

ENVIRONMENTAL PROTECTION
OFFICE OF POLICY, PLANNING AND SCIENCE
COASTAL MANAGEMENT OFFICE
Adopted Amendments: N.J.A.C. 7:7E-8.11 and 8A.2

Proposed: December 17, 2007 at 39 N.J.R. 5145(a)

Adopted: by Mark N. Mauriello, Acting Commissioner, Department of Environmental Protection

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

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

DEP Docket Number: 26-07-11/663.

Effective Date:

Expiration Date:

The Department is adopting amendments to the Coastal Zone Management rules, N.J.A.C. 7:7E, that allow for the modification of the linear public access along a tidal waterway at superhighways and for homeland security. The amendments modify the requirements for municipalities participating in Shore Protection Program funding through a State Aid Agreement for projects along the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and Delaware Bay and their shores. In addition, the Green Acres funding requirements are amended to change the timing for submission of the public access plan and Public Access Instrument, where applicable. As discussed in Response to Comments 91 through 416 below, in response to the Public Access and Marina Safety Task Force Act, N.J.S.A. 13:19-38 et seq., the Department is not adopting the proposed amendments that would have allowed the modification of the linear public access along a tidal waterway at marinas.

Summary of Hearing Officer's Recommendation and Agency Response:

The Department held two public hearings on the proposed amendments. The hearings were held on the following dates and locations: January 16, 2008, New Jersey Department of Environmental Protection, Public Hearing Room, Trenton, and January

17, 2008, Ocean County Administration Building, Toms River. The comment period for the proposal closed on February 15, 2008. The comments received by the Department are summarized and addressed below. The hearing officer for the January 16, 2008 hearing, Ruth Ehinger, Manager, Coastal Management Office and the hearing officer for the January 17, 2008 hearing, David Rosenblatt, Administrator, Office of Engineering and Construction, recommended that the Department adopt the rules as proposed. With the exception of proposed amendments related to modification of public access at marinas, which are not being adopted for the reason referenced above and in the Response to Comments 91 through 416, the Department is accepting the hearing officers' recommendation.

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

Department of Environmental Protection
Office of Legal Affairs
Attn: DEP Docket No. 26-07-11/663
401 East State Street, 4th Floor
P.O. Box 402
Trenton, New Jersey 08625-0402

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

Summary of Public Comments and Agency Responses:

The Department accepted comments on the December 17, 2007 proposal through February 15, 2008. The following persons submitted written comments and/or made oral comments at one of the public hearings.

1. Richard Acosta
2. Edward and Elizabeth Aras
3. William R. Baarck
4. James Bailey
5. Donald Baker

6. Joseph Balogu
7. Dale Barlet, Dockside Marina
8. David W. Beale
9. Thomas R. Beaton, David Beaton & Sons, Inc.
10. Fred and Diane Belverio
11. Eric and Tara Blackman
12. Anothy Blaken
13. Michele Bliven
14. Carl Boms
15. William J. Brady, III
16. Richard K. Brail
17. Joan Breig
18. David H. Brennan
19. James W. Brierley
20. Robert Britton
21. David Brogan, New Jersey Business and Industry Association
22. Fred Brueggemann, Key Harbor Marina, LLC
23. Alastair Brunton
24. Edward H. Burke, Jr.
25. Karen Burns
26. Mike Burrelli
27. Nancy A. Cagliostro
28. Ray Carrigan
29. Laura Casey
30. Jim Cerruti, Fair Haven Yacht Works
31. John M. Chiego
32. Michael Chryanthopoulos, Channel Club Marina
33. Ron Coleman
34. Beth Collis, C&C Marine
35. Paul Curtis
36. Glenn Dagit, New York Construction

37. Joseph and Laura D'Amico
38. Melissa Danko, Marine Trades Association
39. Micheal Datillo, Director of Community Services, City of Ocean City
40. Peter Davenport
41. Beverly J. Davis
42. James and Debra Decker
43. David and Katherine Delasvo
44. Richard Dewling, Jersey Shore Partnership, Inc.
45. Joseph Diamond, Crawford, Diamond & Flynn LLP
46. Joseph L. Dicianni
47. Tim Dillingham, American Littoral Society
48. Joe DiLorenzo
49. Dave DiPaolo, Riverbank Marina
50. William Doleski
51. John P. Dowers
52. Richard Drabik
53. Melinda Edmundson
54. Carolyn J. Ellis
55. Robert Ellis
56. David L. Eurell
57. John P. Everson
58. Patrick Eves
59. Richard W. Eytel
60. Elliot Fabricant
61. Vincent Facciponte
62. Jay Factor
63. Gregory J. Faljean, Sr.
64. Raquel Falotico, Fair Haven First Aid Corps
65. John P. Felsmann
66. S. Fenlisi
67. James J. Ferry

68. Richard J. Fieramosca, Mariners Marina
69. Bill and Donna Fishburn
70. John Flyntz
71. Martin J. Fotusky
72. Marie Francis
73. Louis and Deborah Friedman
74. Scott A. Fritzing
75. Judy L. Fusco
76. Mike Fusco
77. Roger Garrett
78. Edward and Cynthia Gensinger, Riverfront Marina
79. Janet Giersch
80. Dave Giomebetti, Silver Cloud Harbor Marina
81. Donald Golemme
82. Richard B. Gouldey
83. Bill and Ellie Greco
84. Mauro C. Greco
85. Elkins Green, NJ Department of Transportation
86. Donna M. Grykien
87. Brian Hall, Dillon's Creek Marina
88. Eric Hansen, Maritime Marina
89. Ed Harrison, Baywood Marina
90. Douglas Hartmann
91. Keith Hawkins
92. Juaquin Hendriquez, Lanoka Harbor Marina
93. Natalie Hendriquez, Lanoka Harbor Marina
94. Audrey Hicks
95. William T. Hiering, Jr.
96. Virginia Hoffman
97. Stephen Holanov
98. Spencer Hondros, Spencer's Bayside Marina

99. John and Janet Horan
100. Robert Hoste, Garden State Yacht Sales
101. Dan Hoyt
102. Eric R. Jaeger
103. Chris Jolly
104. Gregory T. Josephson
105. Kevin J. Kearney, Kearney International, Inc.
106. Edward A. Kerbs
107. Buck Kimber
108. Alexander Kocsy
109. Dona Kozlowski, Morrison's Seafood, Inc.
110. Horst Krauleidies
111. Matthew Kronyak
112. Robert Krueger, Fair Haven First Aid Corps
113. John B. Lalley
114. William Lane
115. William Lashovitz
116. Thomas Leaming, Leamings Marina Inc.
117. Geroae Letzia
118. C.J. Lewandowski
119. Kenneth Livich, Jr.
120. Phillip Lloyd
121. David Ludwig
122. Patrica Ludwig
123. Tony MacDonald, Urban Coast Institute, Monmouth University
124. Bob Magley, Magley Marina
125. George Mahaly
126. Stephen Marciano
127. Frank M. McDonough, New York Shipping Association, Inc.
128. Robert J. McGroarty
129. Marie S. Mease, Ocean Gate Yacht Basin, Inc.

130. John Merris
131. George Meyer
132. Donald Miller, Miller Yacht Sales, Inc.
133. Donald Miller, Cedar Cove Marina
134. William L. Miller
135. Henry V. Moleris
136. Louis Moore
137. Micheal J. Moore, Sportsman's Marina
138. Jack Muvlhill
139. Gordon Nelson, Nelson Marina Basin
140. Dennis O'Keefe
141. Edward Orvasky, Jr.
142. Stan Pandza
143. William R. Parsons, Jr. Dredge Harbor Yacht Basin
144. Robert and Elenor Patterson III
145. Lucille Pavolic
146. Denise Pelley, Brown's Boat Yard
147. William and Jacqueline Peregrin
148. Manny Perez
149. Bruce Perlmutter
150. Richard T. Pinter
151. John Pompa
152. J. Sheppard Poor
153. Robert A. Porcella
154. Brian Quenstedt
155. James E. Richards, Richards Buttonwood Marina
156. Rudolph Rinderer, Jr.
157. Richard Ritacco
158. Barry M. Rogers
159. Joy Rothman
160. Edward Rubin

161. Victor C. Russell
162. Bob Santry
163. Gerard and Shakeh Sapienza
164. Tammy Parsons Savidge, Dredge Harbor Yacht Basin
165. Ray and Barbara Schilling
166. Gerard T. Schultz, Tuckerton Beach Association
167. Thomas Scriven, Councilman, Borough of Sea Bright, Chairperson, Sea Bright Beach Utility
168. Keith Seeley
169. Eric Sexton
170. Pamela Sexton
171. William P. Shideleff
172. Jean Shivers
173. Donald Smith
174. George E. Smith
175. Mark Smith, City of Bayonne Police Department
176. William Smith
177. Frank and Lorraine Sochacki
178. Charles Speicher
179. Charles Stech
180. Pamela Stech
181. Leonard M. Steiner
182. Edward C. Stokes, III, Stokes & Throckmorton
183. William Sullivan
184. George W. Symington
185. Ernest E. Tarof
186. Linda Tavares, Cozy Cove Marina
187. John V. Tesoriero
188. Laurence G. Thoma, WithumSmith + Brown
189. Donald S. Tracy, Jr.
190. Vito Trapasso, Jersey Shore Marina

191. Richard and Louise Trembley
192. Ed VanNess
193. Kevin Vargo
194. Roy D. Voss, Good Luck Point Marina, Inc.
195. Carl G. Voss, III
196. Jeffrey W. Wald
197. Thomas and Kathy Watson
198. John Weber, Surfrider Foundation Jersey Shore Chapter
199. Gene R. Wefer
200. Harold E. Weiner
201. Marcus E. Witkowski
202. George V. Wood, Jr.
203. Thomas L. Yager
204. Albert Zager, Zager Fuchs, PC
205. Kenneth Zeng, Ocean Beach Marine Centers
206. The following 26 individuals, listed below, sent in form letters objecting to the proposal. (form letter 1)
Thomas Applegate
Samad Bannana
John Bullard
Kenneth Clemente
Peter Collins
L. Cook
Rev. Thomas Craig
Gilbert DeVries
Rich Didio
Joseph Egan, G.E.B. Marina
Thomas Garvey, Jr.
Edward and Louise Koslow
George Koslow
Steven Lowe

Elizabeth and William Marinella

Richard Nicoletti

Joseph Noll

Matt Noble

Norma Rummele

F.R. Pensabene

Charles E. Saugling

Harry H. Selover

Russell and Carol Sprouce

Kimberly Stewart

Gina and Dan Stromberg

Fred Windstery

207. The following 74 individuals, listed below, sent in form letters requesting the Department not adopt the proposal.

Joseph Avicetta

William Baarck

Diane Bade

James Bailey

George Bakos

Joseph Balbo

Louis Boffa

Thomas Boudle

Janet & Robert Carbone

Robert Carhart

Eugene Casazza

Linda Castellano

Carl Christensen

J. Clark

Solomon C. Clark

William T. Conway, Jr.

Dennis Dean

David Dix
John Dowers
Susan V. Evans
John P. Everson
Elliot Fabriciant
Robert Britton
James Fiasconaro
Michael Galeota
Barbara Gittins-Galeota
John T. Gizzi
Rich Gleason
John Goclin
W. Gunzel
Robert Gulp
Scott Handschuch
Thomas K. Harms
Douglas Hartmann
Virginia Hoffman
Illegible Illegible
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Illegible Illegible
Robert Illegible
Scott Illegible
Allen Jackson
Walter Jakoveic
Richard Jarusiewicz
John Kadourakis
Jodi Kenderachi
Cheryl Kleva

Charles Krause
Nils Larson
Robert Levyk
Ira Lipon
David and Susan Makey
Stephen Marciano
Jerilyn McGraw
Robert McGraw
Larrese & Robert Micele
Thomas Murray
Mike O'Connell
Jeffrey & Jess Palmaddress
William E. Pennisi
Rich Powell
Mariyln and William Richardelli
William Riley
Robert Rodio
Barry Rosenson
Daniel Rommwelawn
Deula Sharhey
Sid Stein
C.C. Tarricone
Dolores Ann Verbanaz
Theodore Wallace
William Weims
Ilda and Sterlin Wood

The following individuals submitted comments after the public comment period. Their comments are not specifically included in the response document, but the majority of their concerns are addressed by other individuals whose comments are included.

Richard Andrews

Owen Bowes
David Colon
Charles Cox III
Donn Hiroshmann
Donald Illegible
Jerome Koch
Eugene J. Leahy, Jr.
Richard N. Nick
J.J. Schweizer
James and Laura Shaw

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

General overall

1. COMMENT: The Department is commended for the December 17, 2007 adoption of the public access rules. The newly adopted rules are a huge step forward for the members of the public, who love the beach and have unfortunately found themselves at times frustrated in their attempts to get to the water to enjoy what is rightfully theirs.

These rules are timely. Due to the continued development and redevelopment of the coast, access is unfortunately becoming more contentious; less of a right and something that the public has to fight for on an increasing basis.

The Department should also be commended for the linkage between the public's investment in open space, particularly shore protection projects, and very explicit access requirements. Most importantly, the support facilities required make the access usable and real. An accessway without a restroom nearby is difficult for families, particularly those with young children. Without such facilities, public access is meaningless to these families.

The Department should also be commended for requiring municipalities to plan on a comprehensive basis for both the protection of existing accessways and improvements to make sure that the public is able to take advantage of the rights under the Public Trust

Doctrine. The fact that the Department has taken a common law principle and clarified it through regulations will move us forward in not having to fight for the public's right to access the beach on a case-by-case, town-by-town basis.

The amendments relating to industrialized waterfronts and the provision of alternate access, as well as the relocation of parking that may be displaced by roadway developments are also supported. (47)

2. COMMENT: The Department's objective of furthering the public interest in protecting public trust resources and expanding public access to New Jersey's beaches and tidal waterways is supported. More specific and predictable guidelines for public access, requirements to ensure that commitments are implemented and a framework for comprehensive planning at both the State and local level will support better, safer and more effective public access to New Jersey's shoreline for all residents. (123)

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

3.. COMMENT: How many times can the Department change the public access rules? (80)

RESPONSE: The amendments being adopted at this time were proposed in response to public comments received on the November 6, 2006 proposal that could not be addressed on adoption. As the Department implements the rule, it may determine that additional amendments are warranted. The Administrative Procedures Act governs the amendments for administrative rules such as the public access rules. The Act does not limit the number of times a Department can change rules, but sets forth procedures for such amendments, and requires the re adoption of rules every five years.

4. COMMENT: Has the Attorney General vetted the new regulations and compared them to the 1987 US Supreme Court Case against the State of California? (142)

5. COMMENT: The U.S. Supreme Court decision, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), prohibits the improper imposition of public access as a permit condition. The public access rule and amendments are in contravention of the Nollan holding. (21, 38)

RESPONSE TO COMMENTS 4 AND 5: As with all Department rulemaking, the Attorney General's Office was involved in the Public Access rulemaking. In *Nollan, et ux., v. California Coastal Commission*, 483 U.S. 825 (1987), the U.S. Supreme Court concluded that the California Coastal Commission's imposition of a permit condition requiring public access amounted to an unconstitutional taking in the circumstances presented there. The Nollan decision, however, did not address the Public Trust Doctrine or prohibit the imposition of reasonable permit conditions. Requiring public access to and use of the shores of tidal waterways is not an unconstitutional taking of property since these public rights are background principles of New Jersey State law.

The Public Trust Doctrine is now recognized as extending beyond State owned tidelands. Traditionally, the Public Trust Doctrine addressed the public's interest in the beds of tidal and commercially navigable waterways. See *Arnold v Mundy*, 6 N.J.L. 1, 3 (Sup. Ct. 1821); *Bell v. Gough*, 23 N.J.L. 624 (E. & A. 1852); *Barney v. Keokuk*, 94 U.S. 324 (1877); *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Utah v. U.S.*, 403 U.S. 9 (1971); *etc.* However, the Public Trust Doctrine is now recognized as extending beyond those areas. In 1988, the U.S. Supreme Court recognized public trust interests beyond commerce, navigation and fisheries. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) (finding state assertion of a public right is not an unconstitutional taking or exaction if the right asserted is recognized under the public trust doctrine of the law of that state.). In addition, other courts have applied the public trust doctrine to: 1) periodically navigable waters, (e.g., *Wilbour v. Gallagher*, 462 P.2d 232 (Wa. 1969); *Forestier v Johnson*, 164 Cal. 24, 127 P. 156 (1912)); 2) tributaries of navigable waters (*National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983)); 3) artificial reservoirs and lands covered by water caused by dams (*Pacific Gas & Electric Co. v. Superior Court*, 145 Cal.App.3d 225 (1981); *Fogerty v. State of California*, 187 Cal.App.3d 224 (1986); *State v. Sorensen*, 271 N.W. 234 (Ia. 1937); *State v. Parker*, 200

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

In New Jersey, courts have recognized that the Public Trust Doctrine derives from the English common law principle that all of the land covered by tidal waters belongs to the sovereign held in trust for the people to use. *Neptune City*, *supra*, 61 *N.J.* at 303. In *Arnold v. Mundy*, *supra*, 6 *N.J.L.* at 53, the first case to affirm and reformulate the public trust doctrine in New Jersey, the Court explained that upon the Colonies' victory in the Revolutionary War, the English sovereign's rights to the tidal waters "became vested in the people of New Jersey as the sovereign of the country, and are now in their hands." The Court found that the land on which water ebbs and flows, including the land between the high and low water, belongs not to the owners of the lands adjacent to the water, but to the State, "to be held, protected, and regulated for the common use and benefit." *Id.* at 49, 71.

While early understanding of the scope of the public trust doctrine focused on the preservation of the "natural water resources" of New Jersey "for navigation and commerce ... and fishing," the Court extended public rights in tidal lands "to recreational uses, including bathing, swimming and other shore activities." *Neptune City*, *supra*, 61 *N.J.* at 304, 309.

The public's right to access tidal waters for recreational purposes was further developed in *Matthews*, 95 *N.J.* at 306. In *Matthews*, the Court held that "[t]he bather's

right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed ... [and] must be accompanied by intermittent periods of rest and relaxation beyond the water's edge." *Id.* at 325. The Court also observed that New Jersey's beaches constitute a "unique" and "irreplaceable" resource, subject to increased pressure from population growth throughout the region and improved transportation to the shore. *Id.* at 323.

The *Matthews* Court also set forth a non-exclusive list of factors to consider in determining the scope of this dry sand area on what the Court called "quasi-public beaches," or privately owned beaches operated in coordination with a municipality. These factors include: (1) the location of the dry sand area in relation to the foreshore; (2) the extent and availability of nearby publicly-owned dry sand areas; (3) the nature and extent of the public demand; and (4) the prior usage of the upland sand by the owner. *Id.* at 326.

Subsequent cases have developed the public trust doctrine and confirmed that public trust rights in tidal waters must be accompanied by access to and use of upland areas. For example, in *National Ass'n of Home Builders v. Dept. of Env't'l Protect.*, 64 F. *Supp.2d* 354 (D.N.J. 1999), the court upheld an expansive interpretation of the New Jersey public trust doctrine, rejecting arguments that the doctrine was unreasonably broad or amounted to an unconstitutional regulatory taking. *Id.* at 359-60. The court upheld extensive and detailed Department permit requirements, under the public trust doctrine and the Department's Coastal Rules, to ensure permanent public access along the Hudson River and its shore. Those permits included requirements that property owners along the Hudson River dedicate for public access and use a thirty-foot-wide strip of private property along the river shore and allow perpendicular access to reach the river and walkway. *Id.* at 356.

Most recently, in *Raleigh Avenue*, 185 *N.J.* at 40, the New Jersey Supreme Court clarified that the public trust doctrine requires public access to and use of the ocean, as well as a reasonable area of dry sand, on privately owned land bordering tidal waterways. In *Raleigh Avenue*, a privately owned beach club was operated along a 480-foot-wide stretch of upland sand beach in Lower Township, New Jersey. *Id.* at 42. The property

owner restricted public use of the foreshore and dry sand area of the sole beach in the township by charging fees for access. Id. at 42. The Court found that public trust rights should not be limited to publicly-owned property and adopted the Matthews framework for privately held beaches. The Court concluded that the public must be afforded reasonable access to the foreshore and an adequate amount of dry sand space for recreational use, subject to the private property owner's interests. Id. at 53-54. The court reasoned that use of the dry sand area has historically been a correlate use of the ocean and must be included in the rights associated with the public trust doctrine. Id. at 54. Applying the Matthews factors, the Court found that the public trust doctrine required public access to and use of the entire private beach at issue there. Id. at 55-60.

6. COMMENT: Open lines of communication would be more productive in achieving the public access goals and promoting unfettered access than the current adversarial relationship that has developed. If the Department and public work together to develop the public access rules, then we will have rules that will be fair to all and that everyone can work with. (167)

RESPONSE: The rule making process includes public notice, and the opportunity for public comment in writing and at public hearings. Comments on the amendments the Department proposed in November 2006 were extensive, and resulted in changes to the rule that were made on adoption in December 2007. Changes in response to concerns raised in the initial comment period that were too substantive to be accomplished without further comment were included in the proposed amendments that are being adopted at this time. The Department intends to propose additional amendments to the public access rules in an upcoming rule proposal. The proposal will respond to some of the issues raised on the December 17, 2007 proposal, as indicated in other responses to comment in this adoption, and implementation of the rules since the December 2007 adoption. The Department believes that the refinements to the rules made as a result of this process will help achieve the goals mentioned by the commenter.

