

Q&A – New Jersey Department of Environmental Protection’s Proposed Public Access Regulations

What public access is to be provided by the proposed rule?

The Coastal Zone Management rules require new development on tidal waterways to provide opportunity for public access to tidal waterways and their shores on or offsite. Public access to the waterfront is the ability of the public to pass physically and visually to, from, and along tidal waters 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 access ways and public access areas include streets, paths, trails, walkways, easements, paper streets, dune walkovers/walkways, piers and other rights-of-way.

How do these requirements differ from previous public access requirements?

The Department believes that environmental and policy goals can be accomplished without extensive and proscriptive regulatory requirements. These proposed rule amendments 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 amendments 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.

In addition, the proposed rule amendments provide municipalities with the option to develop a local municipal public access plan tailored specifically to the needs of that community. When a municipal public access plan is completed, and the Department deems it consistent with public access goals, Department-approved development along tidal waterways and their shores will be required to provide public access consistent with the municipal plan.

What is the purpose of these rule amendments?

This rule seeks to maintain and enhance the public’s access to coastal and tidal waters in a reasonable, planned manner. It seeks to build on the Public Trust Doctrine, which is a piecemeal, site-specific, common law doctrine, by providing a comprehensive, yet flexible, approach to public access plan that can be tailored to local needs at the municipal level. These rules are also being proposed in response to a court decision, *Borough of Avalon v. NJ Department of Environmental Protection* and Legislative action (Public Access and Marina Safety Task Force Act, N.J.S.A. 13:19-38 et seq.). Both the courts and the Legislature struck down significant parts of the Department’s current access rules and limited our ability to take certain actions.

How does this rule affect marinas?

Applicants for new marinas will be required to create their own public access plan. Existing marinas will need to maintain existing public access or, if necessary, provide equivalent public access at another onsite location. Marinas that include beach area shall provide public access along the beach.

How does this rule protect public access to the waterfront in urban areas?

Under this rule all existing public access must be maintained. Industrial facilities, which are of particular concern in urban areas, will be required to provide public access either on site or along the same waterbody within the same municipality unless directed to do otherwise by a Department-approved Municipal Public Access Plan.

Does this rule prevent urban waterfront redevelopment projects such as that in Baltimore and New York City?

No. In fact the opposite is true. This rule promotes urban waterfront redevelopment and public access opportunities by recognizing that planning is necessary to accomplish those goals, by allowing for flexibility, and by giving municipalities the tools and resources to implement their plans. Many municipalities in fact complained that the Department's former access rules were too costly and actually prevented them from moving forward with innovative urban waterfront redevelopment and public access initiatives and often required access locations in places that were unsafe.

Can towns still charge the public for beach access?

Towns can charge a fee for the use of bathing and recreational facilities and safeguards. However, no fees shall be charged solely for access to, or use of, tidal waterways and their shores. The Department will still maintain its authority to ensure that beach fees are not excessive and are in compliance with the Public Trust Doctrine.

How did the Court in *Borough of Avalon v. NJ Department of Environmental Protection* impact the Department's authority to control public access?

The Court held that the Department could not require a municipality to impose 24/7 public access, could not mandate that bathrooms be built, and could not require that parking spaces be provided. It also held that the Department could not condition shore protection funding on complying with public access requirements. Funding is a prerogative of the Legislature. While only a portion of the Department's public access rules were challenged in this particular case, the reasoning of the Court questioned other provisions as well. The Department is confident that its new proposed rules will pass legal challenge, and that what it cannot mandate, it can obtain by developing cooperative relationships with municipal governments and by developing Municipal Public Access Plans.

Does this rule require parking or bathrooms?

While the rule does not explicitly require bathrooms, the Army Corps of Engineers (ACOE) Planning Guidance Notebook does provide guidance on access standards and notes that the lack of such facilities may constitute a restriction on public use and, thereby, preclude eligibility for Corps participations.

Are we exempt from the Hudson River Walkway requirements if our town adopts a Municipal Public Access Plan?

No. The Department believes that the Hudson River Waterfront Area has unique issues and concerns best addressed through Department rules.

How does the rule address Homeland Security Concerns?

Homeland security facilities will not have to provide public access on-site but may have an obligation to provide off-site access or pay into a municipal access fund if they are a new facility.

What is a Municipal Public Access Plan?

These rules provide the opportunity for, and encourage, the development of Municipal Public Access Plans. A Municipal Public Access Plan is a planning document that municipalities may develop to ensure that public access is provided efficiently and equitably in a manner that is consistent with local planning efforts. If and when a Municipal Public Access Plan is completed, and the Department deems it consistent with the criteria set forth within the rule amendments, Department-approved development along tidal waterways and their shores will be required to provide public access consistent with the Municipal Public Access Plan.

What criteria will you use to approve a Municipal Public Access Plan?

The criteria for approval of Municipal Public Access Plans are detailed in the rule. Municipal Public Access Plans will be required to meet the goals of the public access rule. Plans must provide an inventory and map of existing access points, an assessment of public access need, a strategy for implementation, details on necessary ordinance changes, and a draft resolution to adopt the plan into the municipal master plan. At a minimum, Municipal Public Access Plans must plan for the same level of access as would be required by the Public Access rules; however, the location and type of access facilities can be determined in accordance with local needs.

Why should towns create a Municipal Public Access Plan?

Municipalities that create and adopt Department-approved Municipal Public Access Plans will have the opportunity to direct the development of public access facilities in a manner that best suits local conditions and addresses the actual needs and wants of the public.

The Department will provide both technical and financial assistance to municipalities to facilitate the development of Municipal Public Access Plans.

By adopting a Municipal Public Access Plan, municipalities will have the ability to create a municipal public access fund that will enable them to channel financial resources towards the development of high-priority public access facilities, such as walkways, restrooms, concessions, parking, etc.

Creating a Municipal Public Access Plan will also make municipalities eligible for Green Acres funding and general permits for beach maintenance.

What will a public access plan cost?

The cost will vary depending on municipal conditions; however, the Department will provide technical assistance. As local communities typically have detailed knowledge of

public access needs, they are in the best position to select the most cost-effective means to achieve public access goals. Recognizing this, the proposed amendments encourage local authorities to create their own Municipal Public Access Plans. The work involved in creating such plans can be performed by municipal employees, by outside consultants engaged by municipalities, or with the Department staff assistance should the municipality request it.

What benefits come to towns that create public access plans?

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 and will be eligible for specifically dedicated Green Acres loans and grants.

Municipalities that do not have Municipal Public Access Plans will be ineligible for general permits for beach and dune maintenance activities and may be ineligible for any Green Acres loans or grants for any purpose within that municipality. Additionally, municipalities without plans may rank lower for shore protection funding projects.