

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

**Coastal Permit Program and Coastal Zone Management**

**Coastal Goals; Prime Fishing Special Area; Bay Islands Special Area; Hackensack  
Meadowlands District and Wetlands Special Area; Impervious Cover and  
Vegetative Cover Requirements for General Land Areas and Certain Special  
Areas; Resource Rules-Historic Structures**

**Adopted Amendments:** N.J.A.C. 7:7-1.4; and 7:7E-1.1, 1.5, 1.6, 1.8, 3.4, 3.21,  
3.27, 3.45, 5.1, 5.2, 6.2, 8.12 and 8.14

**Adopted Repeal:** N.J.A.C. 7:7E Appendix 1, Figure 11

Proposed: March 5, 2007 at 39 N.J.R. 725(a)

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

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

Authority: N.J.S.A. 13:19-1 et seq.; 12:5-3, and 13:9A-1 et seq.

DEP Docket Number: 05-07-01/477

Effective Date:

Expiration Date:

The Department of Environmental Protection (Department) is adopting amendments to the Coastal Permit Program rules, N.J.A.C. 7:7 and the Coastal Zone Management rules, N.J.A.C. 7:7E. The adopted amendments update the goals of the New Jersey's Coastal Management Program; incorporate new digital mapping of prime fishing areas; add the Shawcrest/Hildreth Island to the list of bay islands exempted from the Bay islands rule; specify the standards used to review proposed coastal activities and development within wetlands in the Hackensack Meadowlands District; clarify the application of the Coastal Zone Management rules in the review of coastal activities or developments within the Hackensack Meadowlands District; add electrical substations to the list of activities that are exempt from the impervious cover and vegetative cover

requirements of Subchapters 5, 5A and 5B; and facilitate the preservation of historic structures in danger of demolition, such as those of the Doo Wop era.

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

The Department held a public hearing on this proposal on March 29, 2007 at the New Jersey Department of Environmental Protection, Public Hearing Room in Trenton. Ruth Ehinger, Manager, Coastal Management Office served as the hearing officer. Six people provided oral comments at the public hearing. After reviewing the oral and written comments received during the public comment period, the hearing officer has recommended that the proposal be adopted with the changes described below in the Summary of Public Comments and Agency Responses.

The record of the public hearing is available for inspection in accordance with applicable law by contacting:

Department of Environmental Protection  
Office of Legal Affairs  
DEP Docket Number: 05-07-01/477  
PO Box 402  
Trenton, New Jersey 08625

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

The public comment period for this proposal closed on May 4, 2007. The following persons timely submitted oral and/or written comments on the proposal.

1. Benson Chiles, Coastal Ocean Coalition on behalf of Bayshore Regional Watershed Council, Environment New Jersey, Environmental Defense, Natural Resources Defense Council, New Jersey Audubon, New Jersey Environmental Lobby, New Jersey Federation, New Jersey Sierra Club, Public Employees for Environmental Responsibility, and Surfrider Foundation
2. Richard Hluchan, Ballard Spahr Andrews & Ingersoll, LLP on behalf of Pier 47, Inc.

3. Julia Le Mense Huff, Rutgers Environmental Law Clinic on behalf of Save Barnegat Bay
4. Robert Jubic, Jr., PEPCO Holdings, Inc.
5. Bruce Katcher, Esq., Manko, Gold, Katcher & Fox, LLP on behalf of D'Angelo Investment Group, LLC
6. Susan M. Kennedy, American Littoral Society
7. Tony MacDonald, Urban Coast Institute, Monmouth University
8. Betsy McDonald, NY/NJ Baykeeper
9. Patrick O'Keefe, New Jersey Builders Association
10. Bede T. Portz, Jersey Central Power & Light
11. Paul Schneider, New Jersey Builders Association
12. Captain Bill Sheehan, Hackensack Riverkeeper
13. Jeff Tittel, New Jersey Sierra Club
14. John Weber, Surfrider Foundation
15. Bill Wolfe, Public Employees for Environmental Responsibility

The timely submitted comments and the agency's responses are summarized below. The number(s) in parentheses after each comment correspond to the number(s) identifying the commenter(s) above.

**N.J.A.C. 7:7E-1.1 Purpose and Scope**

1. COMMENT: The Department's efforts to protect the environment are appreciated. (8, 12)
  
2. COMMENT: The commenter congratulates the Department for recognizing the significance of the Pew Oceans Commission and the United States Commission on Ocean Policy findings by attempting to heed the warning of these two august bodies with respect to New Jersey's regulation of coastal areas. (3)

RESPONSE TO COMMENTS 1 AND 2: The Department acknowledges these comments in support of the rules.

3. COMMENT: The proposal purports to be based on national reports that target crisis conditions, which justify an update of the Department's 26 year old coastal goals. As a result, this proposal is highly significant and warrants substantial meaningful public participation, particularly in impacted shore communities. However, the Department limited the public comment period to 60 days with only one public hearing in Trenton. The public comment period should be extended an additional 90 days and a series of three public hearings should be held in shore communities. (1)

4. COMMENT: The Department should extend the public comment period and hold a series of public hearings along the coast to allow public participation and discussion of revisions to the Coastal Management Program. (15)

RESPONSE TO COMMENTS 3 AND 4: The Department held a centrally located public hearing and provided a 60-day public comment period for the proposal. The Department also posted the proposal on its rules and regulations web page. Further, in 2001, the New Jersey Coastal Management Program contracted with the University of Rhode Island's Urban Harbor's Institute (UHI) to evaluate New Jersey's Coastal Management Program. As part of the evaluation, UHI researchers interviewed coastal managers as well as government officials, legislators, academics, fisheries biologists and members of the business and development communities concerning updating the Coastal Management Program's goals. The input from these interviews along with the findings of the Pew Oceans Commission and U.S Commission on Ocean Policy and the Department's 26 years of experience implementing the existing coastal goals were used in the development of the amendments to the coastal program goals. The Department believes that it provided sufficient opportunity for the public to comment by holding a public hearing in a centralized location and by providing a 60-day comment period. Therefore, the Department has determined that extending the comment period and holding additional public hearings is not necessary.

5. COMMENT: Advancement of State policy that will enhance the protection of New Jersey's coastal and open ocean waters, habitats and wildlife is welcomed. However, the proposed amendments offer little protection in that regard. The Department has missed an opportunity to make headway toward substantively improving policies that impact the State's ocean environment. (1)

6. COMMENT: The proposed changes to the New Jersey Coastal Management Program goals and policies are a significant improvement to the current rules and reflect the recommendations of the U.S. Commission on Ocean Policy. The proposed changes reflect more extensive and specific statements of the goals and policies that will support both healthy ecosystem management and sustainable development and redevelopment of coastal communities. These changes will both aid in providing the public with an understanding of what is being required; and by incorporation of these policies into the Coastal Management Program's enforceable policies, will strengthen the hand of the State in assuring consistency of Federal activities with State policies. (7)

7. COMMENT: As the rules accurately point out, the reports from the Pew Oceans Commission and U.S. Commission on Ocean Policy concluded that oceans are "at risk from non-point and point source pollution, climate change, overfishing and the effects of coastal development." These two reports made over 200 recommendations that Federal and State governments should adopt to improve the level of protection they offer the nation's oceans.

Since those reports were issued, New Jersey's record in following up with these recommendations has lagged behind other states. In 2003, Governor McGreevey directed the Department to "consult with representatives of commercial and recreational fisheries, community and environmental organizations, the business community, and other constituencies to develop recommendations that fully respond to the information presented in the Pew Oceans Commission's report." But, the McGreevey Administration never publicly followed up on that directive.

In April 2005, a coalition of State and national environmental organizations known as the Coastal Ocean Coalition, issued a Blueprint for State-Level Action, urging the

forthcoming Governor of New Jersey to take the opportunity to make New Jersey one of the country's leaders in State laws and policies that protect ocean and coastal resources. This report outlined in detail many suggestions for how the State could adapt its policies for a new era of ocean and coastal management that met the challenge set by the two ocean commissions.

Meanwhile, the Joint Ocean Commission Initiative gave State and multi-State efforts led by New York, the Gulf of Mexico, Puget Sound, and the West Coast Governors an "A-" for their progress in implementing the two reports' recommendations. Regrettably, New Jersey was not on that list. This proposal does not do enough to move New Jersey into the field of leading States that are taking strong action on ocean protection. (1)

8. COMMENT: The proposal represents the first effort by the Department under the Corzine Administration to update its ocean policies in response to the call to action by the various reports. While a long overdue update of the coastal goals is welcomed, it is only one small thread of a very large knot of issues that need to be directly and meaningfully addressed by the State. Unfortunately, the proposal will do very little to address the difficult issues that face New Jersey: coastal and ocean habitat degradation, poor coastal water quality that impairs marine life, ever expanding impervious cover due to sprawl, overfishing and bycatch, sea level rise and homes and businesses that are at risk from more frequent and intense storms due to global warming and the need to comprehensively plan for a myriad of future ocean resource uses.

Instead, the proposed rule is a mish-mash of small updates and changes that do little to move the ball forward in terms of upgrading ocean ecosystem protection. In fact, some of the changes appear to be weakening ocean ecosystem protection, and provide the Department with greater discretion in terms of what kinds of uses it will permit in ocean waters. The proposed rules do not rise to the level of truly embracing the recommendations of the national ocean commission reports. The State is urged to develop a comprehensive overhaul of its ocean policies, to embrace ecosystem-based management, and to engage with the conservation and academic communities more directly to pursue new policies that will indeed make a difference to the highest priority problems facing New Jersey's coastal and ocean zone. (1)

9. COMMENT: The summary of the proposal at 39 N.J.R. 725(a) states that there are 200 policy recommendations from the Pew Oceans Commission report. It would be beneficial to the public if there was a summary of those policy recommendations and how this proposal compares to them. If the Pew Oceans report is the benchmark in terms of policy reforms, then from a public information perspective, the Department should lay out specific policies that the proposal satisfies. (15)

10. COMMENT: The rule summary indicates that the rationale for the changes to the coastal goals is that it has been 26 years since they have been revised and since then the Pew Oceans Commission and the U.S. Commission on Ocean Policy have issued their findings indicating that we are failing our coasts and our oceans. Given such statements, one would think that new bold regulations for our coasts and oceans were proposed here; but if that is the case, they're not in this proposal. Will the Department be proposing additional amendments that address these reports? (14)

RESPONSE TO COMMENTS 5 THROUGH 10: The Coastal Management Program goals adopted herein, represent a refinement of the "eight basic coastal policies" presented in New Jersey's original Federally approved Coastal Management Program. While part of the impetus for refining the goals of the Coastal Zone Management rules and Coastal Management Program was the recommendations contained in the reports of the Pew Oceans Commission and the U.S. Commission on Ocean Policy, the goals and supplemental policies are intentionally broad to encompass diverse issues and interests in the State's coastal zone.

The Department agrees that by definition, specific actions are necessary to achieve the goals; however, such specificity is not an appropriate aspect of the broad goals. As has been the case since the inception of the New Jersey's Coastal Management Program, the Coastal Zone Management rules, the rulemaking process in general, Executive Orders, and Administrative Orders serve to provide the specificity that the commenters are seeking. The Coastal Zone Management rules are designed to provide the specific

means to achieve the broad coastal goals and therefore, represents the mechanism to address the "...priority problems facing New Jersey's coastal and ocean zone."

Each coastal issue mentioned in the above comments relates to one or more of the coastal goals. For example, the issues of habitat degradation and water quality fall within the goals of "healthy coastal ecosystems," and "safe, healthy and well-planned coastal communities and regions." With regard to the recommendations and associated recommended measures made by the Coastal Ocean Coalition in its Blueprint for State-Level Action, all except one fall within the Department's proposed goals and supplemental policies. Specifically, the Coalition's recommendations to "protect coastal and bay waters" and "strengthen ocean management" fall under the proposed goal of "healthy coastal ecosystems." The Coalition's recommendation to "restore fisheries" falls under the goal of "effective management of ocean and estuarine resources." The recommendation to "curb coastal sprawl" falls under the goal of "safe, healthy and well-planned coastal communities and regions." The recommendations regarding "public access" and "beach replenishment" fall under the goal of "meaningful public access to and use of tidal waterways and their shores." The Coalition's recommendations regarding "sea life mortality caused by power plants" and "privatization of Federal facilities" fall under the goal of "coordinated coastal decision-making, comprehensive planning and research."

The only recommendation and associated measure made by the Coalition in its Blueprint for State-Level Action not addressed in the goals adopted herein involves "global warming." In this regard, New Jersey and the Department of Environmental Protection are in the forefront with the State's involvement in the Regional Greenhouse Gas Initiative and the Global Warming Response Act, N.J.S.A. 26:2C-37 et seq., signed into law on July 6, 2007. This law calls for reducing greenhouse gas emissions to 1990 levels by 2020, approximately a 20 percent reduction, followed by a further reduction of emissions to 80 percent below 2006 levels by 2050.

Pursuant to Executive Order No. 66(1978), the Coastal Zone Management rules were scheduled to expire on January 7, 2008. The expiration date was extended to July 7, 2009. The Department is beginning the administrative process to readopt the Coastal Zone Management rules, which includes a comprehensive examination of the rules, and a

review to determine whether they are necessary, reasonable and proper for the purpose for which they were originally promulgated. As part of this process, the Department provided an opportunity for public input. Notice of a public meeting and the opportunity to submit written comments was published in the Atlantic City Press, Asbury Park Press and Star Ledger in January 2008 and posted on the Division of Land Use Regulation's web page. The public meeting was held on February 7, 2008 and written input was accepted through February 21, 2008. The Department will evaluate the existing rules and comments received in response to the public meeting and propose amendments as appropriate.

11. COMMENT: The commenters applaud the ambitious goals set forth in N.J.A.C. 7:7E-1.1(c)1 through 8. However, the rules are only as good as their implementation and enforcement strategies, which the rules fail to discuss. (8, 12)

RESPONSE: The Department acknowledges the comment in support of the amendments. With regard to implementation and enforcement strategies, these are addressed in the Coastal Permit Program Rules, N.J.A.C 7:7, which establish the procedures by which the Department reviews coastal permit applications and takes enforcement action under the Coastal Area Facility Review Act (CAFRA), the Waterfront Development Law and the Wetlands Act of 1970.

12. COMMENT: The Department should clarify throughout these rules that New Jersey's Coastal Management Program and all of these goals apply explicitly to ocean waters under State jurisdiction. The rule should either clarify the definition of "coastal" to mean both coastal and ocean waters and ecosystems or include the words "and ocean" whenever "coastal" is used. The commenter recommends that the Department add "ocean" to the goal of "Healthy coastal ecosystems." (1)

RESPONSE: The term "coastal" includes all tidal waters including the Atlantic Ocean. N.J.A.C. 7:7E-1.2(b) provides that the Coastal Zone Management rules apply geographically to the New Jersey coastal zone, which includes "coastal waters." Coastal

waters are defined as any tidal waters of the State and all lands lying thereunder. They extend from the mean high water line out to the three geographical mile limit of the New Jersey territorial sea, and elsewhere to the interstate boundaries of the States of New York, Delaware and the Commonwealth of Pennsylvania. New Jersey's jurisdiction within the Twelve Mile Circle is subject to the 1905 Compact between New Jersey and Delaware. With respect to the coastal goals, the term "ocean" refers specifically to ocean waters.

13. COMMENT: The proposed "balancing and conflict reducing approach..." is not authorized by statute and is inconsistent with the Department's role and obligations under the Coastal Area Facility Review Act (CAFRA) and the New Jersey Water Pollution Control Act to preserve, enhance, protect, and restore coastal ecosystems and water quality. Even if legally authorized, there are no balancing methodologies, weighing factors, priorities, or criteria to conduct such a "balance" which governs and puts restraints on the Department's discretion. Accordingly, the approach is by definition, arbitrary, capricious, and an abuse of discretion and can only result in legally proscribed ad hoc case-by-case bargaining.

The coastal goals need to reflect a policy hierarchy that is consistent with the legislative findings and decisions under CAFRA. By the lack of an overarching goal renders the individual eight goals as potentially conflicting, contradictory and thus, less meaningful. How does one weigh one goal versus another? The Department merely stating that they are doing so at N.J.A.C. 7:7E-1.1(c) does not resolve the contradictory nature of some of these goals. For example, "preserving and enhancing views of the coastal landscape" is not as important as "protecting, enhancing and restoring coastal (and ocean) habitats." The proposed goals lack factors or criteria to "weigh" or "balance" competing, conflicting or inconsistent goals. The proposed notion and framework for "balance" is at odds with the legislative policy under CAFRA. The CAFRA findings use the word "balance" exclusively with respect to natural systems. In 1973, the New Jersey Legislature found that "certain portions of the coastal area are now suffering serious adverse environmental effects resulting from existing development activity impacts." Thirty-four years later, the health of our coastal area is still in

jeopardy, in part, because of development activity. CAFRA Sections 10 and 11 conditions and standards for issuing a CAFRA permit are even more constraining and restrictive and require resource protection. The Department has rarely, if ever, enforced Section 11 and it would appear that Section 10 protections are only loosely enforced. It is feared that this proposal will further weaken statutory goals, legislative intent, and environmental standards under CAFRA.

The coastal goal of “Healthy Coastal and Ocean Ecosystems” at N.J.A.C. 7:7E-1.1(c)1 should prevail as the most important goal. Given the importance that the two ocean commissions placed on the need to protect, maintain and restore ocean ecosystems and their call that states and the Federal government enact policies to accomplish that goal, it is recommended that this goal be the overarching goal that the State’s coastal programs are designed to meet. It is also recommended that this goal state that ecosystem-based management is the means to achieve this goal.

By making the goal of Healthy Coastal and Ocean Ecosystems the paramount object of these rules, the Department will in fact promote the attainment of sustainable recreational and commercial fisheries, coastal open space, and safe, healthy and well-planned coastal communities and regions; conserve water supply; protect the natural environment; and minimize the threat of natural hazards to life and property. This will also help the Department increase the economic viability of tourism and the fishing industries. (1)

RESPONSE: The coastal goals adopted herein reflect both the letter and spirit of CAFRA. In the Legislative findings and declarations section of CAFRA (N.J.S.A. 13:19-2), the Legislature “...recognizes the legitimate economic aspirations of the inhabitants of the coastal area and wishes to encourage the development of compatible land uses in order to improve the overall economic position of the inhabitants of that area within a framework of a comprehensive environmental design strategy, which preserves the most ecologically sensitive and fragile area from inappropriate development and provides adequate environmental safeguards for the construction of any developments in the coastal area.”