7. COMMENT: The extension of the Public Trust Doctrine is not authorized by enabling statutes. Non-elected rulemaking bodies cannot propose rules not authorized by statute and cannot make judicial interpretations. The Department lacks the rulemaking power to extend the Public Trust Doctrine to an area which must be authorized by the legislature and the courts. (182)

8. COMMENT: Where does the Public Trust Doctrine apply? (101)

RESPONSE TO COMMENTS 7 AND 8: The New Jersey Supreme Court has addressed the authority of the Department over public access. In *Raleigh Avenue Beach Ass'n. v. Atlantis Beach Club, Inc.*, 185 N.J. 40, 60 (2005), the Court found that the Department could address public access as part of the CAFRA process. The Court quoted from the decision below, stating:

CAFRA was enacted by the Legislature in 1973. *In re Egg Harbor Assocs.*, 94 N.J. 358, 362 (1983). Although CAFRA is primarily an environmental protection statute, "the powers delegated to DEP extend well beyond protection of the natural environment." *Id.* at 364. Specifically, CAFRA delegates powers to the DEP and requires it to adopt rules and regulations governing land use within the coastal zone "for the general welfare." *Ibid.* The [L]egislature amended CAFRA in 1993, significantly expanding its jurisdiction. *In re Protest of Coastal Permit Program Rules*, 354 N.J. Super. 293, 310 (App. Div. 2002).

The Court then explained:

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

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

....

We agree with the Appellate Division that the boardwalk pathway over the dunes to the Atlantis beach qualifies as a development, thereby triggering the DEP's CAFRA jurisdiction over related use of the beach and ocean. See *Raleigh Ave., supra*, 370 N.J. Super. at 191, 851 A.2d 19. We find jurisdiction also in the DEP's general "power to promote the health, safety, and welfare of the public." (quoting *In re Egg Harbor Assocs., Supra*, 94 N.J. at 372, 464 A.2d 1115). We hold that the broad scope of the DEP's authority includes jurisdiction to review fees proposed by Atlantis for use of its beaches... *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40, 61 (N.J. 2005). See also, generally, N.J.S.A. 12:3 et seq., N.J.S.A. 12:5-3 et seq., and N.J.S.A. 13:9A. The rule is intended to preserve and protect the common law rights under the Public Trust Doctrine. The specific rights and protections recognized under the Public Trust Doctrine continue to develop through individual court decisions. The definition of "Public Trust Doctrine" at N.J.A.C. 7:7-1.3 recognizes this. The Public Trust Doctrine applies to tidal waterways and their shores. For that reason, the regulations do not specify a precise area of privately owned shoreline landward of the mean high water line, or a percentage thereof, that must be subject to public access and use in every case.

The Public Trust Doctrine applies in numerous areas and to various activities. (See Response to Comments 4 and 5.)

9. COMMENT: Codifying the Public Trust Doctrine, which is a time honored doctrine which the courts on many occasions have characterized as an "evolving" doctrine is

unwise. Codifying it simply reduces the doctrine to the specific language utilized in the code, eliminating flexibility, thereby restricting its use in future unforeseen circumstances. In addition, premising the entire legal authority of the rule on a doctrine that was developed for an entirely different purpose and that pre-dates even the State's constitution is questionable. Rather than create a public trust right, the proposed rule robs an extremely important doctrine of its vitality. (127)

RESPONSE: This comment was previously submitted by the commenter on the Department's November 6, 2006 proposed new public access rules and amendments (see 38 N.J.R. 4570(a), November 6, 2006). The commenter has requested that this comment also be incorporated as a comment on this rulemaking. As indicated in the adoption of the November 6, 2006 proposal, the rule is intended to preserve and protect the common law rights under the Public Trust Doctrine. The specific rights and protections recognized under the Public Trust Doctrine continue to develop through individual court decisions. The definition of "Public Trust Doctrine" at N.J.A.C. 7:7E-1.8 recognizes this, stating "The specific rights recognized under the Public Trust Doctrine, a common law principle, continue to develop through individual court cases."

10. COMMENT: It is difficult to comprehend the impact of unilaterally declaring the existence of a "public trust right," which is not based on legislation or court decisions but which is simply inferred. Exacerbating that inappropriateness is the tacking on of a host of responsibilities to "guarantee" a duty inherent to the State to provide universal access, on site or remotely, regardless of prior use of property, location, safety or security. No court or statute has ever expressed the belief, or even contemplated, universal access, all the time, regardless of use. (127)

11. COMMENT: The Department's public access crusade seems to be a misguided effort to circumvent the Legislature and Constitution in order to create its own idea of social engineering. There are many environmental issues not yet addressed by the Department with the excuse of not enough money or manpower. Why is the Department

digressing from their original mandate, looking for other issues on which to use their supposed limited resources? (20, 168)

RESPONSE TO COMMENTS 10 AND 11: As the trustee of the public rights to natural resources, including tidal waterways and their shores, it is the duty of the State not only to allow and protect the public's right to use them, but also to ensure that there is adequate access to these natural resources. As the State entity managing public access along the shore, the Department has the obligation to ensure that this occurs.

Tidal shorefront property in New Jersey has been impressed with public trust rights since colonial times, under a doctrine more than 1500 years old. See, e.g., *National Assn of Homebuilders v. State, Dept. of Env'tl Protect.*, 64 F. Supp. 2d. 354 (D.N.J. 1999) (clarifying that the public trust doctrine is a background common law principle in New Jersey). The rule does take use, location, safety, and security into consideration, both through the standards for specific urban waterfronts at N.J.A.C. 7:7E-8.11(e) and the provisions at (f) that allow the modification of the required permanent on-site public access in certain situations. Further, the amendments being adopted at this time reflect the Department's recognition that appropriate public access may be affected by a property's location and existing use, as well as public safety and security concerns.

12. COMMENT: The commenter opposes the Department's public access rules. (177)

RESPONSE: The State is the trustee of public rights to natural resources, including tidal waterways and their shores. For the reasons expressed in the proposal of the rule amendments being adopted at this time, the Department has determined that the public access rules and the amendments adopted herein are necessary for the Department to fulfill its role as trustee of the public's rights to tidal waters.

13. COMMENT: The Department in the December 17, 2007 adoption of the public access amendments (see 39 N.J.R. 5222(a)), asserted that they already required access from marina owners and other businesses. In meeting with the Department, Department officials reiterated this claim. If this is the case, why is this rule necessary? (21)

RESPONSE: This rule adds clarity and specificity to the previous public access standards, providing greater transparency for the regulated community and the public alike. As described in Response to Comments 91 through 416, the Public Access and Marina Safety Task Force Act, N.J.S.A. 13:19-38 et seq. signed into law on September 10, 2008, imposes a moratorium on implementing the provisions of N.J.A.C. 7:7E-3.50, 7.3 and 8.11 as applied to marinas as such rules and regulations were adopted on December 17, 2007. As a result of the moratorium, until January 1, 2011 marinas will be subject to the rules regarding public access in effect prior to December 17, 2007.

14. COMMENT: Prior to the December 17, 2007 adoption, the Department was providing adequate public access where it was practicable or feasible. The feasibility factor was an important component of this process. It appears that in the effort to provide beach access, the Department took an all encompassing, “one-size fits all” approach, which has a negative impact on business and industrial facilities. The Department should reconsider the scope of the public access rule. (21)

RESPONSE: The rules do not take a “one-size fits all” approach. They take into account different types of development, including varying standards for urban waterfronts, working waterfronts, and small residential developments. For example, the Department recognizes that existing industrial properties with developed waterfronts, as well as energy facilities and port uses, may present situations that warrant modification of the public access requirements. Therefore, N.J.A.C. 7:7E-8.11(f)3 provides that the perpendicular access and/or linear access may be modified by the Department where it determines that the risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions, make it impracticable to provide such access and that there are no measures that can be taken to avert the situation. Similarly, the rule differentiates between publicly funded shore protection projects and other developments, requiring at N.J.A.C. 7:7E-8.11(p)7iv the provision of restrooms for shore protection projects, but not requiring restrooms for other developments. The

amendments adopted at this time add other site-specific factors, including those related to homeland security.

15. COMMENT: Under the public access rules, “tidal waters” should not include rivers, such as the Toms and Manasquan Rivers in Ocean County as well as many other rivers in New Jersey. (120)

RESPONSE: Tidal waterways are those that periodically ebb and flow in response to the gravitational forces of the moon and sun. Tidal waterways include rivers, bays and the ocean. In New Jersey, the Public Trust Doctrine applies to tidally flowed areas and their shores and is not limited to the Atlantic Ocean.

16. COMMENT: What input did interests outside the Department have on drafting the amendments? Did private developers or other similarly benefited parties have involvement in drafting the public access rules at any point in the process? (91)

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

Members of the public also had an opportunity to participate in the rulemaking process. The Department held three public hearings on the November 6, 2006 proposal to receive public comment. In addition, a 60-day public comment period was held during which time the public could submit written comments. Five hundred and forty-nine people representing a variety of interests, as well as members of the general public, commented on the November 6, 2006 proposal. The Department reviewed all of the submissions received from the public during the public comment period. In response to their comments, the Department made several changes on adoption (see 39 N.J.R. 5222(a), December 17, 2007). Comments on the November 6, 2006 proposal raised several issues that could not be addressed on adoption, but required further public notice

and comment. Some of these concerns were also raised in discussions with representatives of the marina industry and municipal government. Although these parties did not have a role in drafting the rules, this input led the Department to propose amendments to the adopted rules on December 17, 2008 (see 39 N.J.R. 5145). The Department held two public hearings on the December 17, 2007 proposal and provided a 60-day public comment period for written comments that ended on February 15, 2008. Three hundred sixteen persons submitted written comments and/or provided oral testimony. Through publication of notice in the New Jersey Register and in newspapers of general circulation in the areas affected by the rule, the Department made reasonable efforts to provide notice to parties potentially impacted by the rules, either positively or negatively, and to provide them with an opportunity to participate in the process through these avenues.

17. COMMENT: New Jersey definitely is in desperate times, but irrational measures are not the way out. Trenton should be focused more on urban blight, rising crime, suburban sprawl, decreased farmlands, gradual encroachment on the Pinelands, lowering carbon based emissions, increasing public transportation, medical coverage for all New Jersey residents, accurately reporting the state of New Jersey's schools, decreasing manufacturing jobs, immigration problems and rising taxes to fixed income seniors. These are the real issues residents elect public officials to address and agree to pay them for in the first place. (158)

RESPONSE: Although the issues cited by the commenter are issues of great importance to the residents of the State, the ability to access and use tidal waterways and their shores is also of great importance to the residents of the State. These rules are intended to preserve and protect the common law rights under the Public Trust Doctrine.

18. COMMENT: History demonstrates that the Public Trust Doctrine was severed from the colonies after "shedding the yoke of King George." The Doctrine as carried out by the rule imposes a new burden on private property owners. The rights of private

ownership are being taken without just compensation or in some other manner by the Public access rule. (62)

RESPONSE: The Public Trust Doctrine has historically been judicially recognized as part of New Jersey's common law by the New Jersey Supreme Court. Furthermore, there is no "taking" of private property rights since the property in question has always been burdened with a right on behalf of the public to access and use the shoreline.

It is essential to understand what was included in the bundle of rights that came from England to America and the allocation of those rights under the common law between private and public interests. In *Arnold v. Mundy*, 6 N.J.L. 1 (1821), the New Jersey Supreme Court addressed the effect of old grants by the Crown.

Specifically, dealing with tide flowed and washed lands the Court stated:

. . . the navigable rivers, where the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purposes of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products . . . are common to all the people, and that each has a right to use them according to his pleasure, subject only to the laws which regulate that use; that the property indeed vests in the sovereign, but it vests in him for the sake of order and protection, and not for his own use, but for the use of the citizen. Id at 24.

Further, the Court explained that only the newly created legislature could manage those rights that had inhered in the people of the colonies after the Revolution "but that they cannot make a direct and absolute grant, divesting all the citizens of their common right; such a grant, or a law authorizing such a grant, would be contrary to the great principles of our constitution, and never could be borne by a free people." Id at 25

The Court concluded that a grant of those public rights to private ownership would be beyond the power of a legislative body and thus “void, and cannot prevail for the benefit of the [private] plaintiff. *Id.* at 26.

The issue of the nature of the impact of the Public Trust Doctrine upon property rights in New Jersey has been visited and resolved by the State Supreme Court more than once. In *Matthews v. Bay Head Improvement Ass’n*, 95 N.J. 306 (1984), the court has explained that the Public Trust Doctrine is a right of the people gained from the break of British dominion of the colonies after the Revolutionary War. Thus, it affects all private property rights that followed. As early as 1821, the New Jersey Supreme Court recognized that “that land covered by tidal waters belonged to the sovereign, but for the common use of all the people.” *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 303 (1972).

The Court in *Matthews* at 95 N.J. 317, citing back to the Justinian Institutes, stated:

“[N]o one was forbidden access to the sea, and everyone could use the seashore "to dry his nets there, and haul them from the sea" (citing to the Justinian, *Institutes* 2.1.1) The seashore was not private property, but "subject to the same law as the sea itself, and the sand or ground beneath it." *Id.* This underlying concept was applied in New Jersey in *Arnold v. Mundy*, 6 N.J.L. 1 (Sup.Ct. 1821)

Thus, guaranteeing access to shorefront properties cannot be a taking of property rights since shorefront private or public property from its origins has been burdened with a right of the people due to its unique character. With respect to the scope of the Doctrine’s impact upon private property, the *Matthews Court* did note, however, that:

This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the

common property. The public interest is satisfied so long as there is reasonable access to the sea. (95 N.J. 324)

...private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand. (95 N.J. 326)

The Public Access rule reflects a reasonable compromise between the public's right to access and use, and the burden on the private owner's property interests.

19. COMMENT: Given that the entire population of New Jersey is 8,724,560 according to the U.S. Census Bureau, it is hard to believe that there are more than 8 million residents within 30 miles of the coast as stated in the Department's handbook *Public Access in New Jersey: The Public Trust Doctrine and Practical Steps to Enhance Public Access*. Similarly, the \$36 billion annually generated by tourism stated in the rule proposal is probably skewed and probably closer to \$22 billion. This raises the question of public need. (62)

RESPONSE: The handbook referenced by the commenter discusses public access to tidal waterways and their shores, and refers to the coastline as including the ocean, bays and tidal rivers. Tidal rivers include the Delaware River north to Trenton and the entire Hudson River. Thus, the statement in the handbook that the vast majority of New Jersey's more than 8 million residents live within 30 miles of the coast is accurate. The tourism figures are from a study of the value of tourism in 2006 conducted by Global Insight, Inc. for the New Jersey Commerce, Economic Growth and Tourism Commission. While these numbers are accurate, they are not a pivotal basis for the rule. As indicated in the Response to Comments 10 and 11 and the Response to Comment 12, the rule is intended to preserve and protect the common law rights under the Public Trust Doctrine and the Department has determined that they are necessary for the Department to fulfill its role as trustee of the public's rights to tidal waters.

20. COMMENT: The Department should consider the fiscal impact of this rule on all businesses affected by this regulation. The economic and regulatory flexibility analyses of the November 6, 2006 and the December 17, 2007 proposals fail to recognize the true extent of the added cost of security; the cost of increased insurance premiums due to the liability risk imposed by the State; the cost of providing added parking; and the overall cost of compliance. (21)

21. COMMENT: While the Department's attempt at addressing some of the concerns posed by businesses is appreciated, the changes do little to improve the public access requirements. The financial impact of this rule proposal on businesses of all sizes will be substantial, unnecessary and only serve to discourage sorely needed business investment and job creation in the State. (21)

22. COMMENT: Costs to operate a small business and to comply with all regulatory requirements in New Jersey are already at an unreasonably high rate as compared to most other areas around the country, and this could very well be the straw that breaks the camel's back. (188)

RESPONSE TO COMMENTS 20 THROUGH 22: Since their inception in 1978, the Coastal Zone Management rules have required developments to provide public access. Both the amendments adopted December 17, 2007 (see 39 N.J.R. 5222(a)) as well as the amendments adopted at this time provide more precise standards. Increased public access to natural resources such as parks, forests and beaches has been shown to provide increased benefits to the greater community. Whereas many natural resources were once only accessible to homeowners, increased access and the recreational and tourist visits that ensue enhance the economies of local businesses, as visitors spend money on purchases from souvenirs to gas to meals at local restaurants. Thus the greater community stands to benefit from the increased public traffic to the State's public resources.

The Department recognizes that there are situations where safety or other concerns warrant appropriate limitations on public access, and these are reflected in the rules. For example, N.J.A.C. 7:7E-8.11(f)3 provides for alternative means of access for energy facilities, industrial uses, port uses, airports, railroads and military facilities. The Department believes these provisions represent appropriate consideration of some of the concerns expressed by the commenters. In addition, the proposal included amendments specific to marinas that provided additional flexibility in the design of public access at marinas, which the Department anticipated would reduce costs of compliance. However, as explained in Response to Comments 91 through 416, the Department is not adopting the amendments pertaining to marinas.

23. COMMENT: Is public access required to golf and country clubs located adjacent to tidal waterways? (161)

24. COMMENT: Does the public access rule apply to private condominium developments, State and municipal parks, and other properties along the shoreline? How are marinas different? (57, 185)

RESPONSE TO COMMENTS 23 AND 24: Tidal waterways and their shores, including those at golf courses, country clubs, condominium developments, marinas, state and municipal parks, and other properties along tidal shorelines, are impressed with the Public Trust Doctrine, which provides that tidal waterways and their shores are accessible to all. Therefore, public access along the waterfront has been and continues to be required at these sites when located adjacent to tidal waterways and their shores. The requirements of this rule apply through the coastal permitting process, Green Acres funding for projects located along tidal waterways, and the State's Shore Protection Program for municipalities. With regard to marinas, the Public Access and Marina Safety Task Force Act, N.J.S.A. 13:19-38 et seq. signed into law on September 10, 2008, imposes a moratorium on implementing the provisions of N.J.A.C. 7:7E-3.50, 7.3 and 8.11 as applied to marinas as such rules and regulations were adopted on December 17,

2007. As a result of the moratorium, until January 1, 2011, marinas will be subject to the rules regarding public access in effect prior to December 17, 2007.

25. COMMENT: Does a property's proximity to an existing public access easement satisfy the public access requirements? Public access should be provided at public street ends where the public can be policed by trained municipal police personnel 24-hours a day. (189)

RESPONSE: Tidal waterways and their shores are subject to the Public Trust Doctrine and are held in trust by the State for the benefit of all the people allowing them to enjoy these lands and waters for a variety of uses. In recognition of this Doctrine, the rule requires access to and along the tidal waterway and its shore. Street ends are an example of a perpendicular accessway that brings the public to the tidal waterway and its shore. However, under the Public Trust Doctrine, the public also has the right to linear or lateral access along the tidal waterway and its shore. Public trust rights are not limited by time of day and therefore, the requirement that public access be provided at all times is appropriate, even if there is a nearby offsite public access easement.

26. COMMENT: As a result of these requirements, the likelihood of undesirables stealing from private properties would increase due to their ability to observe homes, businesses and watercraft from the public access easement. (137)

RESPONSE: The public access requirements do not grant anyone license to disobey laws and municipal ordinances.

27. COMMENT: Public access to the waterfront is not an issue. Many of the towns have public boat launches with adequate parking. Access to the beach and ocean has always been available and has been greatly improved over the last ten years. These rules are taking public access too far. (2)

RESPONSE: Tidal waterways and their shores are subject to the Public Trust Doctrine and are held in trust by the State for the benefit of all the people, allowing the public to fully enjoy these lands and waters for a variety of uses. As the trustee of the public rights to natural resources, including tidal waterways and their shores, it is the duty of the State not only to allow and protect the public's right to use them, but also to ensure that there is adequate access to these natural resources. As the State entity managing public access along the shore, the Department has an obligation to ensure that this occurs. The rule is intended to preserve and protect the common law rights under the Public Trust Doctrine and ensure that meaningful opportunities to enjoy the tidal waterways and their shores subject to public trust rights are provided to the public. Boat launch facilities do provide public access. However, boating is only one activity contemplated by the public access requirements, which address public use of tidal waterways and their shores for activities including swimming, sunbathing, fishing, surfing, sport diving, bird watching, walking and boating as afforded them under the Public Trust Doctrine.

28. COMMENT: If the State wants to allow everyone public access then they should purchase waterfront property and provide State marinas for this purpose. (165)

RESPONSE: Tidal waterways and their shores are subject to the Public Trust Doctrine and are held in trust by the State for the benefit of all the people. The Department does purchase waterfront property through its Green Acres Program. Further, the State owns five marinas; two of which are operated by the State and three that are leased by private entities which operate and maintain them.

29. COMMENT: If the State wants to open up more waterfront access for more of the public, the State should open more State-owned marinas or beachfront parks. (158)

RESPONSE: New Jersey has had a substantial, long-term dedication of funds for land preservation and recreation. In 1999, the Garden State Preservation Trust Act created a stable source of funding for conservation and recreation projects. Every five years the Department's Green Acres Program prepares the Statewide Comprehensive Outdoor

Recreation Plan (SCORP) to provide statewide policy direction on open space and recreation issues. The SCORP serves as a status report, strategic plan and guide for natural and recreational resource protection and planning statewide. The most recent SCORP was prepared in 2008. The SCORP contains an Action Plan, which includes action items that would open up more waterfront access for the public. Action items include continuing to provide funding for State coastal and waterfront recreation areas, as well as funding for local government and conservation organizations for coastal waterfront projects. Certain coastal areas are also specifically highlighted for acquisition projects, including the Delaware Bayshore, the Barnegat Bay Watershed, and the Hudson-Raritan Estuary. Marinas and parks owned by State and local government are designed to provide access opportunities to tidal waterways and their shores. However, under the Public Trust Doctrine the public has the right to access tidal waterways and their shores in other locations.

