the rules address many of the same concepts contained in the document. For example, both the referenced document and the rules recognize that there are different public access needs for different areas of the State as well as the importance of municipalities in implementing public access. In order for public access in the State to improve, State, Federal, municipal and county agencies need to work together.

297. COMMENT: Public access to the water should be expanded to include the public’s right of access from the water to the land. This will provide benefits to the people on the shore as well as the water. The addition of public floating docks and walkways from the docks to the shore will provide both a means and justification for the transient boater to visit the local area by water and not travel there by car. Any small boat, sailboat, canoe or kayak should have a place to safely land, tie up and allow the passengers to come ashore. (147)

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RESPONSE: Boat ramps, piers or other direct access to the waterway are permissible forms of public access. These features can also afford a user the ability to exit the waterway to regain access to the land.. Accordingly, the Department does not believe amendment of the list of examples of the types of public access that the Department would accept to satisfy public access requirements for Department permits is necessary.

Subchapter 7 Use Rules

7:7E-7.3 – Resort and recreational use

298. COMMENT: The rule and proposed amendments to the definition of amusement pier conflict as proposed N.J.A.C. 7:7E-7.3(e)1 (previously N.J.A.C. 7:7E-7.3(e)2) provides that new amusement piers are prohibited except in areas with privately held riparian grants, where they are discouraged. The proposed change to the definition of “amusement pier” will allow the construction of bars and restaurants on existing piers and the construction of new amusement piers from dilapidated structures. In addition, proposed N.J.A.C. 7:7E-7.3(e)2 provides that the expansion of amusement piers in accordance with the coastal general permit at N.J.A.C. 7:7-7.5 is acceptable, without any environmental review. An environmental assessment of the potential

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and actual impact of allowing bars and restaurants on amusement piers needs to be completed before the definition is changed. (18)

RESPONSE: The adopted rules expand the definition of “amusement pier” at N.J.A.C. 7:7-1.3 to permit bars, restaurants, and other entertainment venues as allowed “amusements” on these structures. The expanded definition allows bars and restaurants, as well as other entertainment venues such as stage and band areas and associated seating areas, to be included on amusement piers. While bars and restaurants were previously excluded from the definition, the Department believes that including these uses, as well as entertainment uses, will expand the public’s opportunity for both visual and physical access since the piers would now be viable for year-round use. Also, expanding the definition to include these additional uses makes the rehabilitation of existing dilapidated piers economically attractive which will lead to increased investment as well as increased use of the shore area. While the amended definition of “amusement pier” may encourage construction of amusement piers on existing dilapidated structures, it does not relieve an applicant from the requirement to comply with the CZM rules, N.J.A.C. 7:7E.

The commenter is incorrect in their assumption that an environmental review is not required since in accordance with N.J.A.C. 7:7-6 an Environmental Impact Statement (EIS) or Compliance Statement, which must provide the information needed to evaluate the effects of the

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proposed development on the environment of the coastal area, is required for all coastal permit applicants.

SUBCHAPTER 8. RESOURCE RULES

N.J.A.C. 7:7E-8.11 Public access

Municipal Public Access Plans-general comments

299. COMMENT: It is proper to allow individual municipalities to develop their own access plans because municipalities know best in determining public access for their town. (1, 152)

300. COMMENT: The commenter supports the Municipal Public Access Plan process and urged everyone to become a member of their municipal planning committee. Municipalities need to have some control moving forward. (92)

RESPONSE TO COMMENT 299 THROUGH 300: The Department acknowledges these comments in support of Municipal Public Access Plans.

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301. COMMENT: Municipal Public Access Plans should be mandatory for all communities bordering tidal waters. (197)

RESPONSE: The Department encourages municipalities to develop and obtain approval of Municipal Public Access Plans; however, the Department does not believe that access plans should be mandatory for all communities bordering tidal waters. There are many coastal towns in the State that already provide significant public access to tidal waters in their municipality. In these towns, it may be more appropriate for individual applicants to address public access in accordance with the CZM and CPP rules, rather than require municipalities to develop an Municipal Public Access Plan.

302. COMMENT: If the Department allows shore towns to write their own Municipal Public Access Plans, public access would change from town to town. If this happens on barrier islands that have more than one town present, how is a visitor to know if the rules have changed and where that border exists that delineate where the changes have occurred? (195)

RESPONSE: The public access rules apply to the entire State when an activity is proposed that requires a permit under these rules, including waterfront development permits. They do not

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change from town to town. In addition, the adopted rules require that public access to tidal waterways must be clearly marked and that Department- approved public access signs must be installed and maintained by the permittee and any successors in title and interest in perpetuity at each public accessway, public access area, and/or public parking area. To emphasize and ensure that the signage requirement is met in municipalities with Municipal Public Access Plans, Department-approved Municipal Public Access Plans require the installation and maintenance of appropriate public access signage in accordance with N.J.A.C. 7:7E-8.11(u). This will ensure public access points are clearly marked.

303. COMMENT: The public cannot trust that the municipalities and the State are going to work together. (171)

RESPONSE: The rules establish goals and basic requirements for public access and are intended to encourage municipalities to take an active role in designing and ensuring public access to beaches and tidal waters in ways that will work best for their respective circumstances. The plans developed by the municipalities would only be applicable to a permittee required to provide public access if the Municipal Public Access Plan is approved by the Department. The Department is committed to working with municipalities to help them develop public access plans that will ensure that the public's access needs are met in a comprehensive and systematic

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way. The Department has already been contacted by several municipalities that want to work with the Department on developing Municipal Public Access Plans.

304. COMMENT: The rule should prevent restriction to access below the mean high water line. It should also require that any man-made barriers intended to impede any access point, including construction of fences, plants, or other physical barriers, be removed. Any unauthorized signs restricting access must be removed. Examples of where these types of practices are currently being employed include: the sign on Garfield Terrace in Long Branch's Elberon section, which states "Access for Residents Only;" the stones and rosebushes planted on a beach access path by a resident on Adam Street in Long Branch's Elberon section; the fencing put on top of a rock wall at the end of Roosevelt Avenue in Deal to prevent access along the high water line; and a cement wall erected by the owners of the residential properties bordering Marine Place to prevent access. (144)

RESPONSE: Municipalities should not prevent access to the high water line. If the public is being illegally blocked or illegal signs are being placed preventing public access, the public can contact the Department's Bureau of Coastal and Land Use Enforcement Office by calling 1-877-WARN DEP.

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When public access is required, the rules provide that access shall be provided on a non-discriminatory basis. The rules further require that applications for Municipal Public Access Plans include various analyses through which the municipality is required to review and itemize existing public access, identify public access needs that are not being met by existing facilities, formulate a plan for providing public access and demonstrate that the public access proposed will meet the identified public need. The rules further require the needs assessment to identify any existing practical limitations on and/or alternatives for addressing the limitations associated with providing public access. The Department is committed to working with municipalities to help them develop public access plans that will ensure that the public's access needs are met.

305. COMMENT: The Department has no authority to rule on the adequacy of Municipal Public Access Plans. (116)

RESPONSE: The Department included provisions for Municipal Public Access Plans to provide an alternative mechanism for individuals with public access obligations to meet those obligations, while also providing municipalities an opportunity to customize public access opportunities to local circumstances and needs. Thus, the Department has the authority and the obligation to ensure that Municipal Public Access Plans are consistent with the provisions of this rule and the Public Trust Doctrine.

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306. COMMENT: Municipalities will be given the authority and police powers to enforce where and when the public will have access to tidal waters within their municipality. Many of these towns have in the past shown their unwillingness to allow public access. (223, 225, 18, 29, 42, 44, 57, 84, 89, 98, 115, 127, 141, 149, 182, 189, 210, 216)

307. COMMENT: Towns with few public beach access points will either eliminate them or never create more. The Department should have the final say and not the municipalities, which always side with the beachfront homeowners instead of the entire community. (6, 12, 63, 84, 178)

308. COMMENT: It is recommended that the State develop a list of beach access standards for the State. If a municipality wants to tweak the standards for its individual situation, then the municipality and Department should work through a public process to do so. This is the only fair way to prevent local barriers to beach access. (178)

309. COMMENT: If towns limit access they must have very detailed plans that give greater access to the public along with restroom and changing room access to all the public, not just the

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local community or a select group. These areas should not be “owned” in a way that limits free access and limits the public’s ability to walk to and along the water. (193)

310. COMMENT: Allowing municipalities to develop plans that tailor public access to local conditions and community needs would create a substantial risk of arbitrary decision-making by municipalities, despite assurances from the Department that its approval is required. Arbitrary decision-making by the Department is likewise a substantial risk. The Department has already been sued twice, i.e. *Avalon* and the claim made by the Marine Trades Association of New Jersey. Should the public, too, need to sue; there would be no legal basis to do so. (171)

311. COMMENT: There are numerous places where public access could be lost as a result of this rule and where current practices are in violation of the existing rule. At the end of Adams Street in Long Branch (Elberon Section), the property owner adjacent to the street end landscaped it to match the landscaping on their property. This happened years ago and practices such as this are contrary to the definition of conservation restriction contained in the rules.

On the Department’s public access website there is identified an access point in the Borough of Deal, Monmouth County at the end of Ocean Lane. Although the access point looks sanctioned by the town due to the sign and trash can, it crosses private property. When the site is

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developed the access may be lost even though the rule proposal states that no public access will be lost.

Brick Township, Ocean County, and the Borough of Allenhurst, Monmouth County, charge higher beach fees for non-residents, despite the *Borough of Avon-by-the-Sea v. Neptune* case that outlawed the practice.

In Pier Village in the City of Long Branch, Monmouth County, the beach on which the club is located has been replenished more than once with public money. The United States Supreme Court case, *Florida DEP v. Stop the Beach Nourishment* and the New Jersey Supreme Court case, *City of Long Brach v. Liu* provide that replenished beaches are public beaches.

The Bradley Beach Badge Registration form requires a signature to buy a seasonal beach badge, and states that the badge is not transferable. (208)

RESPONSE TO COMMENTS 306 THROUGH 311: The intent of Municipal Public Access Plans is to enhance the public's access to tidal waters in a more comprehensive manner than the previous, limited, purely regulatory approach. The Department is confident that what it cannot mandate, it can obtain by developing cooperative relationships with municipal governments and by developing Municipal Public Access Plans. In accordance with adopted N.J.A.C. 7:7E-8.11(z), 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

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conservation restriction under the New Jersey Conservation Restriction and Historic Preservation Act, N.J.S.A. 13:8B-1 et seq., maintaining the publicly dedicated areas in perpetuity.

Individuals are encouraged to report potential violations of the Public Trust Doctrine to the Department.

312. COMMENT: Particularly alarming in the rule proposal is the fact that municipalities can weigh cost considerations in determining what level of access will be provided. The rule impact statement states, “the rules will allow the regulated community to choose the way that public access requirements are satisfied based on budgetary constraints.” Public access will not be based on the right of the public to access its waterways, but the cost-cutting desires of municipalities and developers. These entities will choose the least expensive access option, not what will provide the best or most enhanced access. These rules will allow municipalities to simply construct walkways to fulfill access requirements. Citing excessive costs, municipalities will not invest resources in providing parking and restrooms, constructing boat launches and docks, or developing waterfront park facilities. (197)

RESPONSE: The adopted amendments allow municipalities to participate in determining the most appropriate forms of public access for that municipality through the voluntary Municipal Public Access Plan process. As indicated in other responses and in the proposal and notices of

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substantial change, the access proposed in the Municipal Public Access Plan must comply with the standards established in the rules or the Department will not approve the proposed access plan and it will have no impact on what forms of public access are provided under the rules.

The rules do not require municipalities to create additional public access as part of applying for a Municipal Public Access Plan; a municipality would only be required to create public access as an applicant for a permit, just like other permit applicants. In that situation it is assumed municipal permit applicants, just like all other applicants, will consider costs in proposing how they seek to comply with the public access requirements of the rules. However, ultimately it is the Department that determines if the proposed access satisfies the rules. While it was initially proposed that cost could be a factor considered by the Department when determining whether proposed offsite access was acceptable when there is no Municipal Public Access Plan, cost as a consideration in that context was eliminated as a factor in the March 19, 2012 notice of substantial change and it is not part of the adopted amendments.

If a municipality decides to seek Department approval of a proposed Municipal Public Access Plan, the municipality may include in the proposed access plan a requirement that a monetary contribution to be used to provide public access rather than access being provided on a site by site basis. In this way, funds can be accumulated to achieve different forms of public access including potentially parks or boat ramps that would otherwise not be achievable through standard parcel by parcel permit requirements. Municipalities choosing this option are required

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to establish a dedicated Public Access Fund into which all funds collected must be deposited.

The amount that a permittee must pay into such a fund is determined by the formula at N.J.A.C.

7:7E-8.11(f); the amount of the contribution shall be based upon a determination of the costs that

would be incurred if land was purchased for creating access and the access was provided in the

form of a walkway. In accordance with N.J.A.C. 7:7E-8.11(e), Municipal Public Access Plans

must be reviewed and approved by the Department before they are operational. As part of an

application for approval of an access plan, a municipality is required to include a needs

assessment that evaluates all existing access points and all water dependent and water oriented

activities that provide public access to tidal waterways and shores within the municipality. The

assessment must also evaluate existing practical limitations to access which may include lack of

parking or parking restrictions, or a lack of restrooms, and provide alternatives to address any

limitations determined to exist. The needs assessment must also provide an estimate of the cost

of implementing, constructing and maintaining the access facilities proposed in the plan and

specify how the cost will be funded. The Department will review the application, including the

needs assessment, to determine if the application meets the goals of the public access rules. In

proposing how funds paid into such an account would be utilized to provide specified public

access, the Department assumes that costs of various forms of access will be considered by the

municipality in order to provide the best access opportunities with the funds anticipated to be

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available. The Department will not approve an application for a Municipal Public Access Plan that does not sufficiently identify and address the public access needs of the community.

As discussed in Response to Comments 87 through 90 above, N.J.A.C. 7:7E-8.11(j)4 requires municipalities to report on the status of the public access fund including all monies received and an accounting of all expenditures of those monies, every five years. Funds paid into the dedicated public fund under a Department-approved Municipal Public Access Plan cannot be used for any purpose other than public access.

Accordingly, the Department does not believe a desire to control costs will negatively impact public access. Further, N.J.A.C. 7:7E-8.11(m) provides the Department with the ability to revoke its approval of a Municipal Public Access Plan for good cause which may include inappropriate use of public access funds.

The Department believes that the above standards provide the Department with sufficient oversight to ensure that the funds are being expended properly and that the public access provided meets the goals of the access plan.

N.J.A.C. 7:7E-8.11(a) Public access

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313. COMMENT: The description of public access areas should be revised to include public parking and public restrooms. As acknowledged in the description of options for public access improvements for new commercial development at proposed N.J.A.C. 7:7E-8.11(n)1iii(4) and (5), public restrooms and public parking are critical elements of public access areas. (200)

RESPONSE: The Department agrees that public restrooms and public parking are an important component of public access. In recognition of this, as part of an application seeking Department approval of a proposed Municipal Public Access Plan, the municipality is required to provide a public needs assessment which includes analysis of practical limitations to public access.

Practical limitations are specifically stated to include a lack of restrooms or parking, including restrictions on parking availability and duration. (see N.J.A.C. 7:7E-8.11(e)3iii). The analysis is required to include alternatives to address any limitations identified, where feasible. The importance of restrooms and parking is additionally reflected at N.J.A.C. 7:7e-8.11(b)3i which provides types of public access that may be proposed by an applicant, including at (4) public restrooms to accommodate those utilizing public access, and, at (5), additional public parking to accommodate those utilizing public access. The Department believes that the rules adequately reflect the importance of restrooms and parking as a component of public access.

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314. COMMENT: There should be a pro-rated nexus between what is considered as acceptable and meaningful public access proportionate to the development. An applicant, developer or property owner should be required to provide the same amount of actual public access or be required to financially pay for the same; whether public access involves a walkway or trail, boat ramp, fishing pier, pocket park, public restrooms, or public parking. The developer should not be able to call the landscaping around his project a public park; the parking lot for his development public parking; or a four foot sidewalk a public access trail. Instead, meaningful public access should involve some form of proportionality. (130)

RESPONSE: If a municipality seeks approval of a Municipal Public Access Plan including a fund into which a contribution is paid in lieu of providing onsite access, the adopted rules provide a formula at N.J.A.C. 7:7E-8.11(f) to determine how the amount of the contribution to the fund is calculated with the amount due depending upon what would have been required onsite.

In accordance with N.J.A.C. 7:7E-8.11(n), when reviewing site specific public access plans the Department shall consider factors such as type of public access available, the compatibility of the proposed public access with the applicant's proposed use of the site, square footage of access area, and environmental impact or benefit when determining whether or not proposed public access is appropriate and/or sufficient. In addition, when offsite access is

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proposed in accordance with the adopted rules, the offsite access must be equivalent to that which would have been required onsite.

The Department believes that these provisions will result in acceptable and meaningful public access proportionate to the development.

N.J.A.C. 7:7E-8.11(b) – Public Access Goals

315. COMMENT: The amendment recognizing that restrictions to public access seasonally, hourly or in scope may be necessary to preclude endangering public health or safety or to prevent damage to the environment is welcomed. (200)

316. COMMENT: The Department is commended for recognizing that at certain public access points, such as those on commercial properties, it may not be appropriate, safe or economically feasible for 24-hour public access to be provided. By stating in proposed N.J.A.C. 7:7E-8.11(b)⁴ that public access can be restricted either seasonally or hourly, as set forth in a public access plan, the Department is recognizing the importance to private property owners of controlling who can go on their properties, especially after normal business hours. (198)

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RESPONSE TO COMMENTS 315 AND 316: The Department acknowledges these comments in support of the rule.

317. COMMENT: Proposed N.J.A.C. 7:7E-8.11(b)1 provides that “all levels of government in New Jersey shall seek to create and enhance opportunities for public access to tidal waterways and their shores...” In addition, proposed N.J.A.C. 7:7E-8.11(b)2 provides that “all existing public access to and along tidal waterways and their shores shall be maintained to the maximum extent possible.” These provisions are supported and must be applied to the Municipal Public Access Plan process. Municipal Public Access Plans must include every opportunity for public access and must recognize and identify areas that are publicly accessible. (208)

RESPONSE: The Department acknowledges the commenter’s support of N.J.A.C. 7:7E-8.11(b) 1 and 2. Both of these paragraphs apply to not only site-specific public access projects, but also to Municipal Public Access Plans in accordance with N.J.A.C. 7:7E-8.11(d). Therefore, these provisions will be applied to the Municipal Public Access Plan process.

318. COMMENT: The term “existing public access” needs to be defined. The definition should only recognize a legal, formal and planned facility rather than an informal, makeshift,

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casual or improved feature that may take place on public or private property by someone other than the owner of the property. Popular use does not necessarily make a legitimate, legally permitted public access site. (72)

RESPONSE: The Department disagrees with commenters assertion that “existing public access” should be further defined. In most instances, existing public access may be provided through formal and planned development or improvements. In some instances, however, existing public access could include less formal, yet equally well-recognized, public access uses. In each case, all public access requirements, including “existing public access,” will be evaluated on a site-specific basis.

319. COMMENT: Proposed N.J.A.C. 7:7E-8.11(b)4, which would allow municipalities to restrict public access to portions of jetties and groins where they can demonstrate that access to these structures poses an extraordinary risk of injury is not supported. It is understandable that restricting access to jetties and groins may be necessary during beach nourishment projects when heavy machinery is within very close proximity and poses a risk. However, fishermen should be granted public access to these areas immediately after the machinery is removed. Anglers have

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been utilizing these structures as fishing sites for generations and can adequately assess the potential risk of injury and minimize the risk through specialized equipment. (153)

RESPONSE: It is important to allow municipalities to appropriately restrict access to dangerous areas within their jurisdiction. Municipal officials are familiar with local conditions, including risks associated with shoreline activities, and are in a better position than the Department to identify areas that could pose a danger to the public. Municipalities must address access for fishing in their Municipal Public Access Plans and include fishing access and associated amenities to the maximum extent practicable, but it is acceptable under the rules to have restrictions in areas where public safety may be at risk.

320. COMMENT: Proposed N.J.A.C. 7:7E-8.11(b)4 and 5 delineate the circumstances under which public access may be restricted or prohibited, replacing a portion of existing N.J.A.C. 7:7E-8.11(f). While the exceptions have been condensed in format, there are now more and they are substantially vaguer. The burden is now on the municipality to defend the requirements of public access against a list of undefined vague exceptions. Especially dangerous is the provision that “public access may be prohibited in locations where homeland security concerns are present...” While one can recognize the need for public safety, there are no provisions that require that offsite access be provided where access has been prohibited under these exceptions.

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It is suggested that the prior exceptions be continued as the prior exceptions provided more clarity and did not give as many open ended options to the development to restrict or prohibit public access development. It is also suggested that a developer be required to provide offsite access where onsite access is deemed not feasible under one of these exceptions. Given a choice, owners of properties that presently pose some risk to the public or environment will choose the simple alternative of contributing to some “equivalent” credit mechanism, as often done for wetlands, or possibly even a sum of money to a fund. This is not a good alternative solution when it comes to the issue of providing access since it could keep the property “locked up” for undetermined amounts of time. Owners should be incentivized to make the property safe for human health and the environment as their first priority. (132)

RESPONSE: In accordance with N.J.A.C. 7:7E-8.11(b), public access proposed by all applicants (those in municipalities with operational Municipal Public Access Plans and those in municipalities without operational Municipal Public Access Plans) must be designed to achieve the public access goals provided at N.J.A.C. 7:7E-8.11(b)1 through 5. The Department deleted N.J.A.C. 7:7E-8.11(f) of the rules in place prior to these amendments, which contained some of the substantive requirements for public access. The new substantive requirements for public access are located throughout adopted N.J.A.C. 7:7E-8.11. The goals at N.J.A.C. 7:7E-8.11(b) are meant to work in conjunction with the broad coastal goals outlined at N.J.A.C. 7:7E-1.1(c)

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and with the public access requirements for applicants in municipalities with operational Municipal Public Access Plans as well as those in municipalities without operational Municipal Public Access Plans.

The adopted rules do require offsite access where access has been prohibited because of homeland security concerns. In accordance with N.J.A.C. 7:7E-8.11(n)4, for new homeland security facilities, including the conversion of a non-homeland security facility to a homeland security facility, or the expansion of an existing homeland security facility onto a new parcel, the applicant is required to provide either onsite access or offsite access on the same waterway within the same municipality as the development. Existing homeland security facilities must maintain any existing access or provide equivalent access either onsite or offsite on the same waterway and within the same municipality as the development. In addition, for other types of development such as industrial, public, and residential, if an applicant demonstrates that onsite public access is not feasible, equivalent access must also be provided offsite.

The ability of an applicant to make a contribution in lieu of providing onsite public access is not an option left to the discretion of an applicant. Instead, it is up to a municipality proposing a Municipal Public Access Plan to determine when such a contribution will be required and utilization of this optional component of a Municipal Public Access Plan is limited in several ways to ensure accountability. First, the contribution is only possible for a development located in a municipality that has obtained Department approval of a Municipal

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Public Access Plan, where the municipality has chosen to include contribution to a public access fund for specified forms of development in the Municipal Public Access Plan. Second, the municipality must specify the type of development for which a monetary contribution shall be required. For example, a municipality may choose to limit the contribution requirement in lieu of onsite public access to industrial developments only. Third, the contribution must be used to provide access along the same waterway as the development. If a municipality meets all of these conditions and allows for contributions, the municipality must use the fund to provide additional public access or enhance existing public access in accordance with the approved access plan and is required to provide updates to the Department to allow the Department to assure that the Municipal Public Access Plan and public access fund are being appropriately implemented and administered.

N.J.A.C. 7:7E-8.11(e)

321. COMMENT: The recognition that streets, paths, trails, walkways, easements, paper streets, dune walkovers/walkways, piers and other rights-of way are mechanisms that can be used to satisfy public access requirements is supported. (153)

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RESPONSE: The Department acknowledges the commenter's support of N.J.A.C. 7:7E-8.11(e).

Preparation of Municipal Public Access PlanMunicipal Public Access Plans

322. COMMENT: In order to provide greater clarity and simplified access to the requirements, it is suggested that the provisions relating to Municipal Public Access Plans at proposed N.J.A.C. 7:7E-8.11(d) through (m) be clearly set apart, through possibly a header, from the provisions defining how public access should be provided for the different types of development contained at proposed N.J.A.C. 7:7E-8.11(n). (67)

RESPONSE: Headers are not allowed within sections of the Administrative Code. The Department believes that it is important to have the public access requirements under this chapter contained within one section of the rules to avoid potential confusion as to which section applies in a particular situation. This would be particularly problematic as there are several requirements that apply in all municipalities subject to these rules, regardless of whether there is a Municipal Public Access Plan in place or not. (see N.J.A.C. 7:7E-8.11(c)3) Accordingly, the Department does not believe dividing requirements applicable to Municipal Public Access Plans from those applicable in municipalities that do not have Municipal Public Access Plans by creating two

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different rule sections is a viable option. In order to reduce any potential confusion as to which provisions are applicable, N.J.A.C. 7:7E-8.11(c) provides a road map specifying requirements applicable to development proposed on sites which are located on or adjacent to tidal waterways and their shores. The Department believes this provision provides the type of clarity sought by the commenter.

323. COMMENT: Proposed N.J.A.C. 7:7E-8.11(e) requires submission of a digital map and inventory identifying tidal waterways and their shores an all land held by the municipality adjacent to such waterways. The Department should provide technical assistance to municipal governments to prepare the maps and inventory. (54)

324. COMMENT: The proposal indicates that the Department intends to provide extensive guidance to aid in the development of Municipal Public Access Plans, but the proposal does not indicate how the guidance will be structured. Without specific language it is impossible for the public to gauge how the proposed guidance will impact public access. It is suggested that the Department use guidance that is consistent with the current Army Corps of Engineers regulations for providing public access to beaches maintained through Federal replenishment programs. (153)

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325. COMMENT: The proposed implementation strategy at N.J.A.C. 7:7E-8.11(e)5 would engage the municipality in a very detailed and unnecessarily time consuming process. Municipalities would benefit from obtaining the Department's guidance on appropriate strategies. (67)

326. COMMENT: The Department should clearly and emphatically state that it is not necessary for the town to hire a consultant to do the work. (204)

327. COMMENT: Instead of penalties, such as ineligibility for Green Acres funding or authorization under the coastal general permit for beach and dune maintenance activities, it would be more appropriate to offer incentives to municipalities that would encourage them to prepare a Municipal Public Access Plan. While not actually being a mandate to have a plan, as currently proposed, the disadvantages that the municipality would suffer without a plan essentially necessitates that one be prepared. With the current strained economy, many municipalities will find it difficult to finance the preparation of a detailed Municipal Public Access Plan as required under the rules. Rather than offering Department regulatory staff to assist with plan preparation, their time would be better spent protecting the physical environment through permit review and their other existing duties (92, 169)

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328. COMMENT: State funding should be available for preparation of the application for approval of an Municipal Public Access Plan. The lack of funding is a disincentive to undertaking a comprehensive planning process. (67, 92, 169)

329. COMMENT: There must be cooperation between the municipality and the Department in developing an access plan. (122)

330. COMMENT: It is requested that the Department provide technical and financial assistance to all of the local governments that will be subject to the rule and provide them with adequate timelines to complete the Municipal Public Access Plan process and adopt local ordinances. In addition, the Department should provide examples of approvable Municipal Public Access Plans to the municipalities, focusing on the different regions affected by the rule amendments: coastal Atlantic, Raritan Bay, Delaware Bay, and Delaware River. (54)

331. COMMENT: The Department is encouraged to commit to public outreach to affected municipalities on the importance of development a Municipal Public Access Plan and what such a plan must contain to be approved by the Department. The Department should write a Municipal Public Access Plan that could be downloaded from the internet and used by the municipal planner, environmental commission, or planning board to develop a plan. (204)

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332. COMMENT: Municipal Public Access Plans should be implemented through the public process currently in place. The commenter is in support of tying Green Acres funding to the development of a public access plan. (1)

RESPONSE TO COMMENTS 323 THROUGH 332: The Department believes that the development of Municipal Public Access Plans provides municipalities with the opportunity to better be able to plan public access and address concerns and needs of their communities and the surrounding region, but Municipal Public Access Plans are not required under the rule. The Department acknowledges that a municipal government may incur some costs in preparing and adopting a Municipal Public Access Plan; however, the Department believes that a plan can be prepared and adopted at minimal cost with Department technical assistance.

The Department has developed teams of professionals within the Division of Land Use Planning who have already prepared inventories and draft plans for local governments that have requested assistance throughout the State. This team is committed to continuing to provide technical assistance in preparing Municipal Public Access Plans. While the degree to which professional assistance is used is up to a municipality, the Department believes that a Municipal Public Access Plan can be prepared by an environmental commission, planning board or municipal staff at little cost. The Department has also prepared a draft resolution adopting a

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Municipal Public Access Plan, in order to minimize costs to municipalities. The Department continues to conduct public outreach and intends to develop additional templates and guidance documents to assist in preparation of Municipal Public Access Plans. These materials will be available for download from the Department website at www.nj.gov/dep. The Department's Division of Land Use Planning can be reached by calling (609) 984-6888. The Department believes that the assistance provided by the Department provides an incentive for municipalities to work with the Department in developing a Municipal Public Access Plan. In fact, approximately fifty municipalities to date have expressed interest in developing a Municipal Public Access Plan.