The goals are fully consistent with CAFRA and are not inherently contradictory. The Department does not "merely" state that "balances were struck among various conflicting, competing, and contradictory...interests in coastal resources and in uses of coastal locations." In fact, the CAFRA directs the Department to evaluate the effects of a proposed development upon the environment of the coastal area. The evaluation is based upon the Coastal Zone Management rules that implement CAFRA. The Coastal Zone Management rules are the means to address competing and conflicting interests in the coastal area. The rules do not treat every competing and conflicting interest as equal. The Coastal Zone Management rules are structured with location, use, and resource rules. These rules provide the substantive standards by which special resources and uses are designated and protected when regulated developments are proposed or undertaken in the coastal area.

14. COMMENT: The goal of promoting, sustaining and enhancing active port and other water-dependent uses at N.J.A.C. 7:7E-1.1(c)4i should be tempered by the goal of protecting, enhancing and restoring the ecosystem at N.J.A.C. 7:7E-1.1(c)1. To the extent that these goals conflict, the conflict should be resolved in favor of protecting the ecosystem, especially in light of the Department's new commitment to the findings of the Pew Oceans Commission and the U.S. Commission on Ocean Policy. (3)

RESPONSE: The Coastal Zone Management rules provide for the suggested conflict resolution. Docks and piers for cargo and commercial fisheries are addressed under Subchapter 4, General Water Areas. N.J.A.C. 7:7E-4.1 (c) states that "in case of conflict between General and Special Area rules, the more specific Special Area rules shall apply." In addition, the Port Use Rule at N.J.A.C. 7:7E-7.9 is subject to the requirements of both the Basic location rule, N.J.A.C. 7:7E-6.2 and the Secondary impacts rule, N.J.A.C. 7:7E-6.3, each of which provides measures to protect the ecosystem.

15. COMMENT: Ecosystem based management should become the guiding principle of the Department and should guide all of its rules and decisions. (14)

RESPONSE: The Department agrees that ecosystem-based management is fundamental to achieving holistic coastal and marine resource management. The Department believes that the Coastal Zone Management rules constitute an ecosystem based management approach. However, the Department agrees that it would be beneficial to add a supplemental policy to the goal of “Healthy coastal ecosystems” stipulating that ecosystem based management will be a guiding principle employed by the Department in it’s the Coastal Management Program, and will consider this change in the upcoming readoption of the Coastal Zone Management rules.

16. COMMENT: The coastal goals need to be revised so that the goal of “Healthy coastal ecosystems” is reflected, not simply incorporated by reference, and technically integrated into the policies, standards, science, monitoring, assessment, enforcement, infrastructure, and other permitting and implementation requirements of the comprehensive New Jersey Coastal Management Program. For example, there are legislative policies and intent (N.J.S.A. 13:19-2) and standards for issuance of a CAFRA permit in the statute (N.J.S.A. 13:19-10 and 11). The proposed goals appear to ignore these requirements and therefore fail to implement them. (1)

17. COMMENT: There are no indicators, monitoring methods, assessment methods or biological criteria identified in the current Coastal Zone Management rules or proposed amendments that suggest the meaning of “healthy ecosystem.” For some portions of the coast, the developmental indicator’s report for the Barnegat Bay should be used to determine bay area ecosystem health. The goal “healthy coastal ecosystems” is a good goal, but how will it be implemented and what does it mean? (15)

RESPONSE TO COMMENTS 16 AND 17: Stating that healthy coastal ecosystems is a basic goal of the New Jersey Coastal Management Program reflects the magnitude of the importance of that goal to the effectiveness and success of the Program. By healthy ecosystem, the Department means an ecosystem that is capable of supporting resilient biodiversity that functions in a productive manner. The intended means to substantively achieve the goal of healthy coastal ecosystems is through technical integration in the

policies, standards, science, monitoring, assessment, enforcement, infrastructure, permitting and implementation of the Program.

The goals adopted herein reflect the legislative policies and intent contained in CAFRA. The standards for issuance of a CAFRA permit at N.J.S.A 13:19-10 are appropriately contained in the "Coastal decision-making process in the Coastal Zone Management rules (See N.J.A.C. 7:7E-1.5(a)). Further, the standards of CAFRA at N.J.S.A. 13:19-11 are incorporated into the Coastal Zone Management rules at N.J.A.C. 7:7E-6.2.

18. COMMENT: Prior to these amendments, the coastal goal at N.J.A.C. 7:7E-1.5(a)1v contained a specific numerical goal of creating at least one waterfront park in each waterfront community. Has this goal been achieved such that the Department is now in the position of stating its goal as one of protecting, enhancing and promoting waterfront parks? Have all waterfront communities been surveyed to ensure that each contains at least one waterfront park that provides the meaningful public access contemplated by the proposed amendments? (3)

RESPONSE: The Department has not abandoned this standard, which is one of many means to achieve the adopted goal of meaningful public access to and use of tidal waterways and their shores. The standard remains in the Coastal Zone Management rules at N.J.A.C. 7:7E-7.3(b)1, Resort/recreational use rule, which states: "Each waterfront municipality should contain at least one waterfront park on each body of water within the municipality."

19. COMMENT: The stated management objectives of the "effective management of ocean and estuarine resources" at N.J.A.C. 7:7E-1.1(c)2 are untethered to the healthy coastal ecosystem goal, but are instead related to "safe and environmentally sound use." Both the terms "safe" and "environmentally sound" are undefined and lack criteria or scientifically based standards of evaluation to enable implementation. How do these terms relate to healthy coastal ecosystems? (1)

20. COMMENT: N.J.A.C. 7:7E-1.1(c)3 states that one of the coastal goals is to have meaningful public access to and use of tidal waterways and their shores. While this goal is crucial to management and preservation of the coastal zone, these rules suggest that the Department need only think about these goals when determining what proposed coastal development to approve, and do not set up a hard criteria or elements to consider when deciding permit applications. Meaningful public access to and use of tidal waterways is not available if developments destroy coastal resources, and therefore limit access to those resources. The Public Trust Doctrine, as defined on the Department's website, "recognizes and protects natural resources as well as recreational uses such as swimming, sunbathing, fishing, boating and walking along tidal waterways and their shores." By allowing project applicants to move forward with development of the coast, coastal resources will continue to disappear, limiting the public's access to such resources even further. It is the duty of the State not only to allow and protect the public's rights to use tidal waterways and their shores, but also to ensure that there is adequate access to these resources. However, if the resources themselves are not protected, then what exactly is the State securing access for? The best use for the coast is open space/parkland, which will ensure resource protection as well as access to those resources. (8, 12)

RESPONSE TO COMMENTS 19 AND 20: The coastal goals are considered the foundation of the New Jersey Coastal Management Program. From the Department's perspective, the goals are linked and must be pursued in concert with one another to reflect the intent of CAFRA. For example, the goal of "coordinated public education and outreach" embraces elements of each of the other seven goals. While "effective management of ocean and estuarine resources" focuses on resource use, the goal must not be construed as somehow separate from the goal of "healthy coastal ecosystems."

Regarding the definitions of "safe" and "environmentally sound," the Department intends the standard meanings of the words. "Safe" is free from injury, danger, or risk. "Sound" is in good condition, healthy, robust. "Environment" is the biotic, abiotic, social, and cultural factors that act on an organism, population, or ecological community.

21. COMMENT: To accomplish the ambitious goals and policies set forth in this proposal, there needs to be: significantly increased technical assistance and support for coastal communities; more inter-agency collaboration and resources dedicated to implementation; and more public outreach and engagement in public-private partnerships. (11)

RESPONSE: The Department acknowledges this comment that recognizes the ambitious nature of the goals and policies. The Department will continue its efforts to work with coastal communities, other agencies and the public. That effort is captured in the goal of “Coordinated coastal decision-making, comprehensive planning and research.”

22. COMMENT: The supplemental goal of “preserve and enhance views of the coastal landscape to enrich aesthetic and cultural values and vital communities” at N.J.A.C. 7:7E-1.1(c)3ii should not be interpreted or used by the Department as a rationale or means to prevent and/or hinder offshore wind planning and development. (1)

RESPONSE: The goal of “preserve and enhance views of the coastal landscape to enrich aesthetic and cultural values and vital communities” is not a statement regarding the Department’s policy on offshore wind. An offshore wind project would be reviewed on the merits of the specific proposal.

23. COMMENT: Coastal development limits the public’s accessibility to the views of the coast. Public access to the waterfront is the ability of all members of the community at large to pass physically and visually to, from and along the ocean shore and other waterfronts.” At a minimum, height limitations should be imposed on these developments. (8, 12)

RESPONSE: The Coastal Zone Management rules have provisions that address height limitations and conserve public views of the coast, which can be found at N.J.A.C 7:7E-7.14, High Rise Structures and N.J.A.C 7:7E-8.12, Scenic Resources and Design.

24. COMMENT: In accordance with N.J.A.C. 7:7E-1.1(c)3i, the Department proposes to “promote” public trust rights. Does the use of the term “promote” instead of the term “protect” suggest an increased level of commitment to and protection of public access rights? Is the Department taking the position that promotion of public access could allow for a reduction in public access because the goal is no longer to protect these rights? Please clarify. (3)

RESPONSE: The Department agrees that the word “promote” may be construed as a weakening of the Department’s commitment to and protection of public access rights. This is not intended. The Department believes that the word “preserve” more accurately reflects the intent of this supplemental policy. This is evidenced by the rule summary, which states at 39 N.J.R.727, “In order to ensure that the Public Trust Doctrine is implemented, this coastal goal aims to preserve existing and increase safe, environmentally sound and meaningful public access to and use of the State’s tidal waterways and their shores.” Therefore, the Department is replacing “promote” with “preserve” at N.J.A.C. 7:7E-1.1(c)3i on adoption.

25. COMMENT: The public access goal and related six policies at N.J.A.C. 7:7E-1.1(c)3 do not recognize private property rights. The policy to “preserve and enhance views of the coastal landscape to enrich aesthetic and cultural values and vital communities” would virtually include views of the horizon and is very broad in scope. The rule summary refers to the Public Trust Doctrine as the basis for this goal and does not feign an attempt to balance the rights of private property owners with those of the public. (9)

RESPONSE: Tidal shorefront property in New Jersey has long been impressed with public trust rights. The Department recently adopted rule amendments at N.J.A.C. 7:7E-8.11 that are intended to preserve and protect the common law rights under the Public Trust Doctrine. Requiring public access to and use of the shores of tidal waterways does not infringe on constitutionally protected private property rights; rather, these public rights are background principles of New Jersey state law. See, e.g., *National Ass'n of*

*Homebuilders v. State Dept. of Env't'l Protect.*, 64 F. Supp. 2d. 354 (D.N.J. 1999) (clarifying that the public trust doctrine is a background common law principle in New Jersey). The specific rights and protections recognized under the Public Trust Doctrine continue to develop through individual court decisions. See, e.g., *Borough of Neptune v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 309 (1972) ("(T)he Public Trust Doctrine should not be considered fixed or static, but should be molded and extended to meet the changing conditions and needs of the public it was created to benefit.")

26. COMMENT: The public access goal should acknowledge, consistent with the comments the New Jersey Builders Association submitted on the November 6, 2006 proposed public access rules, the limits and responsibilities that attend “meaningful public access.” (9)

RESPONSE: As stated in Response to Comments 5 through 10, the goals and supplemental policies are intentionally broad to encompass diverse issues and interests in New Jersey’s coastal zone. The specificity the commenter is requesting is not an appropriate aspect of the broad goals. The Coastal Zone Management rules’ public access rule is the means to achieve the broad coastal goal of “meaningful public access” and thus contains the specificity the commenter is requesting.

The Department responded to the commenter’s comments on the November 6, 2006 public access proposal in the adoption published in the New Jersey Register on December 17, 2007 (see 39 N.J.R. 5222(a)).

27. COMMENT: Meaningful public access is a sound goal, but it must not be implemented in a fashion that would compromise other goals. It is not clear that the proposed amendments to the goals would place adequate constraints on this potential conflict. (1)

RESPONSE: Open public access as opposed to private exclusion is the Department’s governing principle for the management of public natural resources. However, this does not mean that this access is unregulated. The Department has the authority to protect

natural resources, and implements the Coastal Zone Management rules in the coastal zone to protect these natural resources. The Coastal Zone Management rules contain standards that provide protection of natural resources such as endangered and threatened wildlife and plant species habitats, wetlands, beaches, dunes and critical wildlife habitats.

28. COMMENT: With new development and redevelopment booming in New Jersey, coastal development must be thoroughly examined. Returning the waterfront to water dependent uses is a great goal, however, water dependent uses do not include housing developments, office and retail space. In addition, N.J.A.C. 7:7E-1.1(c)6i(3) suggests that the Department will support well-planned communities and regions that will ensure the availability of suitable waterfront areas for water dependent activities. Water dependent activities do not include housing development, office and retail space, and therefore these structures should be highly limited in the coastal zone. (8, 12)

RESPONSE: The Department acknowledges this comment in support of the amendment. The Department agrees that water dependent uses do not include housing development, office and retail space (except in instances where an office or retail space is part of and specifically serves a water-dependent use, such as a marina). Water dependent uses are defined at N.J.A.C. 7:7E-1.8, which states that “water dependent uses exclude, for example: housing, hotels, motels, restaurants....”

29. COMMENT: Under the goal of “sustained and revitalized water dependent uses,” the Department’s role should not be to promote any commercial or economic uses or redevelopment of coastal resources. This is a function of the private sector and other economic development related State agencies. CAFRA requires that the Department provide a planning and regulatory oversight role to assure that economic uses are compatible with and are constrained by healthy coastal ecosystem requirements. The word “promote” should be deleted, as it is inconsistent with the Department’s statutory role and agency mission. (1)

RESPONSE: The Department agrees that the word “promote” connotes a more active role in coastal development than is contemplated by CAFRA and the Coastal Zone Management rules. Accordingly, on adoption, the Department is replacing the word “promote” with “encourage” at N.J.A.C. 7:7E-1.1(c)4i and ii. The term “encouraged” is defined at N.J.A.C. 7:7E-1.8 and used throughout the Coastal Zone Management rules to identify those uses that should be fostered and supported in the coastal zone. Also, the proposal summary regarding this goal explains it in terms of encouraging water-dependent development and public access to the water’s edge as a way to revitalize the waterfront. The use of this term “encourage” therefore more accurately reflects the Department’s intent under this goal.

30. COMMENT: The goal at N.J.A.C. 7:7E-1.1(c)4i to promote, sustain, and enhance active port and other water-dependent facilities, and maritime uses should also apply to inland sites. (9)

RESPONSE: A water-dependent use is defined at N.J.A.C. 7:7E-1.8 as “development that cannot physically function without direct access to the body of water along which it is proposed.” Since this goal relates to water-dependent and maritime uses, it is not applicable to inland sites.

31. COMMENT: The promotion of redevelopment of inactive or under-utilized sites at N.J.A.C. 7:7E-1.1(c)4ii should be limited to industrial sites, which is consistent with the Department’s statement in the summary of this section (see 39 N.J.R. 727). Further, N.J.A.C. 7:7E-1.1(c)6i(1) encourages mixed-use redevelopment of distressed waterfront communities including underutilized, abandoned and contaminated sites. Such encouragement should be done with respect to underutilized, abandoned and contaminated industrial sites. These goals will open the door to the redevelopment of open space by those arguing that open space, parkland or other similar uses is an underutilization or abandonment of a site. (3)

RESPONSE: The Department does not construe open space, parklands or areas of similar uses as underutilized or abandoned sites. In fact, the original eight basic coastal policies and the goals adopted herein, encourage the preservation, enhancement and restoration of open space, and the Department designates public open space as a special area, at N.J.A.C. 7:7E-3.40, which contains standards that discourage development that adversely affects public open space.

32. COMMENT: The policy of promoting the redevelopment of inactive and under-utilized waterfront facilities for port, water-dependent and maritime uses is a positive policy. However, this policy may not be realistic because it is very difficult to build housing in these areas due to other coastal policies. Marinas often cannot be redeveloped or enhanced through private initiatives without the income derived from housing. (9)

RESPONSE: Housing is not considered a water-dependent use as defined at N.J.A.C. 7:7E-1.8, and therefore, the Coastal Zone Management rules place restrictions on the conversion of waterfront areas for housing. However, the rules also provide ample latitude for the construction of housing in concert with the conservation of the waterfront portions of sites for water-dependent uses. For example the Filled water's edge rule, N.J.A.C. 7:7E-3.23, allows residential development in the filled water's edge provided the waterfront portion of the site is developed in water-dependent uses or preserved for future water-dependent use.

33. COMMENT: The promotion of dredging and dredge material management practices at N.J.A.C. 7:7E-1.1(c)4iv should only be done to the extent it is necessary and there are no reasonable alternatives. (3)

RESPONSE: The Department agrees with the commenter. As stated in the proposal summary at 39 N.J.R. 727, new or maintenance dredging in support of water-dependent development is acceptable where necessary; where impacts on the natural environment can be minimized; and when there is a demonstrated need that cannot be met by existing facilities. The intent of this supplementary goal was not to promote dredging, but rather

to manage dredging in an environmentally sensitive manner where there is a demonstrated need. Although the Department does not promote dredging, where dredging is necessary, the Department promotes environmentally sound and economically feasible dredge material management. Therefore, the Department is modifying N.J.A.C. 7:7E-1.1(c)4iv on adoption to make it clear that the goal is for management rather than promotion of dredging. Accordingly, the provision will read as follows: “manage dredging in an environmentally sound manner, promote environmentally sound and economically feasible dredge material management practices and preserve historic dredged material placement sites.”