30. COMMENT: The public access rules are a knee jerk reaction. The State, counties and local governments have had opportunities to purchase property for public use. Two examples of missed opportunities are Manasquan Inlet and Huddy Park. (93)

RESPONSE: Both private and public lands are subject to the Public Trust Doctrine. The requirements of this rule apply through the coastal permitting process, Green Acres funding for projects located along tidal waterways, and the State's Shore Protection Program for municipalities. As for the examples cited by the commenter, Toms River Township owns Huddy Park and the State, Monmouth County, and Manasquan Borough used Green Acres funding to preserve Fisherman's Cove in the Manasquan Inlet.

31. COMMENT: In collaboration with local government, a State strategic plan should be developed for public access acquisition along the shoreline. A greater effort at the Federal and State level should be undertaken to identify funds and acquire public properties for public access. For example, private beach acquisition could be a priority for the next five to ten years. The current public debate about the future of the Lake Takanasee Beach Club in Long Branch reflects, in part, the lack of a long term plan and

clear State commitment to preserving and working with local communities to preserve these resources where feasible. (123)

RESPONSE: There are several processes through which the Department plans for acquisitions in coastal areas. Every five years, the Department's Green Acres Program prepares the Statewide Comprehensive Outdoor Recreation Plan (SCORP) to provide statewide policy direction on open space and recreation issues. The SCORP serves as a status report, strategic plan and guide for natural and recreational resource protection and planning statewide. The most recent SCORP was prepared in 2008 and includes goals to preserve a sufficient amount of open space for current and future public recreational use and for the conservation of natural resources important to protecting New Jersey's biodiversity and the quality of life in New Jersey. The SCORP additionally includes a goal to encourage coordinated open space and recreation planning by local governments and conservation organizations. The Department developed a plan for acquisitions under the Coastal and Estuarine Land Conservation Program and is now evaluating the public comments received on the draft plan. That plan will use information gathered locally and used by other State and Federal agencies, municipal and county governments, non-governmental organizations and land trusts to prioritize sites to meet their existing local/regional plan objectives, resulting in greater coordination of acquisition.

32. COMMENT: The State should adopt plans to enhance access to State and Federal beaches, public parks and other coastal facilities and add expanded public access along roadways throughout coastal regions. (123)

RESPONSE: On December 17, 2007, the Commissioner of the Department issued an Administrative Order to increase public access and use opportunities at Department facilities, through development and implementation of public access plans for lands the Department manages that are located along tidal waterways and their shores. The Administrative Order sets forth a plan to increase public access and use opportunities for State parks, State marinas and State wildlife management areas. The December 17, 2007 amendments to the public access rules that set forth standards for municipalities

participating in the State's Shore Protection and Green Acres Program funding will enhance public access at coastal facilities, parks and roadways throughout the coastal region.

33. COMMENT: Can the public access all lands owned by the State? No. If a boater wanted to dock their boat at the Statue of Liberty and have lunch along the bulkhead they would be shot. (76)

RESPONSE: The Commissioner issued an Administrative Order on December 17, 2007 to increase public access and use opportunities at Department facilities (State parks, marinas, and wildlife management areas) located along tidal waterways and their shores. The Department has identified those lands and waters it administers that are subject to the Public Trust Doctrine and is drafting public access plans for each of these areas. The exceptions at N.J.A.C. 7:7E-8.11(f) apply to State owned lands as well as privately owned lands.

34. COMMENT: To create a rule in which a property owner must give a portion of their property to provide unlimited public access, while property owners do not have unlimited access to State run parks or recreation is discrimination. Most parks have signs posted indicating the operating hours of dawn to dusk. (146)

RESPONSE: The Public Trust Doctrine provides that the public has the right to utilize tidal waterways and their shores regardless of the time. On December 17, 2007, the Commissioner issued an Administrative Order to increase public access and use opportunities at Department facilities, through development and implementation of public access plans for lands the Department manages that are located along tidal waterways and their shores. The Administrative Order calls for these plans to be finalized in 2008. Among other things, the Administrative Order provides that the Department shall ensure that walk-in public access along the tidally flowed waterways and shore is provided at all times at the following locations: Island Beach State Park; Island Beach State Park Marina; Fortescue State Marina; Senator Farley State Marina; Barnegat Lighthouse State

Park; Corson's Inlet State Park; Wharton State Forest; Cape May Point State Park; and Fort Mott State Park. In implementing these plans, the Department will be removing signs that limit hours of operation contrary to the requirements of the public access rules at tidally flowed areas. Further, the Administrative Order provides that the Department will propose rule amendments revoking the hours of operation at State parks, marinas, and wildlife management areas assigned to the Department for administration where they limit 24-hour public access to tidally flowed areas.

35. COMMENT: Almost all coastal waterways have some facility for launching and retrieving boats at convenient intervals. Some of these are public but most are part of marina operations. It would not be unreasonable to require that such boat ramps be available at convenient intervals where none currently exist. The State Marina in Forked River has no public boat launch or docking facility. (187)

RESPONSE: While the Forked River Marina does not have a boat ramp, other State facilities do have boat ramps that are available to the general public. In addition, the Department will be constructing a boat ramp in the vicinity in cooperation with Ocean Township. The new ramp will be located on Oyster Creek off Dock Road between Route 9 and Barnegat Bay, with completion anticipated in the spring of 2009. The rule does not require that all boat ramps, including those at private facilities, be opened for public use. As stated in Response to Comment 27, the rule requires that the public be able to use tidal waterways and their shores for various activities including fishing, bird watching, and walking, as afforded them under the Public Trust Doctrine. With respect to marinas, the Public Access and Marina Safety Task Force Act, N.J.S.A. 13:19-38 et seq., signed into law on September 10, 2008, imposes a moratorium on the implementation of the provisions of N.J.A.C. 7:7E-3.50, 7.3, and 8.11, as applied to marinas, as such rules and regulations were adopted by the Department on December 17, 2007. As a result of the moratorium, until January 1, 2011 marinas will be subject to the rules regarding public access in effect prior to December 17, 2007.

36. COMMENT: Does the requirement for public access render a Tidelands grant useless? (80)

37. COMMENT: Is the State of New Jersey going to refund all the money that has been paid as part of a Tidelands grant, lease or license? Will Tidelands grants, leases and licenses still exist? (9)

38. COMMENT: The proposed access rule would effectively negate the benefit of a Tidelands grant since the bordering waterfront would be restricted to public access. (68)

RESPONSE TO COMMENT 36 THROUGH 38: In New Jersey, tidelands are held in trust by the State for the public unless these lands have been conveyed to other uses. Even when the State conveys tidelands to private ownership, it does not convey the public trust interest in the lands. See *National Association of Home Builders v. State of New Jersey, Department of Environmental Protection*, 64 *F.Supp.2d* 354, 358-359 (D.N.J. 1999) (upholding Hudson Riverfront Walkway rule as a valid exercise of the police power to safeguard public trust rights, as these rights of use and enjoyment cannot be extinguished even with conveyance of title to these tidal waterfront areas). The upper boundary of tidelands is the mean high water line and all lands seaward of this line are subject to the Public Trust Doctrine and are to be administered by the State in the public interest. The rule does not change this. A Tidelands grant, lease or license does not take away public trust rights of access and the requirement for public access does not render these conveyances useless. The State of New Jersey will continue to convey State owned tidelands where appropriate, subject to the public trust interest in the lands.

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

39. COMMENT: The rule is a violation of personal property rights. The State, through the guise of the Department, is gathering too much power and using it to seize private citizen's property. (10)

40. COMMENT: The public access rule is an egregious use of Eminent Domain. (120)

41. COMMENT: How does the Department plan on paying for the property that it will be taking under this rule? (142)

42. COMMENT: It is evident that the Department is clearly in violation of our constitutional rights by attempting to require certain waterfront property owners to allow unrestricted public access over their private property. Is the Department living and working in a land of laws designed to protect the individual and the environment or are they looking to create a “Police State?” (115)

43. COMMENT: The use of eminent domain by municipalities has generated much media attention where it has been used excessively and for questionable purposes. What the proposed changes to the Coastal Zone Management rules represent is not simply the taking of private property for a few acres of open space, but rather, they represent the taking of potentially hundreds of miles of private property so that the specifications of the proposed rule can be met. (15)

44. COMMENT: This rule results in the confiscation of real estate of any entity without just compensation. (45)

45. COMMENT: The Nazis orchestrated the same kind of land grabs when they took over “changing laws” for “public” purposes while stealing land. There’s money in this for someone powerful because it makes no sense. (128)

RESPONSE TO COMMENTS 39 THROUGH 45: Tidal waterways and their shores are subject to the Public Trust Doctrine and are held in trust by the State for the benefit of all the people allowing them to enjoy these lands and waters for a variety of uses. The public has always had the right to access tidal waterways and their shores. Since their inception in 1978, the Coastal Zone Management rules have required public access. The State of New Jersey is the trustee of public rights to the State’s natural resources,

including tidal waterways and their shores. Accordingly, it is the duty of the State to protect the public's right to use and ensure that there is access to these resources.

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

46. COMMENT: The rules as proposed represent a taking or partial taking of private property suggestive of egregious eminent domain policies, and therefore, warrant legal challenge. To force additional access reduces property rights and value. Many of these obligations never could have been foreseen by the prior generations who ran these businesses, and thereby afforded access to marine waters to the public. The proposed rules offer no compensation for the loss of private property. (21, 38)

RESPONSE: This comment was previously submitted by the commenter on the Department's November 6, 2006 proposed new public access rules and amendments (see 38 N.J.R. 4570(a), November 6, 2006). The commenter has requested that this comment also be incorporated as a comment on this rulemaking. As stated by the Department in the adoption of the amendments published in the December 17, 2007 New Jersey Register (see 39 N.J.R. 5222(a)), the rule does not represent a taking or partial taking of

private property. The rule requires that the public be allowed to walk along the tidal waterway in accordance with the public rights under the Public Trust Doctrine, and that a conservation restriction be recorded to ensure that the public access is maintained in perpetuity. The goal of a conservation restriction is to restrict development in order to permanently safeguard the public benefits of land in its natural condition. As stated previously, the State of New Jersey is the trustee of public rights to the State's natural resources, including tidal waterways and their shores. Accordingly, it is the duty of the State to protect the public's right to use and ensure that there is access to these resources. As explained in Response to Comments 39 through 45 above, requiring public access to and use of the shores of tidal waterways is not an unconstitutional taking of property since these public rights are background principles of New Jersey State law.

Public roadways

47. COMMENT: The idea of a provision for "superhighways" to allow for alternate public access in certain situations is supported. However, obstructions and risks to public safety may also occur along roadways other than "superhighways" including other State roadways and county routes. It appears that if work were proposed along a public roadway, and there were no on-site opportunities to provide safe public access, there would be no option that would allow the proposed project to proceed. Is this a correct interpretation? Is there a hardship waiver that could be utilized? If so, it should be referenced in this section.

If the above interpretation is correct, then it is suggested that instead of listing designated "superhighways," a general statement regarding the allowance for providing alternate public access where public roadways have obstructions or could cause risk to public safety is warranted. (85)

48. COMMENT: The Department's efforts to treat both public and private entities the same should be applauded. However, it appears that one State Department is increasing the costs of another State Department at a time when the State is in a fiscal crisis. It seems counterintuitive to increase any State costs during these troubling times. The impact to the State Department of Transportation will not go unnoticed by the public and

the legislature as the rule increases State costs at a time when the State is frantically searching for budget cuts. (21)

RESPONSE TO COMMENTS 47 AND 48: If work were proposed along a public roadway, the provisions at N.J.A.C. 7:7E-8.11(f)2 would allow for temporary restrictions to public access. The amendments adopted herein make allowances in the case of certain roadways categorized as superhighways where the type of access contemplated by the rule cannot be provided due to risk of injury or the presence of existing and substantial obstacles. The road projects that the Department reviews for coastal permits are typically crossings of tidal waterways. In the Department's experience requiring public access at such crossings, it has been possible to accommodate public access and the Department does not anticipate that there is a need for an additional exception.

49. COMMENT: The consideration given to the unique circumstances of public roadway projects, recognizing that they also provide a public benefit, and that, due to their linear nature, they are subject to certain limitations due to existing development and right-of-way constraints is appreciated. The provision for public roadway projects to provide mitigation for the loss of public access parking within one-quarter mile of the proposed project rather than within 250 feet is supported. (85)

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

Ports and industrial uses

50. COMMENT: Requiring the port industry to provide or pay for alternative access for the public at facilities to which they have never had access by virtue of an application for a Waterfront Development permit is not a Public Trust Doctrine matter. These access "opportunities" were never denied to the public. In the course of the historical development of the United States, certain areas were vital to the economic health of the region and nation. These areas very early on were reserved solely for commercial uses. (127)

51. COMMENT: The on-site public access requirement for major industrial facilities is simply not feasible. The rule continues to punish those companies that have called New Jersey home, but happen to be located on a tidally flowed waterway, by making those businesses pay for off-site access. (21)

RESPONSE TO COMMENTS 50 AND 51: All tidal waterways and their shores are subject to the Public Trust Doctrine and are held in trust by the State for the benefit of all the people. While the original purpose of the Public Trust Doctrine was to assure public access for navigation, commerce and fishing, in the past two centuries State and Federal courts recognized that modern uses of tidal waterways and their shores are also protected by the Public Trust Doctrine.

The Department recognizes that there are situations where public access cannot be accommodated on-site due to existing site constraints, hazardous operations, risk of injury or homeland security risks and the rule includes provisions (see N.J.A.C. 7:7E-8.11(f)) to address these situations. In such cases, alternate public access would be required. The alternate access could take different forms, such as an observation area along the waterfront, a public fishing pier or small boat/canoe launch along a tidal waterway, creation of new public parking spaces at another access point, or recreational enhancements (seating areas, lighting, trash receptacles, interpretive signs, access ramps or stairways, etc.) at existing public access areas.

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

Since changes are not proposed to the port use rule, it could be interpreted that port facilities must address public access and the rules requiring alternative methods of providing such access. If this is the Department's intent, it runs afoul of several Federal laws and regulatory actions which mandate restricted access to port facilities. It would also place a major encumbrance on numerous efforts, including the redevelopment of

brownfield sites in and around the Port of New York and New Jersey; a program which the Department itself has championed for many years. (127)

RESPONSE: The Department recognizes the importance of ports and the nature of port operations. Therefore, N.J.A.C. 7:7E-8.11(f)3 allows the Department to modify the perpendicular and linear public access requirements at port facilities where it has determined that, based on hazardous operations of the facility or the presence of substantial structures, it is impracticable for such public access to be provided, and that there are no measures that can be taken to avert such risks. This comment was previously submitted by the commenter on the Department's November 6, 2006 proposed new public access rules and amendments (see 38 N.J.R. 4570(a), November 6, 2006). The commenter has requested that this comment also be incorporated as a comment on this rulemaking. As indicated in the adoption of the amendments to the section proposed in November of 2006 that this comment was originally submitted in response to (See 39 N.J.R. 5267), the Department proposed the amendments adopted at this time to address homeland security issues at ports. Specifically, the homeland security provision recognizes that both the Federal and State governments have enacted laws and implemented protective measures to enhance homeland security and that these laws may require measures that preclude the full linear and perpendicular public access required at N.J.A.C. 7:7E-8.11(d) and (e). In such cases where the Department and Office of Homeland Security and Preparedness determine such a risk exists, alternate public access would be required. The public access rule has historically applied to ports and the Port use rule at N.J.A.C. 7:7E-7.9(d) requires that new or expanded ports provide public access. An example of public access provided at port facilities is the observation deck constructed adjacent to the Global Marine Terminal on the northern peninsula of Port Jersey Channel in Jersey City, Hudson County.

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

53. COMMENT: Port operations should be specifically exempted from the public access rule requirements. (127)

RESPONSE: This comment was previously submitted by the commenter on the Department's November 6, 2006 proposed new public access rules and amendments (see 38 N.J.R. 4570(a), November 6, 2006). The commenter has requested that this comment also be incorporated as a comment on this rulemaking.

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

54. COMMENT: Ports are a water-dependent use. They are created to serve a public purpose; thus their unique status in statute and regulation. The United States Congress recognized this when it drafted the bi-state compact creating the port district of New York, specifically identifying the public purpose of encouraging and supporting the maritime commerce of both states as in the public interest. Since September 11, 2001, protecting the public from terror attacks has also become one of the Port's most important duties under Federal Law. No one is allowed unescorted on port facilities, no matter where they are located, without required background checks and other special clearances. These twin duties, by necessity and statute, preclude general access by the public to port facilities. (127)

RESPONSE: This comment was previously submitted by the commenter on the Department's November 6, 2006 proposed new public access rules and amendments (see 38 N.J.R. 4570(a), November 6, 2006), and the commenter has requested that this comment also be incorporated as a comment on this rulemaking. The amendments adopted herein address homeland security concerns by providing, at N.J.A.C. 7:7E-8.11(f)10, that where development that would impact a facility subject to a Federal or State homeland security statutory scheme is proposed and the Department determines, upon consultation with the Office of Security and Preparedness, that perpendicular access and/or a linear area along the entire shore of the tidal waterway is not practicable because it poses an unacceptable homeland security risk, the public access requirements could be modified.

55. COMMENT: The rule would apply not only to development directly along tidally flowed waters but also to properties within 500 feet of these waterways. As a result, waterfront landowners would be required to purchase property to provide linear access. This requirement will be imposed on the Port of New York and New Jersey notwithstanding the fact that the port has been operating for the benefit of the regional economy for almost four centuries. To the contrary, during the early years of this State, the Legislature on many occasions made it clear that the port was the significant economic resource in northern New Jersey and a plethora of laws were enacted to protect and encourage that use.

The Port will continue as it has for centuries but there will be a cost that has not been part of the equation until now; a cost that is arbitrary and capricious in that there are any number of access points to the water's edge around the port. (127)

RESPONSE: New Jersey's port areas are a regional, national and international resource. The Department recognizes the importance of ports to the economy of the State. The public access rule has historically applied to ports and the Port use rule at N.J.A.C. 7:7E-7.9(d) requires that new or expanded ports provide public access. An example of public access provided at port facilities is the observation deck constructed adjacent to the Global Marine Terminal on the northern peninsula of Port Jersey Channel in Jersey City,

Hudson County. The Port use rule recognizes the value of the waterfront to the public, and requires port facilities to provide for the maximum public visual and physical access to the waterfront consistent with safety and security concerns. The Department recognizes the nature of port operations and therefore, N.J.A.C. 7:7E-8.11(f)3 allows the Department to modify the perpendicular and linear public access requirements at port facilities where it has determined that, based on hazardous operations of the facility or the presence of substantial structures, it is impracticable for such public access to be provided, and that there are no measures that can be taken to avert such risks. In addition, where exigent circumstances of public safety or security occur, the Department may allow temporary restrictions of public access in accordance with N.J.A.C. 7:7E-8.11(f)2. Moreover, the amendments adopted at this time include a provision for modification of permanent on-site public access where development impacts a facility subject to a homeland security statutory scheme, such as the New Jersey Domestic Security Preparedness Act (N.J.S.A. App. A:9-64 et seq.), if the access would pose an unacceptable homeland security risk. The Department believes that these provisions provide sufficient flexibility to address the unique nature of port facilities.

The rule does not require waterfront landowners to purchase property to provide linear access. Although development within 500 feet of a tidal waterway may be regulated and thus subject to the Coastal Zone Management rules, the rule states at N.J.A.C. 7:7E-8.11(d) that the requirements apply to development on or adjacent to tidal waterways and their shores.

56. COMMENT: Public access on a 24-hour basis at industrial sites is problematic. It would be difficult to continue operations at the site due to the heavy equipment and materials at the site. (36)

RESPONSE: The Department recognizes that existing industrial properties with developed waterfronts may present situations that warrant modification of the public access requirements. Therefore, the Public trust rights rule at N.J.A.C. 7:7E-8.11(f)3 provides that the Department may modify the public access requirements where it determines that the risk of injury from existing or proposed hazardous operations, or

substantial existing and permanent obstructions make it impracticable to provide perpendicular access and a linear area along the entire shore and that there are no measures that can be taken to avert the situation. In such cases, the Department will instead require alternate public access either on-site or at a nearby location. Alternate public access might take the form of an observation area along the waterfront, public fishing pier or small boat/canoe launch along a tidal waterway, creation of new public parking spaces at another access point, or passive recreational enhancements (seating areas, lighting, trash receptacles, interpretive signs, ADA-compliant ramps or stairs) at existing nearby public access areas.