Since the Department's Division of Land Use Regulation is responsible for reviewing land use permit applications and the Department's Division of Land Use Planning is responsible for working with municipalities, permit reviews will not be affected by the adopted rules.

333. COMMENT: Putting together teams of professionals to work with municipalities to help develop beach access plans that are specific to their municipalities is supported. The plans are to identify goals, the needs of the community, the inventory of existing access points, and provide an implementation strategy. Development of these plans will create jobs. If the Department is going to assist municipalities in writing their plans and then the municipalities will submit the plans to the Department for approval, why doesn't the Department write these plans? (24)

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RESPONSE: See response to Comments 323 through 332 for a discussion of the assistance that the Department will provide to municipalities in preparing Municipal Public Access Plans. The Department recognizes that local officials have detailed knowledge of existing public access in their towns, and of public access needs in their communities. The Department does not always have such detailed information. Therefore, the Department believes that municipalities and the Department should work together in developing these access plans and addressing access concerns raised by the public.

334. COMMENT: Cost estimates as required by N.J.A.C. 7:7E-8.11(e)5vii should not be required in the Municipal Access Plan. They should be determined at the time of development, as costs could vary significantly over time. (92, 169)

RESPONSE: Cost should be a consideration during any development planning process; therefore, it is appropriate for municipalities to consider the costs of all proposed public access amenities when preparing a Municipal Public Access Plan. It is understood that costs can change over time, which is why N.J.A.C. 7:7E-8.11(e)5viii requires an estimate of the costs associated with providing access in accordance with the Municipal Public Access Plan, not the actual costs.

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However, it is important that cost estimates that are reasonable at the time the plan is proposed be provided to allow the Department to determine that the goals stated in the plan can be reasonably expected to be achieved taking into account anticipated funds (if the Municipal Public Access Plan includes a provision for establishment of a dedicated public access fund and proposes that funds generated be utilized for a particular project). For example, establishment of a plan that proposes construction of a park or other facility that would cost twice the amount that could ever be anticipated to be generated from development activities on properties subject to public trust rights in the municipality, would not achieve the goal of enhancing public access. Instead, funds collected in lieu of onsite public access from individual projects would remain in the dedicated public access fund account for an indefinite period without any public access being accomplished. Should changing costs affect what can be achieved under the plan, the municipality can seek Department approval of changes to the approved plan in accordance with N.J.A.C. 7:7E-8.11(1).

335. COMMENT: There is a need in any public access rule for the public to be able to ask questions, report concerns and lodge complaints. The current and proposed rules do not specify an agency within the State for the public to address their concerns. Public access organizations are frequently the only recourse. Often the public becomes frustrated with the lack of a State response. Accordingly, there needs to be a State agency available that will provide information

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and assistance to legitimate public concerns. A direct phone number or an interactive section on the Department's website would help to fulfill this request and should be included in any rule revisions. (32, 208)

RESPONSE: The Department's Division of Land Use Planning, as discussed above in response to Comments 323 through 332, is committed to providing technical assistance in preparing Municipal Public Access Plans. In addition, this team is also responsible for responding to questions and concerns about these plans and can be reached by calling (609) 984-6888.

If a member of the public believes that his or her rights have been violated under the Public Trust Doctrine or under the rules, he or she is encouraged to call 1-877-WARN DEP; the Department's Division of Compliance and Enforcement will investigate those allegations. If appropriate, the Department will work with the Attorney General's Office to take appropriate action.

336. COMMENT: The proposal Summary notes that the Department has established teams of professionals to work with municipalities in developing Municipal Public Access Plans. In what division within the Department is the team located, and do the teams include staff with planning degrees or background? (18)

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RESPONSE: The Department's Office of Land Use Planning is responsible for working with municipalities in developing Municipal Public Access Plans. A majority of the staff that will be working on public access plans have planning-related degrees and certifications.

337. COMMENT: The development of Municipal Public Access Plans will add more workload to an already overburdened Department staff. Department staffing is approaching historic lows and assisting municipalities in developing Municipal Public Access Plans will further divert resources in the Department's Division of Land Use Regulation that should be used for permit review. (197)

RESPONSE: As discussed above in response to Comment 323 to 332, the Department's Office of Land Use Planning will work with municipalities in developing Municipal Public Access Plans. Permitting staff in the Division of Land Use Regulation will not be diverted from permit review to assist in developing Municipal Public Access Plans.

338. COMMENT: The Department is urged to re-examine whether all of the supporting documents for implementation should be required as part of the application. For example, as the

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municipality is required to provide the Department with a copy of an approved resolution incorporating the Department-approved Municipal Public Access Plan into the municipality's master plan, there is no need for submission of a draft resolution with the application. (67)

RESPONSE: The requirement for municipalities to include an implementation strategy in their application for approval of a Municipal Public Access Plan is necessary in order to ensure that the goals of the public access plan are met. A draft resolution incorporating the approved Municipal Public Access Plan into the town's Master Plan, required at N.J.A.C. 7:7E-8.11(e)5xi, is necessary so the Department can review the draft language prior to the language being finalized in the Master Plan. This will allow any issues to be resolved prior to final adoption of the plan.

339. COMMENT: The proposed application process for a Municipal Public Access Plan is very extensive and, as a result, may have the unintended consequence of discouraging municipalities from undertaking a comprehensive approach for public access. It is recommended that municipalities be permitted to use existing resources and information available at hand, rather than initiate data-gathering efforts that would be costly and labor intensive. As an alternative, it is suggested that the municipality be allowed to use existing maps (tax maps,

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zoning maps and aerials) rather than prepare a new digital map and inventory of public accessways and related facilities. (67)

340. COMMENT: The proposed rules should include a grandfather provision for municipalities, such as Long Branch, that already have a Department-approved public access plan. The rule proposal is prospective in that the rules only reference Municipal Public Access Plans that are to be developed in accordance with the proposed requirements at N.J.A.C. 7:7E-8.11(d) through (m), without accounting for any existing public access plans. The Department should evaluate existing public access plans to determine whether they substantively satisfy the goal of meaningful public access, and if so, these plans should suffice for providing public access to tidal waterways and their shores. New development should not be required to provide any further public access in these municipalities. (67)

RESPONSE TO COMMENT 339 AND 340: As stated in the proposal Summary (43 N.J.R. at 776), if a municipality already has a public access plan with some, but not all, of the components described at N.J.A.C. 7:7E-8.11, a municipality may supplement its existing plan, indicate to the Department where the existing plan addresses various components, and provide the Department with a complete package. There is no requirement that the municipality draft an entirely new plan. However, existing plans are not “grandfathered”; Department approval is necessary to

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assure that the existing plan, as supplemented, qualifies as a Department-approved plan under the adopted rules.

As discussed above in response to Comments 323 to 332, the Department has committed to providing professional staff to prepare digital inventories and draft plans for local governments. This includes providing assistance to municipalities in updating existing public access plans to meet the standards of the rules. Therefore, if a municipality does not have the resources to prepare a digital public access map, the Department will prepare the digital inventory for the municipality if the municipality desires that it do so. If a Municipal Public Access Plan is approved by the Department and adopted into the municipality's master plan, except for the exceptions at N.J.A.C. 7:7E-8.11(c), development in the municipality that is required to provide public access under the Coastal Permit Program rules (N.J.A.C. 7:7) or the Coastal Zone Management rules (N.J.A.C. 7:7E) must provide access in accordance with the approved Municipal Public Access Plan. The digital inventory will allow the Department to confirm and accurately display access points to the public on its website.

341. COMMENT: A town with an Municipal Public Access Plan will face fewer requirements than those without approved Municipal Public Access Plans, but the marginal reduction in regulation will not be worth the time and money a town would need to create a plan.

(116)

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RESPONSE: As discussed above in the response to Comment 323 through 332 above, the Department acknowledges that a municipal government may incur some costs in preparing and adopting a Municipal Public Access Plan; however, a plan can be prepared and adopted at minimal cost with Department technical assistance. The Department has developed teams of professionals within the Division of Land Use Planning who have already prepared inventories and draft plans for local governments throughout the State that have requested assistance. This team is committed to providing technical assistance in preparing Municipal Public Access Plans. The Department has also prepared a draft adopting resolution to minimize costs. Of course, a municipality may retain professionals to assist it in preparing its Municipal Public Access Plan, but the Department does not anticipate that such professionals will be required in all cases.

While there are benefits to the municipality in obtaining Department approval of a Municipal Public Access Plan, including that the municipality would continue to qualify for the general permit for beach and dune maintenance activities, the Department believes that the ability the Municipal Public Access Plan process provides for the municipality to participate in public access planning and assure that future access is provided in a manner that best fits the needs in the area, by itself will be viewed by many municipalities as justifying the effort involved. In fact, the Department has had contact with numerous municipalities which are

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interested in working with the Department to formulate a Municipal Public Access Plan for their community.

342. COMMENT: The proposal Summary states, “the Department intends to provide extensive guidance, as well as sample plans to facilitate the drafting of plans by municipalities.” These guidance document and sample plans must also be made available to the public and environmental groups. On principle, everything provided to the municipalities must also be provided to others equally. (208)

RESPONSE: Any Department guidance document or sample plan developed by the Department to assist municipalities in preparing an application for approval of an Municipal Public Access Plan is public information and will be provided to any member of the public upon request. These materials will be available for download from the Department website.

343. COMMENT: Adopting the Municipal Public Access Plans as part of a municipal Master Plan adds teeth to the plan. (122)

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RESPONSE: The Department acknowledges this comment in support of the requirement for municipalities to adopt Department-approved Municipal Public Access Plans into their municipal Master Plan.

344. COMMENT: The requirement that municipalities conduct and provide a public access needs assessment as part of the Municipal Public Access Plan is supported. The requirement that municipalities submit a digital map and inventory that identifies tidal waterways and their shores and all land held by the municipality adjacent to waterways is also supported. This information should be included in the iMapNJ layers so the public can visually assess the level of access provided by each town. The requirement that municipalities include an implementation strategy as part of their Municipal Public Access Plan is supported. (153)

RESPONSE: The Department acknowledges the commenter's support of the adopted requirements that municipalities provide an inventory of existing public access in the municipality and an implementation strategy in their application for approval of a Municipal Public Access Plan.

As discussed in response to Comments 213 and 214, there is a public access map depicted on the Department's public access website that was the result of a 2004 effort to capture the scope of public access sites on the Atlantic Coast beaches. The project was intended to

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provide information on beach access, handicap accessibility and amenities, including parking.

The Department intends to continue to update this map to add additional access points as Municipal Public Access Plans are approved by the Department, so that the public can view access points and associated amenities in each of those towns and have the information necessary to take advantage of the public access opportunities available in the State.

345. COMMENT: Municipalities should consult with the Critical Infrastructure Coordinators for the counties/municipalities when developing Municipal Public Access Plans so that there are no potential conflicts with homeland security/critical infrastructure concerns when recommending areas for public access. (72)

RESPONSE: In accordance with N.J.A.C. 7:7E-8.11(b)5, public access must not create a significant homeland security vulnerability. Municipalities are responsible for meeting this requirement in their Municipal Public Access Plans and, therefore, are encouraged to coordinate with the appropriate experts in the municipality or county in order to prevent potential conflicts with homeland security concerns. In addition, N.J.A.C. 7:7E-8.11(h) provides that a municipality submitting an application for approval of a Municipal Public Access Plan must also provide a full copy of the submittal to the county planning board for the county within which the

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municipality is located, as well as to any regional planning entities with jurisdiction over any portion of the municipality affected by the Municipal Public Access Plan.

7:7E-8.11(f) – Allowing Monetary Contribution in Lieu of Access

346. COMMENT: The proposed requirement that a Municipal Public Access Plan may include the creation of a dedicated public access fund, which would have fiscal accounting and expenditure obligations, where monetary contributions may be made in lieu of onsite public access, is supported. This alternative means to satisfy public access requirements and a defined method to calculate such offsite access is also supported. (67)

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

347. COMMENT: In lieu of public access on site, a monetary payment should be an option for industrial and homeland security facilities regardless of whether a municipality has an approved Municipal Public Access Plan. (133)

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RESPONSE: For an existing industrial or homeland security facility, a contribution in lieu of providing public access is unnecessary because, if there is no existing public access, no public access is required. (See N.J.A.C. 7:7E-8.11(n)3i and (n)4i.) For a new industrial facility, if there is a Department-approved Municipal Public Access Plan with a fund available to accept contributions for industrial development in the municipality, the applicant is required to provide access by contributing a monetary contribution in accordance with the formula provided at N.J.A.C. 7:7E-8.11(f). If there is no Department-approved Municipal Public Access Plan fund available, the applicant must provide onsite access. If onsite access is not practicable because of unavoidable obstructions or risk of injury, equivalent offsite public access shall be provided within the same municipality as the development, or if that is not feasible, within the same county. (See N.J.A.C. 7:7E-8.11(n)3ii and iv.) For a new homeland security facility, if there is a Department-approved Municipal Public Access Plan with a fund available to accept contributions for homeland security facilities, the applicant must satisfy their public access obligation through a monetary contribution in accordance with N.J.A.C. 7:7E-8.11(f). If there is not a Department-approved Municipal Public Access Plan fund available, public access shall be provided onsite or in the same municipality. (See N.J.A.C. 7:7E-8.11(n)4i and ii.)

Municipalities are encouraged to develop and seek Department approval of Municipal Public Access Plans and the Department is encouraging municipalities to include public access funds in their Municipal Public Access Plan. However, if there is not an approved Municipal

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Public Access Plan in the municipality where the development requiring public access is located, or a Department-approved Municipal Public Access Plan does not include a public access fund for these types of development, there is no other avenue through which an applicant can make a monetary contribution. Therefore, in those situations, it is the applicant's responsibility to provide public access in accordance with the adopted rules.

348. COMMENT: Allowing monetary compensation to offset public access without a lot more detail in the rule is opposed. The rule should discourage business owners and towns from going that route. (63, 112, 155)

349. COMMENT: N.J.A.C. 7:7E-8.11(d) lacks guidance for deeming what is appropriate in cases where a monetary contribution is made in lieu of providing public access. There is the possibility that without clear criteria, towns could simply pay their way out of providing public access. The Department needs to discourage monetary contributions in lieu of providing access by setting a contribution schedule that makes it more affordable in most cases to provide physical access. (153)

350. COMMENT: While the proposed total walkway cost is a Statewide average estimated price, it appears to be too conservative and may lead to the unintended consequence of

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developers “cashing out” and agreeing to give municipalities extremely conservative contributions in lieu of meeting their public access requirements. (130)

351. COMMENT: A monetary contribution in lieu of providing adequate public access is inconsistent with the intent of the Public Trust Doctrine. It is conceivable that some towns could simply offset their public access responsibilities by passing a rate increase along to property owners in the municipality. This could start a very troubling precedent. (153)

352. COMMENT: There are examples in the State of funds that were supposed to be spent for one thing, being spent for another. The funds required by the rules need to be dedicated so that they can only be used for public access. (61)

353. COMMENT: Some municipalities will use a lack of money as an excuse not to clamp down on public access. (157)

RESPONSE TO COMMENTS 348 THROUGH 353: As indicated in the Response to Comment 320, the rules limit when a permittee would make a contribution in lieu of providing onsite public access in several ways, to ensure accountability. First, the municipality must specify the type of development for which a monetary contribution shall be required. For example, a

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municipality may choose to limit the contribution requirement to industrial developments only.

Second, the contribution must be used to provide access along the same waterway as the development. If a municipality meets these conditions and allows for contributions, the municipality must use the fund to provide additional public access or enhance existing public access in accordance with the approved access plan.

N.J.A.C. 7:7E-8.11(f) provides a pre-determined payment formula that must be used if a Municipal Public Access Plan is to include the fund for payment in lieu of onsite public access. The use of this formula will result in an appropriate contribution to help fund the designated offsite public access project, because it approximates the cost of access that would have been provided onsite. The formula determines the contribution based upon two components: the combined cost of purchasing land upon which to provide access; and the cost of constructing a public walkway that provides both perpendicular access to, and parallel access along, the shore. Further, where a Municipal Public Access Plan includes a public access fund, there are many safeguards to ensure that the funds contributed are used appropriately. As discussed in response to Comments 33 through 43 above, the Department has eliminated the six-year term for an approved Municipal Public Access Plan, and instead required more frequent progress reporting on a five-year interval at N.J.A.C. 7:7E-8.11(j)4. This report, must detail all monies received into the municipality's dedicated Public Access Fund and an accounting of all expenditures of those monies. Also, N.J.A.C. 7:7E-8.11(m) provides the Department with the ability to revoke

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an approved Municipal Public Access Plan for good cause. Good cause is defined at N.J.A.C. 7:7E-8.11(m) to include failure to implement the Municipal Public Access Plan and/or noncompliance with the Municipal Public Access Plan, such as inappropriate expenditure of dedicated Public Access Fund monies for purposes other than public access. These amendments will give the Department the ability to act appropriately in instances of non-compliance, including inappropriate expenditure of the Municipal Public Access Plan fund.

If a Department-approved Municipal Public Access Plan includes a public access fund, as indicated above, that fund is used to receive payments in lieu of public access being provided onsite at individual projects. The fund is not established to, nor could it be used to relieve a municipality of any public access obligation.

354. COMMENT: The arbitrary nature of the fee required to satisfy public access, in the 2007 rules was disconcerting. Depending on the permit writer, a fee could range anywhere from \$10,000 to \$200,000. That type of system is unfair and only reinforces New Jersey's anti-business perception. (52)

RESPONSE: N.J.A.C. 7:7E-8.11(f) provides a formula for determining the amount of the contribution that may be required if a municipality includes in its Municipal Public Access Plan

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a public access fund to hold payments required in lieu of onsite public access. This will ensure that the amounts of any required contributions are fair and consistent.

355. COMMENT: Under the 2007 rules, the public access fees were determined by the Department permit writer. As such, a public access fee for the same repair of a bulkhead at two different locations could be as little as several thousand dollars or as high as \$175,000, depending on the permit writer. There were even instances where the permit application fee was dwarfed by the public access fee. The new rule creates much needed certainty and accountability by establishing a formula for public access fees, and requires a report to be submitted that identifies where those moneys are being spent. (19, 175)

RESPONSE: The Department acknowledges this comment in support of N.J.A.C. 7:7E-8.11(f).

356. COMMENT: Under the 2007 rule, the Department acted as a middle man between companies and municipalities. The money paid by the companies in lieu of access was supposed to pay for public access projects within those municipalities. However, in 2009 when asked by the Department Transition Team for a list of companies that triggered the fee, along with the amounts and locations of the projects, the response was that the Department did not keep track of the money. As such, public access fees were absorbed into municipal budgets, went to projects

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unrelated to public access, went to the Department directly or simply disappeared. The new rule requires a report that identifies where public access moneys are being spent. Further, the Department will have a portion of their website which will provide the locations of public access points throughout the State. The new rule creates a new level of accountability that will not only provide a much needed “paper trail” identifying where money is spent, but also as a benefit to the public as it will provide the locations of access points throughout the State. (19)

RESPONSE: The Department appreciates this comment in support of these provisions in the adopted rules.

357. COMMENT: The formula proposed to calculate the monetary contribution is based on the price to construct a walkway. The proposed formula is inadequate to compensate for loss of public access, and instead the rule should use a willingness to pay formula or another similar formula that is based on the actual value of public access. (153)

RESPONSE: The case-by-case analysis suggested by the commenter would be arbitrary, extremely expensive and time consuming, whether based upon a willingness to pay formula or some other similar formula used to develop the actual value of access at that site. Furthermore, it

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would not be in keeping with the Department's intent to provide a consistent and predictable method of determining the cost of public access.

358. COMMENT: Any monetary contribution must include an initial payment, in addition to annual payments set at a minimum level equal to the projected cost of annual maintenance for the public access mechanism that is being offset through the monetary contribution. (153)

RESPONSE: The Department's goal is for Public Access Funds to be used for the development of new access and enhancement of existing access facilities, not for maintenance.

359. COMMENT: The proposed "total contribution" formula is based on adding the Total Walkway Cost to the Land Acquisition Cost (LAC). The LAC factor is inappropriate in the formula because it would essentially require property owners to pay twice for the "equalized assessed land value." The property owner would pay when the land is acquired, and again when the public walkway is constructed. Property owners should not be burdened with this double payment. (67)

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RESPONSE: The LAC component of the formula is necessary to enable a municipality to provide offsite public access that is equivalent to the onsite access that a property owner does not provide. To create equivalent offsite public access, a municipality may need to acquire property upon which to place walkways or other means of public access. Without the LAC component of the formula, the funds would be insufficient and the offsite public access would not be equivalent.

360. COMMENT: The formula does not account for the scope of the development project in relation to the waterfront, such as where the property contains a significantly long waterfront area, but is actually small in size. The formula should be revised to recognize these two elements of a property. (67)

RESPONSE: The formula accounts for the relationship between the length of the waterfront area and the size of the property through the calculation of walkway square footage. The formula is based upon calculation of the total walkway cost (TWC) and the land acquisition cost (LAC). The TWC is calculated by adding the length of the perpendicular access to the length of the waterfront portion of the property. A small property that has a shorter depth from the non-waterward property boundary to the waterward property boundary with a long waterfront will require fewer square feet of walkway than a larger property with the same waterfront length.

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Thus, a small property will typically require a lower contribution than a large property with the same length of water frontage.

361. COMMENT: N.J.A.C. 7:7E-8.11(f) determines the calculation for the “Total Walkway Cost” and “Total Contribution.” The developer’s ability to contribute to such a fund should be limited to only when the developer cannot build due to meeting one of the exceptions outlined at N.J.A.C. 7:7E-8.11(b). (131)

RESPONSE: Whether a developer can contribute to a fund, rather than providing public access, is determined by whether the municipality in which the development is located has adopted a Department-approved Municipal Public Access Plan that contains a municipal public access fund, and whether the Municipal Public Access Plan requires contribution to the fund for the location and type of development contemplated. The commenter cites “exceptions outlined at N.J.A.C. 7:7E-8.11(b)” which are the public access goals and do not contain any exceptions.

362. COMMENT: The use of the fixed dollar figure (\$7.00 per square foot) at proposed N.J.A.C. 7:7E-8.11(f) ignores the realities of inflation and fluctuating materials and labor costs. Assuming this figure is valid today, the Department, public and regulated community have no assurances that this figure will be valid in the future. As a result, as time goes by and the cost of

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construction and materials increase, there will be additional pressure by developers to make a contribution in lieu of building their public access facilities. (39, 130, 131, 161)

RESPONSE: The Department has the ability under the APA to amend the rules as needed, by undertaking rulemaking. Such amendments could include amendments to the dollar figure at N.J.A.C. 7:7E-8.11(f). The ability for an applicant for a permit to pay into a fund to satisfy public access requirements under this chapter is established by the municipality including in their proposed Municipal Public Access Plan a municipal public access fund and specifying the types of development that would be required to pay into that fund in lieu of providing public access onsite. If that option is not included in the Municipal Public Access Plan approved by the Department, a permittee cannot choose to pay into a fund. Further, even where there is a Municipal Public Access Plan that includes a municipal public access fund, the approved Municipal Public Access Plan will require that specified types of development pay into the fund; projects within the specified types will not have an option as to whether to pay into the fund or do something else onsite. Similarly, projects that do not fall in the specified types of development required to contribute to the fund in lieu of onsite public access will not have the option to pay into the fund.

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363. COMMENT: The assumption that the cost of construction of a walkway is \$7.00 per square foot is excessively high. Information from the RS Means Heavy Construction Cost Data Catalog, 2010, indicates that the cost should be \$9.62 per square yard. This is based on a three-quarter inch stone base that is three inches deep (\$4.96 per square yard) and a one inch asphalt wearing course (\$4.66). Low intensity pathways with mulched surfaces that the Department promotes over other structural alternatives would be even cheaper to construct. The more accurate number is \$10.00 per square yard. This may vary in different parts of the State and perhaps there should be one number for areas north of the Raritan River and another for areas south of the Raritan River. (67)

RESPONSE: The estimate of \$9.62 per square yard, cited in the comment, is for an asphalt walkway placed directly on the ground. It is unlikely that this type of walkway, or the alternative of a mulched surface, would be suitable for public access on every waterfront property in New Jersey. Depending on site conditions, it may be necessary to build a ground-level walkway using concrete, or to build an above-ground walkway using wood and/or composite materials and decking. The Department's \$7.00 figure more accurately reflects the reasonable per square foot cost of the variety of walkways that would likely be utilized for public access.

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7:7E-8.11(f) and 7:7E-8.11(n) Allowing Access in a Different Municipality

364. COMMENT: It is not appropriate to allow towns to create public access points in adjacent municipalities or anywhere in a county, instead of providing public access within the municipal borders. (N.J.A.C. 7:7E-8.11(f) and N.J.A.C. 7:7E-8.11(n)2iii(3)). Such a provision allows a municipality to keep the public out, and send the public as much as 45 miles away. (56, 63, 89, 112, 161, 170)

365. COMMENT: Municipalities will control where and what level of access will be provided and can send their obligations to neighboring towns. (197)

366. COMMENT: Municipal access plans look a lot like the affordable housing plans. Allowing municipalities to transfer the town's access to another town because there are "practical limitations to providing access," sounds like the Affordable Housing Program. The State is going to end up with large stretches of coastal areas that are inaccessible or difficult to access. (32, 47)

367. COMMENT: 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

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housing in Egg Harbor N.J. at 364. First, the proposed amendments are consistent with the existing public access rules promulgated by the Department. Second, CAFRA considers “those multiple uses” of the coastal area that “are in the best long-term . . . interests of all people of the State.” 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. (32)

RESPONSE TO COMMENT 364 THROUGH 367: The option to locate public access in a different municipality is limited to a small class of projects. In accordance with N.J.A.C. 7:7E-8.11(e)1, a municipality may choose to provide access to the waterway through a joint project developed with a neighboring municipality; however, it is not required. If a municipality does choose this option, the project is to be specified in the Municipal Public Access Plan and the municipality is required to specify what mechanisms will be put in place to assure that the jointly developed access will be permanently protected. This would allow neighboring municipalities the flexibility to develop something like a waterfront park with amenities in one of the communities that would not be possible if only one municipality were funding the project. Indeed, it could provide flexibility to provide a municipality with a fully developed waterfront,

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an option to participate in a public access project with the neighboring municipality that may have portions of undeveloped waterfront that could provide much better access for the same expenditure of funds than that which could be provided within that municipality. Further, as the proposed joint project is part of the proposed Municipal Public Access Plan, it would be subject to notice and public comment, and the Municipal Public Access Plan must be reviewed and approved by the Department in order for the plan to be operational and any funds to be collected for such a joint project.

It is not the Department's intent to allow municipalities to keep the public out by sending the public to another town. Municipalities submitting an application for Municipal Public Access Plan approval including a joint project must meet the same application requirements as a municipality seeking approval of a Municipal Public Access Plan proposing only public access projects within its own boundaries, including a needs assessment, an implementation strategy and all other requirements at N.J.A.C. 7:7E-8.11(e) through (g). In addition, the Department will review both applications with and without proposed joint projects outside the municipal boundary in accordance with N.J.A.C. 7:7E-8.11(i), which requires the Department to review an application for approval of a Municipal Public Access Plan to determine whether the plan is consistent with the goals specified at N.J.A.C. 7:7E-1.1(c), the public access goals at N.J.A.C. 7:7E-8.11(b) and all other requirements of N.J.A.C. 7:7E-8.11. If a municipality does choose to include a project in its Municipal Public Access Plan that is located outside its municipal

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boundaries, any public access provided in the other municipality must be on the same waterway. Only joint projects with a municipality or the county are allowed. Further, the municipality must provide assurance that the public access will be protected permanently and identify how that will be accomplished.

If a town has not adopted a Department-approved Municipal Public Access Plan, an applicant for a project may locate the required public access in another municipality only after demonstrating that neither onsite public access nor offsite public access within the municipality is feasible. Any development that cannot meet these stringent standards will not be allowed to satisfy its public access requirement by locating public access offsite in another municipality.

The Department believes that these limits will ensure that offsite public access will not be authorized except when clearly justified.

In response to the comment concerning Egg Harbor N.J., while the commenter did not provide a complete citation, the Department believes the commenter is referring to *Matter of Egg Harbor Associates (Bayshore centre)* 94 NJ 358 (1983).