34. COMMENT: N.J.A.C. 7:7E-1.1(c)5iv addresses the preservation, enhancement, and restoration of open space including natural, scenic, historic and ecologically important landscapes that abate impacts from nonpoint source pollution. This is mandatory for managing coastal resources. (8, 12)

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

35. COMMENT: N.J.A.C. 7:7E-1.1(c)5ii and iii require that the Department promote and enhance public access to and use of open space where appropriate; and promote strategies for creation of open space. These are two very important goals in protecting, preserving and enhancing coastal resources, but they are also examples of where the State cannot rely on regional and municipal authorities to follow these goals. There are many examples of municipalities making efforts to preserve their coastal resources, but there are several more examples of municipalities not employing the proper land use and planning tools when approving development of their coastal properties. The State must stay involved in this process, and use the Coastal Zone Management rules to protect the coast. (8, 12)

RESPONSE: The Department does not rely on regional and municipal authorities to implement these goals. The Department implements these goals through the coastal permitting program. In addition, the Water Quality Management Planning rules, N.J.A.C.

7:15 and Green Acres rules, N.J.A.C 7:36 require consistency with the Coastal Zone Management rules. The Department works with municipal governments through the State Planning Commission's plan endorsement process to incorporate coastal management into their master plans and ordinances.

36. COMMENT: The goal of "coastal open space" at N.J.A.C. 7:7E-1.1(c)5 should be given greater weight in relation to competing or conflicting goals. Nevertheless, the goal is incomplete as currently proposed because it does not directly apply to spatial protection of ocean waters and underwater habitats. It should explicitly provide for spatial protection of ocean waters and underwater habitats under New Jersey jurisdiction. This goal should be revised to "coastal open space and spatial ocean protection" or "coastal and ocean spatial protection." In addition, N.J.A.C. 7:7E-1.1(c)5i(2) should be amended to insert "coastal and ocean ecosystems" between "protect valuable" and "wildlife, and plant habitats..." (1)

RESPONSE: The adopted goals retain the "open space" concept employed throughout the Department. The Department consistently uses the term "open space" to refer to land areas owned or maintained by State, Federal, county and municipal agencies or private groups (such as conservation organizations and homeowner's associations) and used or dedicated to the conservation of natural resources, public recreation, visual or physical public access or, wildlife protection or management. Public open space also includes state forests, state parks, and state fish and wildlife management areas; lands held by the New Jersey Natural Lands Trust; the New Jersey Water Supply Authority; and designated natural areas within Department owned and managed lands."

"The protection of ocean waters and underwater habitats is broadly addressed by the goals of "Healthy coastal ecosystems" and "Effective management of ocean and estuarine resources." Therefore, the Department will not be making the recommended change on adoption."

37. COMMENT: Preservation of open space should be considered as a means of avoiding and preventing an increase in risks to life and property, with respect to the supplemental goal of “minimizing natural hazards” at N.J.A.C. 7:7E-1.1(c)5i(3). (1)

RESPONSE: The Department agrees that preservation of open space should be considered one means of avoiding and preventing an increase in risks to life and property and this concept is incorporated into the supplemental policy of the goal of “Coastal open space.” The supplemental policy at N.J.A.C. 7:7E-1.1(c)5i(3) calls for preservation, enhancement and restoration of open space that minimizes natural hazards.

38. COMMENT: The goal of preserving, enhancing and restoring open space including natural, scenic, historic and ecologically important landscapes that abate impacts from nonpoint source pollution at N.J.A.C. 7:7E-1.1(c)5i(4) is unnecessary. Almost all developments reviewed under these regulations must meet the new stringent Stormwater Management rules at N.J.A.C. 7:8. (9)

RESPONSE: As the commenter notes, the new Stormwater Management rules at N.J.A.C. 7:8 do apply to many developments regulated under the Coastal Zone Management rules, and therefore are an important means of abating impacts from nonpoint sources of pollution. However, the more development there is within a watershed, the greater the impacts from nonpoint source pollution. Therefore, the preservation, enhancement and restoration of open space are important means to maintain water quality.

39. COMMENT: The policy of promoting strategies for the creation of open space at N.J.A.C. 7:7E-1.1(c)5iii could lead to a haphazard acquisition of open space lands. This goal should be pursued in accordance with a master plan governing the State’s acquisition of open space. (9)

RESPONSE: The supplemental policy to promote strategies for the creation of open space need not lead to haphazard acquisition of open space. There are various plans in

place to guide open space acquisition. For example, the Department's Green Acres program acquires land for State open space recreation purposes in accordance with the 2005-2007 Land Preservation Plan and the 2008-2012 Statewide Comprehensive Outdoor Recreation Plan. These plans may be viewed at [http://www.nj.gov/dep/greenacres/lpp\\_05\\_07.pdf](http://www.nj.gov/dep/greenacres/lpp_05_07.pdf) and [http://www.state.nj.us/dep/greenacres/pdf/scorp\\_draft\\_2008.pdf](http://www.state.nj.us/dep/greenacres/pdf/scorp_draft_2008.pdf), respectively. The Green Acres Local Assistance Program provides funding to local governments and conservation organizations for land preservation, park and recreation projects. Many local governments have prepared open space and recreation plans to guide projects. Currently, the Coastal Management Office is preparing a plan that will be available to the public to guide acquisitions under the Coastal and Estuarine Land Conservation Program. The Coastal and Estuarine Land Conservation Program was established by the Department of Commerce, Justice, and State Appropriations Act of 2002. This Act directed the Secretary of Commerce to establish a Coastal and Estuarine Land Conservation Program "for the purpose of protecting important coastal and estuarine areas that have significant conservation, recreation, ecological, historical, or aesthetic values, or that are threatened by conversion from their natural or recreational state to other uses," giving priority to lands that can be effectively managed and protected and that have significant ecological value.

40. COMMENT: N.J.A.C. 7:7E-1.1(c)6 contains the goal of safe, healthy and well-planned coastal communities and regions. The commenter supports the sub-policies at N.J.A.C. 7:7E-1.1(c)6i(1), (4) and (5). (9)

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

41. COMMENT: How does the sub-goal of "minimize the threat of natural hazards to life and property" at N.J.A.C. 7:7E-1.1(c)6i(8) relate to the findings and impediments identified in the 309 Report of the Coastal Zone Assessment with respect to high hazards and storm surges? It appears that the Department had pre-existing findings and

recommendations as to the impediments of achieving the goal. Yet, it does not appear that the rule tries to overcome such impediments by further restricting development in harms way, by retrofitting coastal development or adapting to enhanced risks that are becoming evident on the shore. This is a missed opportunity. (15)

42. COMMENT: The supplemental policy at N.J.A.C. 7:7E-1.1(c)6i(8) “minimize the threat of natural hazards to life and property” should be amended to include “prevention” of threats of natural hazards to life and property.” (1)

RESPONSE TO COMMENTS 41 AND 42: The Department cannot "prevent" the threats to life and property of natural hazards. However, through application of the Coastal Zone Management rules, the Department seeks to reduce such risks. The Department restricts coastal development in naturally hazardous areas through the Coastal Zone Management rules such as the Coastal high hazard areas rule, N.J.A.C 7:7E-3.18, Erosion hazard areas rule, N.J.A.C 7:7E-3.19, Flood hazard area rule, N.J.A.C 7:7E-3.25, and the Riparian zone rule, N.J.A.C 7:7E-3.26.

43. COMMENT: The CAFRA regulatory centers and impervious cover requirements are incompatible with the goal of “safe, healthy and well-planned communities.” These regulations contradict safe, healthy and well-planned communities and should be rescinded. (1)

RESPONSE: The Department does not agree that the CAFRA centers and impervious cover requirements are incompatible with safe, healthy and well-planned communities. The Department has historically used impervious cover as a way to ensure that CAFRA regulated development in the coastal zone is protective of natural resources and the health and welfare of the citizens of New Jersey. The impervious cover limits for the CAFRA area adopted in February 2000 enable the Department to achieve a number of longstanding policy objectives in the CAFRA area, including protection of environmentally sensitive areas, agricultural lands and open space; more efficient use of infrastructure; concentration of development; and protection of water and air sheds. The

CAFRA centers and Coastal Planning Areas are incorporated into these rules after a municipality has proceeded through the plan endorsement process of the State Planning Commission, a process that includes comprehensive land use planning and in which the Department is extensively involved.

44. COMMENT: The supplemental goal at N.J.A.C. 7:7E-1.1(c)6i(1) “encourages mixed used redevelopment” of “contaminated sites.” This supplemental goal should be deleted on adoption. Because New Jersey’s site remediation laws rely exclusively on caps (institutional and engineering controls), it is unsafe to develop housing and other sensitive receptors on incompletely cleaned-up, capped sites. The Department and the Legislature are currently re-examining this policy to allow housing on contaminated or capped sites. (1)

RESPONSE: The Department conducts or oversees the remediation of thousands of sites across New Jersey, many of which are remediated to unrestricted residential standards without the use of engineering or institutional controls. The removal or treatment of contaminated soil and groundwater occurs at many sites with and without the use of engineering controls. The Brownfield Act at N.J.S.A. 58:10B-129 expressly allows for the use of engineering and institutional controls as part of a remediation based on the Department's review. The Department will only allow the use of engineering and institutional controls when it determines that the proposed remediation will be protective of human health and the environment consistent with the intended future use of the site.

The Department is actively promoting the redevelopment of remediated brownfield sites throughout the State including those in coastal communities. If the Legislature changes existing statutes regarding the use of engineering and institutional controls for the remediation of contaminated sites, the Department will change its regulations accordingly.

45. COMMENT: The obligations of the Department to provide adequate opportunities for housing that is affordable to those of modest means may be contemplated within the goal of safe healthy and well-planned coastal communities and regions at N.J.A.C. 7:7E-

1.1(c)6. If this is correct, the Department should make it explicit. If not, the goal should be revised accordingly. (9)

RESPONSE: Exclusionary zoning and affordable housing were addressed by the New Jersey Supreme Court in several cases known as the Mount Laurel decisions, the first of which was decided in 1975. The Supreme Court recognized a constitutional obligation for each of the 566 municipalities in the State to establish a realistic opportunity for the provision of fair share low- and moderate- income housing obligations, generally through land use and zoning ordinances.

To assist municipalities in determining their fair share, the Supreme Court relied on the State Development Guide Plan, which at the time was the State's blueprint for accommodating projected growth. The Court noted that it was relying on the Guide Plan in the absence of a Legislative Statement. In response, the Legislature enacted the Fair Housing Act, N.J.S.A. 52:27D-301 et seq. and State Planning Act, N.J.S.A. 52:18A-196 et seq., in 1985.

In the State Planning Act, the Legislature found that “[A]n adequate response to judicial mandates respecting housing for low- and moderate-income persons requires sound planning to prevent sprawl and to promote sustainable use of land.” (N.J.S.A. 52:18A-196h).

The Fair Housing Act not only requires adjustments to fair share housing allocations to be made based on the same growth management considerations that are the goals of the State Plan, but also specifically requires the Council on Affordable Housing to assure that adjustments are made whenever patterns of development emerge which conflict with existing planning designations of the State Plan (N.J.S.A. 52:27D-307(c)(2)(a)-(g)).

Further, CAFRA was amended in 1993 to preclude the Department from requiring the provision of low and moderate income housing by means of CAFRA permits. (See N.J.S.A. 13:19-11). Although CAFRA precludes the Department from requiring such housing, the Coastal Zone Management rules afford opportunities for all types of housing, through provisions such as the Special urban area rule, N.J.A.C. 7:7E-3.43, which encourages development that will help restore economic and social viability, and the allowance of higher impervious cover in accordance with N.J.A.C. 7:7E-5B where

CAFRA centers have been established and where impervious cover already exists, thus fostering redevelopment.

46. COMMENT: Without rules addressing how N.J.A.C. 7:7E-1.1(c)6 would be accomplished, it is likely that these policies, particularly as they relate to redevelopment, will languish. The Department should identify and encourage practical measures related to redevelopment and include them within the adopted rules. (9)

RESPONSE: The Coastal Zone Management rules do contain standards that encourage redevelopment, most notably the impervious cover requirements of Subchapters 5, 5A and 5B. For example, N.J.A.C. 7:7E-5.3(e) provides for an increase in the impervious cover limit for a contaminated site if required to remediate the contaminated portion of the site. Both N.J.A.C. 7:7E-5A.9 and 5B.4 include provisions that take into account the amount of existing impervious cover on a site in calculating the impervious cover limit.

47. COMMENT: The supplemental policy of managing coastal activities and fostering well-planned communities and regions that provide public access to tidal waterways and their shores at N.J.A.C. 7:7E-1.1(c)6i(9) should be revised to require the provision of meaningful public access. This change would make this supplemental policy consistent with the supplemental policy at N.J.A.C. 7:7E-1.1(c)3iii. (3)

RESPONSE: The coastal goal at N.J.A.C. 7:7E-1.1(c)3 calls for “meaningful public access to and use of tidal waterways and their shores.” Additionally, as the commenter notes, the supplemental policy at N.J.A.C. 7:7E-1.1(c)3iii is to “conserve and increase safe, environmentally sound, and meaningful public access...” For consistency, the supplemental policy to the goal of safe, healthy and well-planned coastal communities and regions at N.J.A.C. 7:7E-1.1(c)6i(9) is being modified on adoption to include the adjective “meaningful” in referring to the public access to be provided to tidal waterways and their shores.

48. COMMENT: The coastal policy to “preserve and restore historic and cultural resources and aesthetic coastal features at N.J.A.C. 7:7E-1.1(c)6i(10) essentially denies redevelopment opportunities and should be reconsidered. (9)

RESPONSE: With this supplemental policy, the Department intended to address significant historic and cultural resources and aesthetic coastal features. As currently worded, the policy might be construed to refer to any human creation. The historic and cultural resources of concern to the Department include objects, structures, shipwrecks, buildings, neighborhoods, districts, and man-made or man-modified features of the landscape and seascape, including historic and pre-historic archaeological sites, which either are on or are eligible for inclusion in the New Jersey or National Register of Historic Places. The word "significant" is the term of art used in the historic preservation field for these resources. Therefore, upon adoption, the Department is adding the term "significant" to this supplemental policy to prevent any misunderstanding of the Department's intent.

49. COMMENT: The policy to protect public health safety and welfare at N.J.A.C. 7:7E-1.1(c)6iv is nebulous and should be deleted. (9)

RESPONSE: Upon adoption, the proposed N.J.A.C. 7:7E-1.1(c)6iv is being amended to replace "protect" with "promote" which is the wording in CAFRA at N.J.S.A. 13:19-2.

50. COMMENT: N.J.A.C. 7:7E-1.1(c)7 is intended to ensure that there is coordinated coastal decision-making , comprehensive planning and research. This goal is another good example of where a cooperative approach by the Department with other government agencies to “employ the policies which supplement the goals” can be advantageous. The Department is ultimately the entity responsible for protecting and preserving the environment, and therefore must also set standards, requirements, rules, and guidance levels. (8, 12)

51. COMMENT: The proper land use and planning processes must take place. The State must balance the need for housing with the need for a livable habitat in an urban area, and ask itself if newly proposed development is really necessary. (8, 12)

52. COMMENT: The Department must seriously limit new development near the water's edge. The Department should examine the cumulative impacts to the coast and the future of municipalities along the coast, as the case for new developments is weighed. (1)

RESPONSE TO COMMENTS 50 THROUGH 52: The Department, and specifically the Coastal Management Program, does intend to cooperate and coordinate to achieve the goal of comprehensive planning. For example, coordination within the Department is underway in water quality management planning, as the Water Quality Management Planning rules state at N.J.A.C. 7:15-3.6 that the Coastal Zone Management rules shall provide the basic policy direction for water quality management planning in the coastal zone. Another example is the Department's work with municipalities, counties, and the Department of Community Affairs Office of Smart Growth in the State Planning Commission's plan endorsement process, where the Department has provided resource information, guidance and policy to incorporate coastal management goals and policies into municipal planning and ordinances. The plan endorsement process is a comprehensive planning process that addresses topics such as land use, capacity and build-out analyses, housing need, transportation, and environmental protection.

53. COMMENT: The goal of coordinated coastal decision-making, comprehensive planning and research at N.J.A.C. 7:7E-1.1(c)7 is a highly desirable goal. The Department is encouraged to make this a priority. (9)

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

54. COMMENT: Each Department program enforces different rules. It would be beneficial to the environment, Department staff and the regulated community to have uniform rules. (9)

RESPONSE: The Department is charged with implementing and enforcing laws that cover a broad spectrum of environmental issues and protect numerous aspects of the environment, from safe drinking water, to solid and hazardous waste management, to natural resource protection. Because of the broad range of regulations and specialized areas covered, and the amount of technical information that must be contained within many of the rules in areas such as water pollution, air pollution, and land use management, the Department believes that it is both appropriate and necessary to devise rules which deal, in as succinct a manner as possible, with the distinct subject areas.

With reference to each program enforcing its own rules, the Department believes that it is appropriate to have specific enforcement bureaus which deal with particular regulatory programs. However, the various enforcement bureaus are coordinated under the Assistant Commissioner for Compliance and Enforcement. This structure and approach ensure a uniform and cohesive enforcement effort while providing the regulated community with an easily identifiable compliance group with which to work as issues arise.