Residential development

57. COMMENT: Will the general public be allowed to access lagoonfront homeowner's properties to enjoy fishing, crabbing and swimming in the lagoon? (53, 161)

58. COMMENT: The commenter stated that his property is located on the Forked River and that he just received permits for the construction of a new bulkhead on his property. He asks if he will need to provide public access because he received a permit. (183)

59. COMMENT: Why aren't all waterfront properties subject to the public access rule? Does the tax-paying public have the right to access every homeowner's backyard along the waterfront? (188, 189, 193)

60. COMMENT: The commenter represents a beach association comprised of over 600 homes and is concerned that they will be faced with providing public access and associated liability issues. (166)

61. COMMENT: Will this proposal permit the entrance of the public across privately owned land to access the water and use of the landowner's restrooms? (45)

RESPONSE TO COMMENTS 57 THROUGH 61: All tidal waterways and their shores are subject to the Public Trust Doctrine, which provides that tidal waterways and their

shores are accessible to all. The requirements of this rule apply through the coastal permitting process, Green Acres funding for projects located along tidal waterways, and the State's Shore Protection Program for municipalities. For residential developments other than individual single family homes that are not part of a larger development, on-site public access is required along any tidal waterway. However, for two and three unit residential developments the rule at N.J.A.C. 7:7E-8.11(f)4 and 5 allows the on-site public access to be provided at a nearby off-site location. At individual single family homes that are not part of a larger development, public access is required only if the single family lot includes a beach and is located on the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or the Delaware Bay or, if located on a waterway other than those listed, where beach and dune maintenance activities are proposed. Public access requirements may also be imposed as a condition of Shore Protection Program funding, pursuant to N.J.A.C. 7:7E-8.11(p). For individual single family homes that are not part of a larger development, the extent of public access required is access along the tidal water and use of the beach. Perpendicular access through single family lots is not required nor is the use of restrooms. The Department decided that it should not require public access at all individual single family homes under these rules because in many cases where one single family home is proposed, the size of the property and density of development do not lend themselves to providing public access on-site. However, due to the great public demand for beach access, public access to the beach is required along the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and Delaware Bay and their shores. As expressed in *Matthews* "Beaches are a unique resource and are irreplaceable. The public demand for beaches has increased with the growth of population and improvement of transportation facilities." 95 N.J. 306, 323 (1984).

62. COMMENT: The public access rule will take away the privacy of homeowners whose property is located on the waterfront. This is unfair. Homeowners should not have their waterfront property treated like a public park. (23, 66, 69)

RESPONSE: The Public Trust Doctrine does not allow unfettered access to all parts of a waterfront property. Instead it assures the public has access to and along tidal waterways

and their shores. Not all single family homes are affected by this rule. At single family homes that are not part of a larger development, public access is required only if the single family lot includes a beach and is located on the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or the Delaware Bay or, if located on a waterway other than those listed, where beach and dune maintenance activities are proposed. Public access requirements may also be imposed as a condition of Shore Protection Program funding, pursuant to N.J.A.C. 7:7E-8.11(p). For individual single family homes, the extent of public access required is access along the tidal water and use of the beach. Perpendicular access through single family lots is not required. Tidal shorefront property in New Jersey has been impressed with public trust. Homeowners should not expect that they will be able to exclude the public from resources impressed with public trust rights, or expect to appropriate public assets for exclusive private use. See, e.g., *National Assn of Homebuilders v. State, Dept. of Env'tl Protect.*, 64 F. Supp. 2d. 354 (D.N.J. 1999) (clarifying that the public trust doctrine is a background common law principle in New Jersey).

Homeland security

63. COMMENT: Under this proposal, the Department has essentially deferred a decision in the event of a perceived Homeland Security issue. This means that any permit application on behalf of the Port of New York or New Jersey is likely to be delayed because local homeland security agencies do not have as their priority, advice and consent on land use permits. Moreover, with all due respect to those agencies, they have neither the expertise nor the ultimate authority on the port's security issues. That expertise and authority resides with the pertinent Federal agencies already operating in the port. (127)

RESPONSE: Both the Federal and State governments have enacted laws such as the Maritime Transportation Security Act of 2002 (46 U.S.C. 701 et seq.), Section 550 of the Homeland Security Appropriations Act of 2007 (the Chemical Facility Anti-Terrorism Standards) (P.L. 109-295 (2006)), and the New Jersey Domestic Security Preparedness Act (N.J.S.A. App. A:9-64 et seq.) and implemented protective measures to enhance

homeland security. These laws may require measures at certain facilities to protect against potential terrorism that preclude the full linear and perpendicular public access that is required under N.J.A.C. 7:7E-8.11(d) and (e). The adopted amendments addressing homeland security rely on these homeland security statutory schemes and consultation with the Office of Homeland Security and Preparedness. The Office of Homeland Security and Preparedness has experience in dealing with homeland security issues on a daily basis, including coordination with Federal and local officials, as necessary. Therefore, the Department does not expect this provision to delay review of land use permit applications.

64. COMMENT: The Department recognizes that there are circumstances that go beyond the public's right to access all coastal areas. Unfortunately, the proposed regulation does not address certain especially sensitive security concerns, such as those where public access could put the general public in close proximity to several large petroleum and chemical storage tanks. The commenter identified the potential for an incident that could cause significant loss of life.

The rule at N.J.A.C. 7:7E-8.11(f)2 should give greater control to county and local law enforcement, especially where critical infrastructure are concerned and a Site Assessment Visit has been performed in accordance with the Homeland Security Act. When lives and property of many people are concerned, the trained law enforcement and counter-terrorism personnel should be making the decisions concerning public access, not Department personnel who are trained in the preservation of open space. (175)

65. COMMENT: Access to the waterfront in Bayonne has increased over the years and is an asset to the community. Public access should not be eliminated, but managed by closing accessways after dark and re-opening them at dawn, similar to most parks. In addition, the public access walkway should be ended before it reaches the IMTT Petrochemical site in Bayonne as recommended by the Site Assessment Visit for this site. A balancing of public access against the risk of critical assets is not unreasonable.

While the Department is urged to amend N.J.A.C. 7:7E-8.11 as discussed above, the local government already has the power to regulate and restrict walkway access. In

accordance with page 33 of the report “Chemical Security in New Jersey: An Overview of Planning, Information Sharing and Response,” dated June 11, 2007, prepared by the Maxwell School of Syracuse University, the home rule system of governance in New Jersey disperses power at the local level, providing a great deal of authority to municipalities. Municipalities and Counties possess not only the power that is expressly authorized by the respective Constitution or Charters, but also any and all authorization needed to carry out those expressly granted powers. This system is based on Article IV, Section VII of the New Jersey Constitution. (175)

RESPONSE TO COMMENTS 64 AND 65: The State of New Jersey is the trustee of public rights to the State’s natural resources, including tidal waterways and their shores. Accordingly, it is the duty of the State to protect the public’s right to use and ensure that there is access to these resources. The rule at N.J.A.C. 7:7E-8.11(f)2 provides the Department with the ability to allow, require or impose temporary restrictions to public access where exigent circumstances of public safety or security exist, and N.J.A.C. 7:7E-8.11(f)10 addresses homeland security risks. These two provisions address concerns related to national security and public safety. The rule at N.J.A.C. 7:7E-8.11(f)10 does take into account Federal and State homeland security statutory schemes, such as the New Jersey Domestic Security Preparedness Act (N.J.S.A. App. A:9-64 et seq.), the Maritime Transportation Security Act of 2002 (46 U.S.C. 701 et seq.), Section 550 of the Homeland Security Appropriations Act of 2007 (the Chemical Facility Anti-Terrorism Standards) (P.L. 109-295 (2006)). Specifically, this provision allows for modification of the public access requirement where development that would impact a facility subject to a Federal or State homeland security statutory scheme is proposed and the Department determines, upon consultation with the Office of Homeland Security and Preparedness, that perpendicular and/or a linear area along the entire waterway is not practicable because it poses an unacceptable homeland security risk.

The Department discussed with the Office of Homeland Security and Preparedness, the homeland security concerns raised by the commenter regarding the portion of the Hudson River Waterfront Walkway on the Bayonne Golf Club and its proximity to the IMTT property. As recommended by the Office of Homeland Security and Preparedness

to address these concerns, the public access plan was revised to restrict public access along the portion of the walkway that runs parallel to the IMTT property, due to the proximity of this portion of the walkway to the IMTT property. However, the remaining portion of the Hudson River Waterfront Walkway that runs parallel to the water is to be constructed and available to the public on a 24-hours/7 days a week basis.

66. COMMENT: N.J.A.C. 7:7E-8.11(i) prohibits activities which discourage or prevent the public from exercising public trust rights. The word “discourage” is nebulous and invites inconsistent and unpredictable interpretation by the Department and prospective lawsuits. (21, 38)

RESPONSE: This comment was previously submitted by the commenter on the Department’s November 6, 2006 proposed new public access rules and amendments (see 38 N.J.R. 4570(a), November 6, 2006). The commenter has requested that this comment also be incorporated into this rulemaking. As indicated in the adoption of the amendments to the section that this comment was originally submitted in response to, the term “discouraged” is defined at N.J.A.C. 7:7E-1.8. “Discouraged” means that a proposed use of coastal resources is likely to be rejected or denied as the Department has determined that such uses of coastal resources should be deterred. In cases where the Department considers the proposed use to be in the public interest despite its discouraged status, the Department may permit the use provided that mitigating or compensating measures can be taken so that there is a net gain in quality and quantity of the coastal resource of concern. The term discouraged has been effectively used in the Coastal Zone Management rules since 1978.

Conservation restriction

67. COMMENT: It is unnecessary to require public access easements on private properties and waterfront businesses when municipal docks, street-ends and beaches already offer freedom of access. (137)

68. COMMENT: The placement of a permanent DEP restriction on the deed to private property in order to receive a permit is unacceptable. (30, 103, 116)

69. COMMENT: The deed restriction provision is nothing more than extortion. (138)

RESPONSE TO COMMENTS 67 THROUGH 69: The Public Trust Doctrine establishes the right of the public to fully utilize tidal waterways and their shores. Therefore it is the responsibility of the State to ensure that the public has the ability to access and use these public trust areas. The rule requires the identification and recordation at the County Clerk's Office of those lands preserved for public access. This requirement is intended to provide future property owners with notification of the public access area.

In recognition of the Public Trust Doctrine, the rule requires access to and along tidal waterways and their shores. Street ends are an example of a perpendicular accessway that brings the public to the tidal waterway and its shore. However, under the Public Trust Doctrine, the public also has the right to linear or lateral access along the tidal waterways and their shores.

Shore Protection Program funding

70. COMMENT: Many of the regulations as they relate to beachfront access are consistent with the objectives of the City of Ocean City. There are over 120 access points to the eight miles of beach in the City. The longest distance a person has to walk parallel to the beach or bulkhead to reach an access point is approximately 250 feet. A number of handicapped accessible access points have been added. Parking, restrooms and boat ramps have also been added.

The City is concerned with the 24-hour access requirement. The City has a longstanding ordinance that restricts access to the beach from 10:00 pm to 6:00 am. The City believes that this is a common sense regulation for a number of reasons, first and foremost is safety. The City has a very aggressive outreach program that discourages swimming at any time that the beaches are unprotected. Swimming after dark is particularly dangerous.

Unlimited public access to the beach is invariably going to lead to problems related to gatherings on the beach. These gatherings are going to include young people and could include activities that are detrimental to what the City is trying to offer. In addition, the City does not want to encourage the public to use the beach as an overnight accommodation. The 24-hour access requirement should be decided by the local officials in consultation with the Department. (39)

RESPONSE: The Public Trust Doctrine provides that the public has the right to utilize tidal waterways and their shores for activities such as fishing and walking, regardless of the time. However, the Department recognizes that there may be unique circumstances that allow closure of a beach during specified late night hours. See N.J.A.C. 7:7E-8.11(f)1.

Since the close of the public comment period, the Department evaluated the circumstances in the City of Ocean City for compliance with the rule. As a result, the City amended its general ordinances to provide that, subject to emergent conditions, the beach shall be accessible to the public at all times, while prohibiting bathing, swimming or entering the ocean between the hours of dusk and dawn in most circumstances. In an August 3, 2008 article in the Philadelphia Inquirer, representatives of Ocean City indicate that no problems have been reported over the summer since the ordinance was changed.

71. COMMENT: The public access rule would have been more productive if the Department's rule writers had left Trenton and familiarized themselves with the area for which they are making blanket rules. If the Department had checked the usage and patterns that were emerging based on public demand and worked with towns on promoting access, the rules would be more palatable. (167)

RESPONSE: The public access rules take into account the different nature of waterways throughout the State, with specific criteria for developments along the Hudson River and along other urban waterfronts at N.J.A.C. 7:7E-8.11(d). The standards for municipalities participating in the Shore Protection Program also provide different standards for the Atlantic Ocean, Delaware, Raritan and Sandy Hook Bays than for other waterways

throughout the State. The Department works with municipalities that wish to participate in the Shore Protection Program to explain public access requirements and to develop appropriate approaches to meet the requirements.

72. COMMENT: In reviewing the comments included in the adoption of the public access rules published in the December 17, 2007 New Jersey Register (See 39 N.J.R. 5222(a)), it is clear that there is a substantial concern that the proposed regulations do not strike the proper balance between mandates and collaboration in support of planning and implementation that reflects local realities. Furthermore, shore protection projects are justified because they protect life and property from coastal storms. The Department should carefully work with local project sponsors to ensure that the regulations do not impose unnecessary requirements which conflict with or impede timely project implementation that protects New Jersey's citizens in a cost effective and environmentally sensitive way. Further, the regulations should establish reasonable time, place and manner restrictions for access that are consistent with appropriate local police powers and the town's obligation to protect public health, safety and welfare. For example, the exception for access to jetties and groins could be amended to include "or other projects where it is demonstrated that there is significant, rather than extraordinary, risk of injury."

The rule should reflect this collaborative approach and provide the flexibility necessary to support development and implementation of public access plans that incorporate the actual beach access needs of municipalities and the physical and financial limitations of diverse shore communities. Rather than require rigid distances for parking and access, public access plan requirements should be amended to establish the distance requirements as planning goals; and require the locality to provide an explanation and justification as to why it could not meet those standards and what alternatives were considered and available and how it plans to support facilities necessary to support beach capacity. (123)

RESPONSE: The public access requirements are necessary because it is the duty of the State, as trustee of the public rights to natural resources, to allow and protect the public's

right to use tidal waterways and their shores and ensure adequate access to them. The public access rules assist the State in fulfilling this duty. Assuring that realistic opportunities for the public to enjoy the areas protected by the public trust doctrine is particularly appropriate in cases involving expenditures of shore protection funding as the citizens of New Jersey will be paying for the shore protection project that triggers the requirements of the rule through both State and Federal taxes that provide the shore protection project funding. In addition, the State and thus the taxpaying citizens of New Jersey will share in the costs of parking and restrooms by providing additional funding of up to five percent of the cost of the shore protection project.

The rules provide minimum requirements for beach access that are necessary and appropriate to assure that meaningful public access is provided, including the provision of perpendicular access to the tidal waterway and its shore, parking and restrooms. The rule provides flexibility in meeting the one-quarter mile perpendicular accessway requirement by allowing municipalities to adjust the location of the accessways provided the one-quarter mile distance is met on average. Similarly, the rule provides the municipality with the flexibility in determining the location of restrooms while ensuring that restrooms are located close enough to the beach and to one another for use by beach patrons. With respect to parking, in lieu of the acquisition of land for a parking lot, a municipality could meet the parking requirement through the dedication of on-street parking for public access, reconfiguration or reorientation of existing parking spaces to provide additional spaces, removal of existing parking limitations or provision of remote or off-site parking with a shuttle service. The Department works with municipalities that wish to participate in the Shore Protection Program to explain public access requirements and to develop appropriate approaches to meet the requirements.

73. COMMENT: With respect to Shore Protection Program funding, the Department should either address the misimpression that communities will be required to use eminent domain or clarify that nothing in this rule shall be construed to require the municipality to use condemnation or eminent domain to acquire property. (123)

RESPONSE: The regulations provide municipalities with the flexibility in the provision of perpendicular accessways, public parking and public restrooms, and municipalities must determine whether condemnation proceedings are necessary in unique circumstances. The rule does not reference and should not be construed to require the use of eminent domain. However, the rule at N.J.A.C. 7:7E-8.11(p)7i(1), adopted on December 17, 2007 (see 39 N.J.R. 5222(a)) required that, in addition to obtaining conservation restrictions for the project area, the municipality must also obtain conservation restrictions for all beaches within the municipality along the waterway on which the project occurs. If a municipality could not obtain conservation restrictions for all privately held beaches outside of the project area, the project could only proceed if the municipality or State has entered into condemnation or other legal proceedings to diligently obtain the necessary easements. The language at N.J.A.C. 7:7E-8.11(p)7i(1) regarding other legal proceedings was included in the November 6, 2006 proposal and adoption (see 38 N.J.R. 4570(a) and 39 N.J.R. 5222(a)) because the State did not want to limit the approaches a municipality might use to obtain conservation restrictions for privately held beaches outside the project area. However, in response to public comment on the November 2006 proposal, the Department on December 17, 2007 (see 39 N.J.R. 5145(a)) proposed to require conservation restrictions only within the project area, and to delete the language addressing condemnation or other legal proceedings. These amendments are adopted herein.

74. COMMENT: Florida has some of the most desirable land being set aside by every municipality along the coast with beautiful beaches, showers, restrooms, restaurants, shops, free parking, boat launches, jogging and bike paths, playgrounds and picnic areas for public use. No beach tags are required. This should be the case in New Jersey. (158)

RESPONSE: The Department agrees with the commenter that public access to tidal waterways and their shores in New Jersey is important. In addition, public access is a common law right under the Public Trust Doctrine. The rule is intended to preserve and protect the common law rights under the Public Trust Doctrine and ensure that meaningful opportunities to enjoy the tidal waterways and their shores subject to public

trust rights are provided to the public. The rule contains requirements for municipalities participating in the State's Shore Protection or Green Acres Program to provide public access on municipality held land. In addition, the State has and will continue to acquire property for public use through the Green Acres Program.

With respect to beach tags, in 1955, a statute was enacted that authorized New Jersey municipalities bordering the Atlantic Ocean, tidal water bays or rivers to charge a fee to beachgoers in order to account for maintenance and safety costs associated with them. N.J.S.A. 40:61-22.20 grants municipalities "exclusive control, government and care" of any municipally owned lands on the Atlantic Ocean, tidal water bays or rivers and boardwalks, bathing and recreational facilities, safeguards and equipment. The law requires that fees charged for access to the beach and recreational grounds must be reasonable, shall not be charged for children under the age of 12 years and may be reduced or eliminated for those over 65 or those who are disabled. Fees collected can only be used to improve, maintain and police the property, to provide protection from erosion and other sea damage, and to provide facilities and safeguards for public bathing and recreation.

75. COMMENT: How much will it cost to police and enforce this new regulation? How does the Department plan to police and enforce this new rule? The enforcement of public access is already a problem on the beaches of Long Beach Island. New Jersey's citizens' tax dollars have been spent to build-up the beach and it is impossible for towns of Loveladies and Ocean Gate to find and use any access points. If the enforcement efforts for the current required access are the same for future access, it will not work, as no one enforces them. (142)

RESPONSE: The rule at N.J.A.C. 7:7E-8.11(p) requires that municipalities participating in the State's Shore Protection Program submit public access plans prior to a coastal permit being issued, and that the plan be implemented immediately upon completion of project construction. The rule for the Green Acres Program at N.J.A.C. 7:7E-8.11(q) provides that the Department will not enter into a Green Acres project agreement prior to Department approval of the public access plan and Public Access Instrument. The rule

also calls for recording at the County Clerks Office a document identifying those lands preserved for public access to notify future property owners of the public access area. The recording of these instruments is intended to ensure both that the public access area is maintained and that future owners are aware of the publicly dedicated area. The rule also provides at N.J.A.C. 7:7E-8.11(p)10 and (q)13 that, if a municipality undertakes any action that is determined by the Department to be in conflict with the Public Trust Doctrine, the Department may withhold funding, terminate the Shore Protection State Aid Agreement or Green Acres Project Agreement, and/or demand immediate repayment of funding. The Department anticipates that these measures will lead to successful implementation of the public access requirements in the long-term as municipalities and the State will have agreed to and made public the public access locations and provisions within the municipality through the public access plan and Public Access Instrument. The public access plan will be updated to reflect current conditions when a municipality applies for additional Green Acres or Shore Protection Program funding, allowing the Department to monitor the implementation of the plan. In order to receive Shore Protection Program funding, Green Acres funding or sites located along tidal waterways or coastal permit for development or activities along a tidal waterway, Long Beach Township and Ocean Gate would be required to meet the requirements of this rule regarding public access.

76. COMMENT: The commenter opposes the proposed amendment that allows beach nourishment to proceed in municipalities that have not met the State requirement for access, parking and bathrooms. (198)

RESPONSE: Because shore protection projects, including beach nourishment, along the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and the Delaware Bay are often conducted in phases over time, and because Federal funding is often only available for one phase of a project at a given point in time and may expire if not used by the State in a timely manner, the Department determined that amendments to the shore protection program funding requirements were necessary. Under the rules as adopted, a conservation restriction is required only to maintain the entire shore protection project for public

access in perpetuity rather than to maintain the entire shore protection project plus all beaches within the municipality along the waterway on which the project is located. Similarly, the adopted amendments require that public access be provided for the length of the shore protection project, along with signed perpendicular public accessways to the entire shore protection project every one-quarter mile upon completion of construction including beach nourishment, rather than to the shore protection project plus all beaches within the municipality along the tidal waterway on which the project occurs. The rule as adopted on December 17, 2007 requires that parking and restrooms be provided for the shore protection project only, rather than to the shore protection project plus all beaches within the municipality along the tidal waterway on which the project occurs. The amendments adopted at this time do not change this requirement.

77. COMMENT: The Department has proposed changes to the public access rules to make beach replenishment more likely. With the December 17, 2007 adoption of the public access amendments, the Department took two giant steps forward. Unfortunately, the proposed amendments are a step backwards. In proposing these amendments, the State is caving in to the desire of those municipalities who want beach replenishment without allowing additional access to their beaches.

