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ENVIRONMENTAL PROTECTION

DIVISION OF FISH AND WILDLIFE

Access Restriction to Tidal Waters for Endangered Species Protection

Proposed New Rules: N.J.A.C. 7:25-4A

Authorized By: Shawn M. LaTourette, Commissioner, Department of Environmental Protection.

Authority: N.J.S.A. 13:1D-155 and 23:2A-1 et seq.

Calendar Reference: See Summary below for an explanation of exception to calendar requirement.

DEP Docket Number: 13-24-11.

Proposal Number: PRN 2024-146.

Submit written comments by close of business February 14, 2025, electronically at www.nj.gov/dep/rules/comments. Each comment should be identified by the applicable N.J.A.C. citation, with the commenter's name and affiliation following the comment.

The Department of Environmental Protection encourages electronic submittal of comments. In the alternative, comments may be submitted on paper to:

Stephanie J. Press, Esq.

Attn: DEP Docket Number: 13-24-11

Office of Legal Affairs

Department of Environmental Protection

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Mail Code 401-04L

PO Box 402

Trenton, NJ 08625-0402

The agency proposal follows:

Summary

As the Department of Environmental Protection (Department) has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

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New Jersey's coastal habitats serve a critical role in the survival, propagation, and recruitment of wildlife species with a conservation status of "threatened" and "endangered" that are of global, national, and regional importance. These coastal habitats include critical habitat areas that support various stages of a threatened or endangered species' life cycle, such as foraging, breeding, nesting, and overwintering behaviors. Everyday human beachgoing activities significantly impact the success of these crucial life cycle stages, jeopardizing the continued survival of these species. Proposed new N.J.A.C. 7:25-4A identifies how the Department determines and delineates public access restrictions to tidal waters or the adjacent shoreline to protect threatened or endangered wildlife, how affected landowners and municipalities will be notified, and the penalties for violating those restrictions.

The Department is proposing this rulemaking pursuant to the authority at N.J.S.A. 13:1D-150 through 156 (the Public Access Statute), which was enacted in response to *Hackensack Riverkeeper, Inc. v. New Jersey Dept. of Environmental Protection*, 443 N.J. Super. 293 (App. Div. 2015) in which the Appellate Division invalidated parts of the Department's Coastal Zone public access and public trust rules as *ultra vires*. The Court determined that the Department did not have the authority pursuant to either the Coastal Area Facilities Review Act's plain language or the public trust doctrine to promulgate rules regarding public access absent legislative authorization. *Id.* at 304. The Public Access Statute codified the public trust rights to the beach and requires any approval, permit, administrative order, or consent decree issued, or any other action taken by the Department pursuant to the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq., the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq., or the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., the State's implementation of the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 et seq., or any other applicable law, to be consistent with the public trust doctrine. N.J.S.A. 13:1D-151.a. Public access pursuant to this statute is intended to include "... visual and physical access to, and use of, tidal waters and adjacent shorelines, sufficient perpendicular access from upland areas to tidal waters and adjacent shorelines, and the necessary support amenities to facilitate public access for all, including, but not limited to, public parking and restrooms." N.J.S.A. 13:1D-150.f. The statute also requires marinas to have some public access, including physical and visual access to boat ramps, piers, pocket parks, public restrooms, public parking, and/or any other direct access to a waterway, and that the current level of public access is maintained. N.J.S.A. 13:1D-154. Finally, the statute requires certain types of development to provide additional public access. N.J.S.A. 13:1D-153.a.

The Legislature has acknowledged that the public trust doctrine has some limitations. The Public Access Statute includes narrow exceptions for restricting public access to those tidal waters and adjacent shorelines traditionally accessible pursuant to the public trust doctrine, such as for homeland security or other safety purposes. The Legislature has also recognized another exception in the Public Access Statute, which is the Department's ability to restrict public access to those tidal waters and adjacent shorelines to protect "critical habitat areas from injurious uses, or threatened or endangered species or their habitat areas from injury, or injurious uses, but only to

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the extent necessary according to the needs of the habitat areas or species.” N.J.S.A. 13:1D-155. Currently, the Department has specific authority to protect threatened or endangered species pursuant to the Endangered and Nongame Species Conservation Act (ENSCA), N.J.S.A. 23:2A-1 through 13. However, ENSCA only provides authority to the Department to charge those who “take” endangered, threatened, or nongame wildlife. In this statute, “take” means to harass, hunt, capture, kill, or attempt to harass, hunt, capture, or kill protected wildlife. N.J.S.A. 23:2A-3. ENSCA does not provide the Department authority to perform preventive measures prior to the taking of a threatened or endangered species, such as the restricting of public access for the purpose of protecting endangered and threatened species and/or their critical habitat areas. The Legislature recognized the importance of these particular areas of the State’s shoreline as critical habitat areas and their role in the protection of threatened or endangered species and passed N.J.S.A. 13:1D-155, which allows public access restrictions to further protect endangered and threatened species and their critical habitat areas. The protection of tidal waters and adjacent shoreline habitats that threatened or endangered species depend on for a stage of their life cycle, or breeding, wintering, resting, and/or foraging, warrants priority over public access. For these reasons, the Department is proposing new N.J.A.C. 7:25-4A to identify a process to determine, publicize, and enforce those public access restrictions of tidal waters and/or the adjacent shoreline for the protection of endangered and threatened species.

A wildlife species is classified as threatened or endangered because of many factors, and human disturbance is often a dominant threat leading to classification. Species of wildlife with a conservation status of “endangered” are listed by the Department on the List of Endangered Species at N.J.A.C. 7:25-4.13 and species with a conservation status of “threatened” are currently listed on the List of Nongame Species at N.J.A.C. 7:25-4.17. “Endangered species” also includes those species listed on the Federal Endangered Species Act List (16 U.S.C. §§ 1531 et seq.) yet to be placed on to the State’s list. While not explicitly distinguished in the statute, those species with a conservation status of “endangered” are those species whose populations are “in jeopardy,” while those listed with a conservation status of “threatened” are those species populations “likely in the foreseeable future” to become endangered. See *ZRB, LLC v. New Jersey Dep’t of Environmental Protection, Land Use Regulation*, 403 N.J. Super. 531 (App. Div. 2008). Together, both “endangered” species and “threatened” species are “endangered species” as defined in the ENSCA. At the proposed changes to N.J.A.C. 7:25, published on June 3, 2024, at 56 N.J.R. 936(a), the Department has proposed to include species with a conservation status of “threatened” on the Endangered Species List at N.J.A.C. 7:25-4.13 and remove them from the Nongame Species List at N.J.A.C. 7:25-4.17. The current rulemaking uses the term “endangered species” to describe those species with a conservation status of “threatened” and “endangered.” Many endangered species are critically dependent upon the State’s tidal waters and/or the adjacent shorelines at some point in their life cycle. In New Jersey, tidal waters and shorelines are heavily dominated by human activity, which negatively impact species that require these areas during their life cycle. This subchapter focuses on protecting those endangered species that would benefit most from restrictions in human activity

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where the public trust doctrine historically guaranteed the right of public access, as discussed below.