55. COMMENT: N.J.A.C. 7:7E-1.1(c)7i merely requires that the Department “promote the attainment” of the goals by “encouraging” other government agencies to “employ the policies which incorporate the goals.” This language is far too weak for several reasons. First, the Department’s role under CAFRA is to “mandate” not “encourage” compliance with the goals. Second, the Department must “require” not “encourage” compliance. Third, by relying solely on “policies that incorporate the goals,” the proposed language fails to enforce the statutory and regulatory mandatory standards that must be met to attain the goals. On adoption, the proposed terms “promote,” “encourage” and “policies that incorporate these goals” should be replaced with the legally applicable terms “mandate, require and regulations and standards to attain the goals,” respectively. This applies throughout the text of the proposal, because there is inadequate linkage and

integration between the proposed goals and existing applicable statutory and regulatory standards. (1)

56. COMMENT: The supplemental goal at N.J.A.C 7:7E-1.1(c)7 would “encourage incorporation of the coastal goals...into state, regional and municipal land use management...” However, the CAFRA regulations are binding on State and regional entities, and supersede municipal land use laws. This legal hierarchy must be reflected in the goals. The term “encourage” must be deleted and replaced with “require” to reflect this legal hierarchy and the Department’s powers under CAFRA. (1)

57. COMMENT: The coastal goal at N.J.A.C. 7:7E-1.1(c)7ii “encourages incorporation of the coastal goals and supplemental policies into State, regional and municipal land use management, funding and acquisition programs within the coastal zone.” Incorporation of the coastal goals and policies of the Coastal Zone Management rules should be more than encouraged; such incorporation should be required for all such programs that result in development or land use management decisions, including planning, that occur entirely or partially in the coastal zone. It is imperative that State and local land use decision makers, including planning entities, ensure that there is consistency between the decisions and/or plans and all applicable State statutes and regulations, including CAFRA and the Coastal Zone Management rules so that substantive outcomes like center designations, density and impervious cover increases, sewer service area extensions, infrastructure investments, water allocation increases, use of TDR, and road construction are strictly compliant with regulatory standards and policies for resource protection. It is also imperative that the decision makers, planning entities and the public consider these requirements up front so they have the information necessary to make decisions and to plan with the intent and ability to comply, rather than waiting until the decision making or planning process is over only to find that they have failed to meet these important and mandatory requirements. To date, “encouragement” has not achieved this goal. (1, 6)

58. COMMENT: Collectively, the Coastal Zone Management rules and the coastal goals and policies incorporated therein, are designed to protect New Jersey's coastal

resources and sensitive environmental areas from irresponsible and unsustainable development decisions and to, instead, promote sustainable and resilient coastal communities. By incorporating these standards into the decision making and planning process, the following are just some of the problems that will be avoided: sprawl; increased impervious coverage and nonpoint source pollution; unsustainable water use (groundwater and surface water); traffic problems; reduction of freshwater flows in estuaries; increasing hazards of shorefront development as a consequence of sea level rise; diminishing wetlands and wetlands buffers; loss of available open space; and loss of other “special” features that may be characteristic of a particular planning area such as forested areas, critical wildlife habitat, dunes, bay islands and endangered or threatened wildlife or vegetation species habitat.

Incorporation of the coastal goals and policies of the Coastal Zone Management rules into other State and local land use management decisions would also facilitate a realistic resources capacity analysis. Successful land use decisions can only be achieved if the projected build-out in areas endorsed for growth and increased density can be justified in terms of location, capacity and cumulative and secondary impacts. The decision making entities must be armed with enough information to answer the question where should growth go and how much growth is appropriate. This requires affirmative demonstration of the impacts a proposed growth center will have on local and regional resources, including but not limited to, water quality and water supply, important and critical habitat and regional sensitive ecological systems, such as bays or estuaries, within the same watershed. Estimates or broad statements of “no foreseeable impact” will do nothing to further a meaningful planning process. Instead, analytical calculations and scientifically tested models should be used to weigh available resources using scientifically derived and determinable thresholds against proposed build-out scenarios. The build-out analysis must affirmatively demonstrate that the proposed growth can be sustained without substantive harm to these specific resources or to the coastal environment in general. This can be achieved by requiring consistency between land use management decisions and the Coastal Zone Management rules and their goals and policies, which specifically articulate such requirements, and will help to avoid conflicts between individuals often sub-regulatory development and regional resource protection needs.

Accordingly, N.J.A.C. 7:7E-1.1(c)7ii should be amended to replace “encourage” with “require” such that the new policy would require incorporation of the coastal goals and supplemental policies into State, regional and municipal land use management, funding and acquisition programs within the coastal zone.” The Department clearly has the authority and opportunity to require such action, as it exercises both consistency reviews and regulatory authority over a range of planning, infrastructure and other actions of both individual applicants and other agencies and levels of government. (6)

59. COMMENT: Instead of “encouraging” incorporation of the coastal goals and supplemental policies into State, regional and municipal land use management decisions, the Department should be “requiring” that this occurs. The New Jersey Coastal Management Program is a regulatory program and the Department maintains regulatory authority under it. Therefore, the incorporation of the goals into State, regional and municipal land use decisions is mandatory. The proposal could be interpreted to weaken existing laws and regulations. (15)

60. COMMENT: The language of the coastal goal proposed at N.J.A.C. 7:7E-1.1(c)7 is weak as it merely “encourages” comprehensive planning and incorporation of the goals and policies into State, regional and municipal land use, funding and acquisition plans. It seems counterintuitive to set forth coastal planning goals and policies, and then cross your fingers that they will be included in comprehensive plans. How can it be assured that these goals are fully incorporated up front into plans so that communities do not get caught between the requirements of the Department and the Department of Community Affairs’ Office of Smart Growth, while assuring a predictable environment for well-planned development, redevelopment, including the very difficult issues of affordable housing in coastal communities and recreational opportunities. (7)

RESPONSE TO COMMENTS 55 THROUGH 60: The commenters’ suggestions that the Department mandate rather than encourage consistency of all government land use management and funding decisions with coastal policies and policies, potentially gives rise to issues of authority. However, as the Department reevaluates and reviews the rules

as part of the upcoming readoption process, the Department will look at the rules closely and consider whether to require such consistency where it has authority.

61. COMMENT: N.J.A.C 7:7E-1.1(c)7 should be amended to provide a greater emphasis on ocean planning and management. Ocean planning and management is only alluded to at N.J.A.C 7:7E-1.1(c)7v, “Encourage the preparation of comprehensive plans, including: (1) Energy facility plans that balance the need for energy facilities and protection of coastal ecosystems and their scenic resources.” This limited reference to ocean management is not enough and should be strengthened. The U.S. Commission on Ocean Policy recommended that government should “address the zoning, permitting and siting of offshore energy facilities and other ocean resource management issues, such as gravel mining, beach nourishment, artificial reef development, fisheries management and protection of ocean habitats. New Jersey should develop an ocean management policy that incorporates ocean zoning and environmental review. Rather than “encourage the preparation of plans” it is recommended that the rule reflect a commitment by the Department to “prepare a comprehensive plan (or plans) to address all ocean resource management siting and planning issues.” (1)

RESPONSE: The Department agrees that effective management of ocean resources is a critical element of the Coastal Management Program and consequently has a specific coastal goal that addresses it, at N.J.A.C. 7:7E-1.1(c)2. The supplemental policies under this goal include the development and implementation of management measures to attain sustainable recreational and commercial fisheries, management of commercial uses to reduce conflict between users and encourage water-dependent use, and administration of safe and environmentally sound use of coastal waters. These are means to address the concerns of the commenter. In addition, the Coastal Zone Management rules contain individual standards specific to the uses identified by the commenter, including gravel mining N.J.A.C 7:7E-4.12, beach nourishment N.J.A.C 7:7E-7.11, artificial reefs, N.J.A.C 7:7E-4.21, and marine fisheries N.J.A.C 7:7E-8.2, as well as special areas rules that address ocean resources.

62. COMMENT: N.J.A.C 7:7E-1.1(c)7v(1), which encourages the preparation of comprehensive plans including energy facility plans that balance the need for energy facilities and protection of the coastal ecosystem and scenic resources, should reference and be consistent with both the State’s 2007 Energy Master Plan and the Blue Ribbon Panel on Development of Wind Turbine Facilities in Coastal Waters Final Report (April 2006). (1)

63. COMMENT: The existing coastal goal at N.J.A.C. 7:7E-1.5(a)1vii provides that it is the Department’s policy to “maintain and upgrade existing energy facilities, and site additional energy facilities in a manner consistent with the rules of this Coastal Management Program.” Hence, energy facilities must be sited in accordance with the Coastal Zone Management rules. This policy is a good policy because it is based on the assumption that the siting of energy facilities and the protection of coastal resources can co-exist. Under the proposed new coastal goals, N.J.A.C. 7:7E-1.1(c)7v(1) provides that in the case of energy facilities, the Department will “balance the need for energy facilities and protection of the coastal ecosystem and scenic resources.” The new policy unnecessarily pits the need for energy against the protection of coastal resources and, in doing so, weakens the Department’s coastal protections. The Department’s first responsibility is to protect New Jersey’s coastal resources against the improper siting of such facilities, which was promoted by the existing rules. There is no reason for this particular policy change, unless there are already plans for the siting of an energy facility that will not meet the current Coastal Zone Management rules. The deletion of the siting criteria is contrary to the findings of the Blue Ribbon Panel, which indicated that environmental studies must be performed prior to the siting of a wind farm. The Department should retain the language found at existing N.J.A.C. 7:7E-1.5(a)1vii and recodify it as N.J.A.C. 7:7E-1.1(c)7v(1). (6)

64. COMMENT: N.J.A.C 7:7E-1.1(c)7v(1) states that it would balance the need for energy facilities and protection of the coastal ecosystem. This proposed language is flawed and contradicts the Department’s statutory mandates and obligations to preserve, protect, and restore coastal ecosystems under CAFRA and water quality under the New

Jersey Water Pollution Control Act. The language would “balance” energy facility need, yet does not require any “demonstration of need.” How can the Department balance what is not demonstrated or quantified? (1, 15)

RESPONSE TO COMMENTS 62 THROUGH 64: In 1999, the Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49 to 98, deregulated the electricity market to foster competition among electricity providers. The Act reduced the regulatory role of the State Board of Public Utilities in the market and de-emphasized considerations of "need" with regard to facility planning. When the Department amended the Energy use rule, N.J.A.C. 7:7E-7.4, in 2003, the standards relating to the Board of Public Utilities and the determination of need (demand) for a facility were, accordingly, deleted. However, in accordance with its mandate under CAFRA, the Department added into the Energy use rule specific energy facility siting standards that are protective of special areas, marine fish and fisheries, water-dependent uses, public access, and scenic and visual resources. These standards are applicable in reviewing any application for an energy facility.

The Department notes that there is no 2007 Energy Master Plan. The most recent Energy Master Plan was published in 1991 and updated in 1995. In October 2006, Governor Corzine launched the current Energy Master Plan process with the aim of planning for New Jersey's energy needs through 2020. The Energy Master Plan is being developed with key involvement of the Governor's Office and the Governor's Office of Economic Growth. It is being prepared by a committee chaired by the Board of Public Utilities President and including the heads and top leaderships of nine State Departments. The 2006 Final Report of the Blue Ribbon Panel on Development of Wind Turbine Facilities in Coastal Waters contains the recommendations of the panel to Governor Corzine. Consequently, the recommendations of the panel are not official State policy that can, at this time, be incorporated and reflected in the Coastal Zone Management rules and the Coastal Management Program goals. In addition, the 1995 Energy Master Plan will soon be replaced.

As explained in the proposal summary, the intent of the supplemental policy at N.J.A.C. 7:7E-1.1(c)7v is to encourage the preparation of comprehensive plans, which

are broad in scope, and that address various activities in the coastal zone including energy facility siting, wastewater treatment facilities, and transportation corridors. Such comprehensive plans would inform the coordinated coastal decision-making and comprehensive planning and research that constitute the coastal goal this policy supplements. However, an "energy facility plan" as referenced in N.J.A.C. 7:7E-1.1(c)7v(1) is, in fact, a site-specific plan related to a particular energy facility rather than a plan that would consider protection of the coastal ecosystem and resources on a comprehensive basis.

In consideration of the above, the Department has determined to not adopt proposed N.J.A.C. 7:7E-1.1(c)7v(1). When the Energy Master Plan is finalized and to the extent the Blue Ribbon Panel's recommendations become official State policies, the Department will, as appropriate, consider proposing amendments to the coastal goals and supplemental policies related to energy facilities that comport with the plan, overall state energy policy, and CAFRA.

65. COMMENT: N.J.A.C. 7:7E-1.1(d) states that in developing these rules, balances were struck among various conflicting, competing, and contradictory local, State, and national interests in coastal resources and in uses of coastal locations. While consideration of the local and regional effect of these rules is crucial, sometimes a balance cannot be struck and the Department must come down hard on the development of the coast. These rules are only useful if there is a coast to manage. The Department must be the one to look past potential short-term gains by regional and local areas, and look to the long-term benefits of preserving the coast. (8, 12)

RESPONSE: In the Legislative findings and declarations section of CAFRA (N.J.S.A. 13:19-2), the Legislature "...recognizes the legitimate economic aspirations of the inhabitants of the coastal area and wishes to encourage the development of compatible land uses in order to improve the overall economic position of the inhabitants of that area within a framework of a comprehensive environmental design strategy, which preserves the most ecologically sensitive and fragile area from inappropriate development and provides adequate environmental safeguards for the construction of any developments in the coastal area." Thus, CAFRA directs the Department to balance various interests.

The Department believes that these rules, when taken as a whole, will protect the resources of the coastal zone, while allowing for appropriate development.

66. COMMENT: The CAFRA statute is designed to protect coastal resources, and implies a hierarchy or weighing scheme. Proposed N.J.A.C. 7:7E-1.1(d) discusses the Coastal Zone Management rules in terms of a balancing and conflict reducing approach, which is contrary to Section 10 of CAFRA. CAFRA is designed to protect coastal resources, implying a hierarchy or weighing scheme. Therefore, it is not a pure balancing of interests but a constraint balancing. Criteria and factors need to be added to first require protection of the coastal resource and then accommodation of other compatible objectives. (15)

RESPONSE: The Coastal Area Facility Review Act directs the Department of Environmental Protection to evaluate the effects of a proposed development upon the environment of the coastal area. The evaluation is conducted using the substantive standards in the Coastal Zone Management rules. The Coastal Zone Management rules do not treat every competing and conflicting interest as equal. The Coastal Zone Management rules are structured with location, use, and resource rules. These rules are the means by which the Department balances and weighs various proposed uses, and work together to impose constraints on certain uses and in certain locations, while protecting resources.

67. COMMENT: There is a typographical error in the second sentence of N.J.A.C. 7:7E-1.1(e). Either the word “that” or “to” should be deleted from that sentence. (3)

RESPONSE: The Department has revised this sentence to correct the grammatical error. The sentence has been revised to “The Department does not expect each proposed use of coastal resources to involve all location rules, use rules, and resource rules.”

68. COMMENT: The proposed decision-making framework at N.J.A.C 7:7E-1.1(e) impermissibly confers essentially unbounded discretion on the Department. While

decisions should reflect context and be flexible, subjective regulatory terms such as “minimal,” “feasible” and “maximum extent” may not be standardless. It is incumbent upon the Department to propose technical methodologies to review and implement these standards. The proposed framework is far too vague and discretionary, and undermines the ability of the public to understand and participate in decisions. (1, 15)

RESPONSE: CAFRA directed the Department of Environmental Protection to "...adopt rules and regulations to effectuate the purposes..." of the Act. In order to effectuate the purposes of the Act and pursuant to the Administrative Procedure Act, the Department developed the Coastal Zone Management rules through a public rule making process. As described in the rule at N.J.A.C. 7:7E-1.1(e), the interpretation of terms such as “prudent,” “minimal,” “practicable,” “feasible,” and “maximum extent” as used in a rule or a combination of rules, may vary depending upon the context of the proposed uses, location and design. For example, in evaluating an application for a new shore protection structure at an existing single family home, the Department would consider the existing use and site conditions, including shoreline slope, geometry, and sediment type; the nature of the erosion problem, waterway, and its use; and the technical feasibility of various potential solutions to protect the home.

#### **NJ.A.C 7:7E-1.5 CAFRA Findings**

69. COMMENT: The proposed decision-making framework and the integration of the proposed goals should have been codified as part of N.J.A.C 7:7E-1.5. While the Department did make an attempt to update the goals, the proposal makes no attempt to actually integrate, implement, and enforce those goals in the CAFRA Coastal Permit Program. This is a huge missed opportunity. (1)

RESPONSE: Much of the decision-making framework previously codified in N.J.A.C 7:7E-1.5(a) has been recodified as N.J.A.C 7:7E-1.4(d) and (e), with the eight basic coastal policies amended as coastal goals and supplemental policies and codified at N.J.A.C. 7:7E-1.1(c). The remaining Coastal Zone Management rules contain specific standards that advance these goals and policies.

70. COMMENT: While a portion of the language at existing N.J.A.C. 7:7E-1.5(a) is being recodified as N.J.A.C. 7:7E-1.1(e), the Department is proposing to delete "...these principles should not be understood as authorizing arbitrary decision-making or unrestrained administrative discretion. Rather, the limited flexibility intentionally built into the Coastal Zone Management rules provides a mechanism for incorporating professional judgement by the Department officials, as well as recommendations and comments by applicants, public agencies, specific interest groups, corporations, and citizens into the coastal decision-making process." This language should not be deleted. (15)

RESPONSE: The amended rules provide at N.J.A.C. 7:7E-1.4(e): "Decision-making on proposed actions involves examining, weighting, and evaluating complex interests using the framework of the chapter. The Coastal Zone Management rules provide a mechanism for integrating professional judgment by Department officials, as well as recommendations and comments by applicants, public agencies, specific interest groups, corporations, and citizens into the coastal decision-making process." The Department determined that the rules, including this language and the standards throughout the chapter, appropriately constrain the potential for arbitrary decision-making and unrestrained administrative discretion and that therefore the phrase "...these principles should not be understood as authorizing arbitrary decision-making or unrestrained administrative discretion" is unnecessary.

#### **N.J.A.C. 7:7E-1.6 Mitigation**

71. COMMENT: The commenter is concerned that the changes to the mitigation rule allows mitigation to occur within the same watershed, which is contrary to other rules that require mitigation on the site of the proposed development. Please confirm that the Department is not altering or intending to alter the more stringent provisions of the mitigation provisions in other rules. For example, tree preservation mitigation provisions of CAFRA require mitigation to be done onsite. This mitigation provision is more stringent than that which is proposed by the Department. To the extent that the

Department is expanding the area in which mitigation can be conducted to the watershed, an area not technically defined in the rule and one that could encompass a vast area, the commenter objects to the rule change. (3)

72. COMMENT: The mitigation rule should have been made stronger by making mitigation mandatory. The amendments should have specified the type of mitigation that would satisfy the requirements of the rule. (15)

RESPONSE TO COMMENTS 71 AND 72: The only amendment to the Mitigation standard at N.J.A.C. 7:7E-1.6 changes reference to the coastal goals and supplemental policies, since they replace the basic coastal policies. The amendment does not affect the mitigation provisions in other rules, a number of which do make mitigation mandatory when a particular resource will be lost due to a proposed project. For example, the Wetlands rule, N.J.A.C. 7:7E-3.27, and the Intertidal and subtidal shallows rule, N.J.A.C. 7:7E-3.15, specify the type and amount of mitigation required.