N.J.A.C. 7:7E-8.11(g)

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368. COMMENT: Proposed N.J.A.C. 7:7E-8.11(g)1 through 4 is supported, since marinas and piers have unique issues and concerns that should be addressed through the Department's rules and not through Municipal Public Access Plans. (153)

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

N.J.A.C. 7:7E-8.11(i) through (l)

369. COMMENT: The process by which the Department hands an "approved" Municipal Public Access Plan back to the municipality for adoption into their Master Plan is opposed. (208)

RESPONSE: It is appropriate for a municipality to adopt into its Master Plan, the Department-approved Municipal Public Access Plan in order to formalize the access plan and to protect the public access identified in the plan. Further, in addition to the provisions provided at N.J.A.C. 7:7E-8.11(i), which require the Department to seek public comment and provide a 30-day public comment period on an application for approval of a Municipal Public Access Plan, the master

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plan process provides additional public notice of adoption of an approved Municipal Public Access Plan

370. COMMENT: If a municipality decides to submit an application for approval of a Municipal Public Access Plan, will there be a public hearing at the municipal level that is prior to Department approval of the plan? (24)

RESPONSE: Although the rules do not require a municipality to hold a public hearing on a proposed Municipal Public Access Plan, N.J.A.C. 7:7E-8.11(e)6 requires a municipality to include in its application for approval of an Municipal Public Access Plan, documentation of any public meetings held by the municipality to accept comments on the proposed plan. In addition, as discussed in the response to comment 369, 7:7E-8.11(i) contains a 30-day public comment period as part of the Department's review of applications for approval of Municipal Public Access Plans.

371. COMMENT: Proposed N.J.A.C. 7:7E-8.11(k) and (l) are supported. (153)

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RESPONSE: The Department acknowledges this comment in support of N.J.A.C. 7:7E-8.11(k) and (l).

372. COMMENT: Proposed N.J.A.C. 7:7E-8.11(i) should contain a timeframe for the Department to review and approve or reject the Municipal Public Access Plan. If the plan is not rejected by the Department within 90 days, the plan should receive a default approval. (131)

373. COMMENT: If a Municipal Public Access Plan is not rejected by the Department within 180 days, the plan should receive a default approval. (130)

374. COMMENT: Proposed N.J.A.C. 7:7E-8.11(j) does not contain a timeframe for the municipality to include the approved Municipal Public Access Plan into the municipal Master Plan once approved by the Department. In addition no timeframe for implementation of the plan is provided. (153)

RESPONSE TO COMMENTS 372 THROUGH 374: The adopted rules do provide at N.J.A.C. 7:7E-8.11(i) that the Department shall issue its decision regarding approval or disapproval of the Municipal Public Access Plan within 60 days of the end of the 30-day public comment period. Municipal Public Access Plans are not covered under the 90-day Construction Law (N.J.S.A.

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13:1D-1 et seq.); therefore, there is no default approval of Municipal Public Access Plans.

Department-approved Municipal Public Access Plans are not operational until the plans are adopted into the municipality's Master Plan. The Department does not believe it is necessary to include a timeframe for the municipality to adopt the approved Municipal Public Access Plan into its Master Plan, because it is in the municipality's best interest to adopt the plan as soon as possible so that it becomes operational.

Appeal of Municipal Public Access Plans

375. COMMENT: There should be an appeal process if a Municipal Public Access Plan is not approved. The appeal review should be outside of the Department and preferably in an agency with licensed professional planners on staff, such as the Office of Planning Advocacy. (92, 169)

RESPONSE: The approval or denial of an application for approval of a Municipal Public Access Plan is a decision by the Department that may be appealed in accordance with N.J.A.C. 7:7-5 and in accordance with the APA.

Parking requirements

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376. COMMENT: The removal of parking restrictions and time limits in order to receive public money should not be adopted. These clear, unequivocal requirements are being removed, and the public is being asked to rely on weak, vague standards and nonexistent commitments to public access by developers and historically hostile towns. (161, 170)

377. COMMENT: Existing N.J.A.C. 7:7E-8.11(j) addresses parking other than for shore protection projects. This subsection should not be eliminated. Development typically eliminates parking that the public can use to access tidal waters. Those seeking permits for development close to tidal waters need to provide public parking at a ratio of one space created to one space lost. (208)

RESPONSE TO COMMENTS 376 AND 377: The *Avalon* decision limited the Department's authority to require additional parking and restrooms from municipalities receiving State shore protection funding (*Borough of Avalon v. NJ Department of Environmental Protection*, 403 N.J. Super. 590 (App. Div. 2008)). Consistent with the *Avalon* decision, the Department believes it can achieve substantial results in enhancing substantive access opportunities by working cooperatively with municipalities.

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In accordance with N.J.A.C. 7:7E-8.11(e)3, a municipality that submits to the Department an application for approval of a Municipal Public Access Plan is required to include in that application a needs assessment that addresses practical limitations to public access. Practical limitations to public access, as provided at N.J.A.C. 7:7E-8.11(e)3iii, include not only a lack of parking, but also restrictions on parking availability that could limit the public's access to tidal waterways.

N.J.A.C. 7:7E-8.11(n)

378. COMMENT: Streets, paths, trails, walkways, easements, paper streets, dune walkovers/walkways, piers and other rights-of way are appropriate mechanisms that can be used to satisfy public access requirements. However, additional amenities including restrooms and handicapped ramps should also be encouraged and possibly rewarded if not required. (153)

RESPONSE: Proposed N.J.A.C. 7:7E-8.11(n)1iii (43 N.J.R. at 778 and 793) identified examples of types of public access that the Department would accept to satisfy public access requirements. Included at N.J.A.C. 7:7E-8.11(n)1iii4 were "public restrooms to accommodate those utilizing public access." As part of the March 19, 2012 notice of substantial change, as set forth in the response to Comments 33 through 43 above, the Department modified the rules to

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relocate the list of public access measures to N.J.A.C. 7:7E-8.11(b)3i, in order to clarify that these same types of public access are also what the Department expects to be included in proposed Municipal Public Access Plans. Therefore, “public restrooms to accommodate those utilizing public access” is now located at N.J.A.C. 7:7E-8.11(b)3i(4) but it has not been modified from the April 4, 2011 proposal. Furthermore, in accordance with N.J.A.C. 8.11(b)1 public access shall be provided in a manner designed to create and enhance opportunities for public access to tidal waterways and their shores, on a non-discriminatory basis.

379. COMMENT: Requiring public access for towns that do not develop public access plans is supported. However, the default access requirements should be those of the Army Corps of Engineers Planning Guidance Notebook. The Department should pull current values from the Corps’ guidance and incorporate them directly into the access plan. It is not recommended that including a blanket reference to the guidance since the Corps could change the values without public comment. (153)

RESPONSE: The Department acknowledges this commenter’s support of requiring public access in towns that do not have a Department-approved Municipal Public Access Plan. As for the commenter’s suggestion to pull current values from the Army Corp of Engineers Planning Guidance Notebook and incorporate them directly into access plans, , the Department believes

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that one size does not fit all at the Jersey shore or other tidal waterfronts in the State. Public access can best be enhanced by recognizing the different geographies of the State and the differing needs of the public.

380. COMMENT: Where onsite public access is not practical, offsite public access should be provided on the same waterway in the same municipality as the development. However, if that is not practical or feasible, the Department should allow public access along the same waterway in an adjoining municipality. (130)

RESPONSE: The rules generally do require onsite public access. Under limited circumstances, the rules allow offsite public access in the same municipality; and in even more limited circumstances, the access may be provided on the same waterway in another municipality.

N.J.A.C. 7:7E-8.11(n)1ii provides that public access be provided onsite, at a minimum during normal operating hours of new commercial development. Under N.J.A.C. 7:7E-8.11(n)2iii(1), certain new residential development must include onsite public access or, if onsite access is not feasible, equivalent offsite public access must be provided on the same waterway within the same municipality as the residential development. If the applicant demonstrates that onsite and offsite access in the same municipality is not feasible, N.J.A.C. 7:7E-8.11(n)2iii(2)

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requires public access to be provided offsite on the same waterway within a neighboring municipality.

N.J.A.C. 7:7E-8.11(n)3ii requires public access for new industrial or public development, except for public highways, to also be satisfied onsite if feasible. The rules recognize that, where it is not feasible to provide public access onsite, there may be situations in highly developed waterfront areas where other offsite options for public access in the same municipality may be nonexistent. If no public access can be provided in the same municipality as the development is occurring because there is no undeveloped land available to accommodate public access, N.J.A.C. 7:7E-8.11(n)3iv allows an applicant to provide public access on the same waterway, in a neighboring municipality.

N.J.A.C. 7:7E-8.11(n)4ii addresses new homeland security facilities. New facilities may provide public access offsite or onsite, at the applicant's discretion. The Department anticipates that homeland security facilities will not generally include onsite public access; however, the Department does not want to prevent an applicant for a homeland security facility from providing onsite public access if the applicant deems it viable.

N.J.A.C. 7:7E-8.11(n)5 provides the requirements for public access at ports. If proposed development would eliminate public access at an existing port, then alternative access must be provided. Access must be onsite, unless such access would pose a risk of injury or a threat to public safety, as described in the rule. If no public access can be provided in the same

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municipality because there is no undeveloped land available to accommodate the required public access, N.J.A.C. 7:7E-8.11(n)5i(2) allows an applicant to provide public access on the same waterway, in a neighboring municipality.

Urban Areas, Commercial Development, Industrial and Public Development, Homeland Security Facilities, Ports

381. COMMENT: The 2007 rule was imposed on industrial, port, chemical and manufacturing facilities with full knowledge that these facilities were, in many cases, strictly prohibited from providing access. The new rule recognizes that existing industrial, manufacturing, port and chemical facilities should not be treated as new facilities, nor should they be treated the same as recreational beaches. The rule recognizes that access must be restricted for safety and security reasons and that companies should not be punished for complying with those requirements. The new rule ensures that access will continue to be provided and maintained at sites where access currently exists, and it mandates access or payment in lieu of access at new facilities which makes sense. This means that the baseline for the number of access points starts now and will only grow over time. The new rule also recognizes that the ports provide access in the form of commerce and should not be penalized for restricting access to those activities. The rule is supported. (19, 175)

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

382. COMMENT The proposed new rules erode public access to urban waterways. (15, 43, 53, 89, 93, 116, 131, 132, 158, 197, 202, 210, 215, 220, 227)

383. COMMENT: These rules limit access in urban areas more than anywhere else by being used to wall-off the State's urban waterfront from the public. This not only undermines access but hurts urban revitalization. Urban waterway access is a successful redevelopment tool that would be denied to New Jersey cities under the proposed rules. Particularly harmful to urban residents, access to waterways in urban areas will be lost and it will be harder for people to have day trips to the beaches. (38)

384. COMMENT: Under these rules, New Jersey's urban residents and environmental justice communities will be denied recreational opportunities along rivers and bays. The proposed rules are opposed. (130, 222)

385. COMMENT: The rule amendments exempt certain locations from providing onsite access or financial contributions to offsite access and therefore will reduce public access to urban

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waterfronts. The northern third of New Jersey has been abandoned to industry. (7, 9, 43, 45, 74, 93, 106, 130, 161, 177, 183, 197, 213, 215, 222, 224)

386. COMMENT: Proposed N.J.A.C. 7:7E-8.11(n)1i, which provides that if there is no current public access, then there is no requirement to provide public access as part of an approval for renovation or expansion of commercial development, is opposed. (61, 63, 112, 136, 208, 220)

387. COMMENT: Businesses that locate next to tidal waters have a responsibility to put something back into the community. Some companies in urban areas that had been negotiating possible financial contributions to offsite access broke-off these discussions when the rule amendments were proposed. (102, 116, 130, 183)

388. COMMENT: The proposed rules reverse the 2007 public access rules that were designed to give urban waterfront access to the public and protect public access to beaches. Under the 2007 rules, Department-permitted activities at a waterfront business triggered public access. If public access was impractical because of safety or security concerns, the business could have contributed to a fund to enhance public access in another appropriate area such as a waterfront park. (7, 43, 51, 93, 101, 189, 202, 215)

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389. COMMENT: The public access rules for the Coastal Zone Management program appear to be undergoing a radical change that will overturn 30 years of settled bipartisan consensus on the issue of public access to tidal waterfront areas throughout the Garden State. The proposed rules break with Federal policy dating back to the U.S. Coastal Zone Management Act of 1972 that explicitly required the promotion of both “access to the coasts for recreational purposes” and “assistance in the redevelopment of deteriorating urban waterfronts and ports, and sensitive preservation and restoration of historic, cultural and esthetic coastal features.” (45)

390. COMMENT: In the northeastern, urban part of the State, these rules mark an abject retreat. For many areas on the Hackensack and Passaic Rivers, there are no public access points at all, and there are very few undeveloped parcels that could be leveraged for access under the new rule. The definition of a homeland security site is so broad that it removes access obligations from nearly any imaginable shoreline use. For a shoreline that is often covered shoulder-to-shoulder by existing industrial and port development, and from which the public has been evicted for generations, it is not acceptable for the Department to simply accede to that status quo. The industrial, port, commercial and residential interests that completely control many urban waterfronts have excluded New Jersey residents from their public trust property for decades without paying for the privilege. The existing rules requiring onsite access or

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contributions toward offsite access are not excessive; they are meager contributions arriving far too late. (116)

391. COMMENT: The Department has focused its public access rules on shore towns, rather than extend this ability for coastal improvement to northern New Jersey as well. In the most densely populated State a reduction of public access penalizes the population as a whole, for the short term economic benefit of a few. (39)

392. COMMENT: The tidal portions of the Passaic River are as much public property and as much subject to legal requirements for vertical and horizontal access as any of the sandy beaches on the Atlantic Coast. The New Jersey Supreme Court has consistently applied the Public Trust Doctrine to all tidal waters. The Supreme Court has also held, “Without some means of access, the public right to use the foreshore would be meaningless. To say that the Public Trust Doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the Public Trust Doctrine.” *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 326, 471 A. 2d 355, cert. denied, *Bay Head Improvement Ass'n v. Matthews*, 469 U.S. 821, 105 S.Ct. 93, 83 L.Ed.2d 39 (1984).

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The public trust has been recognized for well over a thousand years. It has been consistently applied to require access to coastal resources, and to forbid abdication of the State's trust responsibilities. In *Illinois Central Railroad v. Illinois* 146 US 387, the United States Supreme Court held that Illinois could not convey effectively all of Chicago Harbor to industry. Yet that is what New Jersey has done with the Newark Riverfront, and the riverfront of many other urban communities. Until now that conveyance has been de facto; you would bless that conveyance under these new rules and perpetuate it. Yet the *Illinois Central Railroad* court held that "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties ... than it can abdicate its police powers in the administration of government and the preservation of the peace." *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 13 S.Ct. 110 at 453 (U.S. 1892).

There are people in Newark that grew up not even knowing that city has a river, and there are others to whom public access means cutting a hole in a rusty fence. Communities like Newark, Harrison, Paterson and Jersey City are home to many people who cannot afford beach badges and have no means to reach the coastal beaches. For them, the Passaic and Hackensack Rivers are their only reasonable choices. They have suffered outsized impacts from environmental damage that the Department has been unable to prevent or correct. Their waterfronts are taken up entirely by existing industrial facilities that would rarely, if ever, trigger

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the public access provisions of the proposed rule. The rule contemplates a waterfront no less in private hands than the ones the Supreme Court declared illegal in *Illinois Central Railroad*; this rule is no less illegal. (116)

393. COMMENT: Proposed N.J.A.C. 7:7E-8.11(n)3i provides that if an industrial or public development is renovating on the same parcel without expanding and no public access currently exists on site, then public access is not required. This provision conflicts with seeking opportunities to expand access as set forth in the coastal goals at N.J.A.C. 7:7E-1.1(c). (208)

394. COMMENT: Public development and homeland security facilities must include public access when they undergo rehabilitation, renovation, redevelopment or expansion. During construction, alternative access points may be necessary but they need to be sited as close as possible to the existing access points. (153)

395. COMMENT: Existing commercial and industrial buildings, sewer plants and other large facilities should not be exempt from providing public access to waterways. When any of these facilities block public access, they should be required to help pay for access at another location. This not only undermines access, but hurts revitalization of urban waterfronts. (177, 222)

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396. COMMENT: In areas where there is a high population and access is limited, there are extremely degraded resources. People will not care about the resources if they cannot get to them. (157)

RESPONSE TO COMMENTS 382 THROUGH 396: The adopted amendments do not remove urban waterfront areas from New Jersey's Coastal Management Program. The adopted rules provide that all existing access be maintained or replaced, including at industrial and public facilities and homeland security facilities. New or expanding commercial developments will be required to provide public access onsite if the municipality does not have an operational Municipal Public Access Plan. If the municipality does have a Department-approved Municipal Public Access Plan, public access must be provided in accordance with the Municipal Public Access Plan, which may require access to be satisfied onsite, offsite or by contributing to a fund to be used to provide new access or enhance existing access in the municipality.

Construction of new industrial facilities, as well as expansions outside the existing parcel and conversions of any existing use to an industrial use, also trigger the requirement to provide onsite access when the municipality does not have an operational Municipal Public Access Plan, except under certain circumstances. (See N.J.A.C. 7:7E-8.11(n)3ii) Even then, offsite access must be provided on the same waterway as the development.

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Existing industrial facilities will not be required to provide new access. It would be difficult and often prohibitively costly for existing industrial facilities to provide new access without acquiring additional land. It is in the public's interest for industrial facilities to be maintained, rehabilitated, renovated, redeveloped or expanded within the parcel containing the existing development. To require a facility to acquire additional land in order to allow public access would discourage such activities.

Many municipalities complained that the Department's prior access rules were too costly and prevented them from moving forward with innovative urban waterfront redevelopment and public access initiatives, and often required access locations in places that were unsafe. The adopted rules promote urban waterfront redevelopment and public access opportunities by recognizing that planning is necessary to accomplish those goals. The rules allow municipalities the flexibility to seek approval from the Department for a Municipal Public Access Plan that is tailored to their community, and give municipalities the ability to accomplish public access goals that would be impossible if public access was accomplished on a site by site basis.

397. COMMENT: According to both the Statewide Comprehensive Outdoor Recreation Plan (SCORP) and the Department-approved Hudson County Open Space Recreation and Historic Preservation Plan, Hudson County has the least amount of parks and open space among all 21 counties in the state. When the County Executive and Board of Chosen Freeholders established

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the Hudson County Open Space Trust Fund and adopted the above referenced plan, it was the intention of the governing body to simultaneously utilize the complimentary aspects of the Waterfront Development Law, the public access requirements of the CZM rules, along with county and municipal site plan review oversight and the Hudson County Open Space Trust Fund to create a continuous waterfront walkway along the county's numerous waterfronts.

If the public access rules are no longer required by the Department, then developers may vigorously resist such requirements by local boards, thus upsetting the delicate balance. (130)

RESPONSE: The Department is not removing public access requirements from the rules. The adopted rules apply along all tidal waterways in the State, including the northern urban waterfront located outside of the CAFRA zone, which is regulated under the Waterfront Development Law.

The adopted amendments are not intended to interfere with Hudson County's open space initiatives. In fact, the rules encourage long term planning by allowing and encouraging municipalities to develop Municipal Public Access Plans, which can include open space initiatives. For example, if desired, municipalities within Hudson County can submit a joint Municipal Public Access Plan for the county, and can include in the Municipal Public Access Plan waterfront walkways and waterfront parks.

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398. COMMENT: It is understood that the business community found the existing rules to be confusing and unfriendly. The New Jersey Business and Industry Association complained that there was no formula for compensating the public for public access, and that the money they pay into access funds is not properly tracked. Both are problems that need to be fixed, but the proposed rules address neither issue. They merely do away entirely with the existing businesses' responsibility to provide urban waterfront access. (177)

RESPONSE: The adopted rules do provide a formula for calculating the contribution amount to be used to provide new or enhanced public access. The rules require municipalities that establish a dedicated Public Access Fund to use the formula specified at N.J.A.C. 7:7E-8.11(f). The amount of contribution is based upon a determination of the costs that would be incurred if land was purchased for creating access and the access was provided in the form of a walkway. Further, at N.J.A.C. 7:7E-8.11(j)4 as modified by the March 19, 2012 notice of substantial change, five years after the date of adoption of the approved Municipal Public Access Plan into the municipal Master Plan, and every five years thereafter, municipalities must submit a report to the Department detailing all monies received into the municipality's dedicated Public Access Fund and an accounting of all expenditures of those monies. The adopted rule enables the

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Department to monitor progress of Municipal Public Access Plans and assure that only appropriate expenditures are made from Public Access Funds.

399. COMMENT: The proposed rule at N.J.A.C. 7:7E-8.11(n)4i, which allows for circumstances where it may no longer be desirable to continue to allow existing public access or to expand public access at critical infrastructure sites in the future, is supported. Any additional access to a facility designated as critical infrastructure should be discouraged. The provision not requiring public access where public access does not currently exist at these sites is also supported. (72)

RESPONSE: The Department acknowledges this comment in support of adopted N.J.A.C. 7:7E-8.11(n)4(i).

400. COMMENT: Hudson County is the entryway to the Holland and Lincoln Tunnels, the Bayonne Bridge and the PATH system, so it is understood that security professionals need to make tough choices in the name of threat reduction; however, homeland security should not become a blanket pass for companies and developers along the county's waterfront areas. Waivers must be rare, and truly justified. (45)

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401. COMMENT: The blanket exclusion of homeland security concerns to override any public access deemed at risk is of concern. In an urban area, it is not feasible to protect against every possible instance of terrorism. The overriding ability to reject public access based on perceived security concerns is unwarranted. (39)

402. COMMENT: Homeland security facilities should not be exempted from any responsibility to provide public access. (7, 61)

403. COMMENT: It is understandable that there could be legitimate issues with providing onsite waterfront public access at homeland security locations. However, there should be some type of procedure developed to determine if it is inappropriate to provide onsite public access at a specific homeland security location. It is suggested that the Federal Department of Homeland Security and the State Office of Homeland Security and Preparedness be required to approve that an exemption be granted, and the developer of the locations should still be required to make a financial contribution toward offsite public access. (183)

404. COMMENT: In order for a development project to obtain a waiver from the public access requirements, the Federal Office of Homeland Security and Preparedness should make a

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determination that both the site and development are a bona fide homeland security risk and target. Otherwise, there is the potential that every commercial and industrial facility, utility site, energy facility, port and railroad will classify themselves as a homeland security threat in order to obtain a waiver. The Department should not give homeland security uses a free pass from any financial responsibility. These sites should at the very least be responsible for facilitating a public access “detour” around their facilities, or facilitating public access at another location entirely. (130)

RESPONSE TO COMMENTS 400 THROUGH 404: An applicant cannot declare its facility a homeland security threat in order to be relieved of the obligation to provide public access. The definition of “homeland security facility” at N.J.A.C. 7:7E-1.8 provides that the Department, in consultation with the New Jersey Office of Homeland Security and Preparedness, or the United States Department of Homeland Security, will determine whether or not a facility is either critical in nature or a key resource, such that it falls within the definition. These homeland security agencies have expertise in applying their risk assessment models to specific situations in order to determine if a facility, including critical infrastructure, is a homeland security facility. N.J.A.C. 7:7E-8.11(b)5 provides that the Department, in consultation with the New Jersey Office of Homeland Security and Preparedness and/or the United States Department of Homeland

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Security, will determine on a case-by-case basis whether a particular site is considered to be vulnerable.

As discussed above in Response to Comment 320, if it is determined that there are homeland security concerns at a site, N.J.A.C. 7:7E-8.11(n)4 requires the applicant to provide either onsite access or offsite access on the same waterway within the same municipality as the development. Existing homeland security facilities must maintain any existing access or provide equivalent access either onsite or offsite on the same waterway and within the same municipality as the development. Therefore, homeland security facilities must provide public access either onsite or offsite.

405. COMMENT: In light of the additional security concerns applicable to industrial and homeland security facilities, it is suggested that N.J.A.C. 7:7E-8.11(b)5 be modified to identify those additional agencies that govern site access. Proposed language is underlined below. Public access to tidal waterways and their shores shall be provided in such a way that it shall not create significant homeland security vulnerability. Therefore, public access may be prohibited in locations where homeland security concerns are present, or where prohibited by law (i.e. Nuclear Regulatory Commission (10 CFR Part 73), North American Electric Reliability Corporation's Critical Infrastructure Protection Standards, and Maritime Transportation Security Act), or where

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it is not practicable based on the risk of injury from hazardous operations or substantial permanent obstructions, and no measures can be taken to avert these risks. (133)

RESPONSE: Both the State and Federal government have enacted laws and implemented protective measures to address homeland security. These laws may require measures at certain facilities to protect against potential terrorism which may impact an applicant's ability to provide onsite public access. In recognition of these State and Federal laws and as discussed in response to Comment 272 above, the definition in the adopted rules provides that homeland security facilities are those deemed to be critical in nature or a key resource by the Department, in consultation with the New Jersey Office of Homeland Security and Preparedness, or the United States Department of Homeland Security. These agencies have the expertise in applying their risk assessment models to specific situations in order to determine if a facility, including critical infrastructure, is a homeland security facility. The Department, in consultation with these agencies will be making the determination as to whether or not a facility is either critical in nature or a key resource. It was not the Department's intent, nor does it believe it is necessary, to list every type of facility or infrastructure that may be critical in nature or a key resource. The list of types of development that may be determined to be homeland security facilities in the definition are only examples and is not intended to be an inclusive list. The Department

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understands that there may be additional laws that govern site access, and the Department will take them into consideration on a case-by-case basis if appropriate.

406. COMMENT: The proposed rules require new homeland security facilities, including the conversion of a non-homeland security facility to a homeland security facility or the expansion of an existing homeland security facility onto areas not within the parcel containing the existing development, to provide onsite public access or equivalent offsite public access. This would appear to include a situation where an existing road or bridge is added to the list of critical infrastructure/key resource sites designated under the purview of the New Jersey Office of Homeland Security and Preparedness. This should also be the case if an existing roadway or bridge, which does not have existing public access and is currently on the list of critical infrastructure/key resource sites designated under the purview of the New Jersey Office of Homeland Security and Preparedness, is expanded beyond the existing right-of-way.

There should also be consideration to the dynamics of homeland security and continual changes to the New Jersey Office of Homeland Security and Preparedness critical infrastructure/key resource site list. If a bridge or roadway that in the past was not deemed a critical infrastructure/key resource site and provided public access, subsequently becomes a New Jersey Office of Homeland Security and Preparedness critical infrastructure/key resource site, there should be no need to replace public access either offsite or onsite. (72)

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RESPONSE: See the response to Comments 400 through 404 for a discussion of the means by which a site is designated a homeland security facility. Changes to the New Jersey Office of Homeland Security and Preparedness' critical infrastructure/key resource list are not anticipated to be an issue for public access.

The Department believes that all existing public access must be maintained or replaced. Therefore, if a road or bridge project triggers the requirement to provide public access, the applicant has a responsibility to ensure that the public continues to have public access to and adjacent to tidal waters.

Large northern waterways

407. COMMENT: Specific reference to 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 being deleted from the rule. While it is understandable to have a more concise way to separate out the categories as "in or not in," it is not done consistently throughout all of proposed N.J.A.C. 7:7E-8.11(n). Proposed N.J.A.C. 7:7E-8.11(n)1, 3 and 4 for commercial development, industrial development and

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homeland security uses do not geographically separate the standards while proposed N.J.A.C. 7:7E-8.11(n)2 separates them for residential developments. This is generally confusing and almost alludes to the idea that there are no public access requirements for development not regulated by CAFRA boundaries. The Department should provide better clarity and make it clear that the public access requirements apply to non-CAFRA shores in N.J.A.C. 7:7E-8.11(n)1, 3 and 4. The 2007 NJDEP Public Access Report and revisions successfully classify the various waterfront areas by their geographic associations and it is highly recommended that these classifications or some other form be used. (131, 132)

RESPONSE: As stated at N.J.A.C. 7:7-1.1 of the Coastal Permit Program rules and at N.J.A.C. 7:7E-1.1 of the Coastal Zone Management rules, both of these chapters are used to review permit applications under the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19, Wetlands Act of 1970, N.J.S.A. 13:9A, and the Waterfront Development Law, N.J.S.A. 12:5-3. As provided at N.J.A.C. 7:7E-1.2, the Coastal Zone Management rules, which includes N.J.A.C. 7:7E-8.11, apply to the entire New Jersey coastal zone as defined at N.J.A.C. 7:7E-1.2(b)1 through 5, including those tidal areas outside of the CAFRA zone. There is nothing in adopted N.J.A.C. 7:7E-8.11(n) that exempts tidal waterways located outside of the CAFRA zone from complying with the Waterfront Development Law. Therefore, the Department does not believe that it is necessary to additionally state that commercial, industrial and homeland security

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facilities located along tidal waters outside of the CAFRA area are subject to the public access requirements.