Beach-nesting birds, such as piping plover (*Charadrius melodus*), and colonial waterbirds, such as least terns (*Sternula antillarum*) and black skimmers (*Rynchops niger*), are migratory and return to New Jersey annually for breeding. When nesting on the beach, they lay their eggs directly on the sand, taking advantage of the camouflage it provides. However, pedestrians, vehicles, boats, and dogs can destroy nests that are easily run over or stepped on. Humans or dogs can “flush” the endangered birds, or cause incubating adults to fly in the air, allowing predators, such as gulls, to swoop in to eat unattended eggs and chicks. Plover chicks, which are mobile upon hatching, access the water’s edge for foraging and resting. Human disturbance, in the form of pedestrians, vehicles, boats, and dogs, can prevent adults and chicks from foraging and resting at the shoreline, leading to an inability to maintain fitness (adults of all species), put on enough weight to survive (plover chicks), or practice hunting techniques (skimmer chicks). Gibson reported lower body weights for adult piping plovers that winter at sites with higher human disturbance and Department biologists suspect the same is true on the breeding grounds (Gibson, D., M. K. Chaplin, K. L. Hunt, et al. 2018. *Impacts of Anthropogenic Disturbance on Body Condition, Survival, and Site Fidelity of Nonbreeding Piping Plovers*. The Condor, 120(3):566-580). Specifically, in New Jersey, research has confirmed lower survival rates for piping plover chicks hatched at sites with higher human disturbance (Stantial, M.L. 2020. *Factors Limiting Abundance and Productivity of Piping Plovers (Charadrius melodus) in New Jersey* (unpublished doctoral dissertation) State University of New York – Syracuse). Lower survivorship and fitness can result in lower breeding success and delayed species recovery for a species whose population is already compromised. The recent trend of piping plovers to nest primarily on Federally protected land in New Jersey, where human disturbance is more tightly managed, also suggests that the pressures on their habitat by human activity are reducing opportunities for nesting around the State (Heiser E., Davis, C. 2022. *Piping Plover Nesting Results in New Jersey: 2022*. NJ DEP Fish and Wildlife).

Migratory shorebirds are those that stop over on the New Jersey shore to forage and make essential weight gains as they migrate to or from their northern breeding and southern wintering grounds. Coastal habitats in New Jersey are located on the migratory corridor for many bird populations. For many of these species, the distances between breeding and wintering sites are among the longest on record in the animal kingdom. Species, such as the *rufa* subspecies of red knot (*Calidris canutus rufa*), are dependent upon these resting and foraging habitats during their migrations. This species flies over 9,300 miles one way from Tierra del Fuego at Argentina’s southern tip to the Canadian arctic and then in reverse for two journeys per year. The length and breadth of these extraordinary migration events require timely access to critical stopover habitats, so they can forage and refuel. New Jersey’s Delaware Bayshore stands out as one of the most globally remarkable stopover habitats available for shorebirds. According to the U.S. Fish & Wildlife Service (USFWS), Delaware Bay provides the final Atlantic coast stopover for a significant majority (50 to 80 percent) of the red knot population making its way to the arctic breeding grounds each spring.

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Migratory shorebirds arrive at the Delaware Bayshore in early May, in time for the peak spawning season of the horseshoe crab, a natural phenomenon not found anywhere else. These migratory shorebirds must often recover 100 percent of their fat reserves during their use of the Delaware Bay stopover, gorging on the nutrient-rich, abundant horseshoe crab eggs during their three-week to four-week stay in New Jersey. Although their stay may be brief, the birds' ability to rest, recover, and regain energy stores during this period is critical to both to arrive at their arctic breeding grounds and still be fit enough to breed successfully. Any disturbance to the birds' ability to forage interrupts their ability to gain the weight necessary to complete their migration and breed.

The restrictions outlined in this rulemaking will reduce human disturbance, in the form of pedestrians and dogs, in the areas where horseshoe crabs spawn, and, therefore, where migratory shorebirds must rest and eat. A study on human disturbances to migrating shorebirds conducted by the Atlantic Flyway Shorebird Initiative of the USFWS compiled an extensive review of the biological and social science literature, along with interviews of 28 professional staff at coastal sites in the Northeast region, including biologists or managers, law enforcement officers, and outreach/visitor services staff (Mengak, L., A.A. Dayer, R. Longenecker, and C.S. Spiegel. 2019. *Guidance and Best Practices for Evaluating and Managing Human Disturbances to Migrating Shorebirds on Coastal Lands in the Northeastern United States*. USFWS). The study documented disturbance to shorebirds associated with a wide variety of activities, including general beach-going, dogs on the beach, beach driving, recreational fishing and shell fishing, motorized watersports, non-motorized watersports, events (for example, fishing tournaments, festivals, parties, sports competitions, and fireworks), beach raking, coastal engineering projects, and commercial fishing and aquaculture. The study cited a number of research papers related to "general beachgoing" that documented the effects of passive versus active beachgoers, established "flight initiation distances" amongst shorebird species, assessed the specific impacts to foraging uses of the shoreline, and whether, or if at all, bird behaviors such as flock size mitigated shorebird response to human disturbances.

The USFWS study also addressed the effects of the presence of dogs on beaches, citing abundant evidence that dogs displace shorebirds from foraging and roosting habitats and deter them from returning. The operation of vehicles on beaches, whether associated with recreational beach driving or beach maintenance activities, such as beach raking, was highly disruptive to shorebirds. The USFWS study also addressed boating and boat landings, citing a volume of research documenting the degree to which motorboats and personal watercraft, such as jet-skis, affected shorebirds. There were clear effects from all boating activity types, however, in general, boat landings were explicitly identified as a more significant issue than the presence of the boats themselves. Motorized watercraft allow people to more readily access sensitive habitats that may be important to migrating shorebirds. In ranking the types of disturbance upon shorebirds, the study found beach driving/beach raking, dogs, and general beachgoing to be among the more impactful human disturbances documented in the literature or cited by site managers. These stressors affecting avian use of New Jersey's shoreline habitats are in addition to natural stressors,

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such as nest and chick predation by avian and mammalian predators, storm events, and coastal flooding.

In addition to shorebirds, sea turtles can also be found along New Jersey's coastline. In recent years there has been an increase in sea turtles nesting on New Jersey beaches. Five species of sea turtles may occur in the State: the loggerhead sea turtle (*Caretta caretta*), Kemp's ridley sea turtle (*Lepidochelys kempii*), leatherback sea turtle (*Dermochelys coriacea*), green sea turtle (*Chelonia mydas*), and hawksbill sea turtle (*Eretmochelys imbricate*). All of these species are Federally threatened or endangered and are similarly categorized by the State pursuant to the ENSCA. Sea turtles nest on the beach in the sand just above the high tide line by digging a hole to lay their eggs, then refilling the hole with sand. The locations for sea turtle nests are variable and irregular, but occurrences in New Jersey are expected to increase in frequency as Atlantic coast sea turtle populations recover and expand their range and as the climate warms. The timing for nesting is generally April through August, but may extend into September in New Jersey. Their nests require protection from direct or indirect activities that may disrupt the nest and/or cause injury to the nesting adult or the eggs and young turtles. Further, newly hatched young turtles need safe passage to the ocean to give them the best chance at survival. Restrictions on human disturbance during these critical time periods are essential to the well-being of nesting sea turtles and their young.