#### **N.J.A.C. 7:7E-1.8 Definitions**

73. COMMENT: The rules add a definition of “footprint of development” at N.J.A.C. 7:7E-1.8 to address amendments to the Scenic resources and design rule, N.J.A.C. 7:7E-8.12 and the Traffic rule, N.J.A.C. 7:7E-8.14. This definition is consistent with the definition of “footprint of development” at N.J.A.C. 7:7-1.3. However, the Department’s limitation of “footprint of development” to only buildings is inconsistent with the definition of “development” set forth at N.J.A.C. 7:7-1.3. The general definition of “development” applies more broadly to all construction activities, such as “site preparation, grading and filling” associated with the construction of a building. Because the Department take jurisdiction over these activities, and not just the buildings that are constructed as a result of these activities, the definition of “footprint of development” should be applied in a consistent manner and should be broadened to apply to the limits of disturbance associated with construction activities. (9)

RESPONSE: The term “footprint of development” is used in these rules in the context of modification of historic structures that are on or eligible for inclusion on the New Jersey or National Register of Historic Places, and therefore it is appropriate that it apply to buildings. The definition is consistent with the definition of “footprint of development” in the Coastal Permit Program rules at N.J.A.C. 7:7-1.3.

74. COMMENT: The existing language of N.J.A.C. 7:7E-1.8(a) should be retained. Why was the language indicating that some activities and developments that are restricted or prohibited proposed for deletion? By deleting this language it creates the appearance that the Department is trying to remove restrictions on the exercise of discretion. (15)

RESPONSE: The introductory language to the definitions paragraph of the Coastal Zone Management rules at N.J.A.C. 7:7E-1.8(a) indicated that the Coastal Zone Management rules are stated in terms of actions that are encouraged, required, acceptable, conditionally acceptable, discouraged or prohibited. The paragraph otherwise contains only the definitions for terms used in the rules. The Department deleted the language because it is not necessary. The specific terms listed are defined individually at N.J.A.C. 7:7E-1.8. These terms are used throughout the Coastal Zone Management rules to establish the standards for specific regulated developments and activities. The deletion of the introductory language of this paragraph does not alter the definitions of these terms, nor how they are applied.

#### **N.J.A.C. 7:7E-3.4 Prime fishing areas**

75. COMMENT: It seems prudent for the Department to identify prime fishing areas for the purposes of protecting habitat, and tracking species diversity and abundance. Under this proposal, the Department appears to be identifying prime fishing areas for the purpose of extracting the resource via fishing. Both the Pew Oceans Commission Report and the US Commission on Ocean Policy Report concluded that overfishing is one of the gravest problems facing our ocean ecosystem today. The role of the Department should not be to promote recreational fishing. The private sector and numerous agencies are charged with promoting economic activity. The Department’s role should be to bring the

desires of the private sector and those other agencies in line with the Department's goal of protecting these resources. (14)

76. COMMENT: To the extent that the Department has updated the data upon which prime fishing areas are identified, the rule summary suggests that the Department only consulted with recreational fishermen. Because this rule attempts to protect these resources, the Department should consider consulting with fisheries management experts, fisheries biologists and other scientists who might be familiar with other areas that are necessary to support the more robust recreational fishing areas. Did the Department engage in this type of consultation prior to publishing the rule proposal? The commenter is concerned that an overemphasis on where fishermen catch fish, without an exploration of nurseries and other areas that are vital to the survival of these recreational fisheries, is inadequate to meet the goals of the rule. (3)

77. COMMENT: Ocean habitats for all living marine resources should be the driving force behind additional protection and prohibited activities. Habitats are a critical element of prime fishing grounds, and should be considered. Protecting prime fishing grounds from development or ocean uses is not sufficient to protect ocean habitats from the negative impacts of mobile fishing gear and or bycatch. The Department must recognize that ocean habitats also need protection from: 1) the impacts of fishing that disturb the ocean floor; 2) overfishing; and 3) bycatch. These impacts should be addressed as well as development that would adversely affect high fishing productivity or fishing use of the prime fishing area. The recommendation of the Pew Oceans Commission supported by the Ocean Coalition's Blueprint for State-level action (2005), that ocean zoning should be incorporated into States' fisheries management policies in order to protect habitat, define areas where certain types of fishing or gear are (or are not) allowed and reduce conflict among user groups, should be incorporated into the rule. (1)

RESPONSE TO COMMENTS 75 THROUGH 77: Human use of coastal resources, including fishing, is one goal of resource protection. Although the Prime fishing area rule pertains to fishing use, other Coastal Zone Management rules protection of fish

habitats, including Shellfish habitat, N.J.A.C. 7:7E-3.2, Surf clam areas, N.J.A.C. 7:7E-3.3, Finfish migratory pathways, N.J.A.C. 7:7E-3.5, and Marine fish and fisheries, N.J.A.C. 7:7E-8.2. As described in Response to Comment 82, the Department is actively involved in fisheries management and has not concluded that ocean zoning is the only effective means to manage fisheries. The Coastal Zone Management rules do include special areas of the ocean, such as Surf clam habitat and Prime fishing areas, and also include both Use and Resource rules that set forth standards for specific areas and uses. Although this is not ocean zoning, it does serve to protect specific habitat types and to address potential user conflict. Although the Department did not consult with fishery biologist outside of the Department in developing this proposal, the fisheries biologists in the Division of Fish and Wildlife's Bureau of Marine Fisheries were involved in drafting the rule proposal.

78. COMMENT: The proposed amendments to the Prime fishing area rule accord special protection to recreational fishing grounds only, not all prime fishing grounds. The rule identifies prime ocean sportfishing (or recreational) fishing grounds and should not be called "prime fishing grounds." The term "prime fishing grounds" insinuates that such grounds account for where commercial fishermen also go to catch fish. It appears that the Department did not consult with or interview commercial fishing boat captains or operators. Therefore, the Department should more accurately call the map listed on the Coastal Management Program's web page "prime sport fishing areas" as opposed to the current title of "prime fishing areas." Additionally, the Department should justify in the final rule why it accords recreational fishing grounds specific protections that are not afforded to commercial fishing grounds. (1)

RESPONSE: The definition of Prime fishing area at N.J.A.C. 7:7E-3.4(a) states: Prime fishing areas include tidal water areas and water's edge areas which have a demonstrable history of supporting a significant local intensity of recreational or commercial fishing activity. Although the updated mapping is based on recreational fishing grounds, the rule continues to apply to both recreational and commercial fishing grounds. The rule is being modified on adoption to refer to a map rather than a GIS coverage. In addition,

both the title of the updated prime fishing area map and the link to the map on the Coastal Management Program's web page are being changed from "Prime fishing areas map" to "New Jersey's Specific Sport Ocean Fishing Grounds map" to correspond with the title cited in the rule at N.J.A.C. 7:7E-3.4(a).

79. COMMENT: Does the Department really believe that as part of the mapping update, the interviewed fishermen actually told them the location of their "prime fishing areas?" (14)

RESPONSE: The fishermen who were interviewed were party, charter, and private boat captains that the Department's Division of Fish and Wildlife identified based on their fishing experience. Accordingly, the Department has confidence in this mapping.

80. COMMENT: Scientific identification of ocean habitats for all living marine resources should be the foundation for additional protections and prohibited activities under the Prime fishing area rule. The Department should be applauded for attempting some kind of ocean management by delineating parts of its ocean waters off-limits to some uses. However, the Department's approach of taking control of certain activities in areas deemed important only to recreational fishermen is not credible. New Jersey should protect, enhance and restore all critical ocean habitats within its jurisdiction, and this rule does not accomplish that goal. The Department should use scientific data and methods to delineate and map critical ocean habitats for fish and other living marine species, thus protecting areas that are important for fish, cetaceans, sea birds, turtles, and important benthic indicator species. The locations frequented by recreational fishermen in order to catch most fish is important sociological information, but should not be used as a blanket proxy for critical ocean habitats. (1)

81. COMMENT: By including the best information available to assure both the health of the fishery resource and the economic benefits that are derived from them, the proposed amendments to the prime fishing area rule appear to be a common sense approach. However, these changes beg the broader question of the need for more

investment in the science and information that underlies healthy coastal ecosystems; the need for more comprehensive mapping; and, an ecosystem assessment of New Jersey's coastal and ocean resources. (7)

RESPONSE TO COMMENTS 80 AND 81: The Department agrees that scientific identification of ocean habitats for all living marine resources is important and in 2007 contracted to conduct a \$4.5 million baseline study in waters off New Jersey's coast to determine the current distribution and usage of this area by ecological resources. The scope of work includes the collection of data on the distribution, abundance and migratory patterns of avian, marine mammal, sea turtle and other species in the study area over an 18-month period. In addition, the Department has and will continue to conduct ocean surveys for surf clams, marine fish and sea birds. This rule is not intended to be a blanket proxy for critical ocean habitats. The Coastal Zone Management rules contain many standards pertinent to the protection of living marine resources, including Surf clam areas, N.J.A.C. 7:7E-3.3, Endangered or threatened wildlife or plant species habitats, N.J.A.C. 7:7E-3.38, and Marine fish and fisheries, N.J.A.C. 7:7E-8.2.

82. COMMENT: The Department needs to take a more holistic integrated approach to ocean management. The interplay between fishing and the ocean ecosystem needs to be examined. For example, Grand Banks was once a prime fishing area, but as a result of fishing ceases today to be a prime fishing area. (15)

RESPONSE: The Department concurs that fishery management is an important aspect of ocean management. Fisheries are actively managed by both the Department and the Federal government under State and Federal Laws, such as the Marine Fisheries Management and Commercial Fisheries Act of 1979 (N.J.S.A.23:2B). This Act established the New Jersey Marine Fisheries Council. The Federal Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801-1882, established regional fishery management councils. The Department participates in the Mid-Atlantic Fishery Management Council, as well as the Atlantic States Marine Fisheries Commission. Many species are designated as overfished and, as mandated under Federal law, these species

populations must be rebuilt over a specific time period. Management plans for each particular species specify the rebuilding objectives and require implementation of management measures and associated enforcement of those measures to ensure stock recovery. This pertains to both recreational and commercial fishing. This rule does not affect those requirements.

83. COMMENT: Do the proposed exceptions at N.J.A.C. 7:7E-3.4(b) apply to sand mining only, or do they apply to where the sand is being deposited? The proposed amendments to the rule do not make it clear if the exceptions provided at N.J.A.C. 7:7E-3.4(b) apply to a standard beach fill project. Is the widening of a beach considered to be in the national interest? Are subsequent beach fills on once nourished beaches considered “maintenance dredging?” These standards must apply to both the mining and deposition of sand. If groins are considered prime fishing habitat, then they should not be buried. Instead the beach between the two groins should be filled and the groins left alone. Rock groins support an abundance of marine life. However, the Department consistently permits these prime fishing areas to be buried by beach nourishment projects. A typical project buries dozens of these structures in a matter of weeks. The Department must reconcile when they condone burying of these habitats at the same time they declare them prime fishing areas. (14)

84. COMMENT: The existing Prime fishing area rule at N.J.A.C. 7:7E-3.4(b) identifies examples of activities that are permissible in prime fishing areas, such as commercial and recreational fishing and scuba diving, and states that prohibited uses include sand or gravel submarine mining, indicating that there are other uses that are both permissible and prohibited, but not specifically identifying them. Under this proposal, the above language would be deleted and replaced with language prohibiting development that affects the high fishing productivity or fishing use, except for development that is in the national interest; maintenance dredging; and alterations of groins and jetties to restore longshore sand movement. The proposed rule and summary do not provide a definition, explanation or example of development that is in the national interest. Would the siting of an energy facility be considered in the “national interest?” Who would render the

determination that a development was in the “national interest?” Without more information regarding the types of development that the Department would consider to be in the “national interest” and how and by whom such a determination would be rendered, the proposed amendments should not be adopted. (6)

85. COMMENT: The amendments to the prime fishing area rule may prevent or substantially increase to an unreasonable level the cost of developing and siting new alternative electrical energy power generation and/or transmission equipment in and around the Atlantic Ocean. Such electrical generation equipment may include developing and harnessing renewable power sources such as wind, tidal, wave and solar power. All of these renewable power sources which may be associated with the ocean environment will require offshore space for siting of power generation equipment and submarine cables necessary to transmit the electricity generated offshore back to the land where it is needed. The viability of offshore wind generation is being reviewed by New Jersey. In fact, the Blue Ribbon Panel on Development of Wind Turbine Facilities in Coastal Waters April 2006 final report recommended that New Jersey undertake a limited test project to obtain factual knowledge of the benefits and impacts resulting from offshore wind turbine facilities. The prohibition of development within prime fishing areas has the potential to create an insurmountable disincentive to efforts to create viable renewable energy projects. The amendments to the Prime fishing area rule do not contain exceptions that would allow for offshore development of renewable and alternative energy resources if development of such resources conflicts with the high fishing productivity or fishing use of a prime fishing area. (4)

86. COMMENT: The only viable method for transmitting power from renewable energy sources located in the ocean back to the land is through the use of submarine cables. As currently drafted, the rule could impose unreasonable requirements on the placement of such cables, and the added expense involved in complying with the regulation could easily make such development infeasible. This result is inconsistent with N.J.A.C. 7:7E-1.1(a)1vii, which sets forth the basic coastal policy to “maintain and upgrade existing energy facilities, and site additional energy facilities in a manner consistent with the rules

of this Coastal Management Program.” Therefore, N.J.A.C. 7:7E-3.4(b) should be revised to allow exceptions for the placement of submarine cables or other appropriate energy infrastructure. (4)

87. COMMENT: There are insufficient exceptions in the rule to allow for development in prime fishing areas where such development is in the State, county or local interest. Instead, only the national interest is considered with regard to exceptions, and only to the extent that no reasonable alternatives exist. In addition, no consideration is given to the extent that no reasonable alternatives to development in the prime fishing areas exist. For example, routing transmission lines from offshore energy sources for significant distances in order to avoid prime fishing areas may impede the economic viability of such projects. N.J.A.C. 7:7E-3.4(b) should be revised to allow exceptions for development that is in the national, State, county or local interest, or where no reasonable or economic alternatives to such activities exist. (4)

88. COMMENT: The rule does not contain an exception for activities that would only temporarily impact the fishing productivity or fishing use or an exception for de minimis impacts on fishing productivity or fishing use. For example, the amendments would prevent Atlantic City Electric Company from repairing or replacing existing or future submarine cables located within prime fishing areas, even if such construction or repair had only a minimal or temporary impact upon fishing productivity. N.J.A.C. 7:7E-3.4(b) should be revised to allow exceptions for activities conducted within a prime fishing area that have only a minimal or temporary impact upon fishing productivity or fishing use. (4)

89. COMMENT: The rule at N.J.A.C. 7:7E-3.4(c) suggests that the removal of submarine cables is an appropriate form of mitigation to compensate for the value of fishing resources lost. The removal of submarine cables creates a greater disturbance to the marine ecosystem than proper abandonment of the cables in place. N.J.A.C. 7:7E-3.4(c) should be revised to eliminate the mention of removal of submarine cables as a suggested form of mitigation. (4)

RESPONSE TO COMMENTS 83 THROUGH 89: The Department believes that consideration of prime fishing areas needs to be factored into siting decisions, along with consideration of all other relevant Coastal Zone Management rules and environmental resource protection. However, the commenters raise a number of concerns and questions regarding the proposed amendments to the standards at N.J.A.C. 7:7E-3.4(b), and particularly the exceptions to the rule that were proposed at N.J.A.C. 7:7E-3.4(b)1, 2 and 3. Some of these concerns and questions are readily addressed. For example, the short term impacts that would be associated with installation or repair of a submarine cable would not result in prohibition of cable installation under proposed N.J.A.C. 7:7E-3.4(b), because the impacts would be temporary and installation techniques and timing restrictions could be used to prevent an adverse effect on the high fishery productivity or fishing use of the area. Similarly, proposed N.J.A.C. 7:7E-3.4(b) would not prevent placement of electrical cables in the ocean, since cables could be sited to avoid prime fishing areas or be buried deeply so that the cable would not impact fishing. However, the Department has determined that further review and consideration is needed to address other issues raised by the commenters, such as those related to beach nourishment projects and the national interest. Moreover, the Department is currently reviewing and evaluating the Coastal Zone Management rules as part of the process leading to readoption of the Coastal Zone Management rules with amendments. The Coastal Zone Management rules will expire on July 8, 2009. Accordingly, the Department is not adopting the proposed changes to N.J.A.C. 7:7E-3.4(b). During the readoption process, the Department will further consider the comments received on this proposal and other information relevant to standards for activities in prime fishing areas.

90. COMMENT: Please explain the terms “high fishing productivity” and “fishing use.”  
(3)

RESPONSE: The Department intended the standard at N.J.A.C. 7:7E-3.4(b) to refer to development that “would adversely affect the high fishery productivity or fishing use of the prime fishing area” rather than the “high fishing productivity or fishing use of the

prime fishing area.” The word “fishing” was inadvertently used rather than the word “fishery.” However, as described in the Response to Comments 83 through 89 above, the Department is not adopting the proposed amendments to N.J.A.C. 7:7E-3.4(b) and will consider appropriate changes to the rule during the on-going readoption process of the Coastal Zone Management rules.

91. COMMENT: N.J.A.C. 7:7E-3.4(b) prohibits development that adversely affects the high fishing productivity or fishing use of the prime fishing area. N.J.A.C. 7:7E-3.4(b)1 allows development within prime fishing areas where the development is in the national interest provided there is no prudent or feasible alternative that would result in less impact to the prime fishing area, fishery productivity or fishing use of the area. This exception may allow power plants that use cool-water intake systems causing mass fish killings due to entrainment, entrapment and impingement, to secure permits in New Jersey simply by claiming it is within the national interest for supplying power. This exception is vague and should not be limitless. Power plants are an example of an entity that may claim to fall under this exception, when in fact there are several other environmentally friendly power sources that could be used without significant effect to fish habitats. (8, 12)

RESPONSE: The Prime fishing area rule would not be applied to a specific project such as a power plant in isolation. Rather, it would be one of a suite of Coastal Zone Management rules applicable to such a project. These other rules would provide for protection of fish resources, and include the Energy facility use rule, N.J.A.C. 7:7E-7.4, and the Water quality rule, N.J.A.C. 7:7E-8.4. In addition, other regulatory programs would be involved in reviewing the project, such as the New Jersey Pollutant Discharge Elimination System (NJPDES) permit program. However, as described in the Response to Comments 83 through 89 above, the Department is not adopting the proposed amendments to N.J.A.C. 7:7E-3.4(b) and will consider appropriate changes to the rule during the on-going readoption process for the Coastal Zone Management rules.