408. COMMENT: The proposed amendments have been written to exclude public access to urban waterfronts for cultural, historic preservation and recreational purposes. The only opportunity many Hudson County residents will have to visit a shoreline will be to visit the Kill Van Kull, Newark Bay or the Hudson, Hackensack or Passaic Rivers. Therefore curbing or cutting back on New Jersey's current public access regime has a direct environmental justice nexus and impact on some of New Jersey's most economically and socially disadvantaged communities. (130)

409. COMMENT: The proposal removes all specific references to tidal waterfronts in northern New Jersey (for example, Kill Van Kull west of Bayonne Bridge, Newark Bay, Hackensack River and Passaic River) while references to other tidal waterfronts such as the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and the Delaware Bay remain. While the Hudson River is explicitly addressed under N.J.A.C. 7:7E-3.48, the public access rules for the Hudson River are provided by statute under the Waterfront Development Law, N.J.S.A. 12:5-3 and cannot be removed administratively by regulation. The proposed rules do not specifically include or exclude the other urban waterfronts north of the Raritan Bay. (130)

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410. COMMENT: This apparent effort to improve our State's "competitiveness" comes at the cost of a devastating environmental justice impact on the residents of Hudson County. These draft rules remove all specific reference to tidal waterfronts in Northern New Jersey to the Kill Van Kull west of the Bayonne Bridge, Newark Bay, the Hackensack River and the Passaic River. Yet references to other tidal waterfronts from the Raritan Bay south, such as the Atlantic Ocean, Sandy Hook Bay and the Delaware Bay, are explicitly left in the new rules. Public access to New Jersey's coastal wide-open spaces is maintained under the draft rules, while public access protections for residents living in proximity to tidal waterfronts in northern, more urban areas have been effectively erased. This would be a disaster for the people of Hudson County. The existing public access rules requiring true, clearly delineated, developer-provided public access have been very valuable in helping to transform Jersey City into New Jersey's urban job creation engine. (45)

411. COMMENT: It is very important that public access to waterways be provided wherever possible, with the exception of national security sites, in northern New Jersey. Removing references to northern New Jersey waterways is ill-advised. These are the areas with the least parkland and public open space and new waterfront access provides an important quality of life improvement. Multiple planning and policy efforts over the past decades have explicitly aimed

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to open new public waterfront access. The proposed rules represent an unfortunate reversal of this effort and should be discarded. (23)

412. COMMENT: The ability of the public to access the Hackensack River, Passaic River, Southern Newark Bay and Kill Van Kull is important. Without maintaining public access and waterfront improvement requirements, any attempts to reclaim the waterways that have been lost to industrial polluting and contamination will be lost, and the removal of these areas from the New Jersey Coastal Management Program will effectively bring these community efforts to an end. (39)

413. COMMENT: The proposed rules are a “slap in the face” to the thousands of citizens of Bayonne and other urban residents who not only rallied to the cause, but helped to increase access to the Hudson River, Kill Van Kull, and Newark Bay shorelines through a complex formula of transfer of development rights, contributions for access elsewhere by waterfront businesses, and as a result of Natural Resource Damage payments by Bayonne for combined sewer outfall (CSO) violations in a case brought by the NY/NJ Baykeeper. (215)

RESPONSE TO COMMENTS 408 THROUGH 413: As discussed above in response to comment 407, all tidal waterways outside of the CAFRA zone are regulated under the

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Waterfront Development Law, this includes tidal waterways north of the Raritan Bay.

Therefore, public access requirements apply to tidal waterfronts in the northern part of the State, including 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 and the Raritan River. Removal of specific reference to these waterways was done as part of the restructuring of the rules to provide municipalities along these urban waterways, like coastal municipalities in the rest of the State, with the opportunity to develop and seek Department approval of Municipal Public Access Plans. In addition, consistent with other coastal municipalities, when there is not a Department-approved Municipal Public Access Plan, public access must be satisfied in accordance with N.J.A.C. 7:7E-8.11(n). Removal of specific reference to these waterways does not mean that these waterways are no longer regulated under the Waterfront Development Law (N.J.S.A. 12:5-3).

Providing municipalities with the opportunity to develop Municipal Public Access Plans allows for long term planning for new and enhanced public access and provides towns and cities with a greater role in meeting the needs of the surrounding community. By adopting Municipal Public Access Plans, municipalities will have the ability to create municipal public access funds that will enable them to channel financial resources towards the development of high-priority public access facilities, such as waterfront parks and walkways. See also response to Comments 382 through 396 for a discussion of the rules' applicability to urban areas.

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414. COMMENT: Public access walkways built to the standards of the Hudson Waterfront Walkway make the most sense in heavily developed urban areas. The walkway inflates condo prices, rental prices and generally empowers the economic engine. However, the “one size fits all” approach to public access needs to be changed. There have been conflicts between the public access walkway requirements and environmental preservation issues on the Hackensack River. Sometimes there are issues where there is an environmentally sensitive piece of land and maybe the 16-foot-wide walkway does not make sense. There may be situations where a crushed stone walkway without lighting is best for a site. Therefore, there should be some flexibility in the rule; however, the Department should be making the decisions, not each town. (134)

RESPONSE: The Department agrees that one size does not fit all. Therefore, as discussed above in response to Comments 323 through 332, the adopted public access rule amendments give municipalities the flexibility to meet the needs of their communities by providing them with the ability to develop Municipal Public Access Plans for Department approval. The rules set the minimum width of a public access walkway at 10 feet. (N.J.A.C. 7:7E-8.11(x)) Therefore, municipalities have flexibility in developing their plans to require wide walkways along larger waterways and narrow walkways on smaller waterways, or where there may be site constraints.

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415. COMMENT: The Hudson River waterfront is a clear example of a successful urban waterfront. The transformation of Jersey City has seen is in large part due to its Hudson River waterfront, the economic engine of not just Jersey City, but New Jersey as a whole. It is because of the delicate balance between the municipality and the Department's regulatory system currently in place that the city has been able to assure that developers provide unlimited access to all residents.

Jersey City also has water frontage along the Hackensack River. The city has invested millions of dollars in studies and created plans to redevelop this historic industrial shoreline to a place for economic, residential and educational opportunity. Should these rules be adopted as written, there will be more "private" signs along the City's beaches and tidal waterfront. Public access to the city's waterfront is the right of every Jersey City resident, every New Jersey resident, and that is exactly why the proposed amendments are strongly opposed. It is recommended that the Department keep in place the regulatory system created to protect these public access rights. (85, 131)

RESPONSE: The adopted rules are intended to encourage development in urban areas, such as Jersey City, by giving municipalities the flexibility to plan for public access in their town through Municipal Public Access Plans. The commenter states that Jersey City completed studies and created plans to redevelop the city. The Department believes that the development of

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Municipal Public Access Plans provides municipalities with the opportunity to plan public access and address concerns and needs of their communities and the surrounding region, and encourages the type of planning that is taking place in Jersey City. Jersey City and other urban communities are urged to work with the Department in developing plans or updating any existing access plan that a town may have already prepared to meet the adopted rules.

416. COMMENT: There is nothing in the proposal that promotes waterfront redevelopment. The rules are written so broadly that almost all commercial activities, except for large residential developments, can be exempted from waterfront access requirements. (43, 93, 202, 215)

RESPONSE: Under the adopted rules, new or expanding commercial and residential developments will be required to provide public access either on or offsite, or to contribute into a fund. For existing commercial developments with existing public access, existing access must be maintained, or equivalent access be provided. Therefore, the adopted rules do not exempt almost all commercial activities from public access requirements.

417. COMMENT: The proposed rules do not require public access be provided for maintenance, rehabilitation, renovation, redevelopment or expansion of existing industrial and

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public development that remains entirely within the parcel containing the existing development if there is no existing public access onsite. This provision is supported. (72)

418. COMMENT: One argument that was made repeatedly that was ignored up until this proposal was the concept of a rational nexus. In many cases, when the Department imposed a public access fee there was no rational nexus between the activity being performed and the purpose for which that fee was being imposed. For example, if a refinery that was already required by the Federal government to restrict access needed a waterfront development permit to repair a bulkhead, the activity being performed did not in any way impact access because access was already prohibited. There was no rational nexus between the two. However, based on the 2007 rule, the Department insisted that such activity triggered a public access fee.

The new rule recognizes that activities being performed on the parcels of land at existing facilities do not impact public access. If access is not provided, it is not mandated. As such, necessary activities such as maintenance and rehabilitation will not trigger public access.

However, if the activity goes beyond the existing parcel or if it is a new facility, public access is required. Thus there is a rational nexus between the activity being performed and an impact on public access. Accordingly a fee is triggered. The rule is strongly supported. (19, 175)

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RESPONSE TO COMMENTS 417 AND 418: The Department acknowledges these comments in support of the adopted rules.

419. COMMENT: The Department is missing a critical opportunity to expand urban waterfront public access by not requiring commercial and industrial space that does not currently provide onsite access to do so upon renovation, or to make a financial contribution, which might be the most effective way to increase access along heavily developed urban waterfronts. While the Department's concern with the cost of providing access for newly renovated space is understandable, to raise it to the level of a pre-occupation that prevents the expansion of waterfront access in urban areas is a mistake. (183)

420. COMMENT: Prohibiting access for safety, health and homeland security reasons is legitimate; however, these facilities should still have to provide access somewhere else. (184)

421. COMMENT: Large industrial sites should incorporate public access when redeveloping a site. If it cannot be provided on site, the developer should provide access someplace else. (61, 81)

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422. COMMENT: Under the existing public access rules, new public access opportunities must be created as a condition of development along tidal waters. As a result, since 2007 many new public access points for fishing, surfing and beach walking have been created.

Under the proposed rules, new public access opportunities would not be required for many types of development projects, particularly those for projects closest to the State's largest cities. The "status quo" exemptions for existing commercial, residential, industrial, homeland security, marina at proposed N.J.A.C. 7:7E-8.11(n) and for the coastal permit for beach and dune maintenance at proposed N.J.A.C. 7:7E-8.11(q) are opposed. These "status quo" exemptions represent forfeiture of important opportunities to enhance public access in many areas where it is lacking, particularly along the industrial waterfront. In a state as densely populated as New Jersey, the "status quo" is simply not adequate or acceptable. The proposed rules will result in fewer opportunities for public access and less protection of the public's rights under the Public Trust Doctrine. (161, 170)

423. COMMENT: Under these rules, existing commercial and industrial buildings, sewer plants, and other large facilities are exempt. The current rules have resulted in a contribution of \$210,000 by waterfront businesses towards construction of a new waterfront park in Newark to provide access in cases where access was blocked. The proposed rules would end such contribution of requirement from businesses on waterways that block public access. When any of

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these facilities block public access, there must be a way to require access or help pay for access in another place. When commercial and industrial sites are redeveloped, access must be required.

(146)

424. COMMENT: Commercial and industrial properties should be required to provide public access or a meaningful detour. (130)

RESPONSE TO COMMENTS 419 THROUGH 424: N.J.A.C. 7:7E-8.11(n)1i applies only to a limited class of renovations or expansions of existing commercial development. If the renovation or expansion increases impervious cover more than 50 percent, or extends beyond the boundary of the previously developed parcel, the project is classified as "new development" and onsite public access is required under N.J.A.C. 7:7E-8.11(n)1ii. Industrial developments are required to maintain or replace any existing access. If the renovation or expansion extends beyond the existing parcel, the project is classified as "new development" and public access is required on or offsite.

It is in the State's best interest to encourage upkeep of commercial and industrial developments. As discussed in the proposal Summary (43 N.J.R. at 778), applicants in the past have hesitated to perform needed renovations or expansions because doing so under the previous rules triggered a potentially cost-prohibitive public access requirement. The Department

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believes that if there is no public access currently, it would be very difficult and costly for many applicants to provide new public access when a development is undergoing minor renovation or expansion.

Under the adopted rules, municipalities with Department-approved Municipal Public Access Plans will have the ability to collect monies in an access fund as specified in the Department-approved plan. The fund can be used for municipal public access projects, such as a waterfront park.

425. COMMENT: There is concern with the proposed changes in the rules that would allow the regulated community to provide “equivalent” access if new commercial developments or upgrades at existing facilities would block access that is currently provided to the public. Existing public access should be enhanced. Replacement public access must also be enhanced if existing access points are being closed and shifted somewhere else to allow for more development. Under these rules the developer or municipality can even transfer that “equivalent” access to a neighboring municipality. The goal of the Department should be improving and expanding access in all municipalities along our tidal waterways, not allowing certain municipalities to keep the public out by transferring their obligation for public access to other municipalities. The rules should provide for public notice when public access points are moved either elsewhere onsite or completely offsite. There is also no provision of temporary

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access points during construction. Public notification provisions must be contained in the rules and temporary access points provided. (161, 197)

RESPONSE: The commenter is incorrect in stating that under these rules a developer proposing maintenance, rehabilitation, renovation, redevelopment, or expansion at an existing commercial facility can replace any existing access that may be impacted by the development by transferring equivalent access to a neighboring municipality. If a town has not adopted a Department-approved Municipal Public Access Plan, in accordance with N.J.A.C. 7:7E-8.11(n)1i, an applicant proposing maintenance, rehabilitation, renovation, redevelopment, or expansion that remains entirely within the parcel containing the existing development, must maintain any existing public access or provide equivalent public access onsite. Equivalent public access as stated at N.J.A.C. 7:7E-8.11(n)1i, shall include access that provides for opportunities to participate in the same activities, such as fishing, swimming and passive recreation, in the same manner and by the same number of people as in the existing public access area. In addition to being required to maintain or replace public access onsite when conducting maintenance, rehabilitation, or similar activities at an existing commercial development, N.J.A.C. 7:7E-8.11(n)1ii provides that for new commercial development access shall be provided onsite.

As discussed in response to Comments 364 through 367, the option to locate public access offsite or in a different municipality is limited to a small class of projects. It is not the

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Department's intent to allow municipalities to keep the public out by sending them to another town as the commenter suggests. Municipalities submitting an application for a Municipal Public Access Plan that proposes a joint project with a neighboring municipality must meet the same application requirements as a municipality submitting an application including a proposed public access project within that municipality, including a needs assessment, an implementation strategy and all other requirements at N.J.A.C. 7:7E-8.11(e) through (g). In addition, the Department will review either type proposed plan in accordance with N.J.A.C. 7:7E-8.11(i) which requires the Department to review an application for approval of a Municipal Public Access Plan to determine whether the plan is consistent with the goals specified at N.J.A.C. 7:7E-1.1(c), the public access goals N.J.A.C. 7:7E-8.11(b) and all other requirements of N.J.A.C. 7:7E-8.11.

A Municipal Public Access Plan may require a monetary contribution to be used to provide access elsewhere in the municipality or outside the municipal boundaries along the same waterway. A town may choose to include this option but it is not required.

Regarding the commenter's concern that there are no public notice requirements when a public access point is moved somewhere else either onsite or offsite, under N.J.A.C. 7:7E-8.11(i) the Department will accept public comments on applications for approval of Municipal Public Access Plans for 30 days, and then post the final Municipal Public Access Plan on the Department's website for the public to view. The availability of the applications for approval of

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Municipal Public Access Plans on the Department's website provides transparency and increased public participation in review of proposed public access plans. In addition, the public will be able to review final plans so that it will be aware of all existing and proposed access points and facilities in the municipality.

426. COMMENT: All existing public access must be maintained during commercial development. Proposed N.J.A.C. 7:7E-8.11(n)1 mandates an equal amount of public access if a facility increases its footprint by 50 percent or less, but if a facility had no public access before and it expanded it would not be required to provide public access. Commercial entities may circumvent the 50 percent threshold by scheduling development or expansions that exceed 50 percent as separate events. The provision should be revised to stipulate that the 50 percent footprint threshold includes cumulative improvements over the course of 5 year periods. (153)

RESPONSE: The commenter is not correct in their interpretation that the rule allows for an applicant to circumvent the 50 percent threshold by scheduling development or expansion that would cumulatively exceed 50 percent but individually would not. The rule is clear that an expansion resulting in greater than a 50 percent cumulative increase in the area covered by building, asphalt or concrete is considered to be a "new commercial development" subject to the requirement to provide public access in accordance with N. J.A.C. 7:7E-8.11(n)1ii. All permit

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applications are tracked in the Department's New Jersey Environmental Management System (NJEMS) database. Therefore the Department has the ability to track these individual activities and will be aware of any proposed projects where cumulatively the individual expansions on the site exceed 50 percent therefore triggering the proposed development to be defined as "new commercial development" subject to the requirement to provide public access.

427. COMMENT: Proposed N.J.A.C. 7:7E-8.11(n)1ii requires public access to be provided if a facility is expanding by more than 50 percent. However, the required access is limited to normal operating hours. If the facility in question is not considered a homeland security facility as defined by the rule, public access should be provided at all hours. (208)

RESPONSE: In the *Borough of Avalon v. NJ Department of Environmental Protection*, the Court held that the Department could not require a municipality to impose 24/7 public access. In addition, the Department recognizes that it is not always appropriate or feasible to provide access to the public 24 hours a day, seven days a week. The Department believes that the adopted rules provide a balance between public access rights and public safety.

Residential Development

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428. COMMENT: The Department is commended for its proposed amendments to N.J.A.C. 7:7E-8.11(n)2i and ii with regards to public access requirements and exemptions on residential property. As proposed, these sections will protect homeowners both of existing homes that do not currently have public access on site and those building a new home from having to bear both the financial and legal burden of providing public access on the site of their home. (198)

429. COMMENT: The provisions of proposed N.J.A.C. 7:7E-8.11(n)2i through iv are generally supported. (153)

430. COMMENT: N.J.A.C. 7:7E-8.11(n)2i, which provides that the construction of accessory uses to residential development should not trigger public access, is supported. Further, the revision to proposed N.J.A.C. 7:67E-8.11(n)2iii in response to stakeholder input eliminating the 25-unit threshold is supported. (67)

RESPONSE TO COMMENTS 428 THROUGH 430: The Department acknowledges these comments in support of the rule.

431. COMMENT: Wetlands should be protected and not turned into public access. (49, 119, 209)

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432. COMMENT: Long Beach Township is considering the development of a paper street, Station Road, in Loveladies. Residents are concerned with the impacts of the paper street on the wetlands and natural areas. There are more suitable areas such as Coast Avenue or the handicap access beach, which could be enhanced for better oceanfront access. (108)

RESPONSE TO COMMENT 431 AND 432: In accordance with N.J.A.C 7:7E-8.11(d)4, “Municipal Public Access Plans shall not provide for access that is contrary to any requirement contained in this chapter (for example, access that encroaches upon threatened or endangered species habitat or is in violation of the dunes rules).” Therefore, any development proposed in wetlands must be in compliance with the Wetlands rule at N.J.A.C. 7:7E-3.27. This same provision is also located at N.J.A.C. 7:7E-8.11(n), which includes the public access requirements for projects in municipalities without Department-approved Municipal Public Access Plans.

433. COMMENT: Public access to the beach is supported and the public has every right under the Public Trust Doctrine to have access to the beach. However, oceanfront property owners should not have to allow anyone on their property. Long Beach Island has done a good job of providing access. (100)

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RESPONSE: In accordance with the adopted rules at N.J.A.C. 7:7E-8.11(n)2i, at an existing residential development, where the proposed activities consist solely of accessory development or structural shore protection, existing public access must be maintained. If there is currently no public access onsite, no public access is required. In addition, N.J.A.C. 7:7E-8.11(n)2ii provides that no public access is required for new residential development consisting of only one single family home or duplex not in conjunction with a previous development.

434. COMMENT: The proposal provides that offsite public access shall be provided on the same waterway within the same municipality as the residential development where onsite public access is not feasible for residential developments with a total combined water frontage of 500 linear feet or less. If there are no sites available within the municipality, the Department further expands the offsite public access requirement to be “on the same waterways within a neighboring municipality where the access is consistent with the neighboring municipality’s Municipal Public Access Plan”. Under Federal case law, the State cannot mandate any alternative public access where onsite public access is not feasible or practicable. (67)

RESPONSE: The commenter does not cite to any specific cases, and the Department is unaware of any case law that prohibits the State from requiring offsite access if access is not feasible

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onsite. The Department has included provisions for offsite access to provide an alternative mechanism for individuals with public access obligations to meet those obligations.

435. COMMENT: The public access requirements for onsite access versus offsite access at N.J.A.C. 7:7E-8.11(n) are inconsistent for residential developments based on the water frontage threshold of 500 linear feet. The Department proposes only the option of onsite public access for developments with greater than 500 linear feet of water frontage. There is no basis for limiting the options for public access. These two subsections should be consistent. (67)

RESPONSE: The Department recognizes that residential development of more than one single family home or duplex on a smaller property (one defined as having 500 linear feet or less of frontage on the water) may have practical limitations making onsite public access unfeasible. Accordingly, while onsite public access is generally required for this type of development, the rules do allow an applicant an opportunity to demonstrate that, based on the size of the site, the character of the waterway, environmental impact, or benefits achieved by providing offsite access, onsite access is not feasible. The Department must be convinced that onsite access is truly not feasible, utilizing these factors, or onsite access will be required. It is anticipated that allowance of offsite access will be the exception with onsite access generally being required even for smaller residential development. If the

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applicant is able to demonstrate onsite access is not feasible, the rules limit where offsite access can be provided to assure that the alternative access is provided to the same waterway in a geographic area most likely to be utilized by those who would have utilized access provided onsite. Larger parcels (i.e., those having more than 500 linear feet of frontage on the water; a distance roughly equivalent to one city block) may have a greater ability and more options available to address public access onsite. The Department believes that parcels having this amount of frontage can accommodate onsite access and allowance for the possibility of offsite access is not necessary.

436. COMMENT: Proposed N.J.A.C. 7:7E-8.11(n)2iii(2) allows an applicant to provide access in a different municipality, but along the same waterway if none is available onsite nor anywhere in the town the development is planned. This might be practicable on tidal rivers, but it is highly unlikely that it would work along the Atlantic Ocean. Tracks of land of 500 linear feet in size providing access to the Atlantic Ocean are so rare that similar access anywhere along the Atlantic Ocean is highly unlikely. (208)

RESPONSE: N.J.A.C. 7:7E-8.11(n)2iii(2) applies to certain new residential development with a total combined water frontage of 500 linear feet or less. Under N.J.A.C. 7:7E-8.11(n)2iii, providing offsite public access is allowed in limited circumstances. If offsite access is allowed,

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the offsite access must be equivalent to what would have been required onsite. Because public access requirements can be satisfied in a number of ways, the equivalent offsite access for a parcel with 300 feet of water frontage would not necessarily require that the offsite access be provided on a parcel with similar frontage. Instead, the offsite access could consist of a boat ramp, fishing access or other amenities supporting public access areas such as public restrooms or parking.

N.J.A.C. 7:7E-8.11(n)2iv applies to certain new residential development with a total combined water frontage of more than 500 linear feet. The rule requires public access to be provided onsite, only. It is not necessary, therefore, for developers of such projects to identify similar sites elsewhere along the Atlantic Ocean.

437. COMMENT: The proposed rules at N.J.A.C. 7:7E-8.11(n)2 address public access at residential developments. The rules provide that where public access is currently not provided it will not be required. 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. Requiring parallel public access for all new single family homeowners 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

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creative compensation or mitigation for infringement of rights such as opening community bay/riverfront beaches and ramps to public access. (32)

RESPONSE: Since the Department began regulating residential development of less than 25 units in 1994, it has never required the construction of public access for the development of one single family home or duplex and is not changing that practice in the adopted rules.

Seawalls

438. COMMENT: Any references to seawalls at N.J.A.C. 7:7E-8.11(n) must recognize that seawalls along sandy beaches will cause those beaches to disappear. This causes the land itself that is publicly accessible to disappear, and thereby take away people's public trust rights. Accordingly, seawalls along sandy beaches should be discouraged to the greatest extent possible. If a seawall must be built, public access must be provided in all cases. (208)

RESPONSE: The adopted amendments to N.J.A.C. 7:7 and 7:7E do not reference seawalls.

Ports

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439. COMMENT: It is important to keep New Jersey ports competitive. New Jersey ports are constantly in tough competition with other ports on the East Coast such as Baltimore and Halifax, and a growing and prosperous West Coast port. The State has invested in its port infrastructure through dredging and raising the Bayonne Bridge. Those efforts must not be countered through disincentives such as public access fees at the port. The ports in New Jersey support more than 230,000 jobs, representing \$12 billion in annual wages. The port also generates more than 2 billion in annual tax revenues to state and local governments. Increasing the cost of doing business at the port helps no one. Access is being provided at ports through commerce. (52)

440. COMMENT: The issue of public access to the waterfront is one in which the Port Authority of New York and New Jersey has been investing and actively working to obtain an appropriate balance between keeping the facilities of transportation and commerce safe and secure while providing appropriate public access to the millions of citizens that live and work within the Port District.

Since the early 1970's when the Port Authority provided preliminary design work for what is now Liberty State Park, up until present day with critical funding to support Jersey City for the formation of Riverfront Park on the Hackensack River as well as to Essex County for the formation of Riverbank Park on the Passaic River, the Port Authority has invested over \$150

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million in projects and programs described below expressly for the purpose of providing public access to New Jersey's waterfront.

In the City of Hoboken, the Port Authority reconstructed Pier A providing 5.2 acres of public access to the waterfront and contributed significant funding for the reconstruction of Pier C, which provides an additional 2.5 acres of public access. The PATH Station at Exchange Place in Jersey City provides both visual and physical access to the Hudson River waterfront. In the Hackensack Meadowlands, the Port Authority has provided the majority of the funding for the acquisition and construction of River Barge Park, an important public access location within that system which features a marina as well as small craft access for kayaks, canoes and scull boats. The Port Authority's Ferry Transportation Program through the Trans-Hudson ferries provide visual and physical access at both the terminals and on-board the ferries, in combination with an efficient alternative to rail and road commutation. The Port Authority has contributed significantly to the reconstruction of the ferry terminals at Hoboken and at Edgewater, as well as on the New York side of the Hudson River. The Port Authority remains committed to working with their municipal partners and the Department on the issue of public access. The proposed rules as they relate to ports are supported. (221)

441. COMMENT: The proposed rules are a vast improvement over the existing and earlier proposed amendments, particularly as they pertain to public access requirements for port and

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industrial facilities, which raise issues fundamentally different than public access requirements for beaches and residential developments. Most maritime waterfront facilities, characterized as they are by moving heavy equipment and other dangerous operations, do not constitute a safe environment for access by members of the general public. In addition, in the case of maritime facilities that are regulated as homeland security facilities, public access is essentially prohibited by Federal law. The proposed regulations go a long way in recognizing these realities which were for the most part not addressed in earlier proposals. (103)

RESPONSE TO COMMENTS 439 THROUGH 441: The Department acknowledges these comments in support of the adopted rules as they relate to ports.

442. COMMENT: Due to the security sensitive nature of operations, access to commercial port/critical maritime facilities is restricted to individuals that have express business purpose for being there and have undergone and passed security threat assessment conducted by the Department of Homeland Security. Other individuals who have a business purpose, but have not undergone a security threat assessment must be escorted in accordance with Federal regulations.

It is important to point out that there is a United States Coast Guard (USCG) Safety and Security Zone which encompasses 250 yards of each commercial maritime facility that is regulated by the USCG. As a result, swimming, boating, or any other water dependent uses

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adjacent to a port facility within the zone is a Federal offense. Since State law cannot preempt existing Federal law, and since any expansion of a port/critical marine facility would be subject to Federal law, the Department should consider exempting ports, refineries, and other critical infrastructure facilities from the public access regulations entirely as was the original intent of the legislation that has led to the review of the State's public access policy. (31, 37, 173, 192)

RESPONSE: The Department understands the importance of the State's ports; therefore, neither existing nor new ports are required to provide public access unless the proposed activities would eliminate existing public access.

443. COMMENT: The Department must require recreational access at ports or enhanced offsite access on the same waterway within the same municipality to ensure urban communities have recreational access to waterways. (197)

444. COMMENT: The rules exempt all port facilities from access requirements. This is opposed. (43, 93, 202, 215)

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445. COMMENT: The development of new or expansion of existing port facilities does not meet the Public Trust Doctrine obligation just by providing access points for navigation. This is inconsistent with N.J.A.C. 7:7E-3.50 as proposed. (171)

446. COMMENT: The Summary of proposed N.J.A.C. 7:7E-8.11(n)5 says that ports provide public access through navigation and commerce. While some ports may provide real public access, they are not providing access just by existing and doing business. Those using ports are not recreating or accessing the waterway as per their public trust rights; they are on the water as part of their job. Access at port facilities should be subject to the same rules governing commercial development. (208)

447. COMMENT: The Department's position of not requiring public access at certain industrial sites, homeland security facilities and public facilities as defined is supported. However, the inclusion of ports seems overly broad and should be restricted to active port uses where there is an inherent danger to public health, safety and welfare. This change is necessary because there are numerous residential developments scattered within the Port of New York and New Jersey and directly adjacent to industrial uses. To simply say that access is not required within the limits of the defined port raises the argument that access should not be required, even if appropriate. (18)

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RESPONSE TO COMMENTS 443 THROUGH 447: The public access requirements for ports recognize that ports are a unique type of development that should be treated differently than other types of development. Port activities provide water access for navigation and commerce and generally do not provide a safe environment for activities such as swimming or recreational boating by members of the general public. In accordance with N.J.A.C. 7:7E-8.11(n)5i, any existing public access must be maintained or equivalent access provided onsite, or if demonstrated that onsite access is not practicable based on the risk of injury or upon documentation of a threat to public safety due to unique circumstances, access must be provided offsite on the same waterway as the development. Different uses within the confines of a port may be subject to other provisions of the rule.