Additional examples of species that could benefit from this rulemaking include Federally listed species such as the Northeastern beach tiger beetle or roseate tern. It could also include species that are not currently listed but may be in the future, such as American oystercatcher or common tern. However, some endangered species, such as the Atlantic sturgeon or shortnose sturgeon, which utilize New Jersey tidal waters, face different challenges that would not be mitigated by the restrictions outlined in this rulemaking and are not anticipated to be addressed by the proposed restrictions.

The Department has a nearly 40-year history of working with municipalities, Federal, State, and private landowners alike to reduce or eliminate disturbances to the critical life cycles of endangered species utilizing tidal waters and adjacent shorelines. This has included both voluntary and cooperative coordination by municipalities or landowners, as well as regulatory coordination by municipalities or property owners, pursuant to State or Federal permit requirements or related compliance obligations. Examples include, but are not limited to: State permits for beach fill; beach and dune maintenance, and coastal engineering projects that are subject to endangered species protections as required by the Coastal Zone Management Rules, N.J.A.C. 7:7; United States Army Corps of Engineers permits for beach fill; beach and dune maintenance, and coastal engineering projects that are subject to endangered species protection requirements required by Section 1535 (also known as "Section 6") of the Federal Endangered Species Act, 16 U.S.C. §§ 1531 through 1544; and the requirements agreed to pursuant to the conditions of State Aid Agreements for beach nourishment. These permits and agreements have primarily addressed the "adjacent shorelines" under the control of the landowner. N.J.S.A. 13:1D-155 also ensures protections for endangered

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species using tidal waters, particularly intertidal zones. This is an important distinction, as the public trust begins at the mean high water mark and N.J.S.A. 13:1D-155 provides the Department authority to close that area to protect these endangered species.

Accordingly, the Department's rulemaking establishes the process for determining when and where a restriction will be placed to protect endangered species of wildlife and their critical habitat areas and how the public and any affected landowners will be notified of such restrictions. Once a restriction is in place, the Department will place signage, when and where appropriate, for a visual reminder of the restrictions. Finally, the rulemaking establishes penalties for violations of entry into a restricted area.

Purpose, Scope, and Definitions

Proposed N.J.A.C. 7:25-4A.1 provides a process for the Department to establish when a restriction for public access to tidal waters and shorelines is necessary to protect threatened or endangered species, as well as how the Department will determine the size and scope of the restriction. This section will also describe how notice to landowners is to be provided, and the signage or fencing that is to be used on-site by the Department to delineate the restriction. The proposed section also includes the penalties that will be assessed by the Department for violations of the restriction.

Proposed N.J.A.C. 7:25-4A.2 defines the following terms from N.J.S.A. 13:1D-155: "adjacent shoreline," "anticipated use," "critical habitat area," "endangered species," "injurious use," "restrict," and "tidal waters." For the purposes of this subchapter, "adjacent shoreline" is defined as the area above the mean high water mark that an endangered species relies upon for a stage of the species' life cycle, namely breeding, resting, and/or foraging, and it may include the upland dry sand or other upland ecosystem or biome.

"Critical habitat area" is the area of tidal waters, adjacent shoreline, or both, that are necessary for a part of the endangered species life cycle that is critical to the survival of the species. "Tidal waters" refers to the intertidal zone, which is the area that is exposed during periods of low tide but inundated during periods of high tide typically up to the mean high-water line. It also includes the area in the water up to 300 meters from the mean low-water mark. The intertidal area is an especially important area for foraging, for endangered birds, such as the red knot and piping plover, and resting, for endangered birds such as black skimmer, but the habitat will not be utilized if there is human disturbance adjacent to it in the open water. For example, black skimmer chicks will be excluded from resting or practicing their "skimming" behavior in an intertidal area if there are boats anchored in the shallow waters nearby. These definitions of "adjacent shoreline," "tidal waters," and "critical habitat area" are related to the habitat that are required for the survival of those endangered species.

"Endangered species" include not only those species that are listed, as well as those species listed on the Federal Endangered Species Act list (16 U.S.C. §§ 1531 et seq.) yet to be placed on to the

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State's list. The addition or removal of any species from either list is subject to the rulemaking requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

The proposed definition of "anticipated use" is the historical use of tidal waters and/or the adjacent shoreline by an endangered species, where the Department expects that same endangered species to be present at nearly the same time period each and every year that the habitat remains suitable for use by the endangered species. This definition is the basis of a finding that an area should be restricted ahead of time where the Department anticipates an endangered species to return to year after year, so that the restriction will protect the critical habitat area and the endangered species.

Especially important in this new subchapter is the definition of "injurious use," a term derived directly from N.J.S.A. 13:1D-155. The Department considers the use of an area of habitat injurious when it damages or degrades a critical habitat area. The Department also views injurious use as any use that would constitute a "take" of an endangered species as that term is defined pursuant to the ENSCA, at N.J.S.A. 23:2A-3.

Lastly, "restrict" is defined as a closure of an area to the public. This closure includes pets and recreational equipment, such as vehicles, boats, and drones. Boats are included as a disturbance to endangered species because their presence near or anchored in tidal waters or adjacent shorelines will exclude use of this area by wildlife trying to forage or rest. Pets are specifically mentioned in the definition because, for example, walking a dog, particularly off leash, can cause birds to flush and other wildlife to leave the area to avoid the pet. Other recreational equipment may also harass wildlife, especially equipment, such as drones. It is imperative that the Department be able to purposefully exclude people from these areas in order to protect endangered species. Therefore, a restriction means a closure of the area to the public, including for recreational equipment and pets.

The Process For Establishing Restricted Access Areas

The Department proposes to establish a process for determining when a restriction is required to protect an endangered species; how the landowner, municipality, and the public will be notified of a restriction; the process for a restriction that is required immediately; and the posting or fencing of a restricted area pursuant to N.J.A.C. 7:25-4A.3.

The Department determines whether a restriction is required at proposed N.J.A.C. 7:25-4A.3(a). In determining the need to restrict access to tidal waters or adjacent shorelines, the Department determines the need for the restriction and that the restriction is limited only to that which is necessary, spatially and temporally, according to the needs of the habitat areas or species.

Pursuant to proposed N.J.A.C. 7:25-4A.3(a), the Department shall determine whether a public access restriction is required by confirming that three specific conditions described at N.J.A.C. 7:25-4A.3(a)1, 2, and 3 are present at the location of a proposed restriction. First, pursuant to proposed N.J.A.C. 7:25-4A.3(a)1, the Department must document that an endangered species is

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presently using or, based upon historic life history patterns, is reasonably anticipated to use a particular area of tidal waters and/or the adjacent shoreline. “Anticipated use” is a reasonable and necessary factor to consider because many wildlife uses of tidal waters and adjacent shorelines are seasonal and repeat annually and predictably. This does not mandate that endangered species be present but requires some present or anticipated use of the critical habitat area by an endangered species. For example, since monitoring began in the early 1980s, migratory shorebirds have predictably used Delaware Bay beaches in May and June, coinciding with the peak of horseshoe crab spawning on those beaches because that spawning results in a singular food resource for the migrating birds. Similarly, piping plovers have predictably nested at municipal beaches for decades. These types of predictable uses of beach habitats by endangered species warrant proactive restrictions, and, because the use has been documented for many years, the Department can reasonably predict the area to be used and the duration of that use.