92. COMMENT: The exceptions at N.J.A.C. 7:7E-3.4(b)2 and 3 need clarification because there are fish windows that limit when maintenance dredging and beach fills can occur. (8, 12)

RESPONSE: Where fish windows (timing restrictions for protection of the resource) are necessary, they will be imposed under the appropriate rule, such as those for Maintenance dredging, N.J.A.C. 7:7E-4. 6, New dredging, N.J.A.C. 7:7E-4.7, Water quality N.J.A.C. 7:7E-8.4, Coastal engineering, N.J.A.C. 7:7E-7.11, or Marine fish and fisheries, N.J.A.C. 7:7E-8.2. However, as described in the Response to Comments 83 through 89 above, the Department is not adopting the proposed amendments to N.J.A.C. 7:7E-3.4(b) and will consider appropriate changes to the rule during the on-going readoption process for the Coastal Zone Management rules.

93. COMMENT: N.J.A.C. 7:7E-3.4(c) addresses mitigation for the impacts to this special area. There should be some reasonable nexus between the mitigation allowed under this rule and the damage done. For example, if development subject to the mitigation requirement destroys or alters nursery habitat for a particular species, the mitigation required should be to replace similar habitat. The mitigation should be performed in an area proximate to the area destroyed, to the maximum extent practicable. To the extent that the Department intends to interpret the new provision to allow the creation of more meaningful access to a water body as mitigation for destruction of for example submerged aquatic vegetation, the commenter objects to this provision. (3)

RESPONSE: As described in the Response to Comments 83 through 89 above, the Department is not adopting the amendments to N.J.A.C. 7:7E-3.4(b), which contained the standards for development in Prime fishing areas. Proposed N.J.A.C. 7:7E-3.4(c) provided the mitigation requirements for development that would adversely affect the high fishery productivity or fishing use of the prime fishing area, but met the standards at N.J.A.C. 7:7E-3.4(b). Since the Department is not adopting the amendments to N.J.A.C. 7:7E-3.4(b), the Department is not adopting the amendments to N.J.A.C. 7:7E-3.4(c). The Department will consider appropriate mitigation standards for development

in Prime fishing areas during the on-going readoption process for the Coastal Zone Management rules.

94. COMMENT: Development that is exempt from the Prime fishing area rule should reference and be consistent with current State energy policies. It is recommended that N.J.A.C 7:7E-3.4(b)(1) define “development that is in the national interest” as development that is consistent with both the State’s 2007 Energy Master Plan and the Blue Ribbon Panel on Development of Wind Turbine Facilities in Coastal Waters Final Report. (1)

RESPONSE: The 2006 Final Report of the Blue Ribbon Panel on Development of Wind Turbine Facilities in Coastal Waters contains the recommendations of the panel to Governor Corzine. Consequently, the recommendations of the panel are not official State policy that can, at this time, be incorporated and reflected in the Coastal Zone Management rules and the Coastal Management Program goals. The Department notes that there is no 2007 Energy Master Plan. As detailed in Response to Comments 62-64, the most recent Energy Master Plan was published in 1991 and updated in 1995. In October 2006, Governor Corzine launched the current Energy Master Plan process with the aim of planning for New Jersey's energy needs through 2020. In any case, as described in the Response to Comments 83 through 89 above, the Department is not adopting the proposed amendments to N.J.A.C. 7:7E-3.4(b) and will consider appropriate changes to the rule during the on-going readoption process for the Coastal Zone Management rules.

**N.J.A.C. 7:7E-3.21 Bay islands**

95. COMMENT: As the Department moves forward, it is important that the Department reevaluate some of the findings in CAFRA. However, this needs to be done a lot better and stronger. For example, even though the Department is trying to preserve bay islands, under this proposal it is allowing their development. (13)

96. COMMENT: In June 2006, the Department released the New Jersey Coastal Management Program Assessment and Enhancement Strategy in which it characterized the risk to New Jersey citizens and properties from storm surges, flooding, shoreline erosion and sea level rise as high. The document predicted that these threats will only increase as a result of a rise in sea level, increases in sea level rise, which the document estimated could be as much as 0.71 meters by 2100, more than twice the rise that occurred in the last century. The document also stated that one of New Jersey's most significant problems is the fact that residential development and the conversion of single family dwellings into multi-unit dwellings continues in hazardous areas. The document identifies the following as specific areas that New Jersey must strive to do better: (1) direct future public and private development and redevelopment away from hazardous areas; (2) preserve and restore the protective functions of natural shoreline features; and (3) prevent or minimize threats to existing populations and property from both episodic and chronic coastal hazards.

The Assessment also determined that the first step towards dealing with such problems and achieving the stated objectives was to fully enforce and even strengthen certain coastal rules, such as the Barrier Island Corridor and Bay islands rules. In direct contrast to these stated issues and objectives, the Department is seeking to weaken the Bay island rule in one such vulnerable area to satisfy the financial aspirations of one developer. Specifically, the Department is proposing to exempt the Shawcrest/Hildreth Island, located in Lower and Middle Townships, Cape May County, from the protections of the Bay island rule to allow commercial and residential development to occur. The decision to exempt this island is allegedly based upon "a review of the physical conditions of the island, including environmentally sensitivity, accessibility and the level of existing development." However, the proposed amendments present no evidence of such a review. The commenter objects to this rule change and to any changes that weaken the rules at the insistence and persistence of a developer. The adoption of this change will compromise the integrity of CAFRA, the Coastal Zone Management rules and the Department. (6)

RESPONSE TO COMMENTS 95 AND 96: The preservation and protection of bay islands helps ensure protection of areas with high environmental sensitivity, particularly wetlands, intertidal flats, tidal waterways, shellfish beds, and endangered and threatened wildlife habitats due, in part, to the isolation of bay islands from human activity as compared to the intense development and beach usage of oceanfront barrier islands. Moreover, development of bay islands can pose added storm evacuation problems and they are usually distant from public service, and therefore unsuitable for development. However, in this specific case, the Department determined that exemption from the Bay island rule is appropriate because of the level of previous development on the island, the fact that the island is located in a sewer service area, and the proximity of the island to densely developed areas.

The Department recognizes that sea level rise is a concern and will continue to evaluate necessary measures to address the effects of sea level rise. The Department promulgated new Flood Hazard Area Control Act rules, N.J.A.C. 7:13, in November 2007. These rules require new structures, roadways, and parking areas to be elevated 1 foot above the regulatory flood elevation. Under the rules, the Department exerts jurisdiction over tidally flooded areas and therefore this standard applies in areas subject to tidal flooding. The elevation requirement provides a safeguard against the potential effects of sea level rise.

97. COMMENT: The rules supplement the list of exempted bay islands with areas of Shawcrest Island and Hildreth Meadow. Exempted bay islands do not face the same development restrictions imposed on bay islands.

The commenter supports this amendment, as it would promote redevelopment. The Department should continue to review and apply the criteria used in selecting exempted bay islands. Such review would lead to the identification of other areas suitable for development and redevelopment, given that they also would not endanger environmentally sensitive resources nor compound storm evacuation problems, but are accessible to utilities and road network. (9)

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

98. COMMENT: The proposed amendments to the Bay island rule would exempt Shawcrest/Hildreth Island from the restrictions of the rule. According to the proposal summary at 39 N.J.R. 725, the proposed exemption is based on a review of the physical conditions of the island, including environmental sensitivity, accessibility, and level of existing development. Moreover, the Department states that its decisions to exempt this island is based on the physical conditions of the site, accessibility to State Highway 47, the level of existing development and that these areas are serviced by public utilities including sewer, electric, gas and water. This area has traditionally been known as the Cardile site. The proposal summary at 39 N.J.R. 729 characterizes the Cardile site as approximately 28 acres in size and indicates that the site has been developed for uses as a landfill as well as an amusement park, including miniature golf course, go-cart track and arcade. While these uses may have existed in the past, none of them is currently viable. The only business that is currently being conducted on the site appears to be used car sales. The site is presently derelict, and in need of redevelopment. The Department claims that “both areas are serviced by public utilities, including, sewer, electric, gas and water.” This is true for the Shawcrest area, the Cardile site however, while currently designated within an approved sewer service area, is not presently served by the public sewer system, and an extension of existing sewer lines would be necessary in order to provide sewer service to this site. Essentially the Cardile site, which has been characterized by the Department as a large area of existing impervious surfaces consisting of buildings and clam shells in need of redevelopment, is being exempted from the Bay island rule in order to facilitate development of residential housing on the property.

While the commenter indicated that he does not object to the exemption of Shawcrest/Hildreth Island from the Bay island rule, he indicated that the Pier 47 site located on the south side of State Highway 47, should also be exempted from the rule, since it satisfies all of the criteria which led the Department to propose the exemption for the Cardile site.

The Pier 47 site has for many years operated as a marina. It currently has approximately 150 boat slips, a marine store, and substantial dry dock storage. Pier 47 is

located on the same island as Shawcrest and the Cardile site, and has access to Route 47. The upland portion of the site which is used for marina operations is approximately 5 acres, 100 percent of which are covered with existing impervious surfaces. There is little, if any, vegetation; as such, the site is less environmentally sensitive than the Cardile site. Like the marina in Shawcrest which is being exempted from the Bay island rule, the Pier 47 marina site is “fully developed.” The Pier 47 site is substantially more intensely developed than the Cardile site.

The Pier 47 site has water, electricity and gas; while there is presently no sewer service to the site, sewer service is readily available from the collection system serving the existing homes located to the east of the site. The site is presently served by a conventional septic system; tie in to the sewer system would eliminate the need for the septic system and represent a significant environmental improvement.

The Department’s coastal policies encourage marinas along the water’s edge, and should encourage expansion and upgrade of such marinas in order to support the tourist economy of the shore region. Exemption of the Pier 47 site from the Bay island rule will facilitate providing sewer service to the site, which in turn will facilitate expanding and improving pump out facilities for boats, as well as restrooms, showers, and bathhouse facilities for boaters and visitors. Therefore, the Pier 47 site should be exempted from the Bay island rule because it is more intensely developed than the Cardile site, is less environmentally sensitive, has public infrastructure available, and such exemption will facilitate the expansion or upgrade of the marina consistent with existing State policy which promotes such facilities. (2)

RESPONSE: As explained in prior Response to Comments 95 and 96, and in the proposal summary, the Department determined that Shawcrest/Hildreth Island should be exempted from the Bay island rule based on a number of factors, including the level of previous development, the fact that the island is in a sewer service area, and the island’s proximity to densely developed areas. The Pier 47 site is not in a sewer service area, nor is it close to densely developed areas. Therefore, the Department is not exempting Pier 47 from the Bay island rule.

99. COMMENT: The commenter indicated that he supports the Department's proposal to exempt Shawcrest/Hildreth Island from the Bay island special area rule. It is appropriate to exempt certain bay islands from the rule where the physical characteristics of those bay islands, including environmental sensitivity, accessibility and level of existing development and infrastructure, are not such as to warrant the application of the rule and where future development would not pose a significant threat to environmental resources nor adversely affect storm evacuation from the oceanfront barrier islands. The characteristics of the Shawcrest/Hildreth Island are consistent with the characteristics cited by the Department as common to the other bay islands that have been exempted from the rule to date. Specifically, Shawcrest/Hildreth island should be exempted because it has the following physical characteristics: the southern portion of the Island is completely developed with mobile homes and a marina while the northern portion has been extensively developed for use as a landfill, a service station/repair facility, an amusement park, including miniature golf course, go-cart track and arcade, and is also occupied by vacant mobile homes; both portions of Shawcrest/Hildreth Island proposed for exemption are serviced by public utilities including, sewer, electric, gas and water; and the Island is traversed by Route 47, a major State Highway and evacuation route that connects to the mainland and the intensely developed barrier island of Wildwood.

The proposed exemption will have positive social and economic impacts. With regard to social impacts, the exemption will facilitate the proper closure of the landfill on Shawcrest/Hildreth Island, the remediation of the closed service station and site redevelopment, which will have a positive impact on occupants and visitors. Redevelopment will also result in increased public access to the waterfront. Positive economic impacts will include the potential for providing additional housing, hotel rooms and/or marina for Cape May County and the State of New Jersey. Redevelopment of Shawcrest/Hildreth Island will also increase job activity in the project development and construction industries, increased job availability from the potential future commercial development, additional opportunities for small business and the tourism industry. (5)

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

**N.J.A.C. 7:7E-3.27 Wetlands and N.J.A.C. 7:7E-3.45 Hackensack Meadowlands District**

100. COMMENT: The Department is seemingly extending jurisdiction of the Freshwater Wetlands Protection Act within the coastal zone of the Hackensack Meadowlands District. The US Army Corps of Engineers typically regulates these areas. In certain circumstances, the proposal at N.J.A.C. 7:7E-3.27(b)1 requires a freshwater wetlands permit via individual permits, general permits and mitigation based on standards of the Freshwater Wetlands Protection Act rules, N.J.A.C. 7:7A-4, 5, 7 and 15, where no development approval had been previously necessary.

The summary of the rule change contains seemingly contradictory language regarding the Department's jurisdiction over the wetlands in the District. While the Department claims it is not asserting jurisdiction over wetlands under the Freshwater Wetlands Protection Act, the proposal later distinguishes circumstances where the development standards will be applied. (see 39 N.J.R. 729). Language contained in this section, particularly when read with the summary, is confusing and requires clarification. (9)

RESPONSE: The rule does not extend the Department's jurisdiction under the Freshwater Wetlands Protection Act (FWPA), N.J.S.A. 13:9B-1 et seq., into the Hackensack Meadowlands District. The Department reviews coastal activities and development proposed in wetlands in the Hackensack Meadowlands District under the Waterfront Development Law, N.J.S.A. 12:5-3, under the Federal Consistency provisions of the Federal Coastal Zone Management Act, 16 U.S.C. 1451 et seq., and for water quality certification under Section 401 of the Federal Clean Water Act, 33 U.S.C. 1251 et seq. Where development in wetlands in the District requires a Federal permit from the US Army Corps of Engineers, the Department must, pursuant to the Federal Coastal Zone Management Act, concur that the proposed activity is consistent with the New Jersey Coastal Management Program before the Army Corps of Engineers issues a permit, and, where the proposed development in wetlands is the discharge of dredged or fill material, the Department must issue a water quality certificate under the Federal Clean Water Act. The Coastal Zone Management rules establish the standards for those reviews. These amendments change the wetlands standard at N.J.A.C. 7:7E-3.27 for those reviews.

As explained in the proposal summary, in proposing the amendments to the Wetlands rule at N.J.A.C. 7:7E-3.27(b), the Department compared the requirements for reviewing coastal activities and development proposed in wetlands in the Hackensack Meadowlands District under existing N.J.A.C. 7:7E-3.27(c) with the conditions, limits, and requirements for reviewing development in tidal and freshwater wetlands located outside of the Hackensack Meadowlands and north of the Raritan River under N.J.A.C. 7:7A-4, 5, and 7. The Department determined to use the conditions, limits and requirements of N.J.A.C. 7:7A-4, 5 and 7 to review development and coastal activities proposed in wetlands in the Hackensack Meadowlands District because those standards are appropriately protective of wetlands resources. The Department conducts such reviews not for purposes of issuing permits under the FWPA but as required for permits under the Waterfront Development Law, for a water quality certificate under the Federal Clean Water Act, and for consistency under the Federal Coastal Zone Management Act.

The Department notes that the Hackensack Meadowlands special area rule at N.J.A.C. 7:7E-3.45(f) (recodified without change from (c)) explains the applicability of the FWPA in the Hackensack Meadowlands District based on the exemption provision in the FWPA at N.J.S.A. 13:9B-6. For clarity and consistency, on adoption the Department is including at N.J.A.C. 7:7E-3.27(b) the citation to the FWPA exemption as well as the language regarding the exemption that appears in N.J.A.C. 7:7E-3.45(f). At N.J.A.C. 7:7E-3.27(b)1, the Department is also clarifying that it will use this rule when reviewing proposed coastal activities and development in the Hackensack Meadowlands District under the Waterfront Development Law, for certification under the Federal Clean Water Act, and for consistency under the Federal Coastal Zone Management Act.

The Department also proposed at N.J.A.C. 7:7E-3.27(b) to apply the mitigation requirements of N.J.A.C. 7:7A-15 to coastal activities and development in wetlands in the Hackensack Meadowlands District. These mitigation requirements would have been applied in lieu of the mitigation requirements at N.J.A.C. 7:7E-3.27(h), which are applicable to all development in wetlands within the coastal zone other than those defined under the Freshwater Wetlands Protection Act (see N.J.A.C. 7:7E-3.27(b) and (c)). On September 4, 2007 (see 39 N.J.R. 3587(a)), the Department proposed to readopt the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A with amendments, including

amendments to the mitigation requirements in subchapter 15. Upon further consideration, the Department has determined to not adopt at this time the proposed amendment regarding mitigation requirements for coastal activities and developments in wetlands in the Hackensack Meadowlands District at N.J.A.C. 7:7E-3.27(b)1, pending evaluation of the comments the Department received on the proposed amendments to the mitigation requirements in the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-15. Under N.J.A.C. 7:7E-3.27(b)1 as adopted, the Department will continue to apply the mitigation standards set forth in N.J.A.C. 7:7E-3.27(h) to those activities and developments in wetlands in the Hackensack Meadowlands District that require mitigation. The Department is adding language at N.J.A.C. 7:7E-3.27(b)1i that clarifies the applicability of the mitigation requirements.

101. COMMENT: An outstanding issue is how much development actually occurs where dredged or fill materials are placed in wetlands located above the mean high water line and does not require a zoning certificate, resolution or statement of consistency from the New Jersey Meadowlands Commission. This information would be helpful in evaluating development decisions. (9)

RESPONSE: Although the Department did not use the specific data suggested by the commenter, the Department did rely on its experience reviewing each of the applications within the Hackensack Meadowlands District, including those that met the criteria outlined by the commenter, as well as experience reviewing other wetlands applications near the Hackensack Meadowlands District. The Department has determined that using the conditions, limits and requirements of N.J.A.C. 7:7A-4, 5 and 7 is more appropriate than using the previous criteria of the Wetlands rule at N.J.A.C. 7:7E-3.27(c). The data that the commenter is suggesting the Department collect is not necessary to determine these standards.