The stated purpose of the public access rules adopted on December 17, 2007 was to open up the State's beaches to the public by using the State authority and the funding that State aid supplies to beachfront municipalities.

The proposed amendments leave certain parts of the State's beaches inaccessible to the public. The public gains nothing with respect to accessing New Jersey's beaches with the proposed amendments. The amendments themselves admit that there is a negative social benefit to these proposed amendments. If the proposal itself states that there is a negative impact of the proposed amendments, then why did the Department propose them?

The Department changed the rule for beach replenishment in order to bring more beach replenishment to our beaches. However, the Department must ask itself how beneficial these projects are, if the Department has to keep changing the rule to allow these projects to occur. If the State has to sue oceanfront towns to convince them that the

provision of public access is a good idea, and if there are a majority of oceanfront homeowners unwilling to sign construction easements for these shore protection projects, then these projects can not be everything they are cracked up to be by the U.S. Army Corps of Engineers. (198)

78. COMMENT: By requiring improvements within the shore protection project area only, the State is giving up an opportunity to aggressively leverage the expansion and protection of access throughout the State. The rule ranks public access and the idea of promoting and enhancing access lower than beach nourishment and its role of protecting real estate located in coastal high hazard areas. (47)

RESPONSE TO COMMENTS 77 AND 78: Although the amendments to N.J.A.C. 7:7E-8.11(p) modify the requirement for providing public access easements and perpendicular accessways to the beaches along the Atlantic Ocean, Raritan, Sandy Hook and Delaware Bays, by imposing the requirement only within the limits of a shore protection project, the Department believes that the adopted rule continues to strongly advance public access through the link between Shore Protection Program funding and the rule requirements for a municipal Public Access Plan, including provision of restrooms, parking and perpendicular access. As described in the rule summary at 39 N.J.R. 5149, the Department understands that these amendments reduce certain public access requirements to the area of the shore protection project, but believes that the amendments provide an offsetting positive social impact by assuring that Federal funds allotted for specific projects are not lost for those projects where a municipality provides the necessary public access.

79. COMMENT: In the New Jersey Coastal Management Program Assessment and Strategy, the Department states that one of the impediments to directing public and private development away from hazardous areas is the public perception that large scale beach nourishment projects eliminate vulnerability to coastal hazards.

The Department is ignoring the fact that beach replenishment projects are an impediment to directing public and private development away from hazardous areas and is in fact contradicting it by proposing these amendments. (198)

RESPONSE: Beach nourishment projects, including supplementing and creating dunes, do serve to reduce but not eliminate the vulnerability of existing development to coastal hazards. Beach nourishment also improves the recreational opportunities provided by beaches.

The misconception that large scale beach nourishment projects eliminate vulnerability to coastal hazards is a separate issue. The Department believes that the most appropriate method to dispel the myths surrounding the effects of beach nourishment is through public education regarding coastal hazards. The Department has several initiatives underway that provide or will provide pertinent information for the public. These efforts include disseminating coastal hazards information on the Coastal Management Program website, working with municipalities to provide accurate information regarding the limitations of beach nourishment, and data collection, such as beach and dune mapping and beach profile mapping that are employed to determine the degrees of vulnerability of coastal communities.

80. COMMENT: A new law has been enacted that requires a public hearing prior to commencement of a beach nourishment project. The Department must hold a public hearing in cases where the beach nourishment project is only occurring in part of a municipality. An additional public hearing must be held if at a later date, the beach nourishment project proceeds in another part of the municipality. The Department should make the public access rules consistent with this new law. (198)

RESPONSE: N.J.S.A. 13:19-16.3 was enacted on January 13, 2008. This law requires the Department to conduct a public hearing and provide the opportunity for public comment at the conclusion of the feasibility study phase for a proposed shore protection project where the State enters into an agreement with the United States Army Corps of Engineers for the State to assume responsibility as the non-federal sponsor of a shore

protection project. The required public hearing is part of the process for obtaining shore protection funding; a process that is not part of this Chapter.

81. COMMENT: The same shoe size does not fit all. There are many communities along the shore that do not have the ability to immediately meet some of the new public access requirements, such as those pertaining to restrooms and parking. As a result of the public access rules, there will be litigation. In the meantime, beaches will come and go and the safety of the shore communities will be jeopardized. If litigation does occur, beach replenishment projects should not be hindered. (44)

RESPONSE: The public access rules take into account the different nature of waterways throughout the State, with specific criteria for developments along the Hudson River and along other urban waterfronts at N.J.A.C. 7:7E-8.11(d). The standards for municipalities participating in the Shore Protection Program differ for the Atlantic Ocean, Delaware, Raritan and Sandy Hook Bays than for other waterways throughout the State. As stated in the December 17, 2007 adoption (see 39 N.J.R. 5222(a)), the State will provide additional funding of up to five percent of the initial project construction costs to assist municipalities with the cost of complying with the public access requirements of the rule. This funding can be used for restrooms and parking. In addition, parking can be met through additional on street parking and restroom facilities may be made available at existing public buildings or by using portable toilets. The rule also includes provisions at N.J.A.C. 7:7E-8.11(p)9 for emergency shore protection or beach nourishment projects. The Department believes that these various mechanisms will help municipalities satisfy the requirements of the rule and does not anticipate that any shore protection projects will be jeopardized by the public access requirements of the rule.

82. COMMENT: The rule indicates that portable restrooms could be installed to meet the restroom requirements for shore protection projects. Portable restrooms are a public health hazard. They do not provide water, towels or trash disposal. The use of portable restrooms is going to place an addition burden on Municipal or County Health inspectors because they will be required to inspect them and certify that they are being properly

maintained and operated. Even the restrooms at fast food restaurants have a signature certifying that they are OK for use. Portable restrooms do not meet State code for public restrooms for beaches. The rules need to be more sensitized to the uniqueness of the Jersey Shore. (44)

83. COMMENT: The commenter indicates that the rule will result in a blue port-a-potty every one-quarter mile along the beach from Sandy Hook to Cape May. Portable toilets blow over and develop an olfactory problem in the heat of the summer. (167)

RESPONSE TO COMMENTS 82 AND 83: The availability of restrooms is critical to the ability of those members of the public who do not live or rent in close proximity to the beach to use the beach. Accordingly, the Department requires the provision of restrooms when it is providing public funds for Shore Protection projects along the oceanfront. The Department does not agree that providing restrooms is a health hazard; rather restrooms are a necessary public facility.

The use of portable sanitation devices is a common and accepted practice, including at beaches throughout the State. A number of studies identify the numerous health concerns associated with limited access to public toilets, resulting in both physical and psychological difficulties, summarized in “Availability of Restrooms in the United States and Federal Public Health Mandates: A Call to Action” by Robert Brubaker and Carol McCreary, presented at the World Toilet Summit 2007 and available at <http://www.steel-bridge.org/pdf/ARACalltoActionRBCM.pdf>. There are current efforts being made to ensure that there is a consistent national code and practice guiding the use of portable toilets already accepted under the U.S. Department of Labor Occupational Safety and Health Administration (OSHA) codes (29 CFR 1910.141(c)(1)(i)) for the workplace. Federal and state agencies have not only begun to accept the placement of portable toilets but require it as an amenity to serve the public in some instances. National standards guiding the use of portable toilets at mass transit rail systems, linear parks and trails, athletic fields and at special events have been suggested. New Jersey does not have a State health code guiding the placement of portable toilets. The Department of Community Affairs ensures that OSHA requirements are met at

construction sites, and local governments may have zoning and/or use ordinances and local Board of Health and sanitation requirements regarding the standards that must be met to control ‘nuisance complaints’. The American Restroom Association has adopted “Guidelines for Proper Toilet Sanitation Facilities Outside of Buildings and Structures,” available at <http://americanrestroom.org/pr/policy>, that address the recommended use of portable toilets. These guidelines are consistent with those administered by OSHA regarding the number of units per users, the minimum cleaning/service schedule, the siting and approved/licensed disposal of waste, the amenities that may be required to enhance the use of portable sanitation devices and consultation with local health officials. These guidelines are accepted as an ‘industry standard’ by commercial providers of portable toilets and provided with contract agreements which must comply with local health and or sanitation requirements (if applicable).

84. COMMENT: The requirement that municipalities develop a comprehensive public access plan; protect existing public accessways such as street-ends; and remove ordinances such as parking restrictions that might unreasonably restrict the public’s enjoyment of public trust lands is supported. (47)

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

85. COMMENT: The Department must provide flexibility in applying the public access rules. If access is provided in the general location of the project site, the required access should be reflective of the existing access. It’s easy to pass a blanket rule but difficult to implement and expensive for municipalities and businesses, especially when the Department is not at this time willing to offer any type of financial incentive. The Department is putting additional burdens on towns and local businesses without providing flexibility. (44)

RESPONSE: As stated in Response to Comment 72, the rules provide minimum requirements for beach access that are necessary and appropriate to assure that meaningful public access is provided, including provision of perpendicular access to tidal

waterways and their shores, parking and restrooms. While the rules do provide flexibility to allow each municipality to achieve compliance with the rule in manner that takes into account the circumstances specific to that community, it is both necessary and appropriate for the rules to set minimum standards that must be met. The rule provides flexibility in meeting the one-quarter mile perpendicular accessway requirement by allowing municipalities to adjust the location of the accessways provided the one-quarter mile distance is met on average. Similarly, the rule provides the municipality with the flexibility in determining the location of restrooms while ensuring that restrooms are located close enough to the beach and to one another for use by beach patrons. With respect to parking, in lieu of the acquisition of land for a parking lot, a municipality could meet the parking requirement through the dedication of on-street parking for public access, reconfiguration or reorientation of existing parking spaces to provide additional spaces, removal of existing parking limitations or provision of remote or off-site parking with a shuttle service. In addition, the State will provide additional funding of up to 5 percent of the initial project costs to assist municipalities with the costs of complying with the rule. For example, this additional funding could be used for parking and restrooms. The Department works with municipalities that wish to participate in the Shore Protection Program to explain public access requirements and to develop appropriate approaches to meet the requirements.

86. COMMENT: In 1993, at the beginning of the beach restoration project in Sea Bright, the Borough of Sea Bright and a beach club located in the Borough signed an agreement drafted by the Department which protected public access and was consistent with the Public Trust Doctrine. Why did the State feel the only recourse was to seek a court imposed remedy, since the Borough has been in constant contact with the Department and the Borough was the first one to develop a Beach Management Plan jointly with the US Fish and Wildlife Service and the Department's Endangered and Nongame Species Program?

The Borough has never impeded public access on its beaches, either protected and unprotected, and it has never closed its beaches even for pollution problems for as long as the commenter has served as a councilman in the Borough.

The Borough takes custodianship of the public rights and the public's rights to access very seriously. The major impediment to public access in Sea Bright is the Piping Plover and Sea Beach Amaranth. The money spent on lawsuits could better be spent on public access. (167)

RESPONSE: As the commenter is aware, the State has filed suit against the Borough of Sea Bright and several beach clubs in the Borough of Sea Bright. See, *State of New Jersey, Department of Environmental Protection v. Borough of Sea Bright, et als.*, Complaint filed in the Superior Court of New Jersey, Chancery Division, Monmouth County, New Jersey, September 22, 2006, hereafter "DEP Complaint." In that litigation, the Department seeks to reform three-party agreements between the Department, the Borough, and the beach clubs which limit public access in front of the clubs to a 15-foot strip of limited public use. The Department argues that the Public Trust Doctrine is a common law doctrine of ancient origin, that it was one of the State laws that existed at the time the Agreements were entered into and, that it therefore forms a part of the Agreements as if it was expressly referred to or incorporated into their terms. See, DEP Complaint, par. 51, 61. The Department further notes that, since the Agreements were executed, Court decisions have clarified the rights of the public under the Public Trust Doctrine - rights that have existed since ancient times - and argues that the original Agreements must be interpreted and enforced consistent with what the Courts have now clarified as being the governing State law at the time the parties entered into the Agreements. DEP Complaint, par. 46-48; 64, citing *Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005); *National Association of Homebuilders v. DEP*, 64 F.Supp. 2d 354 (D.N.J. 1999); and *Liu v. City of Long Branch*, 363 N.J. Super. 411 (Law Div. 2003). The Department concludes that enforcement of the terms of the original Agreements without taking into account these clarifications of the public's rights "would be contrary to the law and public policy of this State." DEP Complaint.

87. COMMENT: Many municipalities on the Jersey shore rely on the economic benefits of tourism for their livelihood. As such, it is important to allow for as much public access as possible to maximize economic return. In these shore towns, public access is

promoted and encouraged and that is appropriate. In other communities where tourism is less depended upon, issues get more complex. Public access can be impeded by conflicts with private property owners and/or existing or other local ordinances. Guidance needs to be developed in the form of economic and technical assistance for these municipalities to be able to maximize opportunities to provide safe and cost effective public access while preserving the nature of the community. This approach will ensure enhanced public access, maximize the economic benefits generated by both tourism and local economies and protect legitimate interests of town residents. (123)

RESPONSE: All tidal waterways and their shores are subject to the Public Trust Doctrine and are held in trust by the State for the benefit of all the people. While the original purpose of the Public Trust Doctrine was to assure public access for navigation, commerce and fishing, in the past two centuries State and Federal courts recognized that modern uses of tidal waterways and their shores are also protected by the Public Trust Doctrine. These rights of use apply to the general public as well as residents of coastal towns and private property owners. In addition, the citizens of New Jersey will be paying for the shore protection projects that trigger the requirements of the rule through both State and Federal taxes that provide the shore protection project funding. The rule does take into account the differences in the types of waterfront communities throughout the State. The rule provides varying standards for shore protection program funding depending upon the location of the shore protection project. For example, the rule requires that municipalities participating in shore protection or beach nourishment projects on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay under the State's Shore Protection Program through a State Aid Agreement provide restrooms to accommodate beach goers during the active beach season, while the standards for shore protection projects located on other waterbodies do not require provision of restrooms. Similarly, the rule requires that shore protection projects located on the four waterbodies listed above provide parking sufficient to accommodate public demand to access and use the project and the beach capacity of all beaches within and outshore of the project within the municipality. For shore protection projects located on

other waterways, parking sufficient to accommodate public demand to access the entire project, taking into account the availability of existing public parking is required.

The Department works with municipalities that wish to participate in the Shore Protection Program to explain public access requirements and to develop appropriate approaches to meet the requirements. The Department will also work with municipalities interested in participating in Green Acres Program funding.

Green Acres Program funding

88. COMMENT: The Department should ensure that access, parking and other requirements do not unnecessarily burden the carrying capacity of the ecology of the natural beach, or the recreational or other value of Green Acres sites. An exception should be included which provides that the public access requirements may be revised where it is necessary to protect natural, recreational, historical, or other features and it can be demonstrated that there is adequate access to accommodate public demand. It is not sufficient to rely on other provisions which protect endangered or critical species or habitats. (123)

RESPONSE: The rule at N.J.A.C. 7:7E-8.11(d) provides for public accessways along tidal waters to be designed to minimize impacts to natural areas including impacts to habitat value, vegetation and water quality. N.J.A.C. 7:7E-8.11(f) includes exceptions where necessary to protect endangered or threatened wildlife or plant species and other critical wildlife resources. In addition, the parking requirement for Green Acres sites is that parking be determined based on the proposed use of the project site and the nature and extent of public demand. This will enable the Department to take natural, recreational and historic features into account when determining the appropriate amount of parking.

89. COMMENT: The role of government should not be to take land from private landowners. To provide for the welfare and betterment of the State's citizens, the State should use public parks and lands and Green Acres funding. The State should not abdicate its responsibilities by pushing them onto private citizens. (31)

RESPONSE: All properties along tidal waterways are subject to the Public Trust Doctrine. The rule assures the public has access to and along tidal waterways and their shores. Tidal shorefront property in New Jersey has long been impressed with public trust rights. Requiring public access to and use of the shores of tidal waterways is not an unconstitutional taking of property since these public rights are background principles of New Jersey State law. See, e.g., *National Ass'n of Homebuilders v. State, Dept. of Env't'l Protect.*, 64 F. Supp. 2d. 354 (D.N.J. 1999) (clarifying that the public trust doctrine is a background common law principle in New Jersey). (See also Response to Comments 39 through 45) Therefore, the Department is not taking anything from private landowners, but merely protecting public rights that have always been part of the property.

The rule includes provisions at N.J.A.C. 7:7E-8.11(p) and (q) for waterfront municipalities to provide public access to municipally held lands along tidal waterways and their shores as a criterion for participation in the State's Shore Protection and Green Acres Programs. Furthermore, on December 17, 2007, the Commissioner issued an Administrative Order to increase public access and use opportunities at Department facilities, through development and implementation of public access plans for lands the Department manages that are located along tidal waterways and their shores. These plans will be finalized in 2008.

N.J.A.C. 7:7E-8A. 2 Information requirements for public access plans submitted by municipalities to participate in Shore Protection Program funding or be eligible for Green Acres funding

90. COMMENT: The Department should provide specific guidelines, economic and technical assistance for towns to develop public access plans that reflect community characteristics including multi-town and regional access plans to avoid unnecessary duplication, assure integrated planning and the efficient expenditure of limited public funds.

The public access plan provisions should be amended to clarify how they relate to local and county open space plans and how they relate to State land use requirements. Municipalities should not be required to develop duplicative and potentially conflicting

plans. The State should also ensure that State plans, administrative orders or other public access plans are in place and coordinated with potentially affected communities to avoid requiring unnecessary or duplicative public access. (123)

RESPONSE: The rule is implemented by several programs within the Department, including the Division of Land Use Regulation, the Office of Dredging and Sediment Technology, the Shore Protection Program, the Green Acres Program, and the Coastal Management Office. These programs coordinate to ensure that the rule is implemented in a consistent manner throughout the State and that the public access plans developed by municipalities are consistent and can be used for both Green Acres and Shore Protection funding. The Department works with municipalities that wish to participate in the Shore Protection Program to explain public access requirements and to develop appropriate approaches to meet the requirements. The Department will also work with municipalities interested in participating in Green Acres Program funding. Moreover, as described in Response to Comment 31, the Department has developed a Statewide Comprehensive Outdoor Recreation Plan (SCORP) to provide statewide policy direction on open space and recreation issues. The SCORP serves as a status report, strategic plan and guide for natural and recreational resource protection and planning statewide. The SCORP encourages coordinated open space and recreation planning by local governments and conservation organizations.

Marinas

91. COMMENT: The social impact statement states that alternative access can be provided where appropriate to account for special circumstances related to marinas. It is not enough to provide alternate routes at marina work sites. Since there is no way to make marina work areas safe, marinas must be exempt from public access in these areas and alternate available areas within a reasonable distance should be utilized instead. The proposed amendments make provisions for alternate access for highway development within a quarter mile of a waterway. Why not a similar provision for marinas? Similarly, parking is to be permitted at another location within 250 feet of a proposed development,

or if not possible, within a quarter mile thereof. Why not extend the same provisions to marinas? (87)

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

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

A true economic and regulatory flexibility analysis must be performed and submitted to the public. The law and fundamental fairness require it.

The Department did not respond to these comments that were originally submitted on the November 6, 2006 proposal. Once again, with the proposal of these amendments, the Department has failed to fulfill its legal obligation under the Administrative Procedure Act. (21, 38)

93. COMMENT: Contrary to the economic impact statement, the proposed rules fail to give consideration to the negative impact to the small businesses and owners that will result from these regulations. The reality is that there was no true economic impact analysis done on these rules. Instead, incorrect assumptions and summary conclusions were made by the State with little or no actual data on the regulation's impacts on small businesses and property owners. These failures have contributed to the implementation of the new rules and the issuance of the proposed rules, both of which are arbitrary, capricious, unreasonable, and contrary to law. (21, 38)

94. COMMENT: The Landowner Liability Act does not mitigate for the nuisance and expense caused by vandalism and general misuse of marina property. An operator may not be liable for the actions or injury of the public on their property, but in the end it becomes their job to deal with it and mitigate for it. (6, 21, 25, 33, 38, 52, 54, 55, 61, 94, 118, 145, 151, 191, 205,)

95. COMMENT: To force additional access upon marinas increases financial burdens and reduces many of their property rights and value. The proposed rules offer no compensation for the loss of private property, the management of access, additional security and staff, and everything else that will be needed to ensure the safety and protection of all those entering the property. (21, 38)

96. COMMENT: Marina owners spend a large part of every day ensuring that their customers and visitors are safe, that they are not injured, that they do not fall into the water, and that crimes are not committed against their property. Municipalities collect beach fees and tax revenue to pay for these expenses. How does a small business pay for this significant added expense? How does a small business owner provide safeguards for the public wandering around the marina? How does a marina owner protect themselves from this very real and scary new exposure to risk?

Last year the commenter's insurance company sent him a letter advising him to construct a six-foot fence topped with barbwire to protect his marina property from theft, trespassing and other potential problems associated with his marina. (40)

97. COMMENT: The rules place an unnecessary and unfair burden on the owners and operators of New Jersey's marinas, including burdens in the form of increased costs to provide security for their patrons and property, liability insurance and construction costs. (21, 97, 106, 110, 148)

98. COMMENT: Decreasing revenue and increasing expense is a sure formula for failure. It is difficult enough for marina owners to make the monthly mortgage, tax and insurance payments without additional monetary burdens created by the Department.