Second, pursuant to proposed N.J.A.C. 7:25-4A.3(a)2, the tidal waters and/or adjacent shoreline must be demonstrated to be a “critical habitat area” for the species. These areas are critical for the survival of the endangered species that use them and are essential to the conservation of the species. Third, pursuant to proposed N.J.A.C. 7:25-4A.3(a)3, the Department must find that the restriction of the tidal waters, adjacent shoreline, or both, is required to prevent injurious uses that may result in a “take” pursuant to the ENSCA, and that a restriction of the area is warranted to protect the species or the critical habitat area.

When all three conditions at proposed N.J.A.C. 7:25-4A.3(a) are met and a restriction is required, the Department will then determine the extent of the area and the time frame(s) for the restriction to be in place. Pursuant to proposed N.J.A.C. 7:25-4A.3(b)1 and 2, the Department will only designate the minimal area and duration necessary to protect the endangered species and their use of the area during activities critical to their survival, or as necessary to protect the critical habitat area. Proposed N.J.A.C. 7:25-4A.3(b)2i states that the Department may establish the frequency of a restriction as occurring annually, spanning multiple years, starting and ending multiple times within a year, or starting and ending multiple times in multiple years. Any such determination will be supported by the conditions at N.J.A.C. 7:25-4A.3(a) and minimized as required pursuant to N.J.A.C. 7:25-4A.3(b).

Pursuant to proposed N.J.A.C. 7:25-4A.3(c), advanced notice of all restrictions the Department intends to implement includes notice through the U.S. mail, return receipt requested, to the affected landowner and to the respective municipality in which the proposed restriction is located. If the Department has an official email address for a landowner and/or municipality and the landowner and/or municipality has confirmed communication through the email to be their preference, then the landowner and/or municipality will be notified of the restriction through email only. Notice to the landowner shall occur more than 60 days prior to the implementation of the restriction, allowing time for the landowner to contact the Department with questions or concerns or to stay or appeal the restriction.

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The Department also proposes, at N.J.A.C. 7:25-4A.3(d)1, an emergency exception to the 60-day notice requirement where the urgency of the restriction warrants and/or if the need for the restriction was not anticipated. For example, discovery of a marine sea turtle actively nesting on a New Jersey beach cannot reasonably be anticipated, yet requires immediate implementation of a restriction to the tidal waters and adjacent shoreline to protect the sea turtle, resultant sea turtle eggs, hatching juveniles, and the critical habitat area that constitutes the nest. In any such case, notice of the restriction will be provided to the affected landowner(s), whether by telephone call, email, or hand-delivered letter, as soon as all affected landowner(s) can be identified and contacted, no later than 48-hours after placing the restriction. Public notice of all access restrictions will also be made available to the public through postings on the Department's website (<https://dep.nj.gov/njfw/wildlife/regulations-and-resources/laws-and-regulations/shore-protection-rule/>). Pursuant to proposed N.J.A.C. 7:25-4A.3(d)2, the Department will only post a restriction that was put in place pursuant to this emergency exception for, at most, two years before going through the full analysis required at N.J.A.C. 7:25-4A.3(a) and (b). This two-year timeframe gives the Department time to study the species and the area being used to determine if the area is a critical habitat area and if the use can be anticipated again.

As a part of this process, proposed N.J.A.C. 7:25-4A.3(e) provides that the landowner may request a stay of the restriction, and the landowner may appeal the restriction pursuant to proposed N.J.A.C. 7:25-4A.5, but an application for an appeal does not automatically stay the restriction.

Pursuant to proposed N.J.A.C. 7:25-4A.3(f), a restriction will remain in effect until formally revoked by the Department. As noted above, existing habitats can attract repeated use by wildlife, such as beach-nesting birds, migratory shorebirds, and colonial waterbirds over time. Accordingly, notice regarding the restrictions implemented by the Department will confirm that they are intended to repeat as determined by the Department pursuant to proposed N.J.A.C. 7:25-4A.3(b) until such time as the restriction is no longer warranted. At proposed N.J.A.C. 7:25-4A.3(f)1, the Department notes that a restriction will be reviewed annually to ensure that the conditions required pursuant to proposed N.J.A.C. 7:25-4A.3(a)1, 2, and 3 remain valid and that the size and duration of the restriction are still required to prevent injury and injurious uses of endangered species. Should any such annual review confirm that an area subject to an established restriction no longer meets the required criteria, the Department will revoke and cease to implement the restriction pursuant to proposed N.J.A.C. 7:25-4A.3(f)1i. The Department further notes that, at proposed N.J.A.C. 7:25-4A.3(f)1ii, if the conditions warranting the restriction change such that a restriction of lesser size or duration becomes appropriate, such changes will be made. Proposed N.J.A.C. 7:25-4A.3(f)iii requires that the Department notify any landowner or municipality affected by such revocation or modification and that such notification be consistent with the notification requirements established at proposed N.J.A.C. 7:25-4A.3(c). Notice regarding modifications or revocations to restrictions will also be made available to the general public through posting on the Department's website (<https://dep.nj.gov/njfw/wildlife/regulations-and-resources/laws-and-regulations/shore-protection-rule/>).

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The last part of this process is that the Department, where appropriate, will post signs, stakes, flags, temporary fencing, and/or ropes as a visual and physical indicator of where a restricted area is located and the size of the restricted area, pursuant to proposed N.J.A.C. 7:25-4A.4. These physical markers of a restricted area will help the public and landowners to not only avoid the restricted area but to also avoid a violation of this subchapter or the ENSCA. As a restricted area's size is the minimum size required to prevent a "take" pursuant to the ENSCA, the mere entry into the restricted area may be construed as harassment of an endangered species. Once the restriction is over, all signs and other postings will be removed, and people and pets can once again move about in the formerly restricted area.

Appeal of a Restriction and Stay Requests

As stated above, an affected landowner may file an appeal of a restriction but must do so within 30 days of receipt of the restriction notice pursuant to proposed N.J.A.C. 7:25-4A.5. Any appeal received after the deadline shall be denied by the Department pursuant to proposed N.J.A.C. 7:25-4A.5(a). An appeal request must include the information at proposed N.J.A.C. 7:25-4A.5(b)1 through 5, and must be submitted to the Department's address at proposed N.J.A.C. 7:25-4A.5(c)1, and Division of Fish and Wildlife's address at proposed N.J.A.C. 7:25-4A.5(c)2. The required information at proposed N.J.A.C. 7:25-4A.5(b)1 through 5 includes information necessary for the Department to understand the nature of the appeal, and includes the affected landowner's contact information; a copy of the restriction being appealed; the date the landowner received the restriction; any admissions, denials, or explanations or a statement by the landowner regarding the restriction; and a concise statement of the facts or legal principles upon which the affected landowner will depend on for the appeal. This chapter does not grant third parties the right to a hearing pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-3.1, 3.2, and 3.3, at N.J.A.C. 7:25-4A.5(d).