Transportation projects

448. COMMENT: Due to the limited budgets for transportation projects and the fact that transportation projects by nature benefit the public, the Department should reconsider imposing public access requirements on transportation projects. Providing public access at development projects located along the Turnpike and Garden State Parkway within the CAFRA area is

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expensive and takes away needed transportation funds from critical highway projects. For example, the New Jersey Turnpike Authority has expended approximately \$3 million satisfying the public access requirements with respect to the Parkway milepost 30 to 80 widening project. Because the Authority operates solely upon toll revenues, the Authority has been forced to pass these costs along to motorists that utilize its roadways. Although public access to New Jersey's tidal waterways and shores is important given the importance to the State's economy and overall quality of life, diversion of toll revenues to support the development and maintenance of public access to the waterfront detracts from the Authority's mission to safely and effectively operate these roadways and reduces funds available to address the maintenance needs of the roadways.

The Turnpike and Garden State Parkway are the main arteries to the New Jersey Shore and other major recreational areas that are subject to the proposed rule. To divert funds for highway projects, even if they are offsite projects or payments in lieu of access which do not impact safety, is counterintuitive to the ultimate purpose of maintaining and preserving those highways which provide the critical transportation infrastructure necessary to access the State's tidal waterways in the first place. Given the above, it is requested that the Department specifically exempt the New Jersey Turnpike Authority from the public access rules. (203)

RESPONSE: There is no need for transportation projects or the New Jersey Turnpike Authority to be exempt from public access requirements. When roads and or bridges have an impact on

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tidal waterways and/or public access to those tidal waterways, public agencies have a responsibility to replace that access.

449. COMMENT: The rule requires that public access be provided at new industrial and public developments. For the purposes of N.J.A.C. 7:7E-8.11(n)3ii, new industrial or public development includes development of areas where there is currently no existing public access. For public infrastructure projects where there is currently no existing access, there should be an allowable amount of additional right-of-way acquisition, such as the total additional width of 40 feet, before public access is required. For a public agency, a minimal strip taking should not require the same level of effort to mitigate for public access as a large project. The effort should be commensurate with the magnitude of the project. (72)

RESPONSE: Adopted N.J.A.C. 7:7E-8.11(o)1ii and 2ii require new public highways and superhighways that cross or fill a tidal waterway and expand outside the existing right-of-way to provide public access either onsite or offsite. See responses to Comments 135 through 146 above regarding the modification of the rules on adoption to address public access requirements for superhighways.

N.J. A.C. 7:7E-8.11(p) (proposed as N.J. A.C. 7:7E-8.11(o)) Marinas

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450. COMMENT: The proposed changes to the public access rule relating to marinas are supported. The fact that the Department recognized the importance of these businesses and the access they already provide and that they changed the rule to represent a realistic and sensible approach to enhancing public access to New Jersey's waterways is appreciated. (16, 17, 19, 20, 22, 30, 41, 48, 60, 62, 75, 82, 111, 114, 139, 155, 142, 151, 153, 174, 191, 196, 199, 200, 205)

451. COMMENT: When the previous regulations were promulgated in 2007 they placed serious mandates on marina owners by forcing them to provide unlimited public access on their properties without taking into consideration the access and services they already provide. Any marina seeking a permit to improve or expand their facility was required to provide permanent perpendicular and linear access including a walkway across the entire waterfront of the property despite the configuration or operation of the marina. This access would need to be provided to anyone 24 hours a day, seven days a week, even after the business is closed and in the off season; parking would need to be provided even if additional land had to be purchased and deed restrict the walkway in perpetuity by way of a conservation easement. The rules increased security concerns, reduced revenues and increased costs beyond the ability of most marinas to support. Marinas found themselves boxed in, as they could not expand or improve without revising their entire facility for increased and unlimited public access and many projects including a number of environmentally beneficial ones, never moved forward. The proposed

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rules includes a number of significant changes impacting recreational marinas, many of which are positive and represent a return to common sense with a reasonable and balanced approach to providing public access to our waterways.

The Department has made a real effort to take into consideration the nature of family run marina businesses, the access they already provide and the need for a reasonable, realistic and affordable permitting process which does not unduly burden marina owners and operators when essential maintenance and upgrades become necessary. The proposed amendments recognize that one size does not fit all and takes into consideration the access that is currently available, the constraints, operations and configurations of marinas, the unique nature of these businesses and the potential for additional access.

The Department is commended for making these changes and for recognizing that public access can better be provided by applying common sense principles of governing, working with local governments and eliminating unlawful and unnecessary burdens on business owners.

The Legislature agreed that a one size fits all approach for public access is impossible and that marinas are an essential part of the State's waterfront community and should be encouraged. As a result, The Public Access and Marina Safety Act was signed into law in September 2008. The legislation established a two-year moratorium on the implementation of the rules and regulations adopted by the Department governing public access at marinas and stated that the moratorium was critical to ensure that all affected interests were taken into

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account, thus increasing the likelihood of a more reasonable and equitable policy. The moratorium expired in December 2010; therefore, it is imperative that the Department adopt these proposed amendments as soon as possible. (40)

RESPONSE TO COMMENTS 450 AND 451: The Department acknowledges these comments in support of the adopted rules as they apply to marinas.

452. COMMENT: While it is recognized that the intent of proposed N.J.A.C. 7:7E-8.11(y) is to preserve public access rights; marinas already provide public access by the very nature of their business operations and therefore should be exempt from this requirement. There is no justification to require a marina owner to deed restrict his/her property if the operations of the marina will remain the same. Deed restrictions can be enforced at any time and can severely affect a marina owner's ability to make changes and/or improvements, or to run their businesses safely and effectively. A deed restriction is immediately enforceable under the condition of the permit and the proprietary right given to the State can be enforced immediately, therefore directly impacting current property owners. (40)

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RESPONSE: The Department has adopted these regulatory changes as part of a comprehensive effort to maintain and enhance public access to the State's tidal waters. It is through a conservation restriction that the Department will ensure that access is maintained. Therefore, the Department is adopting N.J.A.C. 7:7E-8.11(z) (proposed as N.J.A.C. 7:7E-8.11(y)).

453. COMMENT: With respect to proposed N.J.A.C. 7:7E-8.11(o)3, public access to any beach area of a marina should be provided during normal business hours. (54)

RESPONSE: N.J.A.C. 7:7E-8.11(p)2 (proposed as N.J.A.C. 7:7E-8.11(o)2), provides that for new marinas, public access shall be provided onsite during normal business hours. This includes marinas with beach areas.

454. COMMENT: All marina public access plans required pursuant to proposed N.J.A.C. 7:7E-8.11(o)4 (adopted N.J.A.C. 7:7E-8.11(p)4) should also be included in the Municipal Public Access Plan. (54)

RESPONSE: In accordance with N.J.A.C. 7:7E-8.11(c)3, the standards applicable to public access requirements for marinas, piers, beach and dune maintenance activities, and shore

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protection projects are applicable to all municipalities, regardless of whether they have a Department-approved Municipal Public Access Plan. Consistent with this approach, N.J.A.C. 7:7E-8.11(g)2 specifies that Municipal Public Access Plans are not allowed to require public access at marinas. As explained in the Summary of the proposal at 43 N.J.R. 777, the Department believes that certain forms of development, including marinas, have unique issues and concerns that are best addressed consistently throughout the State. Accordingly, they are subject to the provisions contained in the Department's rules at N.J.A.C. 7:7E-8.11(p). As Municipal Public Access Plans are not authorized to require public access at marinas and these requirements will be administered by the Department as part of its permit review process for applications related to marinas, requiring that marina public access plans be part of the Municipal Public Access Plan would be unnecessary and potentially confusing.

455. COMMENT: The assumption that the 2007 public access rules were "more restrictive" to marina owners is inaccurate. The 2007 rules really only codified the existing requirements imposed on marina owners in the past through permit conditions. Many marina owners were lax in implementing the conditions of their permits. The 2007 rules brought this to light. In fact, the 2007 rules contained exceptions to public access in areas where there were dangerous operations and amenities that were paid for by the marina patrons. Very much like public access to private beach clubs, the entire marina was not expected to be open to the public. (87, 171)

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RESPONSE: The 2007 public access rules were more restrictive than the adopted rules. For example, the 2007 rules required that marinas provide public access 24 hours a day seven days a week, while the adopted rules require access only during normal business hours. The 2007 rules resulted in the passage of the Public Access and Marina Safety Task Force Act, N.J.S.A. 13:19-38 et seq. The adopted amendments to the public access requirements for marinas were made in response to that Act as well as in response to comments received during the Department's stakeholder process.

456. COMMENT: Proposed N.J.A.C. 7:7E-8.11(p) through (w) is supported. (153)

RESPONSE: The Department acknowledges the commenter's support of adopted N.J.A.C. 7:7E-8.11(q) through (x) which were proposed as N.J.A.C. 7:7E-8.11(p) through (w).

N.J.A.C. 7:7E-8.11(r) (proposed as N.J.A.C. 7:7E-8.11(q))

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457. COMMENT: With respect to proposed N.J.A.C. 7:7E-8.11(q), applicants should be able to provide temporary alternative routes to obtain equivalent public access while the activity is ongoing. (54)

RESPONSE: Adopted N.J.A.C. 7:7E-8.11(r) which was proposed as N.J.A.C. 7:7E-8.11(q), requires existing public access to be maintained or equivalent onsite public access to be provided, regardless of whether the loss of access is temporary or permanent. Therefore, applicants may provide temporary alternative routes to obtain equivalent access if necessary.

Barrier free access N.J.A.C. 7:7E- 8.11(w) (proposed as N.J.A.C. 7:7E- 8.11(v))

458. COMMENT: The current and proposed rules only pay lip service to Americans with Disabilities Act (ADA) requirements for access to New Jersey's waterways and beaches. The Department is urged to address ADA compliant access concerns. (32)

RESPONSE: Adopted N.J.A.C. 7:7E-8.11(w) (proposed as N.J.A.C. 7:7E-8.11(v)) 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.

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In addition, the American 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, barrier free access requirements contained in the adopted rules provides sufficient authority to require barrier free access, where appropriate.

N.J.A.C. 7:7E-8.11(x) (proposed as N.J.A.C. 7:7E-8.11(w)) Public access walkways

459. COMMENT: Proposed N.J.A.C. 7:7E-8.11(w) repeats the minimum width of a public accessway of 10 feet free of obstruction. However, it removes any conservation buffer, 20 feet under the existing rule. In many cases, this is not enough of a right-of-way to accommodate the amount of pedestrian traffic that can and will be created once the Jersey City western waterfront is created with an expected increase of 19,000 residential units, two million square feet of new retail and a 22-acre State university expansion. (131)

460. COMMENT: The Department says that a one-size-fits-all approach to public access does not work; however, this is the approach the Department is taking with respect to the size of

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public accessways. The proposal does not consider the density of urban populations in determining the accessway width, nor does it consider multiple user groups all desiring access to the water's edge. Accessways need to be designed to allow for an open feeling and more importantly, safety of the users. Access that is too narrow does not provide a feeling of safety and therefore people will not use it.

It is appropriate that larger waterways, especially in urban areas, have wider walkways to accommodate a greater number of activities. Cities are already crowded and access to the water is a means of relaxation no matter what activity is pursued. Removing the standards for the size of a walkway and replacing them with a standard 10 feet is a disservice to the public and a betrayal of the Public Trust Doctrine. The standards for the size of walkways should be dependent upon the surrounding population density and should remain in the rule. (18)

461. COMMENT: The proposed rule at N.J.A.C. 7:7E-8.11(f)2 and (o) provides for access points having a width of 10 feet. The width of parallel access to the shore should be determined on a case-by-case basis, but at a minimum should be no less than 15 feet for shores that are not created through shore protection projects. For those shores, *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. Super. 306 (1984), requires a case-by-case determination as to the extent of the dry land made available to the public, and 10 feet of parallel access would be far too little in many instances. (161)

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462. COMMENT: The rule should be amended to clarify that the Department has the ability to increase the width of parallel access if it becomes necessary for the full enjoyment of public trust rights. 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. The default width of parallel access should be 30 feet.

(32)

RESPONSE TO COMMENTS 459 THROUGH 462: Ten feet is the minimum parallel access width required by the rules. It is anticipated that this minimum width will provide sufficient access, while accommodating site-specific constraints that may be encountered. Public access walkways for the Hudson River waterfront would be governed by N.J.A.C. 7:7E-3.48, the special area rule for the Hudson River waterfront established unique public access requirements including the Hudson River Walkway.

463. COMMENT: There should be an exception to the 10-foot minimum width requirement for a public accessway in cases where the minimum width cannot be met due to overriding circumstances. (72)

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RESPONSE: The Department has determined that ten feet is the minimum width needed to provide sufficient access. An exception in the rules to allow a lesser width is not appropriate.

Green Acres

464. COMMENT: Non-profit organizations that accept Green Acres matching grants are subject to the public access requirements imposed by Green Acres statutes and regulations. As they currently exist, the public access rules create redundant and prescriptive public access requirements that could have the effect of driving non-profit land management organizations away from preserving properties along tidal waterways with the use of Green Acres matching grants because the costs of compliance with the current rules would be too great. Therefore, the proposed changes that eliminate from coverage under the rules non-profit organizations that use Green Acres matching grants to acquire lands along tidal waterways are supported. Instead, the public access requirements of the Green Acres Program would apply to such lands. (211)

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

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465. COMMENT: The proposal states that there could be penalties that are not specified in the current proposal such as, “Municipalities that do not have Municipal Public Access Plans may be ineligible for any Green Acres loans or grants for any purpose within that municipality.” (43 N.J.R. at 772(a)). It is not clear where Green Acres eligibility is defined either in this proposal or the current Green Acres Program rules, N.J.A.C. 7:36, in such a way that would prohibit a municipality from seeking Green Acres funding for non-waterfront sites. Municipalities without Department-approved Municipal Public Access Plans should still be eligible for Green Acres funding, particularly for non-waterfront projects. Furthermore, developed municipalities that already have ample waterfront public access should not be required to have an approved Municipal Public Access Plan in place to apply for Green Acres funding. (92, 169)

466. COMMENT: Department officials have claimed that for towns that fail to provide sufficient public access, the Department can cut off those towns from Green Acres funding. The proposed rule contains no such “penalty” provision. (161)

467. COMMENT: The proposal Summary provides that municipalities that do not have a Municipal Public Access Plan may be ineligible for any Green Acres loans or grants for any purpose within that municipality (43 N.J.R. at 772(a)). However, there is no specific reference to

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this in the rule language. It is assumed that this provision applies only to Green Acres loans and grants directly to municipalities that lack access plans and not to matching grants to non-profit organizations that seek to preserve land within such municipalities. It is recommended that the Department confirm that this is the case when it adopts the rules. Non-profit organizations that seek Green Acres matching grants to preserve important conservation lands and provide public access to those lands should not be prohibited from the use of Green Acres matching grants simply because those lands are located in a municipality that does not have a Municipal Public Access Plan. (211)

468. COMMENT: The Department should explain the link between the Municipal Public Access Plan and receiving Green Acres funding so that all the towns affected by the new public access rules understand that they will not be eligible for Green Acres funding unless they develop a Municipal Public Access Plan that is approved by the Department. (204)

RESPONSE TO COMMENTS 465 THROUGH 468: Municipalities that develop Municipal Public Access Plans will have greater opportunities to plan for enhanced public access within their boundaries. Additionally, they will be able to direct monies to an access fund for municipal public access projects that implement their public access plan. Municipalities that do not have Municipal Public Access Plans will be ineligible for the general permit for beach and dune

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maintenance activities as of three years from the effective date of these amendments. The Department believes that these are adequate incentives for municipalities to want to develop and seek Department approval of Municipal Public Access Plans. This belief is based in part on the Department's outreach to municipalities about Municipal Public Access Plans. Based on that outreach, the Department anticipates that most coastal municipalities will submit applications to the Department for approval of access plans.

The Department will evaluate whether changes to the Green Acres rules, N.J.A.C. 7:36, to provide that municipalities that do not have an operational Municipal Public Access Plan may be ineligible for any Green Acres loans or grants for any purpose within that municipality, are appropriate. If the Department determines through its evaluation that it is appropriate to revise the Green Acres rules, it will propose those amendment.

469. COMMENT: There are provisions in the rules that conflict with the Green Acres funding rules. For example, if a town receives Green Acres funding to build a park, the town has the right to charge a fee to non-residents or to restrict park hours. Should a town use their Green Acres funding to construct a park on lands subject to public trust rights rule, N.J.A.C. 7:7E-3.50, there could be a potential for conflict that must be clarified. (208)

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470. COMMENT: Exempting Green Acres funded properties from the public access rules is a concern. The proposed amendments would delete any and all references to Green Acres properties from the public access rules. The present rule, N.J.A.C. 7:7E-8.11(q), provides enough flexibility and discretion to the Department to address concerns raised by the land conservation organizations about public accessways and amenities, in particular N.J.A.C. 7:7E-8.11(q)9 and 12. Except in instances where ecological or historic interests dictate otherwise, the public should have access to and use of Green Acres properties. This is consistent with long-standing regulatory policy. See e.g., N.J.A.C. 7:36-25.10. (197)

471. COMMENT: The deletion of existing N.J.A.C. 7:7E-8.11(q) that addresses the requirements for public access in towns that participate in Green Acres Program funding is not supported. (153, 161)

RESPONSE TO COMMENTS 469 THROUGH 471: In those cases where a coastal permit is approved for property for which Green Acres funding was obtained, the Green Acres public access requirements at N.J.A.C. 7:36 will govern. The Green Acres rules require that a “local government unit or nonprofit shall ensure that funded parkland is open and that reasonable public access, as determined by the Department, is afforded to all New Jersey residents” (see N.J.A.C. 7:36-25.10 Public access to and use of funded parkland). N.J.A.C. 7:36-25.10 (f) provides that if

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the local government unit or nonprofit charges fees or requires permits or reservation for access to recreation and conservation facilities on funded parkland, it shall provide for reasonable public access to available facilities during non-business hours. In accordance with N.J.A.C. 7:36-25.10(d), a local government unit or nonprofit shall not enter into exclusive use agreements or allow discriminatory scheduling of the use of the funded parkland or its recreation and conservation facilities based on residency or otherwise in violation of the Law Against Discrimination, N.J.S.A. 10:5-1 et seq., or other applicable law.

472. COMMENT: The rule proposal should list and depict on a map which municipalities are required to prepare a Municipal Public Access Plan in order to qualify for coastal permits and Green Acres funding so that they can be fully prepared before permit or funding applications are made. (24, 169)

RESPONSE: Any municipality that contains tidal waterways has the option of developing and submitting for Department approval, a Municipal Public Access Plan.

Shore protection projects, N.J.A.C. 7:7E-8.11(s) (proposed as N.J.A.C. 7:7E-8.11(r)), and beach access

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473. COMMENT: The change to the distance between beach access points from every one-quarter mile to every half-mile is supported. The change allowing a waiver from certain rules, such as bathroom requirements for communities receiving State shore protection funding, is also supported. (181)

474. COMMENT: The lack of realistic public access rules have prevented vital beach nourishment projects from moving forward. This needs to be addressed immediately as beach nourishment projects are vital for both economic and shore protection needs. The rules are supported (139)

RESPONSE TO COMMENTS 473 AND 474: The Department acknowledges these comments in support of the adopted rules.

475. COMMENT: The proposal summary states, "...municipalities without plans may rank lower for shore protection funding projects..." This statement is not codified in the rule. The word "may" should be replaced with "shall" and a codified ranking system be incorporated into the rule. Otherwise, there is no assurance that towns without Municipal Public Access Plans or towns with poor plans will not get beach nourishment funds. (208)

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476. COMMENT: The proposed rule contains no ranking system for shore projection projects that provide an important and meaningful access to receive priority funding and as a result, organizations and the general public will be unaware of what priority one project has over another. (15, 161)

477. COMMENT: The Department claims shore projection projects that provide for meaningful public access will be given priority for shore protection funding. This claim comports with the Department's authority as granted by the Legislature and interpreted by New Jersey courts. Inexplicably, however, the proposed rule does not contain any such ranking system. Even if its claims are correct, the Department is not advising the public (or municipalities) what types of public access and use enhancements will give one project priority over another.

In accordance with the Department's current policies, priority for shore protection program monies should have been expressly based in large part upon "public access and use enhancements provided by the project" and explained what that phrase means. The *Avalon* opinion expressly recognizes the Department's authority to "develop[ing] a priority system for ranking shore protection projects and establish[ing] appropriate criteria therefore," which is to be used to establish a priority list for projects to be funded from the Shore Protection Fund.

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However, presently, a prioritization system has not been adopted by regulation and one can only be found on a Department webpage.

While “public access and use enhancements” is presented on that webpage as one of three prioritization factors, the phrase is not defined or explained. The Department is missing an excellent opportunity to address this. In its Public Access in New Jersey guide (see pages 36-37), the Department presently disseminates an enumerated list of public access characteristics for various types of waterfront (i.e., beachfront, bayshore, riverfront and urban waterfront) that could be used to develop the public access-prong of the present priority system. The Department should be explaining and codifying these requirements; instead, uncertainty and vagueness will continue to persist even if the Department’s claims are accurate. (161)

478. COMMENT: The Supreme Court of New Jersey has recently ruled in *City of Long Branch v. Liu*, 203 N.J. 464 (2010), that new beach areas created as a result of publicly funded shore protection projects, such as beach nourishment projects, are public property. Under the Public Trust Doctrine, the public has a right to access and use these new beaches, and the State has a duty to protect the rights of the public to do so. Under the proposed rule, the current standards at N.J.A.C. 7:7E-8.11(p) requiring towns to provide public access and amenities for new beaches created through shore protection projects would be abolished. Significantly, the rules requiring public access points every one-quarter mile, parking and other amenities would

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be revoked. Even in light of the *Avalon* decision, the use of shore protection funds remains the Department's most essential regulatory tool for providing broad, comprehensive public access to the New Jersey shore. Accordingly, proposed N.J.A.C. 7:7E-8.11(r) must do more to ensure that the public will have access to beaches and shores renourished with public monies. (161)

479. COMMENT: Do not allow public tax dollars to be spent to replenish beaches unless full 24/7 access and parking are provided for those beaches. (42, 48, 64, 81, 93, 98, 109, 113, 121, 127, 141, 144, 148, 153, 182, 190, 201, 202, 206, 215, 216, 223, 224, 225, 227)

480. COMMENT: All towns receiving Federal or State funds for improvements or repairs to highways damaged by coastal storms or beach nourishment should be required to provide bathroom facilities and accommodations for handicapped access next to the access points. Public money should not be spent on beach replenishment and other improvements with no strings attached to the towns getting the benefit of public funding. (144)

481. COMMENT: The US Army Corps of Engineers document cited in the rule at proposed N.J.A.C. 7:7E-8.11(r) is a guidance document for reasonable public access during shore protection projects. In some cases, the every "one-half mile or less" proposed State requirements may not be feasible. Language should be added to allow municipalities to have the option to

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change this distance. The language should be changed to “requires the permittee to provide public access to the best of their capability following the ACOE Planning Guidance Notebook Section iv- Hurricane and Storm Damage Prevention (CECW-P Engineer Regulation 1105-2-100, April 22, 2000).” (54)

482. COMMENT: The Department should maintain the current mandatory requirement that public access to beaches be every one-quarter mile rather than the proposed one-half mile. (32, 57, 63, 171, 182, 197)

483. COMMENT: Public access points should be based on the terrain of the coast and no more than one-quarter mile apart. Some coastal areas in Monmouth County, such as Deal and Elberon, are on an elevated bluff and require safer access to accommodate seniors, families with children and the handicapped. (144)

484. COMMENT: The Department is proposing to change its quarter mile public access requirement for it is replenished beaches to one half mile, which would make it that much more difficult for surf fisherman to access major fishing spots. (15, 144, 161)

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485. COMMENT: There is concern that the proposed rule changes will allow towns to receive State funding while discriminating against non-residents by denying them access to beaches, surf, ocean and tidal waters. If a town seeks to restrict access to its residents, either by limiting beach access with ordinances or regulations that do so explicitly or implicitly, or by failing to provide means of access to these areas at reasonable intervals of one-quarter mile, it should not be able to secure any Federal funding to protect or use those areas. (112)

486. COMMENT: The Department is not proposing to replace any of its current standards addressing shore protection projects with new standards of its own. Instead, any applicant would have to comply with standards set by the United States Army Corps of Engineers in a guidance document that are not created specifically for New Jersey, and can be changed at any time by the Army Corps without any public process. Those standards presently require public access points every one-half mile and “sufficient parking.” Apparently, the State’s policy of providing “meaningful public access” to the New Jersey Shore and other waterfront areas will be placed in the hands of the Army Corps. (161)

487. COMMENT: To implement Army Corps rules would be to avoid accountability and delegate authority that ought to be in the hands of voting taxpayers to a non-elected institution with no sense of the local and State problems New Jersey faces. (44)

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RESPONSE TO COMMENTS 475 THROUGH 487: For decades, the Department has required that beachfills and other shore protection projects built with public funds be open to the public. This requirement will not change under the adopted rules. In addition, the Department routinely works with the Army Corps of Engineers on federally funded shore protection projects to ensure that access is provided consistent with Federal requirements tailored to local considerations. This practice will continue under the adopted rules. Under the prior rule, however, the Department had sought to condition expenditure of State shore protection money upon municipalities providing additional public access amenities (e.g., parking, restrooms, and perpendicular access). In light of the *Avalon* decision, the Department has determined that it is no longer appropriate to condition State funding upon the provision of such amenities. Even so, the Department anticipates that State shore projects will be coordinated with Municipal Public Access Plans, and that the State, municipalities, and the public will benefit from this coordination. At this time, the Department does not believe it necessary to establish a ranking system for shore protection projects to encourage municipal preparation of access plans. The Department will evaluate municipal participation and would consider appropriate amendments to the rule if needed to ensure municipal compliance with these rules and the Public Trust Doctrine.

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Public access signage N.J.A.C. 7:7E-8.11(u) (proposed as N.J.A.C. 7:7E-8.11(t)) and

Conservation restrictions N.J.A.C. 7:7E-8.11(z) (proposed as N.J.A.C. 7:7E-8.11(y))

488. COMMENT: The rule proposal could be strengthened by clarifying at proposed N.J.A.C. 7:7E-8.11(t) and (y) that areas of replenished beach are accessible to the public per the United States Supreme Court ruling in *Florida DEP v. Stop Beach Re-nourishment*. Areas that were previously private and that have now become public beaches should be marked accordingly. Further, towns should be required to record conservation restrictions dedicating these areas as public beaches in perpetuity. Inclusion of these elements in Municipal Public Access Plans will ensure the public knows where they are rightfully allowed to be and would make Municipal Public Access Plan's strong candidates for Department and public approval. (208)

RESPONSE: The rules as originally proposed required, at N.J.A.C. 7:7E-8.11(t), that public access to tidal waterways must be clearly marked and that Department-approved public access signs must be installed and maintained by the permittee and any successors in title and interest in perpetuity at each public accessway, public access area, and/or public parking area. To emphasize and ensure that the signage requirement must be met in municipalities with Municipal Public Access Plans, as part of the Notice of Substantial Changes published on March 19, 2012, the Department proposed a change at N.J.A.C. 7:7E-8.11(d) to specifically provide at paragraph

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(d)3 that Municipal Public Access Plans must require the installation and maintenance of appropriate public access signage in accordance with N.J.A.C. 7:7E-8.11(t). As part of the Notice of Additional Substantial Changes proposed on July 2, 2012, N.J.A.C. 7:7E-8.11(t) was recodified without change as N.J.A.C. 7:7E-8.11(u) and is herein adopted. In accordance with this provision, municipalities, as part of their Municipal Public Access Plans will be required to provide signage at all existing and proposed public access areas included in their plans.

Regarding the commenter's statement about public beaches being preserved in perpetuity, located at N.J.A.C. 7:7E-8.11(e) are the elements required to be included in an application for approval of a Municipal Public Access Plan. N.J.A.C. 7:7E-8.11 (e)5ix requires municipalities to identify in their applications for approval of Municipal Public Access Plans, measures to be implemented to permanently protect the public access identified in the plan through the required recording of conservation easements/restrictions, or, for municipally owned properties providing public access, through placement of the property providing public access on the municipal Recreation and Open Space Inventory (ROSI). N.J.A.C. 7:7E-8.11(e)5x requires applicants to include in their application for approval of a Municipal Public Access Plan, examples and/or models of existing and proposed conservation easements/restrictions that preserve all public access identified in the Municipal Public Access Plan, to protect the access in perpetuity. The Department believes that the adopted provisions will ensure that the public is aware of all public access in the municipality and that the public access will be preserved.