102. COMMENT: The Department under the proposed changes to the Hackensack Meadowlands District rule is giving away its authority to review regulated activities.

There are currently proposals for 29 million square feet of office, commercial and industrial uses and 15,000 units of residential housing. In addition, changes promoted by the New Jersey Meadowlands Commission's Master Plan will provide another 8,000 to 9,000 units of residential housing, within the District. Because a lot of the sites proposed for development were either previously developed or brownfields, the Department is not looking at the management of stormwater. Instead, the Department is issuing waivers. There are automobiles and impervious cover that are not being addressed. (13)

RESPONSE: The Department's authority to review regulated activities in the Hackensack Meadowlands District is exercised under the Waterfront Development Law (N.J.S.A. 12:5-3), the Flood Hazard Area Control Act (N.J.S.A. 58:16A-50 et seq.), the Federal Clean Water Act (33 U.S.C. 1251 et seq.) (water quality certificates), and the Federal consistency provisions of the Federal Coastal Zone Management Act (16 U.S.C. 1451 et seq.) (Federal actions). Under these authorities, the Department reviews stormwater management systems for compliance with the Stormwater Management rules at N.J.A.C. 7:8. In addition, stormwater management is addressed in the zoning regulations for the Hackensack Meadowlands District at N.J.A.C. 19:4-8.6, which requires that stormwater management systems comply with all applicable sections of the Department's Stormwater Management rules, N.J.A.C. 7:8. Accordingly, stormwater management is addressed by either the Department or the New Jersey Meadowlands Commission when reviewing proposed developments.

103. COMMENT: When addressing development in the Meadowlands, sea level rise and storm surge must be considered. The Department is missing the opportunity to address these issues. (13)

RESPONSE: The Department promulgated new Flood Hazard Area Control Act rules, N.J.A.C. 7:13, in November 2007. These rules require new structures, roadways, and parking areas to be elevated 1 foot above the regulatory flood elevation. Under the rules, the Department exerts jurisdiction over tidally flooded areas and therefore this standard applies in areas subject to tidal flooding. The elevation requirement provides a safeguard

against the potential effects of sea level rise. In addition, the flood insurance studies for the Hackensack Meadowlands District accounted for storm surges in certain tidal areas in establishing the applicable flood elevations.

104. COMMENT: The proposed amendments to the Hackensack Meadowlands District rule are good. These changes are a small step to providing for consistent application of regulations. However, these amendments suggest the need for more comprehensive consideration and integration of coastal management, special management areas and State land use planning programs. (7)

RESPONSE: The Department does work to integrate coastal management, special management areas and State land use planning programs. The Department's Office of Planning and Sustainable Communities works with municipalities, counties and the Department of Community Affairs' Office of Smart Growth in the State Planning Commission's plan endorsement process. Through that planning process, municipalities consider coastal management and protection of critical resources, among other planning considerations.

105. COMMENT: Adoption of a rule that conditions coastal decision-making on zoning certificates issued by the Meadowlands Commission would be contrary to the general welfare which, as recognized by the Supreme Court, requires that governmental entities with authority to regulate land use make proper provisions for affordable housing. The Hackensack Meadowlands Master Plan does not provide a realistic opportunity for the development of affordable housing within the Meadowlands District. The Master Plan acknowledges that "[m]ost housing originally proposed in the [Meadowlands] District was to be located in wetlands areas no longer deemed suitable for development." As a result, there is no land in the Meadowlands District designated for housing, inclusionary or otherwise, pursuant to the Master Plan. The Master Plan also establishes that the acute shortage of affordable housing that prevails throughout New Jersey is even more severe within the Meadowlands counties. The Master Plan evaluates three different measures of the affordability of home ownership, and concludes that all three measures demonstrate

the lack of affordable housing in the Meadowlands counties is more severe than in the State as a whole. The rental situation is not any better, as the Master Plan concludes “a high percentage of renters” in the Meadowlands counties cannot find affordable housing. Additionally, according to the State Planning Commission’s annual report, the current Meadowlands Master Plan will generate 56,000 new permanent jobs within the Meadowlands District. Thus, this housing crisis will only get worse.

On January 11, 2007, the Meadowlands Commission adopted new and revised rules governing affordable housing in the Meadowlands, specifically, N.J.A.C. 19:4-5.2, 8.4, 11.1, 11.7 and 12. The new rules made issuance of Meadowlands zoning certificates contingent upon developer compliance with the third round growth rules adopted by the Council on Affordable Housing. Those rules became effective on February 5, 2007. On March 5, 2007, the Department proposed amendments to the Hackensack Meadowlands District rule in the New Jersey Register. However, since that time, the Meadowlands Commission has determined to halt the implementation of its affordable housing rules. The Commission has advised that it contemplates adopting new affordable housing rules at some time in the future.

Hence today, there is a situation where there is no developable land in the Meadowlands zoned for affordable housing; where there is an acute shortage of affordable housing within the Meadowlands; and where the Meadowlands Master Plan would result in tens of thousands of new jobs within the District, without any provision for workforce housing. Further, the Meadowlands Commission has suspended its rules that would have made issuance of Meadowlands zoning certificates contingent upon compliance with the Council on Affordable Housing’s third round growth share rules.

Under the above circumstances, the adoption of the Department’s rule that conditions coastal decision-making on zoning certificates issued by the Meadowlands Commission would be contrary to the Constitution. Accordingly, the Department must defer action on the proposed amendments to N.J.A.C. 7:7E-3.45 until the Meadowlands Commission fulfills its constitutional and statutory obligations to provide realistic housing opportunities within the Meadowlands District. This is supported by the Appellate Division of Superior Court’s May 21, 2007 decision *In the Matter of the Adoption of N.J.A.C. 19:3, 19:4, 19:5 and 19:6* which determined that the New Jersey Meadowlands

Commission's current affordable housing regulation "frustrates legislative policy and violates the Constitution."

Further, adoption of this rule would be contrary to the Department's own rules, which require that coastal decision making "protect the health, safety and welfare of the people who reside, work and visit the coastal zone." (11)

RESPONSE: Affordable housing policy in the District has evolved since this comment was submitted. Following the May 21, 2007 decision *In the Matter of the Adoption of N.J.A.C. 19:3, 19:4, 19:5 and 19:6*, 393 N.J.Super. 173 (App.Div.2007), Certification Denied February 5, 2008, the New Jersey Meadowlands Commission has approved interim measures to address affordable housing needs in the District pending adoption of new Council on Affordable Housing (COAH) Third Round growth share rules, N.J.A.C. 5:94 and 5:95 and subsequent adoption of revised Commission affordable housing rules. The Commission's interim measures impose emergency restraints on proposed development in the Meadowlands District for which Commission zoning certificates have not yet been issued. Under these interim measures, all non-residential development proposed on sites that Commission staff deem appropriate for affordable housing may not proceed unless the applicant provides elsewhere in the District, by construction or in-lieu payment, one affordable unit per 25 jobs created. All residential development of more than two market-rate units is stayed pending new COAH and Commission rules, except for residential development comprised of 20 percent or more affordable units. Applicants may also petition the Commission to approve affordable housing-compliant residential development in certain industrial and intermodal areas in the District. Further, details concerning the Commission's interim affordable housing policy may be found at [www.njmeadowlands.gov](http://www.njmeadowlands.gov). Since then, amendments to COAH third round growth share rules have been proposed (40 N.J.R. 237(a), January 22, 2008) for public comment.

**N.J.A.C. 7:7E-5.1 Purpose and scope and N.J.A.C. 7:7E-5.2 Definitions**

106. COMMENT: The commenter supports the amendments exempting electrical substations from the impervious cover and vegetative cover requirements at N.J.A.C. 7:7E and applauds the Department for recognizing the positive social and economic

impacts that electrical substations provide to the general population and visitors to the State. Specifically, the commenter supports the amendments to N.J.A.C. 7:7E-5.1(d)9 which add electrical substations to the list of activities exempt from subchapters 5A and 5B. (10)

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

107. COMMENT: The stated basis for the proposed changes relating to the impervious cover requirements for electrical substations is a settlement agreement with PEPCO Holdings, Inc. There is no technical basis provided with respect to the number of substations, their locations, the amount of impervious cover at these facilities, the energy need or basis for those substations, the environmental implications, and the environmental impact of those substations not meeting the current technical requirements for which they are being exempted.

An enforcement settlement should not drive the need for a rule revision. The PEPCO settlement contemplated a shut down of the power plant. It is unclear why the impervious cover exemption for electrical substations is needed. If the plant was going to be required to be shut down, then shut it down. Why was the plant sold and why does it remain operational? Is this somehow related to the need for the substations that are being exempted? (15)

RESPONSE: The administrative consent order known as *In the Matter of Atlantic City Electric Company Conectiv, and PEPCO Holdings* addressed a series of issues between the State and the utility that concern the shore area and available electricity, including the Clean Air Act, the Clean Water Act, natural resource damages, CAFRA and freshwater wetlands issues. The amendments to the Coastal Zone Management rules resulted from an appeal arising from CAFRA decisions regarding the Ship Bottom and Cedar electrical substations and the need for a CAFRA permit for the Dennis electrical substation (Atlantic City Electric, Co. v. NJDEP, Docket No. A-001156-03T5). The amendments exempting electrical substations from the impervious cover limits and vegetative cover requirements of N.J.A.C. 7:7E-5 and 5B resolve this particular issue. Resolution of the

CAFRA issue, which was part of a larger settlement, addressed substation upgrades. These upgrades were deemed necessary to provide safe, adequate and proper electrical service, especially if the B.L. England power plant facility were shut down.

As described in the definition of electrical substations at N.J.A.C. 7:7E-5.2, electrical substations are an essential element of an electric power system through which electricity is passed for transmission, transformation, or distribution. For example, these facilities may transform high voltage electricity to a lower voltage for distribution. Since these facilities are essential public facilities; are located in concert with electrical transmission lines; and require certain safety measures, the Department has determined that it is appropriate that they not be subject to the impervious cover and vegetative requirements of subchapters 5A and 5B. This does not exempt electrical substations from the remaining standards of the Coastal Zone Management rules, such as those described in the Response to Comment 108. These standards will result in protection of environmental resources at electrical substation sites.

108. COMMENT: The proposed amendments exempting electrical substations from the impervious cover limits and vegetative cover requirements of Subchapters 5, 5A and 5B create a loophole for electrical substations. There is concern that these facilities can be located or expanded into wetlands and other environmentally sensitive areas. The reason CAFRA was enacted was to deal with coastal facilities, water and electrical plants, substations and similar types of facilities. (13)

RESPONSE: The amendment to N.J.A.C. 7:7E-5.1 adding electrical substations to the list of developments to which impervious cover limits do not apply, does not exempt these facilities from regulations pertaining to wetlands and other environmentally sensitive areas. These facilities remain subject to applicable rules, including Special area rules such as the Wetlands rule, N.J.A.C. 7:7E-3.27, the Wetlands buffer rule, N.J.A.C. 7:7E-3.28, and the Endangered or threatened wildlife or plant species habitats rule, N.J.A.C. 7:7E-38, and Resource rules, such as the Stormwater management rule, N.J.A.C. 7:7E-8.7.

109. COMMENT: The definition of electrical substations should be revised to read, “means a subsidiary facility of an electric power system through which electricity is passed for transmission, transformation, or redistribution.” For example, an electrical substation may transform high voltage electricity to low voltage electricity for distribution. An electrical substation consists of the footprint of the substation equipment, the safety zone, and the areas necessary for maintenance, access, parking and areas to comply with industry standards or Federal, State or local laws, rules or ordinances, including but not limited to fire protection zones, storm water management facilities, soil erosion control measures and landscaping. (10)

110. COMMENT: The definition of “electrical substation” is too narrow because it does not adequately describe the features and requirements of an electrical substation that should be exempt from CAFRA’s impervious cover and vegetative cover requirements.

First, the proposed definition fails to take into account certain industry, standard safety measures that are necessary to safely operate and maintain an electrical substation, including, but not limited to the use of stone cover to provide step-and –touch insulation of the grounding grid beneath the substation and to control erosion, dust and weed growth. Although the grounding grid is discussed in detail in the proposal summary (see 39 N.J.R. 731) the proposed definition of “electrical substation does not include the grounding grid area, which may extend beyond the fence line.

Second, the proposed definition fails to take into account certain requirements mandated by Federal and/or State law. These measures include, but are not limited to the use of security equipment and fencing, as required by the U.S. Department of Homeland Security and the National Electric Safety Code, as well as the Department’s Forest Fire Service for a forest fire protection zone within which vegetation and debris is removed from a specific distance extending outward from the facility’s perimeter fence line, in order to minimize the danger of fire at the substation.

Third, the proposed definition fails to take into account property improvements that are required by the State, county or local government, including stormwater controls or detention basins required by the State Soil Conservation Committee rules (N.J.A.C. 2:90).

Fourth, the proposed definition fails to take into account other cover which may be impervious that is essential in areas necessary to provide access to substation equipment for maintenance purposes. Although these maintenance areas are described as “necessary” in the rule proposal summary (see 39 N.J.R. 731), the proposed definition does not include areas necessary for access or maintenance.

Finally, the proposed definition fails to allow for expansion or growth of the current boundaries of any existing electrical substations.

The definition of electrical substation should be revised to include all areas, equipment and structures inside the fence line, as well as all areas outside the fence line where vegetation is removed, impervious cover is placed or where property improvements are constructed for the purposes of complying with industry standards or Federal, State or local laws, rules or ordinances, for providing maintenance for the facility, or for access and parking purposes. The definition should clearly state that the expansion of electrical substations and the construction of new substations are exempt from the impervious cover and vegetative cover requirements of the Coastal Zone Management rules. (4)

RESPONSE TO COMMENTS 109 AND 110: The purpose of the definition of electrical substation is to identify those areas that are exempt from the impervious cover limits and vegetative cover requirements at N.J.A.C. 7:7E-5A and 5B. The definition focuses on use and need for safety, access and parking. Insofar as the grounding grid is part of the safety zone for the electrical substation, it is included in the definition of electrical substation. The definition also includes areas necessary for access. The inclusion of soil erosion control measures and landscaping is not appropriate because these areas need not be impervious cover. Stormwater facilities are not counted toward the impervious cover limit for a site, pursuant to N.J.A.C. 7:7E-5.3(b). Finally, in accordance with N.J.A.C. 7:7E-5.1(d)9, subchapters N.J.A.C. 7:7E-5, 5A, and 5B, which contain the requirements for impervious cover and vegetative cover for general land areas and certain special areas, do not apply to electrical substations.

### **N.J.A.C. 7:7E-6.2 Basic Location rule**

111. COMMENT: The existing Basic location rule at N.J.A.C. 7:7E-6.2(a) states that even when a location may seem acceptable for development under the various Coastal Zone Management rules, the Department “may reject or conditionally approve the proposed development as reasonably necessary to promote the public health, safety and welfare.” Under this proposal, the rule is being changed to state that the Department would only be able to reject the proposed development” as reasonably necessary to protect the public health, safety and welfare.” “Protect” is a lesser standard than “promote” in that it places the Department in the defensive mode, rather than a reactive mode and effectively takes away some of the Department’s discretion to reject projects that may meet the letter of the rules, but that are still not good for the coast. In other words, the Department cannot actively do what it thinks is right to advance or encourage the public health, safety and welfare, but can only act when there is an actual threat to the public’s health, safety and welfare. This amendment should not be adopted. (6)

112. COMMENT: The Department is amending N.J.A.C. 7:7E-6.2(a)1 to require the protection, rather than the promotion of public health, safety and welfare. The commenter is concerned that “protect” is a lesser standard than “promote”. To the extent that the Department is proposing to diminish the standard, the commenter objects to this change. Because the Department uses the terms “protect” and “promote” throughout the rules, the Department should clarify what it perceives is the difference between these two terms. (3)

RESPONSE TO COMMENTS 111 AND 112: In order to be consistent with the legislative findings of CAFRA at N.J.S.A. 13:19-2, the Department is not adopting the proposed change to N.J.A.C. 7:7E-6.2(a)1. In addition, as stated in Response to Comment 49, the Department is amending the coastal goal at N.J.A.C. 7:7E-1.1(c)6iv which contains the same language regarding public health, safety and welfare to be consistent with N.J.S.A. 13:19-2.

### **N.J.A.C. 7:7E-8.12 Scenic resources and design**

113. COMMENT: It is ironic that the Department is proposing rules creating a Historic District in the Wildwoods to protect hotels and motels built in the 1950s, 1960s and 1970s, while it deliberates on a CAFRA permit application for the Takanassee Beach Club which contains a building from the 1870s. The reasoning for the proposed Historic District is sound and with justification. If the Department can protect historic structures and make exceptions for their refurbishment through this rule, it must also consider making such designations and/or exceptions for properties such as the Takanassee Beach Club which has been declared on the ten most endangered historic sites in the country.  
(14)

114. COMMENT: The summary of amendments to the parking and scenic resource and design rules indicates that these amendments are proposed to protect the Doo Wop Era hotels of the 1970's which are part of the historic district. In contrast, the Department has before it an application to demolish three U.S. Lifesaving Service Stations built in the 1870's located in Long Branch to make way for the construction of condominiums. This is the only place in the country where three of these structures are located right next to each other. It would be crazy if the Department protects Doo Wop hotels of the 1970s and allows the demolition of three U.S. Lifesaving Service Stations built in the 1870's.  
(14)

RESPONSE TO COMMENTS 113 AND 114: The adopted amendments do not create a Historic District in the Wildwoods. As stated in the summary at 39 N.J.R. 726, the Wildwood Shore Resort Historic District is an existing area eligible for inclusion in the New Jersey and National Registers of Historic Places. The amendments to the Scenic resources and design rule at N.J.A.C. 7:7E-8.12 and parking requirements at N.J.A.C. 7:7E-8.14 are intended to encourage preservation and reuse of the historic structures, whether located in this district or elsewhere. The existing Historic and archaeological resources rule at N.J.A.C. 7:7E-3.36, which contains standards for development that would affect historic and archaeological resources, remains in effect.

115. COMMENT: The amendments to N.J.A.C. 7:7E-8.12 will not have the intended effect of promoting renovation of the “Doo Wop” motels because they fail to consider economic factors associated with renovation activities and market demand for the types of units that would be produced by renovation activities.