The potential layoffs, losing customers, lawsuits and higher expenses are the real effects of these rules. (30, 103)

99. COMMENT: If the Department did a financial impact study, they would realize the hardship these regulations put on small marinas, for example insurance and liability, loss of usable storage space, and public accessibility to hazardous conditions. (9)

100. COMMENT: Insurance is very expensive for the marina owner and these rules will result in higher, unaffordable rates. (156)

101. COMMENT: The rule will result in liability issues, increases in insurance and lawsuits. (139)

102. COMMENT: The costs associated with meeting the public access requirements will result in the closure of marinas. (156, 184)

103. COMMENT: In the past eight years, many private marinas have been sold to developers for residential development. The high costs of doing business and the resulting increase in government regulations and their associated costs are the prime reason for the loss of those marinas. (173)

104. COMMENT: The rules place a huge and unfair burden and expense on marina owners and operators throughout the State. It appears that the Department is attempting to push marinas out of business. (178)

105. COMMENT: This regulation would put most marinas out of business with increased costs for insurance, security and upkeep. (180)

106. COMMENT: Robbery, vandalism and pollution that result from the public access rules will be out of the control of marina owners. Providing additional security to marina patrons will be cost prohibitive. (124)

107. COMMENT: Under this rule, marinas must provide designated parking areas, walkways, restrooms, disposal and recycling receptacles and supplementary lighting. This added expense will result in higher premiums for liability and care, custody and control insurance. (68)

108. COMMENT: The rules will penalize marina owners financially for added security concerns, added insurance costs, added maintenance costs of marina and restroom facilities and the general degradation of their ability to provide a safe and secure environment for the customers. (95)

109. COMMENT: Who will pay for the additional costs that will be incurred to ensure the safety of those accessing the marina at night with limited visibility and present hazards? These regulations will force marina owners, operators and patrons to incur these costs. (21, 38)

110. COMMENT: The Department fails to acknowledge that the rules will add considerable costs and overhead to marinas and boat owners. The costs include higher insurance rates, higher security costs, and higher maintenance costs. The Department says that insurance rates will not rise, additional security is not needed and there will be no increase in vandalism. The Department is naïve to think that there will be no additional costs to marina and boat owners. These costs will be considerable. Some marinas will go out of business because of these additional costs and their properties will be sold for housing developments. Other marinas will pass these additional costs to their slip holders and will force many people out of boating. (98, 139)

111. COMMENT: The cost of slip rental is already very high because of the exorbitant property taxes on the marina. Add this to the increased cost of construction and liability insurance and the whole industry is in jeopardy. (70)

112. COMMENT: The increased expenses for new surveys, additional insurance, appraisals, attorney fees and deed alterations will be staggering. Who's going to pay for this? Marina patrons who are paying marina customers will be overburdened with these extra expenses which are not needed because marinas already provide public access to the water. (116)

113. COMMENT: This proposal will result in an increase of marina's liability insurance. This additional cost will be passed to marina patrons. The public will not be required to pay to access marinas. This proposal means that lands earmarked for public use cannot be used for winter boat storage, which will once again increase marina patrons' costs. (193, 195)

114. COMMENT: The implementation of this rule will adversely affect the boating climate throughout the State and impose undue hardships for all marina operators. (65)

115. COMMENT: If the public access rule is adopted, rates at marinas will increase and costs of doing business will soar and boat owners will end up paying for it. (4, 29)

116. COMMENT: The rule will impose additional expenses on marina owners which will undoubtedly be passed on to boat owners, increasing the costs of boat ownership, pricing some out of the market. (18, 27, 63, 101, 119, 130, 149, 161, 165, 196, 199)

117. COMMENT: The rules will force marina owners to make decisions about their operations which they may not be able to afford or cannot reasonably implement. Allowing public access to marinas will increase insurance costs by at least 20 percent. As a result of these rules marina owners would have to provide and pay for security; lose

business due to a loss of space; and incur expenses for damage to the property due to public access. (78)

118. COMMENT: Marinas are unique and essential part of New Jersey's waterfront infrastructure. Marina owners currently pay exorbitant fees for insurance, taxes and State permits simply to maintain operating status. Marina owners are private property owners who supply a recreational service. The rule will cause operating costs to skyrocket and will negatively impact the entire industry. Clients, whom the Department is claiming to protect, will experience increased rates along with increased insurance premiums. Many of these clients will be forced to leave their dream behind. (186)

119. COMMENT: It is unfair for marina customers to be burdened with rate increases caused by the financial obligations of the marina due to the costs that marina owners will incur from the construction of the public access area, the loss of income from creating parking spaces for public access, and increase in insurance premiums, among other issues. (15, 146, 193)

120. COMMENT: New Jersey marinas insurance rates are already among the highest in the nation and will go up again. Individual boaters will also see their rates go up as insurance companies determine their boats are now at a higher risk for theft and vandalism. Has the Department discussed the impact on insurance rates with the State Department of Banking and Insurance? (20, 168)

121. COMMENT: The public access rule will require additional security to be provided by the marina owner and will only add unnecessary costs for the boat owners. (192)

122. COMMENT: The shortage of slips, the high costs of marina services and ever increasing fuel costs has made boating very expensive and this rule would increase that cost. The Department should consider the taxes boat owners generate for the State

through marina fees, boat sales, boating equipment and the like. Lower the number of boat owners and the tax base will decrease. (173)

123. COMMENT: The rules will create a de facto recreational water enjoyment tax for the citizens of New Jersey who enjoy the State's abundant waterways. Commercial establishments will pass these costs onto the public, thereby either creating costs for enjoying the waterways where there were none or increasing current costs. New Jersey already has some of the highest taxes in the United States, and the public access rules would further exacerbate the cost of living in New Jersey and enjoying its resources. (15)

124. COMMENT: New Jersey has declared war on existing privately owned marinas. This, in turn, is causing it to become too expensive to place a boat in New Jersey's waters. The high slip fees, high registration fees, high fees for boating instruction course and the high price of fuel are putting boating out of the reach of most people. (158)

125. COMMENT: The Regulatory Flexibility Analysis states that there will be minimal impacts to small businesses. There is no substantive basis for the conclusions outlined in this section. There has been no study conducted, or evidence produced, to justify this analysis, which is unfounded and presumptuous. Marina owners will face significant increases in their costs to comply with the new rules and maintain and operate their properties for the use of the general public. Insurance costs will increase. Some marinas will need to reconfigure their operations in order to comply; capital investments that will never be recouped. Engineering costs will increase for compliance. None of these additional burdens and additional costs are adequately explored or acknowledged. Perpetual and constant access creates undue economic hardship on an already stressed and over-regulated industry thereby significantly impacting small businesses. (21, 38)

126. COMMENT: The Department should consider the fiscal impact of this rule on all businesses affected by this regulation. The economic and regulatory flexibility analyses of both proposals fail to recognize the true extent of the added cost of security; the cost of

increased insurance premiums due to the liability risk imposed by the State; the cost of providing added parking; and the overall cost of compliance. (21)

127. COMMENT: The public access rule will require an increased police presence and patrols in neighborhoods where marinas are located. The safety and security of these neighborhoods will be compromised. (65)

128. COMMENT: The rules will have a negative impact on all privately owned marinas. (79)

129. COMMENT: The suggestion from the Department that piers can be gated to prevent the public from gaining access to them is a vain attempt to address a security issue raised by many marinas. Not only is that option logistically impossible for many marinas, installing a gate clearly contradicts the supposed goals of this rule and the Department's efforts to provide quality access to the public. Gates create a new obstacle for those that are paying for the services of a marina and those that are able to access the piers. These gates would be out of scale with a small family marina, and visually ugly. Installation of gates or fencing adds yet another financial burden on the marina owner making operating a marina business in New Jersey even more difficult. If a gate or fencing is installed, the marina and its customers would have to incur additional costs for the installation and maintenance of this barrier to accommodate the Department's expensive rules. Despite the ethical and legal obligation to assess the costs of implementing all of the rules, the Department arbitrarily and capriciously declares that there will be little to no cost. (21, 40, 49, 87, 88, 89, 105, 124, 137, 139, 176, 190)

130. COMMENT: Providing 24-hour access will certainly require additional security measures. Whether this encompasses gating certain areas, providing security guards or installing security cameras, these can be extremely costly. The current rule provides no relief to marina owners in their efforts to comply with these mandates. As such, the State is forcing marina owners to absorb these costs. (21)

131. COMMENT: The proposed amendments which allow marinas to reconfigure the required walkway do nothing to address the many problems created by these rules and appear to be nothing more than an ineffective attempt to appease the industry. Walkways dedicated to public access undeniably present many problems for marina owners. Marina owners will still lose valuable storage space, have to reconfigure their operations and implement additional security measures. There will most definitely be additional costs to the marina owner in addition to a loss in revenue from reduced storage space and a change in operations. Again, the Department fails to account for those costs. (21, 40, 49, 87, 88, 89, 105, 124, 137, 139, 190)

132. COMMENT: Parking is already a problem in coastal communities. Requiring more parking at marinas to accommodate use of the public access easement, will make it difficult to police and be a nightmare for paying customers. (137)

133. COMMENT: The public access rules will limit the land available for boat storage and reduce the already limited parking available to marina patrons. (116)

134. COMMENT: Marina owners and operators pay taxes on the land that will be impacted by these proposed regulations. Despite the increased costs and obligations imposed on these taxpayers, nowhere does the Department suggest that there will be effort on its part to reduce the tax burden to these property owners. (21, 38)

135. COMMENT: Will a marina owner's property taxes decrease since the Department is imposing restrictions and devaluing their property? (194)

136. COMMENT: Marina owners are being forced to pay taxes on property that they essentially no longer have claim to. (186)

137. COMMENT: Is the Department going to reduce the taxes paid by marinas since they are reducing their size? Has any thought been given to the fact that "waterfront property" commands a higher assessment that results in higher taxes being paid to the

municipality? It appears that there is good cause for an appeal based on the assessment and taxes a marina pays because it is “waterfront property.” If successful in the appeal, a municipality would receive less revenue from taxes. Municipalities are already having financial problems. Will the State provide them with financial aid? (129)

138. COMMENT: Marina owners pay higher taxes. The rule is unreasonable. (13)

139. COMMENT: The Regulatory Flexibility Analysis states that the proposed amendments are intended to provide greater flexibility to marinas to meet the public access requirements. The fact is, the proposed amendments take away flexibility from marinas and restrict their ability to control their operations and in some cases attain permits. There are no studies to support these statements and analyses and contrary to the Department’s statement, these rules do not add clarity and predictability. (21, 40, 49, 87, 88, 89, 105, 124, 137, 139, 190)

140. COMMENT: The Department claims that a conservation restriction is necessary to preserve public access rights. What it fails to recognize is that marinas already provide public access by the very nature of their business operations. It is not reasonable to argue that marinas do not afford the public one of the best opportunities to access the waterway and recreate on them. There is absolutely no justification to force a marina owner to deed restrict his or her property if the operations of the marina will remain the same. Deed restrictions can be enforced at any time and can severely affect the marina owner’s ability to make changes and/or improvements or run their business. A deed restriction is immediately enforceable under the condition of the permit and the proprietary right given to the State can be enforced immediately, therefore, directly impacting current property owners. Moreover, if the right so clearly flows from the Public Trust Doctrine, as alleged by the State, then no deed restriction should be necessary. (21, 38)

141. COMMENT: The rule forces marina owners to deed restrict a portion of their property. (78)

142. COMMENT: The conservation restrictions will put marinas in a backward expansion mode for years. What other business or property owners must give up control of their land to make improvements? (194)

143. COMMENT: This proposal is, in effect, an attempt at legal extortion: no easement, no permit. Did the Department consider the marina owners' environment and protection? (34, 194)

144. COMMENT: In exchange for improvement permits, marina owners are required to comply with turning over access to their improved property and bulkheads. (147)

145. COMMENT: The most important environmental problem with the Department's proposal is the loss of trust and the end of mutual co-operation. By proposing to seize control of marina owners' private property through permanent deed restrictions, the Department has violated that mutual trust. Marina owners are now referring to the Department as the "enemy" the "Environmental Nazis," and worse. The environment will suffer because the Department has decided to go far beyond its original mandate of environmental protection. (20, 168)

146. COMMENT: The proposed amendments require that linear access be memorialized in access easements, legal instruments that attach in perpetuity to marina property deeds. Easements of this type will have an immediate negative financial impact on the value of the owner's private property. These easements could also impair marina owner's ability to gain financing for working capital for maintenance or improvements to the facility. This forced easement requirement seems to be a taking of marina property by the use of eminent domain without legal redress. (176)

147. COMMENT: The marina owner's rights are being violated because the rule requires them to deed restrict his marina for the purposes of public access. The marina owner cannot obtain a permit without cooperating with the provision of public access at

his marina which he opposes. Freedom to run the marina business in a fair and just way for all boaters is violated. (155)

148. COMMENT: It is textbook law that any easement or restriction diminishes the value of the property. The measure of damages is the difference in the value of the property with and without the easement or restriction. The proposed public access will reduce the ability of marina owners to derive an income from stored boats. As marinas are appraised under the income approach, the damages are calculable and will be significant. There are additional damages by way of impairment of the marketability of the site for marina or any other use permitted under local zoning ordinances. While case law holds that regulation causing some diminution in value or impairment of marketability does not necessarily constitute a taking, deeding an interest in the property is not a mere regulation but an actual taking, without compensation. (182)

149. COMMENT: The proposed amendments will substantially diminish the value of a marina owner's property; at best making it difficult to sell, at worst making it impossible to sell. In most cases these are private people who have their whole life, family and retirement vested in their property which this rule could destroy. (31)

150. COMMENT: This country and State already have experienced legalized theft of assets and money through exorbitant increases in motor vehicle and other fines which are imposed on citizens to help balance State budgets. The public has suffered enough. New Jersey citizens' salaries have not increased in line with the new surcharges and fines administered by the State. Do not take away the last bastion of recreation for the boaters of New Jersey by imposing the public access requirements on marinas. (19)

151. COMMENT: Banks may not give loans to marinas because of the conservation restriction requirement. Will signing away property rights interfere with underlying

mortgages? Will a marina owner have to refinance to provide the State an easement?
(190)

152. COMMENT: In many cases, as part of their application to the local Planning or Zoning Board, businesses disclose their hours of operation. In New Jersey, many marinas are located in residential neighborhoods. While public access on a 24-hour basis may be inconvenient for marina owners, municipalities may also oppose this requirement because they do not want people running around residential neighborhoods at all hours.
(36)

153. COMMENT: The public should not have access to marinas 24-hours a day. Some marina owners have their residence located on the marina property. How does a marina owner protect their children and the children of their clients at night when the public is afforded 24-hour access? Protecting children from sexual predators is a major concern.
(80, 157, 189, 190)

154. COMMENT: The rule provides that public restrooms required in conjunction with Shore Protection Program funding be open to the public for use beginning on Memorial Day weekend through September 30. Why not extend this provision to marinas as well, since this is typically the length of their season. Requiring these facilities to remain open all year at all times creates additional expenditures, potential safety issues, security issues and additional liability that may also be too costly for many marinas, which are typically small businesses. (87)

155. COMMENT: Boat owners should not have to worry that their boats will be damaged in storage during the winter. Marina owners should not be forced to try to police their property in the off-season to determine who is in the yard for a legitimate purpose and who is not. Marinas should be available for everyone's enjoyment from the spring through the fall, only. There's no reason to be at a marina in the middle of the winter. (29)

156. COMMENT: In *Nollan v. California Coastal Comm'n*, the U.S. Supreme Court ruled that the Commission's requirement of expanded public access along a private waterfront property violated the takings clause of the Fifth Amendment. The basis for the Courts ruling was two-fold. First, there was not a sufficient connection or nexus between the alleged harm of enlarging a house on the property and reducing visual access, and the enforced remedy, which was expanding linear access. Second, the landowners were not compensated for their land. As stated by the Court, the absence of a nexus left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into a plan of extortion. The nexus criteria established in this case was reiterated in a subsequent U.S. Supreme Court case of *Dolan v. Tigard*.

Like the *Nollan* case the installation of boat wash wastewater systems required by the Department under its NJPDES program, has no ostensible relationship between the harm of installing a boat wash wastewater system that helps eliminate discharges, and the enforced remedy, a deeded public accessway. Moreover, there is no compensation to the private property owner for the required access easement. Thus there is a clear parallel between the basis for the ruling of a per se taking in the *Nollan* case and the circumstances at marinas when the Department mandates deeded easements for the installation of treatment facilities. Ironically, it would appear that the Department may be violating the property owner's Fifth Amendment rights as marinas try to eliminate an unabated pollution source. (48)

157. COMMENT: Based on existing case law, the Department is wasting tax dollars, potentially destroying waterfront businesses (specifically marinas), and dismantling the working public access currently provided.

In *Nollan*, the court confirmed the principle that an outright compensated, permanent public access easement would violate the Takings clause of the Constitution, as incorporated to the States by the 14th Amendment. The *Nollan* court found, however, that a State is justified in imposing a condition upon some land uses, even if they result in a concession of rights by the property owner, as long as such condition furthers the same governmental purpose that is stated as justification for prohibiting the use. Therefore, if

the stated government goal is public access, the amount and extent of that access must be reasonably related. The *Nollan* court also stated that although a State can exercise its eminent domain power to take property, it cannot do so without paying for access easements, and that it “cannot compel coastal residents alone to contribute to the realization of its goal of comprehensive beach access.” While an owner cannot interfere with the public trust, interference is a matter of determining what the public trust is in a given State. New Jersey needs to define public trust in a manner that does not amount to a taking as to marina owners.

In *Dolan*, the Court found that the city imposing a permanent recreational easement on the Petitioner’s property would result in the Petitioner losing all right to regulate the time which the public entered the easement, regardless of any interference it might cause to the Petitioner’s retail store. Similarly, the public access the Department is proposing for marina owners to provide would remove the marina owner’s right to regulate times of access, which could cause great interference with day-to-day marina operations, as well as safety and liability issues. The *Dolan* case went on to state that the Petitioner’s “right to exclude would not be regulated, it would be eviscerated.” Similarly, not allowing marinas the right to have control over the time and manner in which the public could enter, or the purposes for which the public could enter, essentially eviscerates any right to excluder the public at all.

Marina owners do not have a problem with public access for recreational purposes at times when the marina is open for operation. But to require unlimited access for unlimited purposes at all times is an unreasonable exercise of police power, especially when there is alternate access for the desired purposes in comparable areas within a reasonable distance.

In order to condition approval of a State permit, the State has to show that the conditions imposed thereby further a legitimate police power purpose. A concession of property rights will be upheld as long as it furthers some legitimate police power purpose.

The State has not shown the need for marina owners to give up legitimate property rights without compensation and provide the public with the equivalent of a permanent public access easement without limitation. There is no hard and fast rule for the type of

access, amount of access or the manner of access in the common law doctrine of public access.