The affected landowner may request a stay pursuant to proposed N.J.A.C. 7:25-4A.5(e) by submitting to the Assistant Commissioner of Division of Fish and Wildlife, at the address provided at N.J.A.C. 7:25-4A.5(c)2, the filing date of the appeal, as well as a concise statement of material facts as to why the restriction should be lifted pending the appeal. The statement seeking a stay must include the irreparable harm the landowner would suffer if the stay is not granted at proposed N.J.A.C. 7:25-4A.5(e)1 and 2, the reasonable probability of the landowner's success in the appeal pursuant to proposed N.J.A.C. 7:25-4A.5(e)3 and 4, and a balancing of the harm caused by the restriction versus the harm caused if the restriction is lifted. At proposed N.J.A.C. 7:25-4A.5(f), if the Assistant Commissioner grants the stay, the landowner will be notified through a letter sent by U.S. mail, and any fencing or signs posted by the Department will be removed.

The decision by the Department to grant or deny a hearing request to challenge a stay denial will be communicated to the landowner(s) by a letter mailed through U.S. mail pursuant to proposed N.J.A.C. 7:25-4A.5(g). If the request is granted, it will be transmitted to the Office of Administrative Law as a contested case to be heard according to the Administrative Procedure Act, N.J.S.A.

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52:14B-1 et seq., and 52:14F-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1. Lastly, at N.J.A.C. 7:25-4A.5(h), the Commissioner may issue a final agency decision after receipt of an initial decision by the Office of Administrative Law, and the Commissioner's decision, or the initial decision if the Commissioner issues no final decision within 45 days of the Commissioner's receipt of the initial decision, can be appealed to the Appellate Division of the New Jersey Superior Court.

Penalties for Violations of Access Restrictions

A person who enters a restricted area may be subject to civil penalties pursuant to proposed N.J.A.C. 7:25-4A.6(a). As the Department has determined the extent and duration that a restriction will protect endangered species, merely entering a restricted area, or allowing one's pet to enter a restricted area will be considered, at a minimum, attempted harassment of endangered wildlife, thus constituting a "taking," and an ENSCA violation. The ENSCA, at N.J.S.A. 23:2A-10.e, authorizes the Department to bring a civil action in Superior Court or municipal court against a violator who "takes" wildlife. Penalties for ENSCA violations may be up to \$25,000 per day for each violation. N.J.S.A. 23:2A-10.d. In addition, a person who is found guilty of knowingly or recklessly violating the ENSCA, a third-degree crime, is subject to a much higher penalty, between \$5,000 and \$50,000.

Additional penalties may be assessed pursuant to N.J.S.A. 23:7-9. This statute authorizes the Department to charge penalties for a violation of the Department's Wildlife Management Area (WMA) rules at N.J.A.C. 7:25-2. Illegal activities pursuant to this statute include removing/disturbing soil, vegetation, water, minerals, or other property of the State, littering/dumping, and causing injury/damage to any equipment, structures, buildings, or other items. N.J.S.A. 23:7-9.b(2) states that the penalties for violating the WMA regulations are \$50.00 to \$1,500 for each offense per day.

The Department acknowledges that while these penalties in the ENSCA and N.J.S.A. 23:7-9 are significant penalties for serious charges and that mere entry into a restricted area may not actually harm an endangered species, a person or a pet who enters a restricted area and causes the flushing of an entire colony of migratory birds that must eat as much as possible during the restriction, could result in those birds failing to put on enough weight to make it to nesting grounds or to mate and hatch eggs. It is not always possible to tell when harassment will result in the death of an endangered animal, but harassment must be prevented. Therefore, the Department is proposing, at N.J.A.C. 7:25-4A.6(b) and (c), a minimum fine of \$250.00 for entering a restricted area and \$50.00 for damage to or the removal of the Department's property, such as fencing and signage. The Department is also proposing significant penalties of up to \$25,000 for the most egregious offenses that cause a taking of an endangered species, and up to \$1,500 for those who cause significant damage or remove the Department's property, especially where replacing the item would cost more than a nominal amount.

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Social Impact

Proposed new N.J.A.C. 7:25-4A provides the process for the Department's restrictions on tidal waters and adjacent shorelines and the penalties for a violation of the restriction. The proposed new rules will result in positive social impacts, as they will contribute to the conservation of coastal wildlife species that the Department manages on behalf of the public. Preservation and management of wildlife habitats and species is valued by the public, particularly species that are endangered (*Public Demand for Preserving Local Open Space, Society & Natural Resources* (2006), Jeffrey D. Kline, <https://www.tandfonline.com/doi/abs/10.1080/08941920600742419>; and *The Economic Benefits of Parks and Open Space: How Land Conservation Helps Communities Grow Smart and Protect the Bottom Line* (1999), Steve Lerner and William Poole, <https://rosap.ntl.bts.gov/view/dot/14457>). These studies have demonstrated that preserving natural resources adds value, both monetary and social, to neighborhoods and communities. This is evidenced by the billions of dollars spent annually throughout the United States by people solely to "wildlife watch." Many persons participating in wildlife-watching activities will welcome rules to protect these species, even if it potentially limits certain activities that may interfere with their enjoyment of natural tidal waters and adjacent shorelines.

The proposed rules may be negatively viewed by those members of the public who may be restricted from certain tidal waters and adjacent shorelines, especially when public use of New Jersey beaches for human pursuits is heightened, such as during the summer. For example, the endangered birds that nest along the shore do so during the late spring through summer when New Jersey recreational beach use peaks. However, as described in the Summary above, certain beach access restrictions to protect endangered species in "adjacent shorelines" are already routinely required in New Jersey, have been positively received, and are a testament to the ability of residents and the Department to come together to protect these species. As these efforts have been successful in the past, it is not anticipated that the proposed rules will have significant new social impacts. For example, many coastal municipalities and private property owners have already agreed to limited beach access restrictions, as a condition of their having accepted State and/or Federal permits, approvals, or State Aid Agreements. Examples of those activities include: beach fills, beach or dune maintenance, and coastal engineering projects. These authorizations have historically been conditioned on coordinating with the Department on such restrictions, often resulting in the establishment of formal Beach Management Plans agreed to by the municipality, the USFWS, and the Department. As such, the Department has extensive experience managing the conflicts or concerns that arise when restricting access to lands adjacent to tidal waters.

The proposed rules more clearly outline how the Department can restrict access to the tidal waters held by the State in trust for the public's use and sets forth the notice requirements and penalties for violations. This is likely to create some new social impacts for public visitors who have historically identified their access to tidal waters, inclusive of offshore sand bars, spits, islands, or the intertidal zone to be protected by the common law public trust doctrine. This rulemaking

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balances social impacts by establishing transparent and scientifically based criteria detailing why, when, and how any restrictions to tidal areas will be imposed and ensuring they are enacted to the minimal degree necessary to protect species.

Further, the proposed rules require notice to property owners and the general public when a restriction of tidal waters and adjacent shorelines is necessary for ensuring the protection of an endangered species and their critical habitat area, and – in the absence of a pressing need that cannot be reasonably planned or anticipated – will not implement the restriction less than 60 days after such notification. This time frame will allow for a reasonable period of time for the property owner(s) to contact the Department with any questions or concerns.

The proposed rules also requires the Department to identify, through signage and/or fencing, the areas the public or property owners cannot enter or utilize for the protection of endangered species or their critical habitat areas. Such signage will also clearly identify the Department as the implementing agency. This signage affords transparency and clarity concerning the agency responsible for any restriction implemented. The new rules also proactively inform people what violations may result from failing to abide by the restriction. As noted previously, many of the restrictions covered by this rulemaking are already being implemented through agreements between municipalities, the USFWS, and the Department.