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489. COMMENT: The Department's proposal to establish conservation restrictions for residential, commercial and industrial properties that already have public access onsite or that may be required to have public access in the future, as set forth at proposed N.J.A.C. 7:7E-8.11(y)1 through 4, is supported. By setting up these restriction that will be recorded with the county clerk, the Department will help to ensure that those buying properties in the future that have a public access point on it will be aware of this before they purchase that home. (198)

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

490. COMMENT: The State needs to preserve open space and access to tidal waterways and their shores. It is nearly impossible to get it back once it is given away. (51, 101)

RESPONSE: Open space and access to tidal waterways should be preserved. N.J.A.C. 7:7E-8.11(b) provides that all existing public access to, and along tidal waterways and their shores shall be maintained to the maximum extent practicable. In addition, N.J.A.C. 7:7E-8.11(z) requires that areas set aside for public access be permanently dedicated for public use through the recording of a Department-approved conservation restriction under the New Jersey

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Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1 et seq., maintaining the publicly dedicated areas in perpetuity.

N.J.A.C. 7:7E-8.12 Scenic Resources

491. COMMENT: Ocean and water access in large part defines New Jersey as a community and is tied to the State's economic health and well-being, tourism and quality of life. It is in the public's best interest to enhance access to the greatest extent practicable and in all reasonable manners. The rationale for the proposed amendments at N.J.A.C. 7:7E-8.12(f) is based on a series of assumptions that would result in the State abdicating its authority to Federal and local governments, denying citizens the right to object to the use of public lands on the waterfront, and allowing projects to be designed and executed by elected officials who do not have the expertise in environmental protection and who do not represent the interests of the State. As a result, the proposed amendments threaten both visual and physical public access to public lands on the waterfront. The proposed amendments should not be adopted. (35, 50, 125, 143, 150, 160, 165, 55)

492. COMMENT: To provide exemptions to government agencies and projects from adherence requirements of 15 feet height of structures by the oceanfront is to believe that all

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governmental projects are in the public interest. This is not so. If exemption from the setback requirements is given to governmental agencies to construct structures more than 15 feet in height that cause interference with current maintenance of visual access to the oceanfront there is no end to the possibilities of unregulated government construction on the oceanfront. (10)

493. COMMENT: “In the public interest” and “visual access” seem to be subjective, arguable conditions that citizens should be permitted to contest. Is there an appeal process? (10, 55, 125)

494. COMMENT: The proposed amendment to N.J.A.C. 7:7E-8.12(f) encourages unwise coastal development in a hazardous zone and therefore is not supported. In this day and age of sea level rise, anything that encourages more development near tidal waterways must be discouraged. Regardless of whether these developments are for the benefit of the public, the public will have to pay when these structures are destroyed by rising sea levels. (208)

495. COMMENT: The commenters oppose the changes to the rules that exempt governmental agencies from the setback requirements where the proposed structures are greater than 15 feet in height where certain criteria are satisfied. (25, 55, 79, 80, 96, 138, 145, 166)

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RESPONSE TO COMMENTS 491 THROUGH 495: Ocean and water access are crucial to New Jersey's economy and quality of life. The Department has fashioned these rules in an effort to ensure maximum ocean and water access, while respecting the rights of landowners to utilize their properties, ensure security and prevent damage or vandalism. The setback requirements at N.J.A.C. 7:7E-8.12(f) are intended to prevent adverse effects on the scenic resources of the coastal zone by encouraging visually compatible uses and maintaining visual access of the waterfront by the public. This provision is not intended to address flooding or storm issues. These issues are dealt with in other portions of the rules including N.J.A.C. 7:7E-3.25 flood hazard areas and N.J.A.C. 7:7E-3.18 coastal high hazard areas. The conditions for the setback exemption in N.J.A.C. 7:7E-8.12(f) will ensure that the Department can review the impacts of a proposed project to ensure that the project enhances physical or visual public access to the waterfront. As N.J.A.C. 7:7E-8.12 is only one of many requirements for an approval under the Coastal Permit Program Rules, the appeal process that applies under those rules would apply to a Department decision under N.J.A.C. 7:7-5.

496. COMMENT: Open space by the beach is needed. Visitors come to Stone Harbor for its beach and back-bay, not for a library. Why were the residents not asked for their input? The county changed its original site in Sea Isle to one more amenable to its residents. A new library

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is not needed in the age of the electronic book. If a survey of library patrons were conducted, 90 percent would be against the beach site. (91)

497. COMMENT: Instead of eliminating beach access parking for a library in Stone Harbor, the library should be located near the school where the children have access. (145, 80, 91)

498. COMMENT: The current setback regulation requiring that structures over 15 feet must be set back three times their height from the seawall is intended to preserve public open space and the view of dunes, sand, sea and sky. The height of the proposed library in Stone Harbor and its proximity to the seawall will block sunlight from the dunes and the beach beginning in the afternoon. The library would cast a large shadow on the 95th Street public beach, spoiling people's enjoyment of this unique open-space resource. The beach is Stone Harbor's primary resource, not just from an environmental standpoint, but also from an economic standpoint. The beach should not be impaired by high structures that overshadow it. (55, 125)

499. COMMENT: Construction of an eight million dollar library on the beach in Stone Harbor, which has a permanent population of a few thousand people, seems preposterous. Stone Harbor is a seasonal beach town, not a large town with community or school need for a huge library that takes up valuable beach property. (25)

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500. COMMENT: A beachfront library with 100 feet of beach frontage will displace flood waters and pose a threat to public safety, health and welfare. Currently there is a beach parking lot on site which has no mass. Using taxpayer money to construct a \$6.5 million library in an “A-Zone” is a breach of fiduciary duty and is stupid. Taxpayer dollars should be invested prudently. Instead on constructing a library to provide visual access, the Borough should enclose some of its beach pavilions at a cost of \$100,000. (80)

501. COMMENT: The proposed plan to build a library in Stone Harbor will take away from the community beach access and the ocean view of residents and renters. According to the Mayor’s articles of incorporation, the goal of the library is to protect the environment, to provide beach access and to enhance nature watching, bird watching and fishing. How can a proposed two story library accomplish these goals? The library will have a negative effect of on property values. (179)

502. COMMENT: The building of a library in Stone Harbor on the beach will take away most of the public parking for the beach. Where will the beach parking be located? Doesn’t the State want tourists to use its beaches? Beachgoers patron the restaurants and shops in Stone Harbor and limiting tourists will hurt these businesses. (145)

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503. COMMENT: The Borough of Stone Harbor has three assets: the beach, bay and centralized business district. Construction of a library would negatively impact the beach and business district. Stone Harbor is a resort town where the population surges in the summer months. The library will result in the loss of 20 to 50 parking spaces and more parking in the Borough is needed, not less. The overflow parking from the business district is spreading into the surrounding residential neighborhoods. (80)

504. COMMENT: According to the Notice of Action on Petition the proposed amendments to the setback requirements are in response to a petition filed by Neil Yoskin, Esq. on behalf of the County of Cape May and the Borough of Stone Harbor. (See 43 N.J.R. 451(a), February 22, 2011). The County and Borough's CAFRA permit application was for construction of a branch library on an existing municipal parking lot on the oceanfront of Stone Harbor. The permit was denied because the proposed library did not comply with the Coastal Zone Management rule's public open space rule, N.J.A.C. 7:7E-3.40 and scenic resources and design rule, N.J.A.C. 7:7E-8.12.

The denial of the permit was appropriate, as it reduces parking and adversely effects scenic resources by reducing the setback requirement for structures greater than 15 feet in height. With respect to parking, the construction of the library will result in the loss of 16 public parking

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spaces which provide the public access to the beach. Further, the County has estimated that approximately 50 parking spaces would be necessary to support the library. The general public either staying on the island or visiting for the day relies on the limited parking lots in order to enjoy the beach. The elimination of public parking in favor of the library will make it very difficult for the public to access the beach, especially the elderly, handicapped and families with children.

With respect to scenic resources, the public parking lots at 95th and 96th Streets provide visitors with a view of Stone Harbor as a gateway to the beach and Atlantic Ocean. To the right and left of the parking areas the natural elements and open plane to view the ocean are blocked by private homes. The open view corridor provided these parking areas are a public porthole on an otherwise closed landscape. Erecting a massive structure will destroy this view corridor. Additionally, the proposed library would cast a large shadow on the beach and spoil the public's enjoyment of this unique open space resource. (50, 55, 80, 125, 150, 160, 165)

RESPONSE TO COMMENTS 496 THROUGH 504: These comments are beyond the scope of this rulemaking. The comments do not discuss or raise issues regarding the rule amendments themselves, but instead address a specific project. Any further permit application regarding the project the commenters reference would be subject to notice in the DEP Bulletin and public

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comment may be submitted at that time. However, with reference to permit applications in general under the amended rules, the Department will conduct a case-by-case analysis of any application that includes all relevant facts, and will evaluate the proposed project against each of the applicable requirements in the rules. The person submitting an application for a permit would first need to show the level of physical or visual public access that would result from strict application of the setback requirements to that development, and then would have to demonstrate that the development contains design elements that enhance physical or visual public access to the waterfront beyond that which would be afforded by strict compliance with those setback requirements that would otherwise apply. Further, the agency must show that the development would remain in compliance with N.J.A.C. 7:7E-3.50, which addresses public trust rights.

505. COMMENT: The proposed language at N.J.A.C. 7:7E-8.12(f) is vague and subject to broad interpretation. The term “public interest” is imprecise because the public interest of a particular town, borough, city or county may be at odds with the public interest of citizens in other parts of the State, or adjacent jurisdictions. Because many New Jersey towns are not resort areas, it is not only possible, but likely that the “public interest” might be viewed differently by local residents, part-time residents, and property owners without a vote in local elections (who are also New Jersey taxpayers), visitors, and vacationers. Additionally, whether a structure visually enhances a waterfront location is subjective, and the merits of its architecture are open to

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debate, while the value of an unobstructed view of the Atlantic Ocean will not generate such debate. (25, 50, 55, 96, 125, 138, 145, 150, 160, 165, 166)

506. COMMENT: The proposed beachfront library in Stone Harbor is a perfect example of why the proposal to provide an exemption to public entities under the assumption that they will only propose projects in the public interest is at best misguided and at worst a collusion between State and municipal officials. The library will obstruct beach views, cast shadows on the beach and eliminate public parking. (166)

RESPONSE TO COMMENTS 505 THROUGH 506: Although the Department's promulgation of N.J.A.C. 7:7E-8.12(f) was based partly on the belief that government agencies can be assumed to work in the public interest, the term "public interest" is not used in the rules. Whether a project is in the public interest is not part of the Department's evaluation of whether a project is eligible for exemption from setback requirements under N.J.A.C. 7:7E-8.12(f). Rather, the standard that a government agency must meet for exemption is to show that a development "contains design elements that enhance physical or visual public access to the waterfront beyond that which would be afforded by strict compliance with (d)2 above." Further, the agency must show that the development would remain in compliance with N.J.A.C. 7:7E-3.50, which addresses public trust rights. With reference to permit applications in general under the amended

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rules, the Department will conduct a case-by-case analysis of any application that includes all relevant facts, and will evaluate the proposed project against each of the applicable requirements in the rules.

Beach fees

507. COMMENT: Proposed N.J.A.C. 7:7E-8.11(x) sets forth clear standards for beach fees. The Department is commended for not changing any part of this subsection. (208)

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

508. COMMENT: To allow local officials to burden the public with potentially higher beach fees and restrict access is a bad policy. (164)

509. COMMENT: Part of the Department's new plan is to use taxpayer's money to replenish beaches that will have no access. (81)

510. COMMENT: Beaches should be free and open to the public because they are owned by the public and public money goes to replenish them. (90)

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511. COMMENT: New Jersey is one, if not the only state that allows municipalities to charge for access to the Federal lands known as oceanfront beaches. (164)

512. COMMENT: Every year a child drowns in the ocean because they go to the beach after hours when they do not have to pay a beach badge fee. That is the kind of work that should be done to improve public access. (208)

513. COMMENT: All over the world and in the United States, with the exception of New Jersey, people have access to the beach and waterfront without having to pay for a beach badge. To say that these new rules will open up more access, is a clear misrepresentation of the facts. (218)

514. COMMENT: The accounting of where beach fees go and for what they pay for needs to be more transparent. Many suspect that towns use beach fees as “cash cows” with revenue far exceeding what the town spends on beach maintenance and safety. The public should be able to access these balance sheets easily via the internet. (208)

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RESPONSE TO COMMENTS 508 THROUGH 514: By statute, municipalities are allowed to charge reasonable beach fees commensurate with the operating cost of the beach and associated amenities. N.J.S.A. 40:61-22.20. The New Jersey Department of Community Affairs, Bureau of Financial Regulation and Assistance, oversees municipal budgets, including 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

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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.

Adopted N.J.A.C. 7:7E-8.11(y), recodified without change from N.J.A.C. 7:7E-8.11(m), sets forth clear standards for beach fees.

515. COMMENT: As part of the 2006-2007 public access rulemaking, the Department was urged to conduct aggressive outreach to towns to make them understand beach fees. Beach badge checkers are typically seasonal employees and low-paid workers. They and the entire beach staff of a town need to understand that the town cannot charge for access to the resource. Some towns understand this, while others do not. For example, some beach towns allow an angler carrying nothing but fishing gear onto the beach without asking for a fee or badge, while other towns would require that same angler to purchase a beach badge. Similarly, despite the current rule being in effect for four years, some towns are still requiring persons purchasing beach badges to fill out and sign a form claiming that their beach badges are not transferrable. The Department needs to conduct seminars or provide municipalities with guidance regarding the charging of beach fees. (208)

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516. COMMENT: The transferability of badges and other attempts to restrain the abuse of fees to restrain public trust rights is supported. Until the middle of the twentieth century, beaches were free in New Jersey. 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. (see 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 access rule has emphasized the limited nature of these fees, which “shall be no greater than that which is required to operate and maintain the facility.”

Although proposed N.J.A.C. 7:7E-8.11(x) (existing N.J.A.C. 7:7E-8.11(m)) defines “legitimate” beach fee charges, there is presently no real mechanism for how fees are determined, collected or accounted for. This is an area that needs to be investigated and enforced if it is to have any real protections for the consumer, the public. All entities that charge a fee for beach access and use should be made to provide a yearly accounting of fees collected and a

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justification of the fees charged. This must apply to private as well as municipal fees collected.

(32)

RESPONSE TO COMMENT 515 AND 516: As discussed above in response to comments 508 through 514 above, adopted N.J.A.C. 7:7E-8.11(y) (proposed as N.J.A.C. 7:7E-8.11(x)) sets forth the standards for beach fees and mechanisms are in place to assure funds are not used inappropriately. In addition, as part of the coordination with municipalities in development of their Municipal Public Access Plans, the Department intends to provide education and guidance to towns regarding beach fees.

Subchapter 8A

517. COMMENT: Existing Subchapter 8A provides criteria to demonstrate compliance with the public trust rights afforded through the Public Trust Doctrine and should be retained as an added level of protection to ensure the rights of the Doctrine are not eroded. (153)

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RESPONSE: Subchapter 8A has been deleted because the majority of the content is no longer necessary in light of the adopted amendments. The substantive standards are now located at N.J.A.C. 7:7E-8.11.

MISCELLANEOUS:

518. COMMENT: The proposal Summary states, “the State needs to ensure that there is sufficient and reasonable access to beaches...” (43 N.J.R. at 772(a)) Sufficient and reasonable access should be defined. (208)

RESPONSE: As the commenter notes, the summary states “the State needs to ensure that there is sufficient and reasonable access to beaches on which to bathe, rivers and streams in which to canoe or kayak, bays in which to fish, and ports and marinas in which to conduct commerce and navigation.” The summary also references the New Jersey Supreme Court findings in *Matthews v. Bay Head Improvement Associations* that "recognizing the increasing demand for our State's beaches and the dynamic nature of the Public Trust Doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary. While the public's rights in private beaches are not co-extensive with the rights enjoyed in municipal

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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." The Department, therefore, has an obligation to ensure that the common law right is not abridged. This obligation remains even after the State has conveyed tidelands to a private owner. Therefore, the Department's role is to promote and protect the public's right to access beaches and other tidal waters in the State. Sufficient and reasonable access will be accomplished by meeting the goals and standards in the adopted rules. Accordingly, there is no need to define "sufficient and reasonable access."

519. COMMENT: "Purchasing a membership" should be added to the list of activities that have the effect of discouraging or preventing the exercise of public trust rights. (208)

RESPONSE: As stated in the Response to Comment 518, the New Jersey Supreme Court findings in *Matthews v. Bay Head Improvement Associations* recognized the increasing demand for our State's beaches and the dynamic nature of the Public Trust Doctrine and that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand at private beaches. Therefore, while beaches in the State may be

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privately owned affording those owners' rights to use their land it does not prevent the general public from exercising their public trust rights.

520. COMMENT: The commenter is opposed to beach clubs in Sea Bright and Monmouth Beach that prevent access to the beach by the public. (33)

RESPONSE: The question of public access to the beach clubs in Sea Bright was the subject of recent litigation that was resolved by settlements with the beach clubs and court decisions that resulted in increased public access to those beaches.

Global warming

521. COMMENT: Tidal areas are important resources that are in flux. Any discussion of tidal areas must consider global warming. A recent report noted that global warming may submerge sections of the 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

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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. (32)

RESPONSE: Municipal Public Access Plans must be reviewed and approved by the Department. In addition, the Department is adopting the change proposed in the notice of proposed substantial changes on adoption (44 N.J.R. at 614(a)), to delete the six-year expiration date and the requirement for municipalities to renew their plans. Instead, municipalities will be required to report on the success or failure of their approved plan every five years after the date of adoption of the Municipal Public Access Plan into the municipal Master Plan. Since the effect of sea level rise may vary from site to site, these reports will allow the Department to evaluate any impacts to public access caused by any rise in sea level on a site by site basis.

Mitigation

522. COMMENT: In order to meet the public access rule requirements, mitigation may be required under other State or Federal regulations. While public access is commendable, expending additional public dollars related to permitting and mitigation in order to provide

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public access is not supported. Consideration and flexibility should be provided in excusing other mitigation requirements where warranted in order to provide a public benefit, such as these rules purport. If property is purchased for wetland or riparian mitigation and deed restricted, it should satisfy the public access requirement depending upon its location and accessibility. For example, the mitigation site may provide visual and/or physical access, by boat. (72)

RESPONSE: The public has a right to access tidal waters for activities such as fishing, swimming, boating and surfing and public entities have a responsibility to maintain the public's access to these waterways and to mitigate for any development that prevents or limits access to tidal waters. If this requires expenditure of public funds, then such expenditures are appropriate.

Mitigation for wetlands and riparian zones is not the subject of these adopted public access rules; however, as evidenced by other mitigation projects approved by the Department, mitigation for more than one type of resource can be accomplished on one site when appropriate. For example, a permittee could purchase one property to satisfy both wetland mitigation and public access obligations by enhancing wetlands and building a fishing pier on a tidal waterway.

523. COMMENT: Property that is currently in use should not have to be condemned to meet the public access requirements. Public agencies should be able to provide public access on public land. In certain circumstances, this may eliminate the additional expenditure of public

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funds to purchase additional rights-of-way. The purchase of land can be quite expensive in some coastal communities. (72)

RESPONSE: The adopted rules do not limit the construction of public access to private property. Public access can be provided on public land, where appropriate.

The following comment is beyond scope of the proposal

524. COMMENT: To extend the possibility of waivers under the waiver rule will only allow for the economically affluent to make the case for removing a local access point for the supposed betterment of New Jersey as a whole simply because of the economics involved in the transaction. (39)

Summary of Agency-Initiated Changes

The Department is making a change on adoption to the coastal general permit governing the construction of certain structures related to the tourism industry at hotels and motels, commercial developments and multi-family residential developments over 75 units At N.J.A.C. 7:7-7.26(a)11, to change the number of revised site plans that an applicant is required to submit

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to the Department when a structure is located on a beach, from three copies to one copy because the Department has found that one copy is sufficient.

The Department is making changes on adoption to change “Public access rule” to “public access rule”. This capitalization correction is being adopted at N.J.A.C. 7:7E-7.2(e)5, N.J.A.C. 7:7E-7.2(f)5 and N.J.A.C. 7:7E-7.11(e)4.

The Department is making a grammatical correction at N.J.A.C. 7:7E-8.11(c)2 to remove the word “and” from the phrase “and for homeland security facilities” because it is not needed.

The Department is correcting a grammatical error at N.J.A.C. 7:7E-8.11(e)1 to change “adjacent municipality governmental body” to “adjacent municipal governmental body”.

The Department is correcting a typographical error in the phrase “Hudson Waterfront area” at N.J.A.C. 7:7E-8.11(q). The word “area” has been changed to “Area”.

The Department is correcting a typographical error in the phrase, “Northern Waterfront region” to capitalize the word, “Region” at N.J.A.C. 7:7E-8.12(d).

Federal Standards Statement

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995 c. 65) require State agencies which adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis.

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The Federal Coastal Zone Management Act (P.L. 92-583) 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 C.F.R. 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. The guidelines 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 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 new rules and amendments at N.J.A.C. 7:7E-8.11(s) will be conducted through a joint funding agreement between the State of New Jersey and the United States Army Corps of Engineers (Corps). These agreements often include local government as well. Such projects are authorized by Congress through Federal Water Resources Development Acts, generally passed annually. In a document entitled ACOE Planning Guidance Notebook Section IV– Hurricane and Storm Damage Prevention (CECW-P Engineer Regulation 1105-2-100, April 22, 2000) the Corps establishes standards for Federal participation in shore protection, paramount among them the requirement for public use of the shore protection projects. These Federal standards require that the shores be

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available for public use on equal terms to all, and for a reasonable fee. The standards cite sufficient parking facilities for the general public located reasonably nearby and with reasonable public access to the project, as requirements. The standards state that parking should be provided every one-half mile or less. The adopted amendments require the same Federally-established maximum distance of one-half mile between access points for projects to be conducted under the guidance of, and with participation by, the ACOE. Therefore, the proposed rules are as stringent as, but do not exceed, Federal standards for public access.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

CHAPTER 7 COASTAL PERMIT PROGRAM

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.

"Amusement pier" means an elevated, pile-supported structure located on a beach and/or tidal water, seaward of a bulkhead or boardwalk, and perpendicular to the mean high water line, on which amusements are located. For purposes of this definition, "amusements" includes rides,

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games of skill or chance for prizes other than cash payoffs, vendors of toys and/or other merchandise. "Amusements" also means bar and restaurant establishments and entertainment venues such as stage and band shells and associated seating areas. "Amusements" do not include games for cash payoffs.

...

7:7-7.5 Coastal general permit for amusement pier expansion

(a) This coastal general permit authorizes the expansion of an existing, functional amusement pier as defined at N.J.A.C. 7:7-1.3, provided that the expansion complies with the following:

1.-9. (No change.)

10. 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 access rule, N.J.A.C. 7:7E-8.11.

(b) (No change.)

7:7-7.6 Coastal general permit for beach and dune maintenance activities

(a) This coastal general permit authorizes beach and dune maintenance activities *[by municipal applicants with Department-approved municipal public access plans, in accordance with N.J.A.C. 7:7E-8.11(c) through (m), or by non-municipal applicants]* provided:

1.- 3. (No change from proposal.)

(b) (No change.)

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(c) As of (three years after the effective date of this subsection), the Department shall not approve authorization under this general permit to any municipality that does not have a Department-approved municipal public access plan in accordance with N.J.A.C. 7:7E-8.11(c) through (m).

7:7-7.7 Coastal general permit for voluntary reconstruction of certain residential or commercial development

(a) This coastal general permit authorizes the voluntary reconstruction of a non-damaged legally constructed, currently habitable residential or commercial development landward of the existing footprint of development provided:

1.-7. (No change.)

8. 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 access rule, N.J.A.C. 7:7E-8.11.

(b) (No change.)

7:7-7.8 Coastal general permit for the development of a single family home or duplex

(a) - (f) (No change.)

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(g) *[Except as provided in (g)1 below, public]* ***Public*** access shall be provided in accordance with ***the public trust rights rule, N.J.A.C. 7:7E-3.50, and*** the public access rule, N.J.A.C. 7:7E-8.11.

[1. 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.]

(h) - (o) (No change.)

7:7-7.9 Coastal general permit for the expansion, or reconstruction (with or without expansion), of a single family home or duplex

(a) - (f) (No change.)

(g) *[Except as provided in (g)1 below, public]* ***Public*** access shall be provided in accordance with ***the public trust rights rule, N.J.A.C. 7:7E-3.50, and*** the public access rule, N.J.A.C. 7:7E-8.11.

*[1. 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,

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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.]*

(h) - (o) (No change from proposal.)

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.)

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 access rule, N.J.A.C. 7:7E-8.11.

(b) (No change.)

7:7-7.11 Coastal general permit for the construction of a revetment at a single family home or duplex lot

(a) - (b) (No change from proposal.)

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(c) *[Except as provided in (c)1 below, public]* ***Public*** access shall be provided in accordance with ***the public trust rights rule, N.J.A.C. 7:7E-3.50, and*** the public access rule, N.J.A.C. 7:7E-8.11.

[1. 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.]

(d) (No change.)

7:7-7.12 Coastal general permit for the construction of gabions at a single family/duplex lot

(a) - (b) (No change.)

(c) *[Except as provided in (c)1 below, public]* ***Public*** access shall be provided in accordance with ***the public trust rights rule, N.J.A.C. 7:7E-3.50, and*** the public access rule, N.J.A.C. 7:7E-8.11.

*[1. 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,

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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.]*

(d) (No change.)

7:7-7.13 Coastal general permit for the construction of support facilities at legally existing and operating marinas

(a)-(b) (No change.)

(c) The construction of support facilities listed at (b)1 through 7 above shall also comply with the following:

1. (No change.)

2. 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 access rule, N.J.A.C. 7:7E-8.11;

3.-5. (No change.)

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(d) (No change.)

7:7-7.14 Coastal general permit for reconstruction of a legally existing functioning bulkhead

(a) (No change.)

(b) The reconstruction of a legally existing bulkhead as described in (a) above is acceptable provided that:

1. (No change.)

2. *[Except as provided in (b)2i below, public]****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 access rule, N.J.A.C. 7:7E-8.11.

[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.]

3. - 7. (No change.)

(c) (No change.)

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7:7-7.17 Coastal general permit for the construction of recreational facilities at public parks

(a) (No change.)

(b) 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 access rule, N.J.A.C. 7:7E-8.11.

(c) (No change.)

7:7-7.18 Coastal general permit for bulkhead construction and placement of associated fill

(a) This coastal general permit authorizes the construction of a bulkhead and associated fill at a single family/duplex lot on a natural water body provided that the proposed bulkhead complies with the following:

1. - 10. (No change.)

11. *[Except as provided in (a)11i below, public]* ***Public*** access shall be provided in accordance with ***the public trust rights rule, N.J.A.C. 7:7E-3.50, and*** the public access rule, N.J.A.C. 7:7E-8.11.

*[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,

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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) - (c) (No change.)

7:7-7.24 Coastal general permit for the legalization of the filling of tidelands

(a) This coastal general permit authorizes the legalization of the filling of any lands formerly flowed by the tide provided:

1.-2. (No change.)

3. 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 access rule, N.J.A.C. 7:7E-8.11;

(b)-(c) (No change.)

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7:7-7.26 Coastal general permit for the construction of certain structures related to the tourism industry at hotels and motels, commercial developments and multi-family residential developments over 75 units

(a) This coastal general permit authorizes the construction of structures such as equipment storage containers and sheds, stage platforms, bleachers, portable restrooms, food concession stands, gazebos, lockers, canopied shelters, and wooden walkways related to the tourism industry, at hotels and motels, commercial developments and multi-family residential developments over 75 units provided that:

1. Except as provided in i. below, the structure remains in place only from May 1 through October 31;

i. Underground utilities, floor decking, open drink and food concession stand shells, and stage shells may remain in place on a year-round basis;

2. All structures authorized by this general permit that are located on a beach, except underground utilities, shall be immediately removed from the beach and relocated to a secure place at any time that the National Weather Service issues a Severe Weather Alert for the municipality in which the development is located, for significant weather events, such as Coastal Flood Warning, Extreme Wind Warning, Hurricane Warning, Tornado Warning or Tropical

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Storm Warning, that would directly affect structures left on the beach, until the Severe Weather Alert is lifted.

3.-9. (No change in text.)

10. 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 access rule, N.J.A.C. 7:7E-8.11; and

11. Where the structure(s) is located on a beach, for each year of the duration of the permit, the permittee shall submit on or before April 1st to the Department for its review and approval [three] *one* [copies] *copy* of a revised site plan, dated no more than 30 days prior to the submittal, including supplemental documents as appropriate, showing:

i.– ii. (No change.)

(b)–(c) (No change.)

7:7-7.29 Coastal general permit for habitat creation and enhancement activities

(a)–(e) (No change.)

(f) 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 access rule, N.J.A.C. 7:7E-8.11.

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(g)-(h) (No change.)

CHAPTER 7E

COASTAL ZONE MANAGEMENT

7:7E-1.8 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

...

"Amusement pier" means an elevated, pile-supported structure located on a beach and/or tidal water, seaward of a bulkhead or boardwalk, and perpendicular to the mean high water line, on which amusements are located. For purposes of this definition, "amusements" includes rides, games of skill or chance for prizes other than cash payoffs, vendors of toys and/or other merchandise. "Amusements" also means bar and restaurant establishments and entertainment venues such as stage and band shells and associated seating areas. "Amusements" do not include games for cash payoffs."