Many of the existing buildings are structurally unstable and in a precarious condition. It would be cost-prohibitive and not economically feasible to refurbish only the rooms and expand existing facilities upwards, as suggested in the summary, because the costs to stabilize structurally unstable buildings to the degree necessary to facilitate upward expansion will exceed what can be justified by future income (see 39 N.J.R. 731). Further, rooms in “Doo Wop” style facilities typically are very small in dimension, which does not support the supposition that there would be a significant increase in occupancy simply by renovating these buildings.

Upward expansion of existing facilities within the same footprint of development of an existing structure will not make this style of unit more desirable to potential private occupants. To the extent that the Department intends to preserve existing structures by facilitating renovation, the rules should permit facility expansion outside of the existing footprint of development. (9)

RESPONSE: The Department has received CAFRA permit applications in the last several years that proposed the construction of additional floors above an existing motel. Such developments may have difficulty complying with the parking restrictions of the Coastal Zone Management rules at N.J.A.C. 7:7E-8.14 and the restrictions of the Scenic resources and design rule at N.J.A.C. 7:7E-8.12. These rule amendments are intended to encourage renovation and redevelopment that maintains historic structures.

116. COMMENT: The assumption that the amendments will have a positive economic impact by promoting tourism and increasing the number of motel rooms available to the public is mere speculation (see 39 N.J.R. 732). The Department has not conducted any economic analysis or study of the potential impact of the rules on market conditions and demand for the product to justify the costs involved in renovation versus the cited benefits of promoting tourism (see 39 N.J.R. 732). (9)

RESPONSE: Although the Department did not conduct an economic analysis of market conditions, the rule was proposed in consideration of discussions with stakeholders, including representatives of Wildwood Crest and the Casino Reinvestment Development Authority, who were concerned about the loss of historic structures and the need to facilitate renovation of historic structures and redevelopment of the Wildwoods. As noted in the Response to Comment 115, the Department has received applications that proposed the construction of additional floors above an existing motel and the difficulties in complying with the parking and scenic resources and design rules that arose with these applications. These rule amendments are intended to encourage renovation and redevelopment that maintains historic structures

117. COMMENT: The amendment to N.J.A.C. 7:7E-8.12, by precluding economically viable redevelopment, denies fundamental property rights and will thwart redevelopment which is essential to the District's long term viability. These amendments fail to recognize other State and Federally accepted means of historic preservation, such as mitigation through studying and documenting historic resources in accordance with applicable preservation standards and constructing new structures in the same style as the "Doo Wop" era. (9)

RESPONSE: The existing Historic and archaeological resources rule at N.J.A.C. 7:7E-3.36 contains standards for development that would affect historic and archaeological resources. The rule states that development that detracts from, encroaches upon or destroys the value of historic and archaeological resources is discouraged. The rule also requires scientific recording and/or removal of the historic and archaeological resources or other mitigation measures if the proposed development would irreversibly and/or adversely affect such resources. The adopted amendments do not alter this standard. Instead, they encourage preservation and reuse of these historic buildings.

118. COMMENT: The amendments to N.J.A.C. 7:7E-8.12 are completely unrelated to resource protection and improperly promotes one "style" of development over another.

In the absence of a rationale based on environmental resource protection, the Department's judgement about the supposed benefits of one style of development is an unwarranted reach and should be abandoned. (9)

RESPONSE: The amendments to N.J.A.C. 7:7E-8.12 pertain to development that modifies a historic structure. The Coastal Area Facility Review Act contains findings that must be made before a permit is issued. One of these findings is that the proposed development would result in minimal practicable degradation of historical or archeological areas. Thus, the amendments are related to the impacts that need to be addressed under CAFRA and are consistent with the findings of CAFRA to protect historical resources.

119. COMMENT: While preservation of historic structures in the Doo Wop era of Wildwood is important for its historical and cultural value and "unique character" it is equally important to allow for redevelopment to occur in those areas for future residents. There are available means to ensure that any redevelopment project maintains or enhances its historic value while also providing future opportunities. The Department should explore these means before restricting modifications to only refurbishments. (9)

RESPONSE: The adopted amendments do not preclude redevelopment projects that maintain or enhance the historic value of existing structures. Rather, they are intended to facilitate redevelopment and refurbishment that maintains the historical and cultural value of historic structures.

#### **N.J.A.C. 7:7E-8.14 Traffic**

120. COMMENT: The summary of the amendments to N.J.A.C. 7:7E-8.14 indicates that the basis for the amendments is "an effort to maintain and sustain the unique character of certain historic structures on or eligible for listing on the New Jersey or National Register of Historic Places" (see 39 N.J.R. 731). The summary further clarifies that these structures are mostly historic motels. The amendments recognize that historical motels would only require one parking space per dwelling unit added to the

motel. If one parking space is adequate, the Department should apply the same minimum parking requirements for non-historical structures as well. (9)

RESPONSE: The parking requirement for residential development in municipalities which border the Atlantic Ocean is intended to ensure that such development does not result in the loss of parking for members of the public to access the ocean. As described in the rule summary at 39 N.J.R. 731, the Department is modifying the parking requirements for historic structures in an effort to maintain historic structures. The rule is intended to “balance the need for the preservation of historic motels and the character of the shore communities with the need to provide adequate parking in shorefront communities.” A similar modification of parking requirements for non-historical structures is not warranted.

121. COMMENT: The proposed amendments to the parking requirements of the traffic rule need to discuss nonpoint source pollution. Any new development that is permitted in the coastal zone should be required to have covered parking structures to abate stormwater runoff to the coast. (8, 12)

RESPONSE: New development that is subject to the Coastal Zone Management rules is required to comply with the Stormwater Management rule, N.J.A.C. 7:7E-8.7, which in turn requires that the development comply with the Stormwater Management rules at N.J.A.C. 7:8. The Stormwater Management rules contain standards that address water quality impacts, and allow a variety of stormwater management measures to protect water quality, rather than requiring covered parking.

### **Comments beyond the scope of this proposal**

122. COMMENT: The impervious cover requirements under CAFRA are a failure. The existing rules take areas along the coast and assign them a 90 percent impervious cover. Once a watershed gets over 30 percent impervious cover it does not function properly. (13)

123. COMMENT: Despite the fact that New Jersey continues to compete with New York City for economic development opportunities, with high rises springing up in areas such as Jersey City and Hoboken, the State must take a close look at every site proposed for development to determine if such massive construction projects are sound for the area. Future residents will not benefit, if as a result of global warming and loss of crucial habitat along the coast, their new homes become submerged by coastal waters.

In addition, local residents and the general public suffer as a whole from the traffic impacts that are inherent in such development. (1)

124. COMMENT: The Department needs to take another look at how it addresses large facilities such as power plants and other facilities under CAFRA. There are proposals for reopening power plants and the construction of new coal plants in coastal areas. There is the concern that these facilities are located in the wrong place; and that coal will add more greenhouse gases and will not only increase the mercury in fish, but add to global warming and sea level rise. (13)

125. COMMENT: The environmental stressors from over development of the coast are often overlooked and underplayed. However, several municipalities, including New York City, are starting to understand and address how different the region will look as sea levels rise. It is the responsibility of the State to help prevent contributions to the problem, and setting a good example for dealing with relentless developers by preserving the coast is a start. (8, 12)

126. COMMENT: Nonpoint source pollution has become the largest contributor to pollution of our coastal waters, and therefore must be controlled immediately. The State should have minimum “green” design standards for all developments seeking approval along the coast, including low impact development components such as green roofs to stave off water resources entering the system. The Department should look at the Town of Babylon on Long Island in New York State, for guidance on a green building code that will require new industrial, commercial and multi-residential structures above 4,000 square feet to be built green. Although the Department is not responsible for creating

building codes, this highlights another example of how building green can be accomplished. (8, 12)

127. COMMENT: The findings the New Jersey Coastal Management Program's Assessment and Strategy developed in accordance with Section 309 of the Federal Coastal Zone Management Act are extremely troubling on the issue of coastal hazards. Much more needs to be done on implementing this goal. It is incumbent upon the Department to propose regulations and identify legislative strategies that address the specific barriers to implementation that the Department identified in its 309 Assessment. (1)

### **Federal Standards Statement**

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c. 65), require that 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.

The Federal Coastal Zone Management Act (16 U.S.C. 1450) 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. The Federal Coastal Zone Management Program guidelines are found at 15 C.F.R. 923. The guidelines do not specifically address the review standards that should be applied to new coastal development in order to preserve and protect coastal resources and to concentrate the pattern of coastal development. They simply provide a planning and management process, without establishing development standards for development in the coastal area.

Accordingly, Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. do not require a Federal Standards Analysis.

Full text of the adoption follows (additions to the proposal are indicated in bold face underline with asterisks **\*thus\***; deletions from the proposal are indicated in brackets with asterisks **\*[thus]\***);

## **N.J.A.C. 7:7E Coastal Zone Management**

### **7:7E-1.1 Purpose and scope**

(a) – (b) (No change from proposal.)

(c) Both the Coastal Management Program and the Coastal Zone Management rules are founded on the eight broad coastal goals described at (c)1 through 8 below. The coastal goals express results that the Coastal Management Program strives to attain. Each goal is supplemented by related policies that set forth the means to realize that goal. The Coastal Zone Management rules, including the coastal goals and policies set forth below, are enforceable policies of New Jersey’s Coastal Management Program as approved under the Federal Coastal Zone Management Act (16 U.S.C. 1450). The New Jersey Coastal Management Program goals and supplemental policies are:

1. – 2. (No change from proposal. )

3. Meaningful public access to and use of tidal waterways and their shores.

i. \*[Promote]\* \*Preserve\* public trust rights to tidal waterways and their shores;

i. – vi. (No change from proposal.)

4. Sustained and revitalized water-dependent uses.

i. \*[Promote]\* \*Encourage\*, sustain and enhance active port and other water-dependent facilities, and maritime uses;

ii. \*[Promote]\* \*Encourage\* the redevelopment of inactive and under-utilized waterfront facilities for port, water-dependent and maritime uses;

iii. (No change from proposal.)

iv. \*[Promote]\* \*Manage dredging in an\* environmentally sound \*manner,\* \*[and]\* \*promote\* \*environmentally sound and\* economically feasible \*[dredging and]\* dredge material management practices and preserve historic dredged material placement sites;

5. (No change from proposal.)

6. Safe, healthy and well-planned coastal communities and regions.

i. Manage coastal activities and foster well-planned communities and regions that:

(1) – (8) (No change from proposal.)

(9) Provide meaningful public access to tidal waterways and their shores,  
and

(10) Preserve and restore significant historic and cultural resources and  
aesthetic coastal features,

iii. (No change from proposal.)

iv. Protect Promote public health, safety and welfare;

v. – vii. (No change from proposal.)

7. Coordinated coastal decision-making, comprehensive planning and research.

i. – iv. (No change from proposal.)

v. Encourage the preparation of comprehensive plans, including:

\*[(1) Energy facility plans that balance the need for energy facilities and  
protection of the coastal ecosystem and scenic resources,]\*

\*[(2)]\* (1) Land acquisition plans that further the goals and supplemental  
policies of New Jersey's Coastal Management Program; and

\*[(3)]\* (2) Special area management plans that protect significant natural  
resources and provide the opportunity for sound coastal dependent economic  
development; and

8. (No change from proposal.)

(d) (No change from proposal.)

(e) The Location rules (subchapters 3 through 6), Use rules (subchapter 7) and  
Resource rules (subchapter 8) stem from the coastal goals at (c) above. The Department  
does not expect [that] each proposed use of coastal resources to involve all location  
rules, use rules, and resource rules. Decision-making on proposed actions involves  
examining, weighing, and evaluating complex interests using the framework provided by  
this chapter. The Coastal Zone Management rules provide a mechanism for integrating  
professional judgment by Department officials, as well as recommendations and  
comments by applicants, public agencies, specific interest groups, corporations, and

citizens into the coastal decision-making process. In this process, interpretations of terms, such as "prudent," "feasible," "minimal," "practicable," and "maximum extent," as used in a rule or a combination of rules, may vary depending upon the context of the proposed use, location, and design.

#### **N.J.A.C. 7:7E-3.4 Prime fishing areas**

(a) Prime fishing areas include tidal water areas and water's edge areas which have a demonstrable history of supporting a significant local intensity of recreational or commercial fishing activity. These areas include all coastal jetties, groins, public fishing piers or docks, and artificial reefs. Prime fishing areas also include features such as rock outcroppings, sand ridges or lumps, rough bottoms, aggregates such as cobblestones, coral, shell and tubeworms, slough areas and offshore canyons. Prime fishing areas also include areas identified in "New Jersey's Recreational and Commercial Fishing Grounds of Raritan Bay, Sandy Hook Bay and Delaware Bay and The Shellfish Resources of Raritan Bay and Sandy Hook Bay" Figley and McCloy (1988) and those areas identified in on the [Department's Geographic Information System (GIS) coverage] map titled, "New Jersey's Specific Sport Ocean Fishing Grounds." This [GIS coverage] map is available through the Coastal Management Program's website at [www.nj.us/dep/cmp](http://www.nj.us/dep/cmp).

[(b) Development which would adversely affect the high fishing productivity or fishing use of the prime fishing area is prohibited, except for the following:

1. Development that is in the national interest provided there is no prudent and feasible alternative that would result in less impact to the prime fishing area, fishery productivity or fishing use of the area;
2. Maintenance dredging performed in accordance with N.J.A.C. 7:7E-4.6; and
3. Alteration of groins and jetties for purposes of restoring longshore sand movement.

(c) The impacts of a development that complies with (b)1 or 3 above to a prime fishing areas shall be mitigated. Mitigation shall reflect the value lost, for example,

reduction in fish habitat or fishing access. Examples of mitigation are creation of wetlands or shallow water habitat that serve as a nursery area for marine fish, or improvement of fishing access through a parking provision or an accessway, or by removal of submarine cables.]\*

\*(b) Standards relevant to prime fishing areas are as follows:

1. Permissible uses of prime fishing areas include recreational and commercial fin fishing and shellfishing, as presently regulated by the Department's Division of Fish and Wildlife, scuba diving and other water related recreational activities.
2. Prohibited uses include sand or gravel submarine mining which would alter existing bathymetry to a significant degree so as to reduce the high fishery productivity of these areas. Disposal of domestic or industrial wastes must meet applicable State and Federal effluent limitations and water quality standards.\*

\*[(d)]\* \*(c)\* Rationale: Natural bathymetric features, such as the Shrewsbury Rocks, important sand ridges, and artificial structures act as congregation areas for many species of finfish, shellfish, and diverse invertebrate species that are essential to marine ecosystem functioning. These areas are heavily used by recreational and commercial fishermen. Commercial fishing occurs primarily along the Delaware Bay and in the Atlantic Ocean off the New Jersey coast. Annually, more than 800,000 people, of which 639,000 reside in New Jersey, participate in marine sport fishing and shellfishing. In a recent survey conducted by the National Marine Fisheries Service, New Jersey ranked first in the harvest of four of the five most important recreational fish species (summer flounder, bluefish, seabass, and tautog) and ranked second in the harvest of striped bass. The recreational fishery industry is worth \$1.5 billion annually to the economy of New Jersey. In 2001, New Jersey's commercial fisheries contributed \$590 million to the State's economy.

### **7:7E-3.27 Wetlands**

(a) (No change.)

(b) Development in wetlands defined under the Freshwater Wetlands Protection Act is prohibited unless the development is found to be acceptable under the Freshwater Wetlands Protection Act Rules (N.J.A.C. 7:7A), except as provided at (b)1 below.

\*Pursuant to the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-6, coastal activities under the jurisdiction of the New Jersey Meadowlands Commission shall not require a Freshwater Wetlands permit, or be subject to transition area requirements of the Freshwater Wetlands Protection Act, except that discharge of dredged or fill materials may require a permit issued under the provisions of Section 404 of the Federal Water Pollution Control Act of 1972 as amended by the Federal Clean Water Act of 1977, or under an individual or general permit program administered by the State under the provisions of the Federal Act and applicable State laws. Accordingly, under this rule the Department does not exert jurisdiction under the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., in the Hackensack Meadowlands District. However, the Department shall, in accordance with N.J.S.A. 13:9B-6 and applicable law, review any such coastal activity or development as follows: \*

1. \*[In the Hackensack Meadowlands District,]\* \*For the purposes of reviewing\* a coastal activity or development that proposes the placement of dredged or fill materials in wetlands located below the mean high water line \*in the Hackensack Meadowlands District under the Waterfront Development Law, N.J.S.A. 12:5-3, Federal Consistency provisions of the Federal Coastal Zone Management Act, 16 U.S.C. 1451 et seq., or water quality certification under Section 401 of the Federal Clean Water Act 33 U.S.C. 1251 et seq., \*[shall comply with the standards of] \*the Department shall use the conditions, limits, and requirements governing activities or developments in wetlands set forth in\* N.J.A.C. 7:7A-4, 5\*[,]\* \*and\* 7 \*[and 15] \*. \*[A] \*For the purposes of reviewing a\* coastal activity or development that proposes the placement of dredged or fill materials in wetlands above the mean high water line that does not require a zoning certificate, resolution or statement of consistency from the New Jersey Meadowlands Commission pursuant to N.J.A.C. 7:7E-3.45(c) \*[shall comply with the standards of] \*in the Hackensack Meadowlands District under the Federal Consistency provisions of the Federal Coastal Zone Management Act, 16 U.S.C. 1451 et seq., or water quality certification under Section 401 of the Federal Clean Water Act 33 U.S.C. 1251 et seq.,

the Department shall use the conditions, limits, and requirements governing activities or developments in wetlands set forth in\* N.J.A.C. 7:7A-4, 5\*[,]\* \*and\* 7 \*[and 15]\*.

\*i. The mitigation requirements at (h) below shall apply to any coastal activity or development reviewed under this subsection, unless, where the coastal activity or development is reviewed under the conditions, limits, and requirements at N.J.A.C. 7:7A-4 and 5, those conditions, limits, and requirements do not require mitigation.\*

(c) – (i) (No change.)

## SUBCHAPTER 6. GENERAL LOCATION RULES

### **7:7E-6.2 Basic location rule**

(a) A location may be acceptable for development under N.J.A.C 7:7E-3, 4, 5, 5A, 5B and 6, but the Department may reject or conditionally approve the proposed development of the location as reasonably necessary to:

1. \*[Protect]\* Promote the\* public health, safety and welfare;
2. – 3. (No change.)