Commercial activities may require access to the shore during these restrictions, such as shellfish aquaculturists who grow their oysters along the Delaware Bay. However, these commercial entities are already required to accommodate access restrictions imposed pursuant to their State shellfish lease agreements and other rule requirements pursuant to the Coastal Zone Management rules. For example, the USFWS presently imposes access restrictions on specific Delaware Bayshore tidal waters and adjacent shorelines pursuant to their April 2016 “Biological Opinion on the Effects of Existing and Expanded Structural Aquaculture of Native Bivalves in Delaware Bay, Middle, and Lower Townships, Cape May County, New Jersey on the Federally Listed red knot (*Calidris canutus rufa*)” (Biological Opinion), with which commercial leaseholders must comply. The Department will place restrictions carefully, and only for the time and area required, based on the best available scientific data supporting such need. The Department is also committed to assisting those commercial entities that may have unique considerations in opposition to a restriction by finding alternative ways to access the shore if the restriction would negatively impact a commercial enterprise. For example, the Department created a plan for those shellfish aquaculturists who have Delaware Bay leases for accessing the Bay during the red knot migration through New Jersey, by identifying access locations and time schedules that minimize negative impacts on red knot habitat use.

Economic Impact

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The proposed rules are expected to have a positive economic impact. In 2000, a study conducted for Fish and Wildlife found that at that time, the annual gross economic value of wildlife watching in the Delaware Bayshore study area alone ranged between \$16.9 and \$32 million annually (*Wildlife-associated Recreation on The New Jersey Delaware Bayshore, The Economic Impact of Tourism Based on the Horseshoe Crab-Shorebird Migration in New Jersey*, prepared by Fermata, Inc., Austin, Texas (2000) <https://rucore.libraries.rutgers.edu/rutgers-lib/16681/pdf/1/>). More recent estimates suggest that day trips to view shorebirds in the Delaware Bay area bring in considerable income, including day trips, overnight trips, and seasonal totals. Myers et al. (2011) found that day trips and overnight trips generated \$66.00 to \$90.00 and \$200.00 to \$245.00 per household, respectively, while Edwards et al. (2011) generated estimates of \$32.00 to \$142.00 per trip and \$181.00 to \$582.00 per season, per household. (*Measuring the Recreational Use Value of Migratory Shorebirds: A Stated Preference Study of Birdwatching on the Delaware Bay* (2010), Kelley Myers, George R. Parsons, and Peter E. T. Edwards, Researchgate, https://www.researchgate.net/publication/42831392_Measuring_the_Recreational_Use_Value_of_Migratory_Shorebirds_A_Stated_Preference_Study_of_Birdwatching_on_the_Delaware_Bay; and *The economic value of viewing migratory shorebirds on the Delaware Bay: An application of the single site travel cost model using on-site data*, Human Dimensions of Wildlife (2011), Peter E. T. Edwards, George R. Parsons, and Kelley Myers, <https://www.tandfonline.com/doi/full/10.1080/10871209.2011.608180>).

The continued use of the Delaware Bayshore by the species generating those wildlife-watching activities is significantly enabled by the imposition of reasonable, scientifically justified beach access restrictions. USFWS' 2011 *National Survey of Fishing, Hunting, and Wildlife-Associated Recreation: New Jersey* reported that wildlife-watching expenditures in New Jersey in 2011 alone totaled \$986 million (2011 *National Survey of Fishing, Hunting, and Wildlife-Associated Recreation*, U.S. Department of the Interior, U.S. Fish and Wildlife Service, and U.S. Department of Commerce, U.S. Census Bureau.

<https://www.census.gov/content/dam/Census/library/publications/2014/demo/fhw11-nat.pdf>). Much of the expenditures are generated by persons from New Jersey and surrounding states who come to New Jersey's shore specifically to view the migrating shorebirds this proposed rulemaking seeks to conserve. This economic value has been generated by visitors already abiding by access restrictions that have long been in place pursuant to other conservation partnerships or agreements.

The Department acknowledges that there may be some lost tourist revenue or additional costs imposed on commercial entities due to the restrictions, although these are expected to be minimal. In most cases, the restrictions are in place to limit the ability of vessels landing on beaches and disturbing habitat. Offshore fishing from charter vessels and personal watercraft would still be allowed outside of the restricted zone. As noted above, many municipalities already agree to restrict access to applicable portions of their beaches in association with permits or agreements with the USFWS and the Department. These facilitate beach fills and maintenance activities upon

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which their summer tourist economies are entirely dependent. This rulemaking is expected to add a level of regulatory authority, clarity, and transparency over such existing restrictions.

Environmental Impact

The proposed new rules will have a positive environmental impact. N.J.S.A. 13:1D-155 protects endangered species and the critical habitat areas relied upon by these species. Species that will benefit include the red knot, and the whole suite of migratory shorebirds, who require undisturbed access to foraging habitat on the Delaware Bay during their crucial northbound New Jersey stopover on their way to arctic nesting areas. The beaches the Department seeks to protect for this species group are limited to areas that have historically supported large numbers of spawning horseshoe crabs, creating food-rich locations for shorebirds to feed during their May and June stopover. These unusually rich areas are critically important locations to create the best possible feeding and resting sites for migrating shorebirds, attained by minimizing disturbances that prevent shorebird use. By improving the habitat conditions for red knots, the Department is acting to improve the outlook for recovering this population to historic levels. Beach-nesting birds, such as piping plover, will benefit, as human disturbance is reduced in the areas where they nest and forage, thereby improving their chances for higher reproductive success. Colonial waterbirds, such as black skimmers, will also be able to nest and roost in areas undisturbed by humans. Restrictions are especially important during the incubation, chick rearing, and post-fledging periods as the colony utilizes the upper beach and intertidal regions to complete this portion of their life cycle. Sea turtles, who nest rarely in the State, but will likely increase as the climate warms, will gain protection for their nests (laid on the upper beach) and corridors that will allow safe passage of newly hatched young as they venture to the sea.

A healthy ecosystem, which benefits all New Jerseyans, is one that features a variety of life forms. Promoting and protecting this biodiversity is one of the most important actions wildlife managers can take to keep ecosystems intact. Prioritizing protection of the species most likely to go extinct, those listed as endangered, will help preserve the biodiversity of the New Jersey coastline and is needed as species face ever greater challenges. Coastal development and engineering in recent decades have created conditions that restrict the locations where beach-nesting birds can nest and feed, making their populations more vulnerable to extirpation from the State. The targeted protection of tidal waters and adjacent shorelines for these species helps to maintain a minimum inventory of suitable habitats.

Proactive management to enhance endangered species and their habitats helps to sustain other populations that are currently more stable and may help avoid declines that require future listing as threatened or endangered and, most critically, avoid extirpation from the State. That is, the protections enacted for endangered species often serve as “umbrellas” to non-listed species inhabiting the same area. For example, protections for piping plover will also benefit American

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oystercatchers, a species of special concern, and protections for red knot will also help ruddy turnstones, semipalmated sandpipers, and sanderling, all species of special concern. This rulemaking will not only provide environmental benefits to endangered species, but also to those species beyond those the rule directly protects.