The State of New Jersey is placing virtually unlimited liability on marina owners, inhibiting their ability to conduct business, without compensation and without showing a legitimate police power purpose for singling marinas out, when it gives alternatives to State highways and homeland security areas, thereby depriving them of property without just compensation. (87)

158. COMMENT: The public is paying for the security guards at the State parks. Will the State pay for security guards at marinas? (80)

159. COMMENT: Why can a State or county park close during evening hours and a marina be required to be open 24-hours a day? (2, 24, 53, 58, 60, 80, 126, 128, 131, 135, 147, 153, 193, 205)

160. COMMENT: A marina is a marina regardless of who owns it. Why are the State-owned marinas exempt from the public access rules? (96)

161. COMMENT: Why is the Department focusing on private property first? There are many State, county and local waterfront parks. All are closed at dusk; some are closed seasonally. Few provide parking and restrooms which the Department is now requiring marinas provide. If public access is such a priority, State, county and local parks should have to provide public access at all times. (20, 168)

162. COMMENT: New Jersey has several State-owned marinas. Leonardo State Marina does not grant public access on a 24-hour basis. The reason is because it is not practical or safe. (162)

163. COMMENT: It is unreasonable to force marinas to allow the general public to access their properties 24-hours a day 365 days a year. State parks close at dusk and charge fees to enter. (6, 52, 54, 55, 61, 83, 94, 95, 104, 110, 118)

164. COMMENT: Most State-run parks charge a fee for access during several months of the year. How can the State of New Jersey demand a tax-paying marina to have a no-fee, unlimited access available to the public when the State does not provide it to the public? (146)

165. COMMENT: Island Beach State Park charges for use of their facilities. The public is not allowed to enter the facility at night without a fishing pole. Marina owners should be able to charge a fee and require the public to bring a fishing pole. (80, 194)

166. COMMENT: Public beaches such as Seaside should be free to the general public just as access to marinas is proposed to be free. (53)

167. COMMENT: The amendments proposed in response to the marina operators concerns on the February 6, 2006 proposal are reasonable and the Department should move forward to adopt them as soon as possible. (47)

168. COMMENT: The Department should take time to discuss changes to the rules with marina owners and construct a plan that works for and benefits everyone and not a broad sweeping regulation that does not realistically work for anyone in the marina industry. (21, 38)

169. COMMENT: Better laws could be drafted if everyone got together and supported the Marine Trades Association. The Department should listen to their comments. (18)

170. COMMENT: There are millions of dollars worth of boats and equipment at marinas. Allowing them to come within reach of the casual visitor is akin to allowing free access to a flight line of airplanes at an airport. There is real danger of injury to visitors. One might as well allow access to their garage or backyard gym set. (70)

171. COMMENT: The proposed rules create a number of serious concerns for marina owners statewide, and in particular those family-owned operators that make it possible for middle class people to afford and enjoy the recreational boating tourism that brings New Jersey so much revenue. Such concerns include, but are not limited to, an increase in security issues such as vandalism and theft of boats and property and domestic security; access issues for paying customers; and decreased revenues for the State. (200)

172. COMMENT: Allowing public access to marina areas would create unsafe conditions in marinas from people who are unfamiliar with marina activities. It would also invite persons into the areas that do not share the same sense of community that boaters do and therefore could create an unsafe environment for boaters and their property. (24, 43, 83, 178)

173. COMMENT: “Private” means belonging to a particular individual or group. “Privacy” means the quality or state of being apart from others. Marina patrons want privacy, which is what they pay for. Under the public access rules, marinas will no longer be secluded places with familiar faces. Marinas are not public playgrounds, public beaches or public docks; they are private and must stay that way. (42, 75, 110, 165)

174. COMMENT: The supposed goal of the Department is increased public access. Under this proposal, the Department wants marinas to create and maintain what amounts to “public parks” on the private property at the marina owner’s expense. (20, 168)

175. COMMENT: There is value in providing the public access to tidal waterways and their shores. However, such access should not be required at private marinas. Monmouth County and several municipalities through Green Acres and other funding have provided many public access opportunities at the following locations: Red Bank, Marine Park and Riverside Gardens Park; Fair Haven, Fair Haven Pier; Sea Bright, Old Anchorage Beach Club; Monmouth Beach, Beach across from Cultural Center; and Little Silver, Santelle’s Park and Boat Launch. (79)

176. COMMENT: The State and counties provide public access through waterfront parks. Public access at marinas is not necessary. (156, 184)

177. COMMENT: The public does need more water access areas. However, it should be the public owning it, paying for it and being responsible for it; not marina owners and their patrons. Many waterfront municipalities and the State own waterfront real estate. These properties instead of private marinas should be made available for public access and the costs should be shared by all the public through fees. (179, 180)

178. COMMENT: The commenter stated that in the last 24 years he has not witnessed or heard about an accident at any marina that he has frequented. Unless there are substantial documented records of accidents that clearly justify such drastic measures that the Department is proposing, the Department would be better served to look for other ways to justify their existence. (157)

179. COMMENT: Land Trusts have the right to exclude and conserve as well as preferential tax treatment, based upon being private owners of land; the purpose of public trust lands is to do both. "Once it (land trust) becomes the owner of the land, the land trust may use its fee ownership to control all activities on the land." (Duke Law Review, p. 632) "as private landowners, land trusts have the right to exclude all comers from their property, unless the conservation easement on the land specifically provides otherwise." (Duke Law Review, p. 638). Conservation easements created favorable tax treatment and "almost never include a right of public access to the conserved land." (p. 636, Duke Law Review)

Marinas are also privately held land, but are being denied the right to exclude the public, how is that different from the above? "Although land trusts are private, they benefit greatly from public support" (in the form of preferential tax treatment) (Duke Law Review, p. 630). The State argues that since marinas benefit from public funded programs (i.e. I-Boat), marinas are subject to public trust and public access. Marinas do not get or require preferential tax treatment; however they do create an increase in tax ratables. Since land trusts get the same benefits or greater benefits (preferential tax

treatment) than marinas, why are marinas subject to public access and land trusts are not? The argument is made that if Land Trusts were to provide public access, it would provide additional public benefit of recreation (Duke Law Review, p. 637). Marinas by their very existence and purpose, already provide recreation.

In the case of *Phillips Petroleum Co.*, 484U.S. at 475, (Duke Law Review, p. 641) affirms that “states have the authority to define the limits of the land in public trust and to recognize private rights in such lands as they see fit.” Based on this case, it would seem that public trust does not mean “unlimited access.” Rather, each State can define the type of access and the limits of such access. In fact States are currently split on the type and extent of access required by the public trust.

In New Jersey, the *Borough of Neptune City v. Avon-by-the-Sea*, 294A. 2d 47, 54-55 N.J. (1972) case declared that “the public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.” (Duke Law Review, p. 644). In this case, the NJ Supreme Court confirmed that the public trust “is a flexible concept that changes with the needs of the population.” “The geographic breadth of the public trust is to be determined by the State.” (Duke Law Review, p.645). In other words, each State can determine what land or waterways are subject to the public trust and what activities are covered by it. Since each State is entitled to determine the needs of its population and the boundaries and extent of public trust are not set in stone, there is no reason that marinas should not be afforded the same rights of exclusion as land trusts, or be permitted the same alternatives as State highways and homeland security areas under the public trust. As it now stands, marinas are the least able to absorb the burden and liability, and they are being asked to absorb both, while they are already meeting needs of conservation and affording the public access to recreational uses of the waterways. (87)

180. COMMENT: To walk around a marina watching boats being hauled out of the water, sandblasted, painted or repaired is as eventful as touring a police impound yard. Eliminating beach fees, boat ramp fees and admission fees to Island Beach State Park and

increasing the number of attractive, well-staffed beachfront parks is the answer to better public access, not requiring access at marinas. (158)

181. COMMENT: There is a need for more public boat ramps and public access to the waterfront, but it should not be at the expense of small private marinas. The issue that should be addressed is municipalities that restrict access to municipal boat ramps or beaches for residents only. If the municipality uses taxpayer dollars to maintain these ramps, then anyone should be allowed to use them. (97, 130)

182. COMMENT: What public benefit does a walkway along the bulkhead at a marina where vehicles are parked in the summer and boats stored in the winter provide? (130)

183. COMMENT: These new rules imposed on marinas do not bring noticeable value to the general public. (27)

184. COMMENT: The Coastal Zone Management rules have historically included requirements for public access for both new development and the maintenance and improvement of existing facilities. These regulations also afford Department staff the flexibility to consider site specific and project specific factors in determining the extent to which public access would be required. An example of such flexibility is the permitting of the Red Dragon Canoe Club on the Delaware River. This facility is over 100 years old and it would not have been financially or historically feasible to meet the new rule. As a result, the Club's waterfront facilities would have become unserviceable, unsafe and would have ultimately been abandoned. Instead, the Club was able to repair the waterfront bulkhead and preserve its usefulness to the community, as well as mitigate shoreline erosion.

The new rules effectively mandate that commercial establishments such as marinas and waterfront restaurants, as well as owners of waterfront homes provide public access in accordance with defined specifications. The degree of discretion available to regulators is severely limited, effectively eliminating their ability to reasonably balance the interests of the parties and the project benefits.

The rules should be revised to focus on the provision of public access for new “Greenfield” development and should provide the Department with regulatory latitude to apply the public access rules in a reasonable and fair manner and not a singular prescriptive approach for what are individually unique projects by definition. (15)

185. COMMENT: The proposed amendments make no mention of user fees for the public. Membership fees contribute to the service, maintenance and security provided for marina patrons. Allowing the public to use the same facility for free is absurd. The proposal makes no mention of the number of people expected to use marinas for public access to the waterfront. On any given day in the summer, public beaches reach capacity by noon. If the public access at marinas results in an overwhelming number of people using the marina, paying marina patrons will not be able to use the facility. (197)

186. COMMENT: Given the understanding that boat owners are conscious of the extra measure of safety required around a dock or wharf, many boaters require their children to wear personal floatation devices when walking or playing near the docks. As a result of this rule requiring public access at marinas, will boat owners and marinas be obligated to equip visitors with safety equipment when standing near the water’s edge? (99)

187. COMMENT: Under the new rules, what is it to stop someone from inebriating themselves on marina property in the early morning hours, then falling into the bay and drowning; or urinating on marina or boat owner’s property; or worse leaving in an automobile maiming some innocent person and involving the marina owner in a liquor liability lawsuit? What right does a marina owner have to ask them to leave? (189)

188. COMMENT: The proposed rules are onerous to property owners, imposing expensive procedures during a contracting economy; difficult, if not impossible to comply with given the physical restrictions of limited space and municipal regulations; and dangerous, exposing both the general public and marina customers to situations that are potentially unsafe and far from secure. (32)

189. COMMENT: The commenter is concerned that the public access rules will result in anyone at anytime sitting on the docks at a marina or pulling their boat up for a period of time. (165)

190. COMMENT: This rule will let everyone walk down finger piers and invade the privacy of boat owners. Under this rule, the State is giving the public permission to fish off the bow of private boats. (17)

191. COMMENT: Marinas provide public access through the rental of transient boat slips. This should be sufficient in terms of providing public access. (10)

192. COMMENT: Public access will be better served if the Department focuses its efforts on violators of beach access such as Sea Bright, rather than marinas. Sea Bright provides public access to the beach but virtually no parking for a beachfront of several miles. (51)

193. COMMENT: The Department's efforts relating to public access should be focused on beaches, not marinas. (3)

194. COMMENT: The public already has access to the waterline in the form of the docks and slips that they rent or buy from the marina. There is no real difference in a boat owner renting and occupying a slip as compared to an individual purchasing and using a beach access pass from a town along the New Jersey shore. (187)

195. COMMENT: The Department contends that private marina public access is related to the beach access issue. This is simply not true. Where the State has spent millions of dollars on sea walls and beach replenishment, they have spent nothing on private marinas. Marinas must pay the State an annual riparian fee for the use of the water. Marinas must pay for their own bulkheading, docks and dredging. There is simply no comparison to beach access and unlimited private marina access. The next obvious step

in the Department's taking of private property rights would be to extend the policy to all waterfront homes. (20, 168)

196. COMMENT: Forcing private marinas to provide public access is not, by any means, a rational extension of the Public Trust Doctrine. This Doctrine has been invoked along the oceanfront and is understandable in light of the fact that the beaches would not exist but for the sand replenishment program which creates those properties at public expense. There is no service performed by the State with funds to the property owned by private marinas and no analogy can be drawn to beach access cases. The piers, pilings, and docks are installed and maintained by marina owners, at great expense, and provide slips and access to the boating public. (182)

197. COMMENT: The commenter stated that if the general public is allowed access to her marina, she will not be able to enforce the best management practices outlined by the Department. She said that contaminants could be introduced to the Barnegat Bay that she could not control. She stated that the public access requirements will impede the Department's own mission to protect the Bay. (109)

198. COMMENT: The Department has chosen to ignore the environmental problems that private marina public access could create. Marinas have to submit a stormwater permit plan to the State, which includes a requirement to educate customers about the many environmental issues affecting waterfront property. Marina customers are required to abide by all of the rules and regulations. Total strangers on the property would have no knowledge or even care about the rules. There would be no consequence to their violating the rules. The property owner, who has no control over strangers; access or actions, would be cited for violation. (20, 168)

199. COMMENT: Existing public access areas such as beaches and public docks should be taken into consideration when applying the rules to marinas. The public access rules should be applied on a case-by-case basis. (30, 97, 103, 121, 122, 133, 149, 176, 199)

200. COMMENT: The commenter stated that he moors his boat at a marina in Island Heights. The properties adjacent to the marina are already available to the public for access. What is the need for additional public access? (202)

201. COMMENT: Does this proposal include free access to private boats? Will the State assume the protection of boats at marinas and be responsible for any harm to the craft or its occupants, lawful or otherwise, when just anyone is able to wander around a marina at all times? Who is going to monitor these people in the middle of the night and guarantee that the marina patrons do not have to worry about theft and safety? (77, 108, 111, 174)

202. COMMENT: Boats are not secure in the same manner as homes. A boat is secured to a dock by a few ropes that can be easily untied or cut. Many boats can be entered by merely unzipping a piece of canvas. Many smaller boats lock from the outside and cannot be safely locked at night when people are on board. (158, 159, 162, 185, 193)

203. COMMENT: The commenter stated that when he purchased his marina, his customers demanded that he construct a fence and gate. He said that he was able to stop cars from accessing the marina at night, but not thieves. As a result he said he installed a security system. He said that now he believes he has stopped the thieves but not the biggest thief of all, the State of New Jersey. (92)

204. COMMENT: The Public trust rights rule and amendments infringe on marina owners' rights to free enterprise. Marina owners should not be told how to run their business and that they can not charge the public for accessing their property. These rules are a Pandora's Box. (190)

205. COMMENT: The commenter stated that he has two municipal docks and the Forsythe Reserve is located down the street from his marina. How much public access is required? (80)

206. COMMENT: The Department should review all case law pertaining to the Public Trust Doctrine. The Public Trust Doctrine does not apply to access at marinas. (88)

207. COMMENT: The Department is continuing to demand unlawful and unsustainable obligations on property owners through permit conditions and doing so under the guise of implementing the Public Trust Doctrine. The Public trust rights rule and proposed amendments represent an unlawful expansion of the Public Trust Doctrine. The Public trust rights rule and proposed amendments result in the general public being afforded greater rights to privately owned marinas than the customers and marina owners. A marina owner and customer have to pay for upkeep, taxes, and insurance and other costs for property over which they will have limited use. (21, 38)

208. COMMENT: The commenter indicated that he supports the underlying goal of the public access rule which is providing greater access to the water. However he questions the logic of enforcing it on privately owned marinas that already provide public access. He stated that the fact that such access is offered to a group of paying customers rather than the public at large does not reduce that effect. Monmouth County is filled with private enterprise along its many waterways which provide recreational access to the water, whether it be a restaurant, bar or private beach club, while limiting that access to only the patrons of the business. The commenter stated that one of his primary reasons for purchasing his boat was because of the limited access offered to the numerous beach clubs that have waiting lists many years long. (11)

209. COMMENT: With hundreds of miles of unrestricted waterfront access this State offers, the amount of additional public space through the requirement of public access at marinas would be insignificant compared to that which is already provided. (193)

210. COMMENT: The Public Trust Doctrine establishes the public's right to full use of the seashore, not private deeded land. If it is public land, how could marina owners purchase the property and receive a deed? (194)

211. COMMENT: Five commenters oppose the public access rule as it pertains to marinas. (79, 84, 133, 143, 164)

212. COMMENT: The recreational marine industry has been working hard in partnership with government to protect our environment and New Jersey's coastal resources. Proof of these efforts can be found in such programs as the Clean Vessel Act Program, the Shrink Wrap Recycling Program and the Clean Marina Program. Through the Department sponsored Clean Marina Program, marinas go above and beyond what is already required of them by implementing best management practices targeted at reducing pollution. These businesses realize that the success of their industry relies on the health and beauty of their surroundings. This program clearly demonstrates that the marine industry and government can work together towards the same goal. The Marine Trades Association of New Jersey and New Jersey Department of Transportation have been working together in partnership through the I BOAT NJ Program to fund hundreds of thousands of dollars in public access improvements in New Jersey's marinas. These are much needed improvements that could be jeopardized by the proposed public access rules. (21, 38)

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

Many family-owned marinas are trying to maintain, improve or expand their facilities so that they remain economically viable businesses. Yet, they only continue to get caught up in an already time consuming, complicated and expensive permitting process. They are told over and over that assistance is available from the Department and a staff person is available to help, only to find telephone calls unanswered, meetings and permits denied. The new regulations add injury to insult. Now the complicated regulatory process will not only be time consuming and expensive, but will result in a loss of property rights. (21, 38)

214. COMMENT: The proposed amendments address only one small element of the public access rules and do nothing to provide relief or protection for marinas in New Jersey. The rules still require a surrender of property rights and force a business owner to make decisions about their operations which they may not be able to afford or cannot reasonably implement. The rules are impracticable and violate the very principles of affording access which they purportedly support. These amendments do not address the problems associated with unlimited access; the practical problems and financial costs associated with the rules and proposed amendments; the requirement of a deed restriction and the additional parking requirement. (21, 38)

215. COMMENT: The Department provides that the proposed amendments are a logical extension of public access under the Public Trust Doctrine. It is not in the spirit of the Doctrine to hold a private marina owner hostage to provide this access as a prerequisite for securing Department permits necessary to maintain an environmentally responsible marina, that is safe for customers, and navigable boat slips and mooring facilities which require regular maintenance dredging to maintain their use and value. (114, 176)

216. COMMENT: The Public trust rights rule and proposed amendments result in the loss of a marina owners control over what is occurring at their business. Marina patrons know what is expected of them. Allowing access to the marina by the general public is problematic. (124)

217. COMMENT: The commenter stated that his marina is unique in that marina patrons dock their boats along the marina's bulkhead and behind their slip. They are allowed to set up a barbecue grill, picnic table and tent. Because the rule requires public access to the marina, the privacy of patrons would be violated by complete strangers who could sit at patrons' picnic tables and not have to pay to use the marina facility. (190)

218. COMMENT: The commenter appreciates the Department's acknowledgement of the importance of boating and navigable waterways to the general public. These proposed regulations, however, will undermine the very industry, which affords much of the boating public access to marine waters. For some marinas, the proposed regulations will make it impracticable to continue the marina business. (21, 38)

219. COMMENT: The prospective reconfiguration of work and storage areas at marinas as a result of these new regulations and requirements will cause many marinas to lose space from which they derive essential revenues. (21, 38)

220. COMMENT: The proposed rules refer to certain situations in which public access may not be practicable on-site or for the entire shore and an alternative route or area may be necessary. None of these situations take into account the unique nature of a marina and the services that it provides. It seems ridiculous to force a marina, a business that is already providing access, to provide access when a reasonable alternative that provides a more quality and meaningful experience is nearby and available to the public. Many marinas are located on man-made lagoons surrounded by residential communities that already offer beaches, parks, fishing piers and more to the general public. (21, 38)

221. COMMENT: One of the rationales for these regulations is that they would make access circumstances uniform. If the underlying premise of unfettered marina access was reasonable, which it is not, this goal is misguided and fails completely to acknowledge the unique characteristics of many of these marinas. Some of these family-owned marinas have been in existence for decades. Many marinas provide onsite dry storage. A bailment is usually created for that paid for service and use of land, which imposes a

legal responsibility on the marina owner and operator. Unfettered access by the public undermines the ability of the marina owner and operator to abide by its bailment requirements. The proposed changes and related requirements will result in, for many of these marinas, a reconfiguration and immediate reduction in available land for boating related support activities in order to obtain necessary permits. In many instances, parking, which is already at a premium and constitutes part of the incentive for marina customers to support these marina businesses, would be further reduced by providing compelled parking for general public use. An unrealistic and unaffordable alternative is the provision of off-site parking. (21, 38)

222. COMMENT: A marina is no place for people to be freely wandering. It causes a security and safety issues. (27)

223. COMMENT: The commenter indicated that he provides sailboat rentals as well as sail boating classes for children and adults. He is concerned that this rule will have an effect on his children's program because he is afraid that he will not have the ability to stop someone he deems is or could be a danger to the children. He also said that he is concerned about his liabilities. (139)

224. COMMENT: Amendments concerning modification of the linear public access along tidal waterways at commercial marinas do not realistically meet safety concerns of marina owners.

Given that a large portion of the marina's function at any given time involves moving boats, painting boats, power washing boats, storing boats, and otherwise working on boats, there is never a time that public presence in these areas will be safe. Therefore, proposed N.J.A.C 7:7E-8.11(f)9 which requires the shortest possible alternative route around a lift or similar operation is neither realistic or feasible and safe. These areas should not be available to the public for access, as the public interest in safety and the marina owner's interests in liability issues outweigh the public's need for access to these particular areas.

By its own comments, the Department recognizes that the linear public access required by the rule may not always be practicable on-site or for the entire shore and an alternative route or area may be necessary.

Marinas should be given the same alternative provided highway projects and homeland security concerns, that is, if public access on site is not practicable, alternative access of a comparable use to the public shall be provided at a nearby off site location. For example, in Island Heights, there is comparable public access at nearby beaches and or municipal boat ramps. This area known as Long Point Beach provides a short alternative route to linear and perpendicular public daces to the water. It does not compromise public safety or the marina owner's liability. This area meets the 250 foot, one-quarter mile requirement for parking. There is plenty of on-street parking and some grassy areas that could be used as well. The municipal boat ramp can be used by the public for launching of small boats such as kayaks and canoes. (87)

225. COMMENT: Every marina has different physical constraints that have to be considered when enforcing the rules. Some marinas are located on irregular lots and boats are stored and serviced at multiple locations. In some cases, heavy boat lifting equipment operates throughout the boatyard. The proposed amendments suggest that marinas provide a walkway around the boat hauling area by taking the "shortest possible alternate route around the operation." To successfully do that is impossible, as the walkway may end up zigzagging around the entire yard. The Department also proposes the reconfiguration and enhancement of access in lieu of linear access. Besides the obvious lack of definition of that statement, it must be noted that most marinas cannot reconfigure without impacting other specific areas of the property at considerable time and expense. (11, 30, 65, 103, 201)

226. COMMENT: The rules fail to recognize that certain parts of marinas, such as waterfront areas where boats may be fueled and serviced or where heavy equipment is operated, are not safe or appropriate for public access. Repeatedly, marina owners have warned the Department that parts of marinas are unfit for public access. However, the Department chooses to downplay and trivialize these concerns. The Department has

willfully chosen to put the public in harm's way. As such, the Department shall be held personally and criminally responsible if any man, woman or child loses life or limb due to this poor decision. (98)

227. COMMENT: The waterfront is inherently dangerous. State mandated Worker's Compensation Insurance has a special category for waterfront operations. The rate for this category is many times higher than most. Liability insurance is much higher for waterfront locations due to the higher risk. Marinas are required by their insurance companies to have rules and safety regulations that their customers are not allowed in at anytime, and all have areas that are closed at night or in the off-season. The Department proposed that anyone should be allowed to walk anywhere along the waterfront at anytime. These strangers entering the property would be unaware of the rules and safety regulations at a particular marina. The thought of someone walking along an ice-covered waterfront walkway at night should be enough for any reasonable person to conclude that the Department has gone too far with their proposed public access to private property. A marina could be sued by someone injured in an areas specifically secured and rendered "off-limits" that the Department has now forced them to provide access to at all hours. (20, 168)

228. COMMENT: Most marinas employ the use of forklifts, boat hoists and other machinery required for boat handling and maintenance. Consequently certain areas of the facility are very dangerous to an unfamiliar visitor. The burden of this public access rule would neutralize the current safety, security and environmental supervision now in effect at some marinas. (68, 193)

229. COMMENT: Will the State be liable if someone is injured in a working shipyard with heavy equipment, boat lifts, power stripping, copper-based painting and fiberglass dust present? Only a complete fool would want the public to have unrestricted access to these areas. (158)

230. COMMENT: The new rules would limit the amount of space to be used for boat storage and significantly limit the amount of usable space for heavy boat-handling equipment to provide a safety buffer for pedestrians. (121)

231. COMMENT: Most marinas allow some access for the public to walk along and view the water while others limit that access for safety, security and liability reasons. (187)

232. COMMENT: The commenter stated that she would lose 30 percent of her marina and all her boat storage in order to provide the public access required by the rule. (13)

233. COMMENT: The financial burden of providing “perpendicular and linear access” in the winter will be high for the marina owners during a time that the public value of that access would be very low. All space allocated to public access will be space that cannot be used for winter boat storage. Winter storage for boats in Monmouth County is valuable and in short supply. Many boaters that use alternatives to marinas during the boating season seek off-season service and storage from marinas. The winter storage spaces lost to provide required public access, and the lost service and maintenance orders associated with those spaces would have a sizeable negative financial impact on marina owners. (14, 117, 176)

234. COMMENT: The proposal will decrease marina capacity, limit the maintenance capabilities of most facilities and curtail normal operations for those that are forced to comply with the requirements of this rule. (150)

235. COMMENT: Requiring perpendicular access to and linear access across the waterfront is impractical for almost all marinas. Marinas make very efficient use of all available space during both the boating season and the off-season. Requiring public access paths in the midst of the property will decrease the amount of space available to properly operate the marina. As such, the application of these access rules on private

marinas will decrease not increase public access to the waterfront for boating purposes, the very functions marinas are intended to provide.