...

"Critical infrastructure" means the same as "Homeland security facility."

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"Dwelling unit" means a house, townhouse, apartment, cooperative, condominium, cabana, hotel or motel room, a patient/client room in a hospital, nursing home or other residential institution, mobile home, campsite for a tent or recreational vehicle, floating home, or any other habitable structure of similar size and potential environmental impact, except that dwelling unit shall not mean a vessel as defined in section 2 of P.L. 1962, c.73 (N.J.S.A. 12:7-34.37).

...

"Homeland security facility" means any facility deemed by the ***Department in consultation with the*** New Jersey Office of Homeland Security and Preparedness or the ***[Federal]* *United States*** Department of Homeland Security to be either critical in nature or a key resource. These facilities may include, but are not limited to, airports and military facilities, ***certain*** transportation infrastructure, and certain chemical or energy facilities and utilities, marine terminal or transfer facilities, and freight or passenger rail lines.

...

"Industrial development" means a development that involves a manufacturing or industrial process, and shall include, but is not limited to, electric power production, food and food by-product processing, paper production, agri-chemical production, chemical processes, storage facilities, metallurgical processes, mining and excavation processes, and processes using mineral products.

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...

"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. 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.

"Parcel" means the totality of all ***contiguous*** lots under common ownership *[upon which an existing development is located]* on April 4, 2011.

...

"Public development" means a solid waste facility, including incinerators and landfills, wastewater treatment plant, public highway, airport including single or multi-air strips, an above or underground pipeline designed to transport petroleum, natural gas, or sanitary sewage, and a public facility, and shall not mean a seasonal or temporary structure related to the tourism industry, an educational facility or power lines. "Public development" does not have to be publicly funded or operated.

...

"Redevelopment" means the development of a previously developed site that has been inactive, underutilized, or abandoned for 5 years or less.

...

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"Residential development" means a development that provides one or more dwelling units.

7:7E-3.22 Beaches

(a)-(b) (No change.)

(c) Public access shall be provided in accordance with the lands and waters subject to public trust rule, N.J.A.C. 7:7E-3.50, and the public access rule, N.J.A.C. 7:7E-8.11.

(d) (No change.)

7:7E-3.23 Filled water's edge

(a)-(h) (No change.)

(i) On all filled water's edge sites, development must comply with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public access rule, N.J.A.C. 7:7E-8.11.

(j) (No change.)

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7:7E-3.43 Special urban areas

(a)-(b) (No change.)

(c) Housing, hotels, motels and mixed use development, which is consistent with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, the public access rule, N.J.A.C. 7:7E-8.11, and the Hudson River Waterfront Area rule, N.J.A.C. 7:7E-3.48, where applicable, are acceptable only over large rivers where water dependent uses are demonstrated to be infeasible. These uses are conditionally acceptable on structurally sound existing pilings, or where at least one of the following criteria is met:

1.-3. (No change.)

(d) Housing, hotels, motels and mixed use development are acceptable in filled water's edge areas, provided that development is consistent with the filled water's edge rule at N.J.A.C. 7:7E-3.23 and public access is 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 access rule, N.J.A.C. 7:7E-8.11.

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(e) (No change.)

7:7E-3.48 Hudson River Waterfront Area

(a) - (b) (No change.)

(c) Hudson River Waterfront Area development shall be consistent with all other applicable Coastal Zone Management rules with particular attention given to N.J.A.C. 7:7E-3.40, Public open space, N.J.A.C. 7:7E-3.41, Special hazards areas, N.J.A.C. 7:7E-3.43, Special urban areas, N.J.A.C. 7:7E-3.50, Lands and waters subject to public trust rights, N.J.A.C. 7:7E-7.14, High rise structures, N.J.A.C. 7:7E-8.11, Public access, *[specifically N.J.A.C. 7:7E-8.11(a), (n)3i, 4i and 5,]* N.J.A.C. 7:7E-8.12, Scenic resources and design, and N.J.A.C. 7:7E-8.4, Water quality.

(d) – (f) (No change from proposal.)

7:7E-3.50 Lands and waters subject to public trust rights

(a) (No change from proposal.)

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(b) *[Except for the Hudson River Waterfront Area, public]* **Public** access to lands and waters subject to public trust rights shall be provided in accordance with the public access rule, N.J.A.C. 7:7E-8.11. *[Public access to lands and waters subject to public trust rights in the Hudson River Waterfront Area shall be provided in accordance with the Hudson River Waterfront Area rule, N.J.A.C. 7:7E-3.48.]* Development that does not comply with N.J.A.C. 7:7E-8.11, Public access, *[or with N.J.A.C. 7:7E-3.48 in the Hudson River Waterfront Area,]* is discouraged in lands and waters subject to public trust rights.

(c) (No change from proposal.)

7:7E-7.2 Housing use rules

(a) (No change.)

(b) Standards relevant to water area and water's edge housing are as follows:

1. (No change.)

2. In special urban areas and along large rivers where water dependent uses are demonstrated to be infeasible, new housing is also acceptable on structurally sound existing pilings, or where piers have been removed as part of the harbor clean up program, the equivalent pier area may be replaced in the same or another location.

i.-ii. (No change.)

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iii. New housing acceptable under this rule shall be consistent with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public access rule, N.J.A.C. 7:7E-8.11.

3. Housing is conditionally acceptable in the filled water's edge, provided that it meets the requirements of the Filled Water's Edge rule, N.J.A.C. 7:7E-3.23, lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public access rule, N.J.A.C. 7:7E-8.11. The residential development shall comply with the requirements for impervious cover and vegetative cover that apply to the site under N.J.A.C. 7:7E-5 and either N.J.A.C. 7:7E-5A or 5B, except on bay islands where the requirements of the Bay Island rule (N.J.A.C. 7:7E-3.21) shall apply.

4.-7. (No change.)

(c)-(d) (No change.)

(e) Standards relevant to the development of a single family home or duplex and/or accessory development (such as garages, sheds, pools, driveways, grading, excavation, filling, and clearing, excluding shore protection structures) which does not 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, and provided the single family home or duplex and accessory development are located landward of the mean high water line are as follows:

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1.-4. (No change.)

5. Public access shall be provided in accordance with the [P]*p*ublic access rule, N.J.A.C. 7:7E-8.11.

6.- 13. (No change.)

(f) Standards relevant to the expansion, or reconstruction (with or without expansion) of a legally constructed habitable single family home or duplex and/or accessory development (such as garages, sheds, pools, driveways, grading, excavation, filling, and clearing, excluding shore protection structures) which does not 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, and provided the single family home or duplex and accessory development are located landward of the mean high water line are as follows:

1.- 4. (No change.)

5. Public access shall be provided in accordance with the [P]*p*ublic access rule, N.J.A.C. 7:7E-8.11.

6.-13. (No change.)

(g) (No change.)

7:7E-7.3 Resort/Recreational Use

(a)-(c) (No change.)

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(d) Standards relevant to marinas are as follows:

1. (No change.)

2. New marinas or expansion or renovation (including, but not limited to, dredging, bulkhead construction and reconstruction, and relocation of docks) of existing marinas for recreational boating are conditionally acceptable if:

i.-iii. (No change.)

iv. New marina facilities and expansions and renovation of existing marinas shall provide public access in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and public access rule, N.J.A.C. 7:7E-8.11.

3.-11. (No change.)

(e) Standards relevant to amusement piers, parks and boardwalks are as follows:

1. New amusement piers are prohibited, except in areas with privately held riparian grants, where they are discouraged. Expanded or extended amusement piers, parks, and boardwalks at the water's edge or in the water, and the on-site improvement or repair of existing amusement piers, parks and boardwalk areas are discouraged unless the proposed development meets the following conditions:

i.– v. (No change.)

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vi. 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;

2. The expansion of a pier qualifying for a General Permit under N.J.A.C. 7:7-7 is acceptable.

3. Rationale: See the OAL Note at the beginning of this subchapter.

7:7E-7.4 Energy facility use rule

(a) (No change.)

(b) Standards relevant to siting of new energy facilities, including all associated development activities, are as follows:

1.-2. (No change.)

3. 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 access rule, N.J.A.C. 7:7E-8.11; and

4. (No change.)

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(c)-(s) (No change.)

7:7E-7.7 Industry Use rule

(a) (No change.)

(b) Industrial uses are encouraged in special urban areas. Elsewhere, industrial uses are conditionally acceptable provided they comply with all applicable location and resource rules. Particular attention should be given to Location rules which reserve the water's edge for water dependent uses (N.J.A.C. 7:7E-3.16 and 7:7E-3.32); to the Buffers and compatibility of uses rule N.J.A.C. 7:7E-8.13, which requires that the use be compatible with existing uses in the area or adequate buffering be provided; and the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and public access rule, N.J.A.C. 7:7E-8.11, which places public access requirements upon the use.

(c)-(g) (No change.)

7:7E-7.11 Coastal engineering

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(a)-(c) (No change.)

(d) Standards relevant to beach nourishment are as follows:

1. Beach nourishment projects, such as non-structural shore protection measures, are encouraged, provided that:

i.-iii. (No change.)

iv. Public access to the nourished beach is provided in accordance with the lands and waters subject to the public trust rights rule, N.J.A.C. 7:7E-3.50, and the public access rule, N.J.A.C. 7:7E-8.11.

2. (No change.)

(e) Standards relevant to structural shore protection are as follows:

1.-3. (No change.)

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4. Public access to the shore protection project is provided in accordance with the Lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50 and the [P]*p*public access rule, N.J.A.C. 7:7E-8.11.

5.-6. (No change.)

7:7E-8.11 Public access

(a) Public access to the waterfront is the ability of the public to pass physically and visually to, from, and along tidal waterways and their shores and to use such shores, waterfronts and waters for activities such as navigation, fishing, and recreational activities including, but not limited to, swimming, sunbathing, surfing, sport diving, bird watching, walking, and boating. Public accessways and public access areas include streets, paths, trails, walkways, easements, paper streets, dune walkovers/walkways, piers and other rights-of-way. *[Public access for the “Hudson River Waterfront Area” shall be provided in accordance with N.J.A.C. 7:7E-3.48 except for ports and certain existing industrial, public, and homeland security facilities for which access is not required in accordance with N.J.A.C. 7:7E-8.11(n)3i, 4i and 5.]* 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 accordance with N.J.A.C. 7:7E-3.50. Further, no

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authorization or approval under this chapter shall be considered a Tidelands approval or shall exempt an applicant from the obligation to obtain a Tidelands approval, if needed.

(b) In addition to the broad coastal goals outlined at N.J.A.C. 7:7E-1.1(c), public access shall be provided in a manner designed to achieve the following ***public access goals***:

1. All levels of government in New Jersey shall seek to create and enhance opportunities for public access to tidal waterways and their shores, on a non-discriminatory basis;

2. All existing public access to, and along tidal waterways and their shores shall be maintained to the maximum extent practicable;

3. New development shall provide opportunity for public access to tidal waterways and their shores on or offsite;

***i. Public access proposed by an applicant may include any one or combination of the following:**

(1) A public accessway designed in accordance with (x) below, located parallel to the shoreline with perpendicular access;

(2) A boat ramp, pier, fishing, or other direct access to the waterway;

(3) A waterfront pocket park;

(4) Public restrooms to accommodate those utilizing public access; and/or

(5) Additional public parking to accommodate those utilizing public access;

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ii. Public access proposed by an applicant shall incorporate, to the maximum extent practicable, fishing access and associated amenities, including parking that accommodates nighttime fishing for a reasonable duration of time, on or adjacent to tidal waterways and their shores. In the case of a beach, fishing access shall not be required in areas designated for swimming during hours designated for swimming.*

4. Public access to tidal waterways and their shores shall be provided in such a way that it shall not create conditions that may be reasonably expected to endanger public health or safety, or damage the environment. To that end, public access may be restricted seasonally, hourly, or in scope (for example, access restricted to a portion of the property, or access allowed for fishing*[,]* but not swimming due to consistent strong currents); and

5. Public access to tidal waterways and their shores shall be provided in such a way that it shall not create a significant homeland security vulnerability*, **as determined by the Department in consultation with the New Jersey Office of Homeland Security and Preparedness or the United States Department of Homeland Security***. Therefore, public access may be prohibited in locations where homeland security concerns are present or where it is not practicable based on the risk of injury from hazardous operations or substantial permanent obstructions, and no measures can be taken to avert these risks.

(c) Development proposed on sites which are located on or adjacent to tidal waterways and their shores shall provide public access ***in accordance with (c)1 through 4 below***.

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[Public access in the Hudson River Waterfront Area, as described at N.J.A.C. 7:7E-3.48(a), shall be provided in accordance with N.J.A.C. 7:7E-3.48. Public access for development in other areas shall be provided as follows:] ***Municipalities are encouraged to develop and submit to the Department an application for approval of a Municipal Public Access Plan. Public transportation agencies and counties are encouraged to submit to the Department an application for approval of a Transportation Public Access Plan.***

1. In municipalities ***from*** which ***[have received Department approval of a Municipal Public Access Plan in accordance with (d) through (m) below]*** ***the Department has received a resolution incorporating a Department-approved Municipal Public Access Plan into the municipality's Master Plan in accordance with (k) below*** on or before the date of receipt of a permit application by the Department, public access requirements shall be satisfied in accordance with the Municipal Public Access Plan;

2. In municipalities ***[that do not have an approved Municipal Public Access Plan]*** ***from which the Department has not received a resolution incorporating a Department-approved Municipal Public Access Plan into the municipality's Master Plan in accordance with (k) below*** on or before the date of receipt of a permit application by the Department, access shall be provided in accordance with (n) below, for commercial, residential, industrial and public development, [and] for homeland security facilities ***and ports***. Coastal permit

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applications shall include a project specific access plan that provides for public access in accordance with all applicable requirements; and

3. In all municipalities, regardless of whether **[there is a Department approved Municipal Public Access Plan]** ***the Department has received a resolution incorporating a Department-approved Municipal Public Access Plan into the municipality's Master Plan in accordance with (k) below***, access shall be provided in accordance with **[(o)]* *(p)** below for marinas, **[(p)]* *(q)** below for piers, **[(q)]* *(r)** below for beach and dune maintenance activities, and **[(r)]* *(s)** below for shore protection projects. Coastal permit applications shall include a project specific access plan that provides for public access in accordance with all applicable requirements.

4. In all municipalities, regardless of whether the Department has received a resolution incorporating a Department-approved Municipal Public Access Plan into the municipality's Master Plan in accordance with (d) below, public access for public highways shall be provided in accordance with (o) below.

(d) **[Municipalities are encouraged to develop and submit to the Department an application for approval of a Municipal Public Access Plan complying with the requirements of (e) through (m) below.]** Municipal Public Access Plans shall satisfy the goals specified at N.J.A.C. 7:7E-1.1(c) and ***the public access goals at (b) above**[,]**. Municipal Public Access Plans shall additionally meet the requirements at (d)1 through 4 below,*** as well as

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all other requirements of this section. *[Municipal Public Access Plans shall not provide for access that is contrary to any requirement contained in this chapter (for example, access that encroaches upon threatened or endangered species habitat or is in violation of the dunes rules).]*

***1. Municipal Public Access Plans shall incorporate fishing access and associated amenities, including parking that accommodates nighttime fishing for a reasonable duration of time, to the maximum extent practicable on or adjacent to tidal waterways and their shores. In the case of a beach, fishing access shall not be required in areas designated for swimming during hours designated for swimming.**

2. Municipal Public Access Plans shall require public access along the Hudson River and on adjacent piers in the Hudson River Waterfront Area as defined at N.J.A.C. 7:7E-3.48(a)2 consistent with N.J.A.C. 7:7E-3.48(d) and (e).

3. Municipal Public Access Plans shall require installation and maintenance of appropriate public access signage in accordance with N.J.A.C. 7:7E-8.11(u).

4. Municipal Public Access Plans shall not provide for access that is contrary to any requirement contained in this chapter (for example, access that encroaches upon threatened or endangered species habitat or is in violation of the dunes rules).*

(e) A municipality seeking approval of a Municipal Public Access Plan shall file an application for approval with the Department. The application shall include a proposed Municipal Public Access Plan consisting of the following elements:

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1. A statement describing the overall goal of the Municipal Public Access Plan and the administrative mechanisms (for example, conservation restrictions, easements, ordinances) that either are already in place, or that shall be put in place to ensure that the municipality will provide permanently protected access to the water and, water dependent and water oriented activities along all tidal waterways and their shores within the municipal boundaries. If the Municipal Public Access Plan proposes to provide access to the same waterway outside of municipal boundaries through a joint effort with a county or adjacent [municipality]*municipal* governmental body, the statement shall include a description of the administrative mechanisms that will ensure access through that effort will be permanently protected;

2. A statement of consistency with any applicable provisions of the municipal Master Plan;

3. A public access needs assessment that evaluates:

i. Existing access points or locations providing perpendicular access to tidal waterways and their shores within the municipality;

ii. Existing water dependent and water oriented activities that provide public access to tidal waterways and their shores within the municipality;

iii. Existing practical limitations to public access. *[Alternatives to address any limitations determined to exist shall be provided, where feasible.]* Examples of practical limitations include, but are not limited to, a lack of restrooms or parking, ***including restrictions**

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on parking availability and duration,* which could effectively limit the public's access to tidal waterways and their shores*. **Alternatives to address any limitations determined to exist shall be provided, where feasible*;** and

iv. The need for additional locations to provide perpendicular access to tidal waterways and their shores within the municipality;

4. A digital map and inventory identifying:

i. All tidal waterways and their shores within the municipality and all lands held by the municipality adjacent thereto;

ii. All existing and proposed public accessways to tidal waterways and their shores including, but not limited to, streets, roads, paths, trails, easements, paper streets, dune walkovers/walkways, and public dedicated rights-of-way held by the municipality;

iii. All proposed public access facilities, including, but not limited to, public accessways located parallel to the shoreline with perpendicular access; boat ramps, piers, or other direct access to the waterway; sitting/observation areas; public restrooms; off and on-street parking; and

iv. Those facilities identified in (e)4ii and iii above that are compliant with the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 et seq.);

5. An implementation strategy that:

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i. Describes the forms of public access proposed in order to satisfy the need for public access as determined by the public access needs assessment, while taking into account the population, anticipated demand and local availability of alternatives;

ii. Provides a comprehensive list of public access projects and initiatives to be undertaken along with an implementation schedule;

iii. Identifies proposed tools to implement the municipal public access plan measures, including, but not limited to, the adoption or amendment of municipal ordinances, the creation of a Public Access Fund established in accordance with (f) below to be used solely for the development and *[maintenance]* ***enhancement*** of public access, and the development of other municipal programs that ensure reasonable access to the water, and water dependent and water oriented activities along all tidal waterways and their shores;

(1) If the Municipal Public Access Plan includes a provision for monetary compensation in lieu of onsite public access in accordance with (f) below, this portion of the plan shall specify ***the location and/or* type of uses*, for example, residential, commercial, industrial, homeland security, and/or public highways,*** for which a monetary contribution shall be required*[, for example residential, commercial, industrial, and/or homeland security]*;

iv. Identifies and, as necessary, proposes modifications to existing plans, ordinances and programs necessary to implement the Municipal Public Access Plan;

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v. For municipalities *[subject]* ***conducting a shore protection project pursuant*** to *(r)* *(s)* below, identifies how the municipality proposes to provide access points to achieve compliance with that subsection;

vi. Identifies and, as necessary, proposes modifications to existing plans, ordinances and programs necessary to implement the Municipal Public Access Plan;

v. For municipalities *[subject]* ***conducting a shore protection project pursuant*** to (r) below, identifies how the municipality proposes to provide access points to achieve compliance with that subsection;

vi. Provides an estimate of the cost of implementing, constructing and maintaining the access facilities proposed in the plan and specifies how this cost will be funded;

vii. Provides a schedule for implementation of the municipal public access plan;

viii. Identifies ordinances already in place or to be adopted requiring appropriate signage and placement of signage for public access areas;

ix. Identifies measures to be implemented to permanently protect the public access identified in the plan through the required recording of conservation easements/restrictions, or, for municipally owned properties providing public access, through placement of the property providing access on the municipal Recreation and Open Space Inventory (ROSI) (see Green Acres Program rules at N.J.A.C. 7:36-6.5, Recreation and Open Space Inventory submissions);

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x. Provides examples and/or model(s) of existing and proposed conservation easements/restrictions that preserve all public access identified in the municipal public access plan, to protect the access in perpetuity; and

xi. Includes a draft resolution for incorporating the Department-approved, Municipal Public Access Plan into a Master Plan element (for example, the land use, recreation, and/or conservation plan element).

6. Documentation of any public meetings held by the municipality to accept comments on the proposed Municipal Public Access Plan.

(f) A Municipal Public Access Plan may require a monetary contribution to be used to provide ***new or enhanced*** public access elsewhere in the municipality or outside the municipal boundaries along the same waterway as part of a joint project with a county or adjacent municipal governmental body in lieu of onsite public access. Municipalities that require a monetary contribution shall establish a dedicated Public Access Fund into which all funds collected shall be deposited. A Municipal Public Access Plan containing a monetary contribution requirement shall specify the circumstances in which such contribution will be required in accordance with (e)5iii(1) above. *[If a monetary contribution in lieu of onsite public access is included in a Municipal Public Access Plan]*

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1. For projects other than linear projects, the amount of the contribution shall be based upon a determination of the costs that would be incurred if land was purchased for creating access and the access was provided in the form of a walkway, using the following formula:

$$\text{Total Contribution} = \text{TWC} + \text{LAC}$$

where:

TWC = total walkway cost

LAC = land acquisition cost

[1.] *i. The TWC is calculated by first adding the length of the perpendicular access, as measured in feet along the shorter property line, running from the non-waterward property boundary to waterward property boundary, to the length of the waterfront portion of the property as measured in feet. This total accessway length is multiplied by 10 feet, the minimum walkway width (subsection ***[(w)] * (x)*** below), to give the total square feet of walkway. The TWC is determined by multiplying the total square feet of walkway by \$7.00 (approximate average cost per square foot for walkway construction).

[2.] *ii. The LAC is calculated by dividing the equalized assessed *land* value of the property by the total square footage of the property and multiplying the resulting value per square foot by the total square footage of the walkway utilized in calculating TWC ***in (f)li above***. “Equalized assessed ***land*** value” means the assessed value of a property divided by

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the current average ratio of assessed to true value for the municipality in which the property is situated, as determined in accordance with N.J.S.A. 54:1-35 et seq.

[3.] *iii.* For example, the total contribution for a 10,000 square foot property with a perpendicular access length of 50 feet, a total *[water frontage]* ***length of the waterfront portion of the property*** of 100 feet and an equalized assessed ***land*** value of \$300,000 would be calculated as follows:

Total Walkway Cost:

Length of perpendicular access		50 ft.
Length of *[access parallel to shore]* *waterfront portion of property*		
+ 100 ft.		
<hr/>		
Total linear feet		150 ft.
Minimum walkway width (feet)	x	10 ft.
<hr/>		
Total square feet of walkway		1,500 sq. ft.
Total walkway cost (1,500 sq. ft. x \$7.00)		\$10,500

Land Acquisition Cost

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Equalized assessed land value of property		\$300,000
Lot size	÷	10,000 sq. ft.
<hr/>		
Cost per sq. ft.		\$30.00/sq. ft.

Land acquisition (\$30.00/sq. ft. x 1,500 sq. ft. total walkway) \$45,000

Total Contribution = \$10,500 + \$45,000 = \$55,500

***2. For linear projects, other than projects of the New Jersey Department of Transportation which shall provide public access in accordance with (o) below, the amount of contribution shall be based upon a determination of the costs that would be incurred if land was purchased for creating access and the access was provided in the form of a walkway, using the following formula:**

$$\text{Total Contribution} = \text{TWC} + \text{LLAC}$$

where:

TWC = total walkway cost

LLAC = linear land acquisition cost*

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***i. The TWC is calculated by first adding the length of the perpendicular access, as measured in feet along the right-of-way from the first non-waterward public road to the waterward portion of the property as measured in feet or one-quarter mile, whichever is less, to the width of the right-of-way along the waterfront. This total access way length is multiplied by 10 feet, the minimum walkway width (subsection (w) below), to give the total square feet of walkway. The TWC is determined by multiplying the total square feet of walkway by \$7.00 (approximate average cost per square foot for walkway construction).**

ii. The LLAC is calculated by dividing the equalized assessed land value, as defined at (f)1ii above, of all waterfront lots located within one-half mile upstream and downstream from the right-of-way centerline at the location where the linear project crosses the water body by the total square footage of all waterfront lots located within one-half mile upstream and downstream from the right-of-way centerline at the location where the linear project crosses the water body and multiplying the resulting value by the total square footage of the walkway utilized in calculating TWC in (f)2i above.*

(g) A Municipal Public Access Plan shall not ***[include]* *require***:

[1. Onsite public access requirements in excess of those that would be required under this chapter in the absence of an approved municipal public access plan;]

[2.]* *1.* Public access ***[requirements]* *along the Hudson River in the Hudson River Waterfront Area as defined at N.J.A.C. 7:7E-3.48(a)2 ***inconsistent with N.J.A.C. 7:7E-****

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3.48(e)*. Public access **[requirements]** ***elsewhere*** in the Hudson River Waterfront Area shall be governed by **[N.J.A.C. 7:7E-3.48]** ***this section***;

[3.] ***2.*** Public access **[requirements]** at marinas, as defined at N.J.A.C. 7:7E-7.3(d)1. Public access requirements at marinas shall be governed by **[(o)]** ****(p)**_below;** **[or]**

[4.] ***3.*** Public access **[requirements]** at piers. Public access requirements at piers shall be governed by **[(p)]** ****(q)** below**[.]***;**

***4. Public access at existing commercial development that is not classified as “new commercial development” pursuant to (n)1ii below. Public access requirements at existing commercial development shall be governed by (n)1i below;**

5. Public access at existing residential development or new residential development where the development consists solely of the construction of one single family home or duplex not in conjunction with a previous development. Public access requirements at existing residential development shall be governed by (n)2i below. Public access at new residential development, consisting solely of the construction of one single family home or duplex not in conjunction with a previous development, shall be governed by (n)2ii below;

6. Public access at existing industrial or public development. Public access requirements at existing industrial or public development shall be governed by (n)3i below;

7. Public access at existing homeland security facilities. Public access requirements at existing homeland security facilities shall be governed by (n)4i below; or

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8. Public access at existing or new ports. Public access requirements at ports shall be governed by (n)5 below.*

(h) A municipality filing an application for approval of a Municipal Public Access Plan pursuant to (e) above shall provide a full copy of the submittal to the county planning board for the county within which the municipality is located as well as to any regional planning entities with jurisdiction over any portion of the municipality affected by the Municipal Public Access Plan. If the municipality filing an application for approval of a Municipal Public Access Plan has proposed, as a component of the plan, any joint projects with ***one or more*** neighboring ***[municipality]* *municipalities***, a full copy of the submittal shall also be provided to ***[that]* *the*** neighboring municipality***(s)*** and the county planning board for the county within which the neighboring municipality***(s)*** ***[is]* *are*** located should ***[that]* *the*** municipality***(s)*** be located in a different county.

(i) The Department shall review ***[the draft]* *an application for approval of a*** Municipal Public Access Plan ***[and supporting documents]*** to determine whether the plan is consistent with ***the broad coastal goals described at*** N.J.A.C. 7:7E-1.1(c), the ***[standards and]*** goals for public access at (b) above and all other requirements of this section. ***[The Department shall notify the applicant in writing of its determination and will publish notice in the New Jersey Register and the DEP Bulletin.]***

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***1. Upon receipt of an application for approval of a Municipal Public Access Plan that meets the requirements of (e) above, the Department shall seek public comment on the application by:**

i. Posting the proposed Municipal Public Access Plan on the Department's website;

ii. Notifying by email individuals who have requested notice of applications for approval of Municipal Public Access Plans; and

iii. Publishing notice in the DEP Bulletin.

2. The Department shall accept public comments on the proposed application for approval of a Municipal Public Access Plan for 30 days following publication of the notice in the DEP Bulletin.

3. After the close of the public comment period, the Department may request revisions to the proposed Municipal Public Access Plan.

4. If revisions are requested, the Department shall, in writing, notify the municipality within 60 days of receipt of the revisions that the proposed Municipal Public Access Plan either:

i. Satisfies the requirements of this section and is approved; or

ii. Does not satisfy the requirements of this section and is not approved with explanation.