Jobs Impact

The Department has evaluated this rulemaking to determine the impact of proposed new N.J.A.C. 7:25-4A and concluded it will have no impact on jobs. The proposed new rules will neither create jobs nor eliminate jobs. Many of the areas that are considered “adjacent shorelines” already have restrictions in place with no measurable job impacts. Restrictions to “tidal waters” are more novel, although not unprecedented, but there is no data to suggest that any jobs will be negatively impacted by this rulemaking. The New Jersey Atlantic and Delaware Bay coastlines are extensive and any temporary restrictions to portions of them will be offset by the vast areas that will remain without restrictions. As previously noted, Delaware Bay commercial shellfish aquaculture leaseholders already must comply with the USFWS’ Biological Opinion through their leases, so there would not be an impact to jobs related to this use. If the Department implements a new restriction or an emergency restriction, people may be inconvenienced, but because the restriction will be for only the time and area necessary, it will neither create nor cause the elimination of any jobs. For example, the Department could restrict a popular summer beach for a few days during the summer to let sea turtles come ashore and lay their eggs, and then again about a month later for the eggs to hatch and the hatchlings to make it to the water. A lifeguard stand may have to be moved for the duration of the restrictions, but the lifeguard jobs will not be eliminated as they will just move the stand away from the restricted area. Tourism jobs will not be created because of the brevity of the restrictions. Beach restrictions have been implemented by the Department for decades and to date there have been no known jobs created or eliminated because of the restrictions. The proposed new rules are strictly about restricting tidal waters, adjacent shorelines, or both, to protect endangered species and/or critical habitat areas.

Agriculture Industry Impact

Pursuant to N.J.S.A. 52:14B-4(a)2, the Department has evaluated this rulemaking to determine the nature and extent of the proposed new rules’ impact on the agriculture industry. The proposed new rules apply solely to restricting New Jersey’s tidal waters and adjacent shorelines. While salt hay has historically been farmed along New Jersey’s shorelines, and some limited activity may continue, these restrictions are not anticipated to affect these areas or activities in any way, because salt hay is grown in elevated marshes on Delaware Bay where intertidal habitat is extremely limited in area. As discussed above, shellfish aquaculturists have been impacted by the

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presence of red knots on the Delaware Bay shore every spring. Since the creation of the USFWS' Biological Opinion in 2016, shellfish aquaculturists have a designated path they take through an off-road vehicle to reach their offshore leases during low tide. This path provides the red knot with plenty of space and keeps the off-road vehicles, and their noise, away from the red knots. This rulemaking will not further impact the shellfish aquaculturists unless the Department determines that the Biological Opinion no longer works sufficiently to protect red knots, the area the red knots use to eat horseshoe eggs moves north to where the current path for off-road vehicles is, or another endangered species must also be considered and it impacts the route the shellfish aquaculturists take to reach their leases. If the Department implements a new restriction in another area that affects commercial shellfish aquaculturists, the Department is committed to assisting those aquaculturists with finding a safe pathway to their leaseholds.

Federal Standards Statement

The New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 through 21 (P.L. 1995, c. 65), require State agencies that adopt, readopt, or amend State rules that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis. The proposed new rules do not implement, comply with, or enable the State to participate in any program established pursuant to Federal law, standards, or requirements. The species that are being protected through the new rules for the protection of endangered species that inhabit the shoreline include species listed in the Federal Endangered Species Act (16 U.S.C. §§ 1531 et seq.). However, those species are also listed on, and protected through, the New Jersey endangered species list promulgated pursuant to the ENSCA. Accordingly, no further analysis is required.

Regulatory Flexibility Analysis

In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has reviewed the proposed new rules for reporting, recordkeeping, or other compliance requirements on small businesses. The proposed new rules will affect tidal waters and adjacent shorelines, and to the extent that small businesses use these areas, they, too, will be affected. However, as stated above in the Summary, these businesses have already been affected by restrictions. Therefore, the proposed new rules will not cause any additional burden on small businesses. For any new restrictions, the Department will assist small and large businesses with navigating around restrictions. In addition, the proposed new rules have no recordkeeping, reporting, or compliance requirements.

Housing Affordability Impact Analysis

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Pursuant to N.J.S.A. 52:14B-4, the Department has evaluated this rulemaking to determine the nature and extent of the proposed new rules on the impact to housing affordability. The proposed new rules apply solely to the State's tidal waters and adjacent shoreline where residential development is already highly restricted and, thus, has no impact on the average costs associated with housing or on the affordability of housing in the State.

Smart Growth Development Impact Analysis

Pursuant to N.J.S.A. 52:14B-4, the Department has evaluated this rulemaking to determine the nature and extent of the proposed new rules on the impact to smart growth development. The proposed new rules apply solely to the State's tidal waters and adjacent shoreline. It has no impact on the housing production within Planning Areas 1 or 2, or within designated centers, pursuant to the State Development and Redevelopment Plan.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

The Department has evaluated this rulemaking and determined that it will not have an impact on pretrial detention, sentencing, probation, or parole policies concerning adults and juveniles in the State. Accordingly, no further analysis is required.

Full text of the proposed new rules follows:

SUBCHAPTER 4A. ACCESS RESTRICTION TO TIDAL WATERS FOR ENDANGERED SPECIES PROTECTION

7:25-4A.1 Purpose

The purpose of this subchapter is to provide the process by which the Department establishes a restriction prohibiting public access to particular tidal waters and adjacent shorelines traditionally available for public use pursuant to the public trust doctrine for the purpose of protecting a threatened or endangered species and/or their habitat.

7:25-4A.2 Definitions

The following words and terms, as used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

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“Adjacent shoreline” means the area above the mean high water mark that an endangered species relies upon for a stage of an endangered species life cycle, and it may include the upland dry sand or other upland ecosystem or biome as determined by the Department.

“Anticipated use” means utilization of areas that have a history of use by endangered wildlife and the habitat remains suitable, such that the Department predicts it will be used in the calendar year by the endangered species.

“Critical habitat area” means the area of the tidal waters, adjacent shoreline, or both, that are necessary for a stage of an endangered species life cycle that is critical to the species survival and/or reproductive success.

“Endangered species” means those species listed with a conservation status of “endangered” or “threatened” at N.J.A.C. 7:25-4.13, pursuant to the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1, including those Federally “endangered” or “threatened” species on the Federal Endangered Species Act List (16 U.S.C. §§ 1531 et seq.) yet to be placed onto the State’s list.

“Injurious use” means any use of a restricted area that causes damages or degradation to a critical habitat area, or when such use results in a “take” as defined at N.J.S.A. 23:2A-3, of an endangered species.

“Restrict” means the closure of an area to the public, including their pets and recreational equipment, such as vehicles, boats, and drones.

“Tidal waters” means the intertidal zone, which is the exposed area during periods of low tide, but inundated during periods of high tide, typically up to the mean high-water line. It also includes the area in the water up to 300 meters from the mean low-water mark.

7:25-4A.3 Process for implementing a restriction; notification

(a) The Department shall determine the need to restrict tidal waters, the adjacent shoreline, or both, based upon the following conditions:

1. There is an actual, or anticipated, use of an area by an endangered species;
2. The tidal waters, adjacent shoreline, or both are critical habitat areas for the endangered species; and
3. The restriction of the tidal waters, adjacent shoreline, or both, is required to protect the critical habitat areas and/or endangered species from injurious uses.

(b) If conditions at (a)1, 2, and 3 above are met, the Department will establish the following:

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1. The minimum size of the area to be restricted for the prevention of injury and injurious uses to the endangered wildlife species or critical habitat areas; and

2. The minimum duration of the restriction for the prevention of injury and injurious uses to the endangered wildlife species and the critical habitat areas.

i. The Department may establish a restriction that occurs annually, starts and ends multiple times within a year, or starts and ends multiple times over multiple years, as necessary, to address the conditions established at (a) above.

(c) Once a restriction is established pursuant to (a) and (b) above, the Department shall notify the landowner of the restricted area using certified U.S. mail, return receipt requested, post details concerning the restriction on the Department's website at <https://dep.nj.gov/njfw/wildlife/regulations-and-resources/laws-and-regulations/shore-protection-rule/>, and mail notice of the restriction through the U.S. mail to the municipality in which the restricted area is located. If a landowner or municipality has authorized the Department to communicate regarding such restrictions through an email address, the required notice may, instead, be emailed. Unless conditions require an emergency restriction be put in place, the Department will provide at least a 60-day notice before implementing a restriction to tidal waters or adjacent shorelines.

(d) The Department reserves the right to implement an emergency restriction in an instance where utilization of a new critical habitat area by an endangered species emerges where there could be an injury to the endangered species or injurious uses of the critical habitat area.

1. A landowner will be notified through a telephone call, email, or hand-delivered letter within 48-hours of the emergency restriction being implemented.

2. An emergency restriction will only be authorized for the same area for a maximum of two consecutive years. Subsequent authorizations by the Department will comply with the analyses at (a) and (b) above.

(e) A landowner may appeal the restrictions in this section by applying to the Department pursuant to N.J.A.C. 7:25-4A.5. The filing for an adjudicatory hearing shall not remove the restriction. A landowner may request a stay of the restriction pursuant to N.J.A.C. 7:25-4A.5(f) pending the outcome of an appeal.

(f) Once the Department has determined a restriction is needed and notice has been provided in accordance with (c) or (d) above, the restriction shall be valid until amended or revoked by the Department.

1. The Department shall reassess restrictions annually, ensuring that the conditions established at (a) above continue to support the need for the restriction, and that the size and duration of the restriction established pursuant to (b) above continue to represent the minimum

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size and duration of a restriction necessary to prevent injury and injurious uses to the endangered species or critical habitat area(s).

i. If the annual review concludes that the conditions identified pursuant to (a) above are no longer present at the location of a restriction, the Department shall revoke and cease to implement the restriction.

ii. If the annual review concludes that the conditions identified at (a) above have changed sufficiently to warrant altering the size or duration of a restriction, or both, the Department will modify the restriction, as necessary, to ensure it remains the minimal necessary to prevent injury and injurious uses to the endangered species or critical habitat area(s).

iii. If a restriction warrants modification or revocation pursuant to this section, the Department shall notify the affected landowner and municipality in which the restricted area is located consistent with the notification requirements at (c) above, noting any changes. Modified or revoked restrictions will be posted on the Department's website at <https://dep.nj.gov/njfw/wildlife/regulations-and-resources/laws-and-regulations/shore-protection-rule/>.

7:25-4A.4 Signage or fencing

The Department shall post such signs, stakes, or flags and may install temporary fencing or ropes, as necessary, to visually and physically identify an area subject to a restriction. The Department, at its discretion, may post signs along the upland perimeter of the restricted area or in a manner that best marks the restricted area for the public to identify and avoid the area during the restriction. Such signs and fencing shall be removed by the Department when the restriction has ended.

7:25-4A.5 Procedure to request an adjudicatory hearing; request for a stay

(a) To contest a restriction, an affected landowner shall submit an adjudicatory hearing request within 30 calendar days of receipt of the restriction notice. If an affected landowner submits the adjudicatory hearing request after this time, the Department shall deny the request.

(b) An affected landowner requesting an adjudicatory hearing shall provide the following information:

1. The name, address, daytime telephone number, fax number, and email address of the person requesting the hearing and the person's authorized representative, if any;
2. A copy of the restriction notice;

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3. The date that the restriction notice on which a hearing is being requested was received by the person requesting the hearing;
4. A specific admission, denial, or explanation of each fact appearing in the restriction notice, or a statement that the person is without knowledge thereof; and
5. A concise statement of the facts or principles of law asserted to constitute any factual or legal defense.

(c) An affected landowner requesting an adjudicatory hearing shall:

1. Submit the original hearing request to:

New Jersey Department of Environmental Protection
Office of Administrative Hearings and Dispute Resolution
ATTENTION: Adjudicatory Hearing Requests
401 E. State Street
Mail Code 401-07A
PO Box 420
Trenton, NJ 08625-0420; and

2. Submit a copy of the hearing request to the Assistant Commissioner of the Division of Fish and Wildlife, at the address below:

Fish and Wildlife
Attn: Assistant Commissioner
Mail Code 501-3
PO Box 420
Trenton, NJ 08625-0420

(d) Nothing in this subchapter shall be construed to provide a right to an adjudicatory hearing in contravention of the Administrative Procedure Act, N.J.S.A. 52:14B-3.1, 3.2, or 3.3.

(e) The request for an adjudicatory hearing shall not stay the restriction. To stay the restriction, an affected landowner must apply for a stay within 30 days of the restriction notice by submitting a request for a stay to the Assistant Commissioner at the address at (c)2 above. Such stay request shall include:

1. The date a request for an adjudicatory hearing was filed with the Department;

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2. A concise statement of material facts as to why the restriction should be removed, pending the appeal including the irreparable harm the landowner will suffer due to the restriction;

3. The reasonable probability of success of the landowner on the merits of the landowner's case; and

4. The hardship caused by the restriction, if any, and if it is a greater harm than if a stay were not granted.

(f) The Department shall notify the landowner by a letter sent by U.S. mail if a stay has been granted or denied. If the request for a stay is granted, any signage or fencing shall be removed by the Department.

(g) The Department shall notify the landowner by a letter sent by U.S. mail that the request for hearing is granted or denied. If the hearing request is denied, the denial shall provide the reason(s) for the denial. If the hearing request is granted, the Department shall refer the matter to the Office of Administrative Law for a contested case hearing in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and 52:14F-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

(h) A final decision issued by the Commissioner after the hearing in the Office of Administrative Law shall be considered final agency action for purposes of the Administrative Procedure Act and shall be subject to judicial review in the New Jersey Superior Court, Appellate Division, as provided in the Rules of Court.

7:25-4A.6 Penalties

(a) Once the tidal waters, adjacent shoreline, or both, are restricted, a person shall not enter the restricted area. A person shall not allow the person's recreational equipment or pet to enter the restricted area.

(b) A person who violates this section shall be liable to a penalty imposed pursuant to N.J.S.A. 23:2A-10 of not less than \$250.00 and not more than \$25,000 for each violation. Each day during which each violation continues shall constitute an additional, separate, and distinct offense.

(c) A person who damages or removes State property, such as signs, stakes, flags, ropes, or fencing, shall be liable to a penalty imposed pursuant to N.J.S.A. 23:7-9 of not less than \$50.00 and not more than \$1,500 for each violation.