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5. If no revisions are requested by the Department, the Department shall, in writing, notify the municipality within 60 days of the end of the public comment period that the proposed Municipal Public Access Plan either:

- i. Satisfies the requirements of this section and is approved; or**
- ii. Does not satisfy the requirements of this section and is not approved with explanation.**

6. The Department shall provide notice of its determination under (i)4 or 5 above by:

- i. Posting on the Department's website;**
- ii. Notifying by email individuals who have requested notice of applications for approval of Municipal Public Access Plans; and**
- iii. Publishing the determination in the DEP Bulletin.***

(j) A municipality which has received approval of a Municipal Public Access Plan shall as a condition of the approval:

1. Initiate action necessary to incorporate the ***Department-***approved Municipal Public Access Plan into the municipality's Master Plan; ***[and]***

***2. Notify the Department two weeks in advance of the dates and times of any scheduled public meetings on the Department-approved Municipal Public Access Plan. The Department shall post the meeting information on its website and notify by email**

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individuals who have requested notice of applications for approval of Municipal Public Access Plans;*

[2.]* *3. Upon adoption of the Municipal Public Access Plan into the municipal Master Plan, provide the Department with a copy of an approved resolution incorporating the ***[DEP]* *Department-***approved Municipal Public Access Plan into the Master Plan***[.]**;**
and

4. Five years after the date of adoption of the Municipal Public Access Plan into the municipal Master Plan, and every five years thereafter, submit to the Department a report detailing:

i. The status of all projects that have been undertaken in accordance with the Municipal Public Access Plan;

ii. All monies received into the municipality's dedicated Public Access Fund and an accounting of all expenditures of those monies; and

iii. Any problems encountered in pursuit of the plan's objectives and goals and proposed remedies to assure the objectives and goals of the plan are met.*

(k) Upon receipt by the Department of the resolution incorporating the approved Municipal Public Access Plan into the municipality's Master Plan, public access required to satisfy the conditions of a ***[Department]* *coastal*** permit for development in the municipality for permit applications filed with the Department subsequent to the Department's receipt of the

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resolution shall be provided in accordance with the Municipal Public Access Plan. ***The Department shall include on the posted Department-approved Municipal Public Access Plan the date of receipt of the resolution.***

(l) Department review and approval is required before a municipality may make changes to an approved Municipal Public Access Plan that impact the location or type of access to be provided, or that institute or amend the terms of a contribution in lieu of an onsite public access requirement pursuant to (f) above. In support of a request to amend the approved plan under this subsection, the municipality shall submit to the Department the approved plan with the information specified in (e) above updated to reflect the proposed change. This submission shall {provide information with reference to the requested change to the plan and shall} detail how the proposed change affects the approved plan. ***The Department shall review and make a determination on the Municipal Public Access Plan amendment request in accordance with (i) above. Upon Department approval of the amended Municipal Public Access Plan, the municipality shall comply with (j) above.***

*(m) An approved Municipal Public Access Plan shall be valid for a period of six years. However, the plan may be renewed. To obtain plan renewal, at least six months before the plan expires the municipality shall provide a copy of the expiring Municipal Public Access Plan, together with a progress report identifying:

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1. The status of all projects that have been undertaken in accordance with the existing, approved, plan since the approval or last renewal;
2. Projects not yet initiated in accordance with the plan with an explanation of why the project has not been initiated and a new proposed schedule for initiation and completion of the project;
3. Proposed amendments to the approved plan;
4. All funds received as contribution in lieu of onsite access and a detailed accounting of all expenditures of those funds; and
5. Any problems encountered in pursuit of the plan's objectives and goals and proposed remedies to assure the objectives and goals in the proposed new plan are met.]*

***(m) The Department shall revoke its approval of a Municipal Public Access Plan for good cause. Good cause includes failure to implement the Municipal Public Access Plan and/or noncompliance with the Municipal Public Access Plan such as, but not limited to, inappropriate expenditure of dedicated Public Access Fund monies for purposes other than public access, conversion of public access sites to other uses, and failure to maintain existing public access and signage.**

- 1. Upon determination that good cause exists, the Department shall furnish written notice of its determination to the municipality by certified mail, providing 30 days within which to either remedy the noncompliance, provide an explanation of why such**

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noncompliance cannot be remedied, offer a plan to remedy such noncompliance, or demonstrate to the Department that good cause for revocation does not exist. Any remedial plan shall indicate the time necessary to implement the remedy.

2. If the above requirements are not met, the Department shall provide the Municipality with written notice, by certified mail, of intent to revoke the Department's approval of the Municipal Public Access Plan and of the Municipality's right to a hearing pursuant to the provisions of N.J.A.C. 7:7-5. A request for a hearing shall be addressed to the Office of Legal Affairs, ATTENTION: Adjudicatory Hearing Requests, Department of Environmental Protection, Mail Code 401-04L, PO Box 402, 401 East State St., 4th floor, Trenton, New Jersey 08625-0402. A copy shall also be submitted to the Office of Land Use Planning, Mail Code 401-07C, PO Box 402, 401 East State St., 7th floor, Trenton, New Jersey 08625.

3. If a hearing under (m)2 above is not requested within 10 days of receipt of said notice, the Municipal Public Access Plan shall be revoked.*

(n) In municipalities that do not have an approved Municipal Public Access Plan, for sites which are located on or adjacent to tidal waterways and their shores, public access along and use of the beach and the shores shall be provided as *[follows]* ***specified in this subsection and, as applicable, in (p) below for marinas and (q) below for piers. Public access may include any one or a combination of the options listed at (b)3 above. When determining whether**

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proposed public access is appropriate and/or sufficient,* *[The]* **the*** Department shall consider factors such as type of public access available, the compatibility of the proposed public access with the applicant's proposed use of the site, square footage of access area, and environmental impact or benefit *[when determining whether proposed public access is appropriate]*. The Department shall not approve public access that is contrary to any requirement contained in this chapter (for example, access that encroaches upon threatened or endangered species habitat or is in violation of the dunes rules):

1. Commercial development shall provide both visual and physical access as follows:

i. For existing commercial development, except for existing commercial development classified as "new commercial development" pursuant to (n)1ii below, where the proposed activity consists of maintenance, rehabilitation, renovation, redevelopment, or expansion that remains entirely within the parcel containing the existing development, ***no public access is required if there is no existing public access onsite. Any*** existing public access shall be maintained or equivalent public access shall be provided onsite. Equivalent public access shall include access that provides for opportunities to participate in the same activities, such as fishing, swimming and passive recreation, in the same manner and by the same number of people as in the existing public access area*[. If there is no existing public access onsite, no public access is required]*;

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ii. ***Except as provided in (n)1ii(1) below,*** ***[For]*** ***for*** new commercial development, access shall be provided onsite, at a minimum during normal operating hours. For the purposes of this subparagraph, “new commercial development” also includes the conversion of any existing non-commercial use to a commercial use and any change in an existing development that would result in either*[:

(1) Greater]* ***greater*** than a cumulative 50 percent increase in the area covered by buildings, asphalt, or concrete paving; or

[(2) Development on a parcel which was not included in the existing development]
***development outside the parcel containing the existing development*;**

***[iii. Public access proposed by the applicant to satisfy the requirements of this paragraph may include any one or combination of the following:**

(1) A public access way designed in accordance with (w) below, located parallel to the shoreline with perpendicular access;

(2) A boat ramp, pier, fishing or other direct access to the waterway;

(3) A waterfront pocket park;

(4) Public restrooms to accommodate those utilizing public access; and/or

(5) Additional public parking to accommodate those utilizing public access;]*

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(1) Public access along the Hudson River and on adjacent piers in the Hudson River Waterfront Area as defined at N.J.A.C. 7:7E-3.48(a)2 shall be provided in accordance with N.J.A.C. 7:7E-3.48(d) and (e).

2. Residential development shall provide both visual and physical access as follows:

i. At an existing residential development, where the proposed activities consist solely of accessory development or structural shore protection, ***no public access is required if there is no existing public access onsite. Any*** existing public access shall be maintained. If it is necessary to permanently impact the existing public access in order to perform the activities, equivalent access shall be provided onsite*¹. If currently there is no public access onsite, no public access is required]²;

ii. For new residential development, where the development consists solely of the construction of one single family home or duplex not in conjunction with a previous development as defined at N.J.A.C. 7:7-2.1(b)8, no public access is required;

iii. ***Except as provided in (n)2iii(3) below,*** ³[For]⁴ ***for*** new residential development consisting of more than one single family home or duplex, or the conversion of any existing non-residential use to a residential use ***consisting of more than one single family home or duplex***, that has a total ⁵[combined water]⁶ frontage of 500 linear feet or less ***on areas subject to N.J.A.C. 7:7E-3.50***, public access shall be provided ***onsite.*** ⁷[as follows:

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(1) Unless the applicant demonstrates that onsite public access is not feasible, in accordance with (n)2iii(2) below, public access proposed to satisfy the requirements of this paragraph shall be provided onsite in accordance with (n)1iii above;]*

[(2)] *(1)* If the applicant demonstrates that onsite public access is not feasible, based on the size of the site, the character of the waterway, and environmental impact or benefits, equivalent offsite public access shall be provided on the same waterway within the same municipality as the residential development. The Department shall consider factors such as type of public access available (for example, if swimming access is available onsite, then swimming access should be available at the offsite location), *[cost,]* square footage of access area, and environmental impact/benefit when determining whether the proposed offsite public access is equivalent to that which would have been required onsite;

[(3)] *(2)* If the applicant demonstrates that offsite public access within the same municipality is not feasible because there are no sites available upon which to provide public access in accordance with (n)2iii*[(2)]***(1)* above, equivalent offsite public access shall be provided on the same waterway within a neighboring municipality where the access is consistent with the neighboring municipality's MPAP or, if there is no MPAP, the access is located and designed to be consistent with *[local requirements such as local zoning and ordinances]* *(b) above*. The Department shall consider factors such as type of public access available (for example, if swimming access is available onsite, then swimming access should be available at

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the offsite location), *[cost,]* square footage of access area, and environmental impact/benefit when determining whether the proposed offsite public access is equivalent to that which would have been required onsite;

(3) Public access along the Hudson River and on adjacent piers in the Hudson River Waterfront Area as defined at N.J.A.C. 7:7E-3.48(a)2 shall be provided in accordance with N.J.A.C. 7:7E-3.48(d) and (e).

iv. ***Except as provided in (n)2iv(1) below,*** *[For]* ***for*** new residential development consisting of more than one single family home or duplex or the conversion of any existing non-residential use to a residential use ***consisting of more than one single family home or duplex***, where the development has a total *[combined water]* frontage of more than 500 linear feet ***on areas subject to N.J.A.C. 7:7E-3.50***, ***public*** access shall be provided onsite ***[in accordance with (n)1iii above;]**.***

(1) Public access along the Hudson River and on adjacent piers in the Hudson River Waterfront Area as defined at N.J.A.C. 7:7E-3.48(a)2 shall be provided in accordance with N.J.A.C. 7:7E-3.48(d) and (e).

3. Except as provided at (n)4 and 5 below, industrial development and public development, ***except for public highways,*** shall provide both visual and physical access ***[as follows:]*** ***in accordance with (n)3i through iv below. Public highways shall meet the requirements at (o) below.***

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i. For existing industrial or public development, except as provided at (n)3ii below, where the proposed activity consists of the maintenance, rehabilitation, renovation, redevelopment, or expansion that remains entirely within the parcel containing the existing development, ***no public access is required if there is no existing public access onsite. Any*** existing public access shall be maintained or equivalent onsite public access shall be provided. Equivalent public access shall include access that provides for opportunities to participate in the same activities (such as fishing, swimming, or passive recreation), in the same manner and by the same number of people as in the existing public access area* [. If there is no existing public access onsite, no public access is required]*;

ii. ***Except as provided in (n)3ii(1) below,*** *[For]* ***for*** new industrial or public development, including the conversion of any existing use to an industrial or public use, public access shall be provided onsite during normal operating hours, unless it can be demonstrated that continued public access is not practicable based on the risk of injury from proposed hazardous operations, or substantial permanent obstructions, ***or upon documentation of a threat to public safety due to unique circumstances concerning the subject property,*** and no measures can be taken to avert these risks. In cases where the Department concurs that the risk is too great for onsite public access, access shall be provided in accordance with (n)3iii below. For the purposes of this paragraph, “new industrial or public development” includes development of

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areas not within the parcel containing the existing development. *[Where onsite public access is required, public access shall be provided in accordance with (n)1iii above;]*

(1) Public access along the Hudson River and on adjacent piers in the Hudson River Waterfront Area as defined at N.J.A.C. 7:7E-3.48(a)2 shall be provided in accordance with N.J.A.C. 7:7E-3.48(d) and (e).

iii. Where it has been demonstrated that onsite access is not practicable based on the presence of substantial permanent obstructions or the risk of injury from proposed hazardous operations, ***or upon documentation of a threat to public safety due to unique circumstances concerning the subject property,*** and no reasonable measures can be taken to avert these risks, equivalent offsite public access shall be provided on the same waterway and within the same municipality as the development. The Department shall consider factors such as type of public access available (for example, if swimming access is available onsite, then swimming access should be available at the offsite location), *[cost,]* square footage of access area, and environmental impact/benefit when determining whether the proposed offsite public access is equivalent to that which would have been required onsite;

iv. If the applicant demonstrates that offsite public access within the same municipality is not feasible because there are no sites available upon which to provide public access in accordance with (n)3ii above, equivalent offsite public access shall be provided on the same waterway within a neighboring municipality where the access is consistent with the neighboring

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municipality's Municipal Public Access Plan or, if there is no Municipal Public Access Plan, the access is located and designed to be consistent with *[local requirements such as local zoning and ordinances]* ***(b) above***.

4. Homeland security facilities shall provide both visual and physical access as follows:

i. For existing homeland security facilities, except as provided at (n)4ii below, where the proposed activity consists of maintenance, rehabilitation, renovation, redevelopment, or expansion that remains entirely within the parcel containing the existing development, ***no public access is required if there is no existing public access onsite. Any*** existing public access shall be maintained onsite or equivalent public access shall be provided either onsite or offsite on the same waterway and within the same municipality as the development. Equivalent public access shall include access that provides for opportunities to participate in the same activities such as fishing, swimming, or passive recreation, in the same manner and by the same number of people as in the existing public access area*[. If there is no existing public access onsite, no public access is required]*;

ii. ***Except as provided in (n)4i(1) below,*** *[For]* ***for*** new homeland security facilities, including the conversion of a non-homeland security facility to a homeland security facility, or the expansion of an existing homeland security facility onto areas not within the parcel containing the existing development, the applicant may provide either onsite public access or equivalent offsite public access on the same waterway and within the same municipality as the

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development. The Department shall consider factors such as type of public access available (for example, if swimming access is available onsite, then swimming access should be available at the offsite location), *[cost,]* square footage of access area, and environmental impact/benefit when determining whether proposed offsite public access is equivalent to that which would have been required onsite;

(1) Public access along the Hudson River and on adjacent piers in the Hudson River Waterfront Area as defined at N.J.A.C. 7:7E-3.48(a)2 shall be provided in accordance with N.J.A.C. 7:7E-3.48(d) and (e).

5. Ports, as defined at N.J.A.C. 7:7E-3.11, shall provide both visual and physical access as follows:

i. For *[all port facilities,]* ***existing ports, public access shall be provided as follows:**

(1) No public access is required if there is no existing public access onsite. Any* existing public access shall be maintained or equivalent onsite public access shall be provided. If it can be demonstrated that continued onsite public access is not practicable based on the risk of injury from proposed hazardous operations, or substantial permanent obstructions, ***or upon documentation of a threat to public safety due to unique circumstances concerning the subject property,*** and no measures can be taken to avert these risks, equivalent public access shall be provided offsite ***on the same waterway and within the same municipality as the development***. The Department shall consider factors such as the type of public access available

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(for example, if *[swimming]* ***linear or visual*** access is available onsite then *[swimming]* ***linear or visual*** access should be available at the offsite location), *[cost,]* square footage of access area, and environmental impact/benefit when determining whether the proposed offsite public access is equivalent to that which would have been required onsite. *[If there is no existing public access onsite, no public access is required.]*

***(2) If the applicant demonstrates that offsite public access within the same municipality is not feasible because there are no sites available upon which to provide public access in accordance with (n)5i(1) above, equivalent offsite public access shall be provided on the same waterway within a neighboring municipality where the access is consistent with the neighboring municipality's Municipal Public Access Plan or, if there is no Municipal Public Access Plan, the access is located and designed to be consistent with (b) above.**

ii. For new ports, no public access is required.

(o) Public highways, including superhighways, shall provide both visual and physical access as follows. For purposes of this subsection, an example of visual and physical access is a sidewalk on or adjacent to a bridge. Public transportation agencies and counties are encouraged to submit to the Department an application for approval of a Transportation Public Access Plan in accordance with (o)3 below:

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1. Superhighways, specifically, the Garden State Parkway, New Jersey Turnpike, Atlantic City Expressway, and Interstates 76, 78, 80, 95, 276, 278, 195, 295, and 676, shall provide access as follows:

i. Where the proposed activity consists of maintenance, rehabilitation, reconstruction, or expansion that remains entirely within the right-of-way existing as of (the effective date of the amendments), no public access is required if there is no existing public access onsite. Any existing public access shall be maintained or equivalent public access shall be provided offsite on the waterway(s) and within the municipality(s) where the development is located. Equivalent public access shall include access that provides for opportunities to participate in the same activities, in the same manner and by the same number of people as in the existing public access area;

ii. Where the proposed activity is an expansion outside the right-of-way existing as of (the effective date of the amendments) and the expansion crosses or proposes fill in a tidal waterway, public access shall be provided offsite on the waterway(s) and within the municipality(s) where the development is located or in accordance with the following:

- (1) A Department approved Transportation Public Access Plan;**
- (2) A Department approved Municipal Public Access Plan; or**

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(3) An agreement between the New Jersey Department of Transportation and the Department specifying the payment of funds to the Department or the municipality to be used to provide new or enhanced public access;

iii. If the applicant demonstrates that offsite public access in the same municipality is not feasible because there are no sites available upon which to provide public access in accordance with (o)1i and ii above, equivalent offsite public access shall be provided on the same waterway(s) within a neighboring municipality where the access is consistent with the neighboring municipality's Municipal Public Access Plan or, if there is no Municipal Public Access Plan, the access is located and designed to be consistent with (b)above.

2. Public highways, other than superhighways, shall provide both physical and visual access as follows:

i. For existing public highways, except as provided at (o)2ii below, where the proposed activity consists of the maintenance, reconstruction, rehabilitation, or expansion that remains entirely within the right-of-way existing as of (the effective date of the amendments), no public access is required if there is no existing public access onsite. Any existing public access shall be maintained or equivalent onsite public access shall be provided. Equivalent public access shall include access that provides for opportunities to participate in the same activities, in the same manner and by the same number of people as in the existing public access area.

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ii. For new public highways, or expansion of existing public highways outside the right-of-way existing as of (the effective date of the amendments) where the new public highway or expansion crosses or proposes fill in a tidal waterway, public access shall be provided in accordance with a Department approved Transportation Public Access Plan if one exists or onsite unless it can be demonstrated that public access is not practicable based on the risk of injury from proposed hazardous operations, or substantial permanent obstructions, or upon documentation of a threat to public safety due to unique circumstances concerning the subject property, and no measures can be taken to avert these risks. In cases where the Department concurs that the risk is too great for onsite public access, access shall be provided in accordance with (o)2iii below;

iii. Where a Transportation Public Access Plan does not exist and it has been demonstrated that onsite access is not practicable based on the presence of substantial permanent obstructions or the risk of injury from proposed hazardous operations, or upon documentation of a threat to public safety due to unique circumstances concerning the subject property, and no reasonable measures can be taken to avert these risks, equivalent public access shall be provided in accordance with the following:

(1) Offsite on the waterway(s) and within the municipality(s) where the development is located where the access is consistent with the municipality's Municipal Public Access Plan;

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(2) Consistent with an agreement between the New Jersey Department of Transportation and the Department specifying the payment of funds to the Department or the municipality to be used to provide new or enhanced public access; or

(3) In accordance with (b) above if there is no Municipal Public Access Plan;

iv. If the applicant demonstrates that offsite public access in the same municipality is not feasible because there are no sites available upon which to provide public access in accordance with (o)2ii and iii above, equivalent offsite public access shall be provided on the same waterway(s) within a neighboring municipality where the access is consistent with the neighboring municipality's Municipal Public Access Plan or, if there is no Municipal Public Access Plan, the access is located and designed to be consistent with (b) above.

3. Transportation Public Access Plans shall satisfy the goals specified at N.J.A.C. 7:7E-1.1(c) and the public access goals at (b) above. Transportation Public Access Plans shall additionally meet the requirements at (o)3i through iii below:

i. Transportation Public Access Plans shall incorporate fishing access and associated amenities where appropriate.

ii. Transportation Public Access Plans shall require installation and maintenance of appropriate public access signage in accordance with N.J.A.C. 7:7E-8.11(u).

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iii. Transportation Public Access Plans shall not provide for access that is contrary to any requirement contained in this chapter (for example, access that encroaches upon threatened or endangered species habitat or is in violation of the dunes rules).

4. A public transportation agency or county seeking approval of a Transportation Public Access Plan shall file an application for approval with the Department. The application shall include a proposed Transportation Public Access Plan consisting of the following elements:

- i. A statement describing the overall goals of the Transportation Public Access Plan;**
- ii. A public access policy for public roadways included in the Transportation Public Access Plan;**
- iii. A description of potential public access options;**
- iv. A description of the general locations where public access will be provided;**
- v. A description of the general locations where public access will not be provided due to practical limitations;**
- vi. An implementation strategy that describes the forms of public access proposed in order to satisfy the public access policy and measures to be implemented to permanently protect public access;**
- vii. Demonstration that at least two public informational meetings have been held to take public comment on the proposed Transportation Public Access Plan and that the applicant**

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notified the Department two weeks in advance of the dates and times of the public meetings so that the Department can provide notice of the public meetings by posting the meeting information on its website and notifying by e-mail individuals who have requested notice of applications for approval of Transportation Public Access Plans; and

viii. A description of any changes made to the Transportation Public Access Plan as a result of public comments received.

5. The Department shall review an application for approval of a Transportation Public Access Plan to determine whether the plan is consistent with the broad coastal goals described at N.J.A.C. 7:7E-1.1(c), and the goals for public access at (b) above as follows:

i. Upon receipt of an application for approval of a Transportation Public Access Plan that meets the requirements of (o)4 above, the Department shall seek public comment on the application by:

(1) Posting the proposed Transportation Public Access Plan on the Department's website;

(2) Notifying by e-mail individuals who have requested notice of applications for approval of Transportation Public Access Plans; and

(3) Publishing notice in the DEP Bulletin.

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ii. The Department shall accept public comments on the proposed application for approval of a Transportation Public Access Plan for 30 days following publication of the notice in the DEP Bulletin.

iii. After the close of the public comment period, the Department may request revisions to the proposed Transportation Public Access Plan.

iv. If revisions are requested, the Department shall, in writing, notify the applicant within 60 days of receipt of the revisions that the proposed Transportation Public Access Plan either:

(1) Satisfies all applicable requirements of this section and is approved; or

(2) Does not satisfy all applicable requirements of this section and is not approved with explanation.

v. If no revisions are requested by the Department, the Department shall, in writing, notify the applicant within 60 days of the end of the public comment period that the proposed Transportation Public Access Plan either:

(1) Satisfies all applicable requirements of this section and is approved; or

(2) Does not satisfy all applicable requirements of this section and is not approved with explanation.

vi. The Department shall provide notice of its determination under (o)5iv or v above by:

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(1) Posting on the Department's website;

(2) Notifying by e-mail individuals who have requested notice of applications for approval of Transportation Public Access Plans; and

(3) Publishing the determination in the DEP Bulletin.

6. A public transportation agency or county which has received approval of a Transportation Public Access Plan shall as a condition of the approval, every five years after the date of approval, submit to the Department a report detailing:

i. The status of all projects that have been undertaken in accordance with the Transportation Public Access Plan; and

ii. Any problems encountered in pursuit of the plan's objectives and goals and proposed remedies to assure the objectives and goals of the plan are met.

7. Department review and approval is required before a public transportation agency or county may make changes to an approved Transportation Public Access Plan. In support of a request to amend the approved plan under this subsection, the applicant shall submit to the Department the approved plan with the information specified in (o)4 above updated to reflect the proposed change. This submission shall detail how the proposed change affects the approved plan. The Department shall review and make a determination on the Transportation Public Access Plan amendment request in accordance with (o)5 above.*

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(o) *(p)* Marinas, as defined at N.J.A.C. 7:7E-7.3(d)1, shall provide both visual and physical public access ***[as follows:]* *in accordance with this subsection. Public access may include any one or a combination of the options listed at (b)3 above. When determining whether proposed public access is appropriate and/or sufficient, the Department shall consider factors such as type of public access available, the compatibility of the proposed public access with the applicant’s proposed use of the site, square footage of access area, and environmental impact or benefit.***

1. For existing marina development where the proposed activity consists of maintenance, rehabilitation, renovation, redevelopment, or expansion that remains entirely within the parcel ***[which included]* *containing* the existing development, ***no public access is required if there is no existing public access onsite, except as provided at (p)3 below. Any* existing public access shall be maintained. If it is necessary to impact the existing public access in order to perform the proposed activities, equivalent public access shall be provided onsite. Equivalent public access shall include access that provides for opportunities to participate in the same activities, such as fishing, swimming, and passive recreation, in the same manner and by the same number of people as in the existing public access area*[, If there is no existing public access onsite, no public access is required except as provided at (o)3 below]*;****

2. For new marina development, public access shall be provided onsite during normal operating hours. For the purposes of this subsection, “new marina development” includes any

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change in the existing development that would result in greater than a cumulative 50 percent increase in the area covered by buildings, asphalt, or concrete paving, or proposed development of areas not within the parcel containing the existing development *[for which a coastal permit was obtained if the marina was not previously permitted because a coastal permit was not required, includes development on a lot or lots which are purchased after April 4, 2011]*;

3. If the marina development includes a beach area, public access along and use of the beach shall be provided and activities that have the effect of discouraging or preventing the exercise of public trust rights, as described at N.J.A.C. 7:7E-3.50, are prohibited in accordance with (u) below.

4. Applicants for new marinas, as described at *[(o)2]* ***(p)2*** above, shall provide to the Department at the time of application, for its review and approval, a public access plan for the marina development which shall include the following:

[(1)] ***i.*** A site plan identifying the location and type of access provided, including both existing and proposed, as well as any areas closed to public access based on the presence of substantial permanent obstructions, *[or]* the risk of injury from proposed hazardous operations, ***or a threat to public safety due to unique circumstances concerning the subject property,*** and where no reasonable measures can be taken to avert these risks. The plan shall include an explanation of what the specific risks and hazards are and shall indicate where access has been

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enhanced to compensate for the area closed due to the dangerous or hazardous conditions*[*].

Public access shall be provided in accordance with (n)liii]*; and

[(2)] ***ii.*** A listing of the normal operating hours for the marina;

5. Once a marina access plan has been approved by the Department, any proposed changes to that plan shall require additional Department review and approval, regardless of whether or not a permit modification is also required. *[For example, a change in the marina's operating hours that would not require a permit or permit modification, would result in a change in the public's ability to use the public access and therefore requires review by the Department.]*

In support of a request to amend the approved plan under this paragraph, the applicant shall submit to the Department the approved plan updated to reflect the proposed change(s). This submission shall provide information with reference to the requested change(s) to the plan and shall detail how the proposed change(s) affects the approved plan. If the proposed change(s) result*s* in *[curtailment of public access hours or]* ***a*** reduction in any way of public access, the submission shall additionally specify proposed changes to offset proposed reductions in public access.

[(p)] *** (q) *** Except in accordance with the Hudson Waterfront [a]***A***rea at N.J.A.C. 7:7E-3.48, and Atlantic City at N.J.A.C. 7:7E-3.49, development which is proposed to be located on an existing pier shall provide public access in accordance with the type of development being

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proposed, that is, commercial, residential, industrial or public, homeland security, or ports (see (n)^[1, 2, 3, 4 or 5, respectively,] above).

Recodify proposed (q) – (v) as **(r) – (w)** (No change in text from proposal.)

^[(w)] **(x)** If a public accessway is chosen to satisfy the public access requirement in (n) and ^[(o)] **(p)** above, the accessway shall provide a minimum width of 10 feet free of obstructions to public access. Amenities such as public benches, litter or recycling receptacles, and lighting fixtures are provided to enhance public access and shall not be considered obstructions.

^[(x)] **(y)** 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 ^[(x)1] **(y)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 and its successors in title and interest upon request.

1. - 6. (No change.)

Recodify proposed (y) – (z) as **(z) – (aa)** (No change in text from proposal.)

7:7E-8.12 Scenic Resources and Design

(a) – (c) (No change.)

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(d) In all areas, except the Northern Waterfront [r]*R*egion, the Delaware River Region and Atlantic City, new coastal development adjacent to a bay or ocean or bayfront or oceanfront, beach, dune or boardwalk and higher than 15 feet in height measured from the existing grade of the site or boardwalk shall comply with the following, unless it meets the requirements at (e) or (f) below:

1.-2. (No change.)

(e) (No change.)

(f) Federal, State, county, or municipal development projects which are located adjacent to a bay or ocean or bayfront or oceanfront, beach, dune or boardwalk, and are greater than 15 feet in height measured from the existing grade of the site or boardwalk need not comply with the setback requirements in (d)2 above provided that the development contains design elements that enhance physical or visual public access to the waterfront beyond that which would be afforded by strict compliance with (d)2 above and the development, as proposed, would remain in compliance with N.J.A.C. 7:7E-3.50.

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