The current configurations of marina properties with respect to building locations, building alignments, location of parking spaces and access to docks were originally developed only with the functioning of the marina in mind. For the Department to ex post facto require public access paths be constructed on existing marina properties will severely impact the ability of these marinas to do function. (91)

236. COMMENT: The proposal should provide exceptions for marina owners who have limited sized lots or shorelines. It does not make sense to force owners of small marinas to make the changes to comply when it will have little to no effect on public access to the waterway. (199)

237. COMMENT: These rules will negatively impact boat winter storage. As a result, many boat owners will be displaced. (37, 106, 158)

238. COMMENT: The commenter stated that his marina has a unique shape due to its location at the foot of the Route 35 Bridge over the Manasquan River. This location lends itself to a history of theft and break-ins. Non-marina guests have involved the marina with several “slip and fall” litigations. The commenter is in the process of improving his facility and its profitability, but because of these rules he will not move forward. (100)

239. COMMENT: Ensuring a safe environment for the general public now becomes an extremely difficult task. The marina owner will need to provide additional infrastructure and security to control where the public goes on site. The number of people is finite when accommodating customers and their guests. These regulations, however, provide no restrictions on the amount of people who will gain access. At many marinas and boat yards, it is logistically impossible to secure or restrict access to dangerous areas while still providing a walkway along the entire length of the waterfront. Due to the nature of marinas and the services they provide, travel lifts and forklifts must access the water to

transport boats, and therefore can not be relocated. Many dry docks are on the water's edge. This heavy machinery and equipment poses a significant risk of injury when both in use and not in use. (21, 38)

240. COMMENT: The care, custody and control of the marina, vessels, slip holder property and attendant infrastructure is the full responsibility of the marina owner. There is significant risk of injury in certain areas of a marina facility that must be recognized. The proposed rules acknowledge the potential for risk of injury and include "such activities at energy facilities, industrial uses, port uses, airports, railroads and military facilities." Additionally, the rules state "portions of jetties and groins pose an extraordinary risk of injury." However, the proposed rules fail to acknowledge and appreciate the hazards at a marina or boatyard. Hazardous areas include travel lifts, forklifts, service areas with heavy machinery and fuel areas. People who own boats are aware of the dangers a marina and the water present. Marina rules can control access to these areas and related safety. Even if the Department allowed a marina to restrict these areas, these regulations would render such rules ineffective. People who are unfamiliar with marinas and the water have less or no fear of the potential for bodily harm, or worse, that can result from a careless step or deliberate foolish act. (21, 38)

241. COMMENT: Public access on a 24-hour basis at a marina is ridiculous. At a minimum, the need for restrictions on access at night is so apparent and necessary that no justification would seem necessary. (18, 21, 38)

242. COMMENT: Twenty-four hour access to marinas doesn't make sense from a public health and safety standpoint. (44)

243. COMMENT: Twenty-four hour access to marinas is excessive. Theft, vandalism, mischief and mayhem should not be considered an unalienable right of the population made possible by the Department of Environmental Protection. (56)

244. COMMENT: The provision that marinas provide public access on a 24-hour basis is idiotic. (68)

245. COMMENT: To force marinas to surrender property rights and allow 24-hour uncontrolled access with no restriction on the number of people will result in property damage and significantly increase the risk of injury to the general public in certain areas of the marina. (107)

246. COMMENT: The provision that marinas provide public access on a 24-hour basis is unreasonable. Shorefront State parks provide ample public access for non-boat owners. Will boat owners have to contend with the general public on the bulkheads and adjoining docks after dark? What if a group shows up with lawn chairs, coolers, fishing rods, and crab traps? Will the general public be permitted to sunbathe on lawn chairs, crab, and fish off the docks and adjoining bulkheads directly behind rented slips? (147)

247. COMMENT: Several commenters oppose the public access requirements for marinas. They oppose the requirement that public access be provided on a 24-hour basis. The public access requirements will subject as well as their property to robbery and vandalism, and violate their privacy. Twenty-four hour public access requirement at marinas will create an insurance issue for both marina and boat owners. (1, 5, 10, 12, 15, 18, 23, 24, 26, 35, 42, 45, 50, 58, 59, 63, 69, 71, 74, 82, 83, 86, 99, 101, 102, 108, 114, 115, 125, 128, 135, 140, 144, 153, 154, 159, 161, 165, 171, 172, 173, 178, 179, 180, 181, 183, 184, 185, 192, 193, 195, 197, 200, 203, 206, 207)

248. COMMENT: The commenter stated that the marina where he docks his boat provides restrooms and showers for marina patrons. Children walk freely around the marina and that his family is safe from the public. The Department has no right to allow the public to access the water along the docks of the private marina where a boat is moored. The Department should allow the commenter the ability to enjoy the water with safety and privacy because he pays for it. If marinas in New Jersey can not provide

safety and security on a 24-hour basis, he will leave the state and so will a lot more boaters. (76)

249. COMMENT: Seven commenters stated that they read an article in the *Barnegat Leader* discussing the Department's proposal to allow public access to marinas on a 24-hour basis. The commenters said that they oppose this requirement and sympathize with their marina owners who maintain a safe marina. The commenters stated that they are concerned with the safety of their boats and the general ambiance of the marina which they patron. (43, 46, 74, 77, 108, 111, 158, 174)

250. COMMENT: How can the Department justify the general public's use of private marinas on a 24-hour basis? (53, 158)

251. COMMENT: The rules deprive marina patrons of their right to privacy and to the full enjoyment of their property without interference from the public. It is unreasonable to force marinas to allow the public to have access to their property on a 24-hour basis. (143, 164)

252. COMMENT: The cost of gas, registration, insurance and the new requirements for licensing of boat pilots is driving many boat owners out of this form of recreation. This proposal would put the icing on the cake. Boat owners are concerned with vandalism; which all boat owners have experienced at one time. What will happen to boats at marinas if public access is allowed on a 24-hour basis? (19)

253. COMMENT: It is incomprehensible that the Department could consider that 24-hour public access to private marinas is in the public interest. The only logical result of this requirement would be the closure of marinas, the destruction of private property and a hazard to the public. Since there is no opportunity for swimming or fishing at a marina, there is no advantage to providing public access. This whole plan has nothing but negative implications. (70)

254. COMMENT: Year round, 24-hour public access must be reconsidered. To provide public access during the winter some marinas may be required to deny storage to customers. Due to the loss of this revenue, costs for slips and service of boats will have to be increased. The Department has stated that while marina owners have to provide a walkway along the waterfront, they do not have to allow the public onto the docks. To provide the security marina customers have come to expect and which they pay for, marina owners will have to install a locked gate at every dock. From an emergency response standpoint, that will serve to slowdown EMS and Fire Department access. During the winter most marinas have very few people around the boat yard. Marinas are congested places with boats and storage. There are numerous changes for possible injury. If marinas are required to implement the rules, how do they ensure the safety of the wandering public and the protection of their customer's property at all times? There is no way to stop someone from climbing aboard a stored boat. (30, 103, 149)

255. COMMENT: As a result of these rules, marina owners have no control over the people entering their facility. How does a marina owner explain to their paying customers the 24-hour access requirement? Marina patrons spend thousands of their hard-earned money to purchase a boat, to rent a slip, and store their boat in a secure location. (34)

256. COMMENT: With New Jersey's economy in the red, businesses leaving the state for other less restrictive and expensive states, it is time to take a step back and reevaluate the impact of the 24-hour public access requirement for marinas. Marina owners are easy targets for having to surrender waterfront property in order to obtain a permit to upgrade and improve their facility. In addition to the high cost of dredging, bulkheading and permitting, marina owners now have the additional expenses associated with the provision of public access. (129)

257. COMMENT: The personal safety of marina customers, guests and staff is a main concern of marina owners. Access must be limited to fuel pumps, pump outs and areas where heavy boat moving equipment operate because accidents and vandalism do happen

and it is unreasonable to force a marina to forego security measures to offer the public access at all times. These rules actually put the public in jeopardy. The consequences of an accident could be dire and something a family-owned business cannot afford. (109, 158)

258. COMMENT: Marinas provide slips, boat ramps, fuel services, marine supplies and more. Marinas provide important boating services that allow recreation on or near the water. Marinas are private businesses and marina owners pay taxes and insurance. What other private businesses must allow the general public access to property on a 24-hour basis? How can the Department impose such a requirement on marina owners; it is unreasonable. (34, 194)

259. COMMENT: Four commenters oppose unlimited public access, stating that it will adversely affect their personal welfare and that of their family. They are fearful that strangers will lay in wait in the restrooms if the restrooms are open 24-hours a day. (115, 207)

260. COMMENT: The commenter stated that he opposes the rules that grant the public access to private marinas. This proposal will force marinas to sustain significant expenses to conform to the rule and this additional expense will be passed to patrons of the marina. In addition, the rule is a violation of not only the marina's privacy and property rights; it is a violation of the boat owner's privacy and security that marina patrons pay for. The general public that does not pay for the right to be at a private marina should not have access and threaten the security of boats and also increase the risk of injury and therefore increase rates of marina patrons. (28)

261. COMMENT: Through the adoption of the public access rules, the Department has nullified the reasons for mooring a boat at a marina: security and reasonable access. (56)

262. COMMENT: Can the public walk through a private residence at any time of day with the expectation of using the restroom? Of course not. Do not expect the public to do the same at private marinas. (59)

263. COMMENT: The impacts of the rule on a boat slip renter at a marina that is required to comply with the public access rules include the security of the renter's private property; much higher slip rental fees; and denial of access to the marina because of a lack of parking. (120)

264. COMMENT: Asking marinas to maintain 24-hour watch is expensive. The owner just cannot sleep there; they have to maintain an active and moving watch over slips that often are not in a direct sight line. Twenty-four hour access is not in the best interest of the public in terms of safety. (16)

265. COMMENT: Vandalism is a major concern with the public permitted on marina sites all day and night. This is an unreasonable risk. (22, 156)

266. COMMENT: The 24-hour public access requirement poses a security risk to marinas and marina patrons. Non-marina patrons may not respect the privacy of marina patrons and may cause a public disturbance. (22, 78)

267. COMMENT: The Fair Haven Volunteer Fire Company and First Aid moors their rescue boats at a private marina. They are concerned that the public access rule will present a security issue for their equipment and may have Homeland Security implications. (64, 65, 112)

268. COMMENT: Why does the State want the public to have dockside access from midnight to 6:00 AM? (158)

269. COMMENT: Does the Department really think that 24-hour access, 365 days a year to a small business on private property is a good idea? Would a person be allowed

to wander the aisles of Home Depot at 3:00 AM? Who besides a thief is at a marina in New Jersey at 3:00 AM in February? The average marina today stores boats cumulatively worth millions of dollars, with hundreds of thousands of dollars in electronics and equipment on board. Marinas in some areas have spent thousand of dollars on fences, gates, lighting and camera systems for after-hours security. Since marinas are closed for the winter season, carefully locking and securing their property, there is no one on-site. Other marinas are closed at night with key-access gates for customers. Boat owners can feel safe allowing their children to use marina showers and restrooms knowing that only other boaters have access at night. No business spends all that money without reason. The Department now wants private property open to total strangers at all hours, somehow believing that only “good” people will be wandering around at night. Is the Department really that naïve? Has the Department consulted with local Police Departments or the State Marine Police? (168)

270. COMMENT: Twenty-four hour access at marinas will be a disaster. This requirement will be creating the opportunity for theft, vandalism, litter and other disrespectful and unthinkable acts. Boat owners are relying on marina management to watch over their expensive watercraft by providing them with protection and security, as well as their expertise. (8, 138)

271. COMMENT: The rules require privately owned marinas to provide open access to the public 24-hours a day, 365 days a year. These rules extend beyond mere access and into hospitality by requiring marinas to provide all of the following: a linear access to and along the tidal waterways; sufficient access to parking areas; and access to private restrooms. (29, 196)

272. COMMENT: Unlimited public access will negatively impact marinas. The storage of boats is a primary aspect of many marinas. These boats are under the marina’s custody and control, in a safe environment, and are what marina customers pay for. To allow members of the general public into the marina for unlimited access to the waterway will violate this safe environment. Marina customers sign a contract that states the rules

and regulations of the marina. These rules ensure that marinas have a secure and pleasant atmosphere. The general public will not adhere to these rules. Public access will add issued concerning liability, theft, vandalism and pollution. (146)

273. COMMENT: Danger arises in allowing open access to the marina docks at all times. As a result of individuals trespassing on marina patrons' boats as well as personal injuries, marina owners are encouraged by insurance carriers and their patrons to limit unauthorized access by installing security gates on each dock. At one time, to enforce safety and security, the US Environmental Protection Agency proposed that marina owners enclose their entire facility with a locked fence. To allow unmonitored public access at all times is an invitation to disaster. It would result in prohibitive increases in the cost of liability insurance, if coverage would even be made available under those circumstances. (32)

274. COMMENT: Allowing public access to marinas at night, when people are sleeping on their boats and no marina personnel are on duty would degrade marina security. (196)

275. COMMENT: Marinas currently provide water access to the public in accordance with the common law precept of the Public Trust Doctrine. The Department's expansion of this Doctrine as set forth in the 24-hour access requirement at marinas will do great harm to the citizens of New Jersey. It will deprive them of affordable water access for their boats; affordable winter storage for their boats and will eliminate hundreds of jobs through the industry in New Jersey. It is suggested that the Department waive the 24-hour access requirement and that the Department work with the industry to achieve a realistic compromise, perhaps access on a 9:00 a.m. to 5:00 p.m. basis. (105)

276. COMMENT: The additional security, safety, and inconvenience of uninvited guests around a marina on a 24-hour basis will be a burden. The public can purchase a boat, pay all associated fees and have access to a marina for six months in the same manner as marina patrons. (203)

277. COMMENT: Marinas are different than beaches. If a person wants to walk on a beach at night away from people sleeping on their boats, ok. The liability of people walking around a marina in the daytime is scary enough, but at nighttime, totally inappropriate. The well being of a family with small children could be compromised. (83)

278. COMMENT: It is grossly unreasonable to expect the marina owner to provide 24 hour access and security. Marina owners will be in a situation, much like doctors with malpractice insurance, where the cost of insurance becomes so excessive they cannot afford to stay in business. (31)

279. COMMENT: One cannot run a service business such as a marina, and have constant year round interference by non-customers or the unrestricted public. This is an open invitation to trespass, personal injury, property damage, higher insurance rates, business disruption and theft during open and closed hours and seasons and will clearly injure adjacent businesses. (188)

280. COMMENT: With unfettered 24-hour access at marinas, New Jersey's new State tourism slogan should be "NJ and boat thieves-perfect together." (159)

281. COMMENT: The commenter indicated that he supports public access to certain portions of all marinas during daylight hours. The public access areas should be fenced to separate them from restricted areas. (135)

282. COMMENT: Marina owners are fearful that the public access requirements will have a tremendous negative impact on their businesses. The requirement that marinas provide public access 24 hours a day, 365 days a year, free and at times unsupervised will adversely affect marina owners. How can the State require such access when the State does not provide access at all times? This requirement does not pass the basic common sense rule. (40)

283. COMMENT: It is unreasonable and unrealistic to force marinas to allow the general public access to their properties at all times, or in the areas covered by the conservation restriction. Marinas currently do not permit their own customers, all of whom pay for the services being provided to them, to freely roam the marina property at all times of the day, or in all areas. Marina owners require their customers to sign slip agreements which clearly detail the rules and regulations of the marina; rules and regulations that are in place to ensure the safety and security of their customers, their vessels, and the orderly and profitable management to the marina.

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

Do marina owners have to waive the marina restrictions and regulations otherwise imposed on marina patrons for the area of the marina that is reserved for public access? The newly adopted public trust rights rule and proposed amendments create a potentially hazardous and costly situation, make marina security impracticable and will negatively affect upland operations of many marinas. Stating that signage will suffice as a control measure to keep the public away from hazardous or restricted areas is unrealistic. (21, 38)

284. COMMENT: Millions of dollars have been invested in Homeland Security. Airports are the most obvious security risk, but subways, trains and bus terminals all have been subject to increased security. Homeland security and the U.S. Coast Guard are well aware that the waterfront is a vast and unprotected area. Each year several visits are made by special units of the U.S. Coast Guard to marinas. They discuss the measures that should be taken to secure docks and vessels. They leave posters and flyers warning what to look for and whom to contact in case of suspicious activity. The U.S. Coast Guard is concerned about many New Jersey recreational marinas because of their close proximity to bridges, tunnels and ports. Earle Naval Pier, with ships that bring

ammunition and supplies to the current Middle East conflict, is easily reached by a fast powerboat potentially loaded with explosives. Unrestricted access would be unthinkable at airfields, train terminals and bus depots. Why would unrestricted access be allowed at marinas? Does the Department believe that Homeland Security approves of suspicious individuals having unlimited, 24-hour access to marinas? Has the Department consulted with the Federal Department of Homeland Security and the State Homeland Security Office? (20, 168)

285. COMMENT: Four commenters stated that the provision of public access at marinas will lead to Homeland Security issues because access will be provided to potential terrorists who look to harm our nation and its citizens. (78, 115, 207)

286. COMMENT: The commenter stated that the State Police approached him concerning homeland security and the operation of his marina. Public access at a marina on a 24-hour basis could result in the loss of life because of terrorists. How and why has public access at marinas become an issue and who has complained? The number of complaints would never outweigh the complaints the Department would receive if the rule contributed in any way to future terrorist activities. Some laws which are hundreds of years old make no sense with all that is going on with this country today. (155)

287. COMMENT: The insurance industry which owns New Jersey, may be behind this rule because they will make a killing on insurance sold to marinas and boat owners. (128)

288. COMMENT: The Department rationalizes that marina owners are somehow afforded protection under the Landowner Liability Act, N.J.S.A. 2A-42A-2 et seq. In fact, these proposed regulations and requirements will greatly expand the liability to which marina owners and operators are exposed. The Landowner Liability Act affords limited protection. There are many cases in which liability has been found against landowners who thought they might be protected by this Act, such as a child who hurt herself rollerblading when she slipped and fell due to an accumulation of sand on a

roadway surface (*Toogood v St. Andrews at Valley Brook Condominium Association*, 313 Super 418 (App. Div. 1998), a man who tragically drowned while attempting to rescue two children who had fallen through an ice covered lake located on the Defendant's property (*Harrison v. Middlesex Water Company*, 80 NJ 391 (1979), a young boy injuring himself on a golf course (*O'Connell v. Forest Hill Field Club*, 119 NJ Super 317 (App. Div. 1972), and numerous other cases. Moreover, many of these marinas are located within or near residential neighborhoods or fully developed areas, which further reduces protection under the Act. A new liability is being imposed by these regulations which will require additional exposure to liability; potentially increased employment costs associated with supervision, and increased insurance costs. (21, 38)

289. COMMENT: Does this proposal make the State responsible for the actions of the public? Is the State liable for lawsuits, vandalism, and general misuse of marina property? Does the Department post a bond or have insurance to cover these costs? (153, 158, 194)

290. COMMENT: The State should apply their insurance required public access at marinas just like State parks. (135)

291. COMMENT: Who is financially responsible for the theft, vandalism and injury which will be an inevitable by-product of the rule? (24)

292. COMMENT: Marinas are dangerous places for those unfamiliar with the marina environment and especially on a 24-hour basis. What is to prevent someone from climbing around the boats, trying to manage small finger piers and trying to avoid mooring lines at 3:00 a.m.? What happens if someone falls in? What are the legal issues for marinas and boat owners? (16)

293. COMMENT: Liability is a great concern for marina owners. The State is accepting zero responsibility in this matter. (186)

294. COMMENT: The commenter stated that he is a marina insurance broker, and that he has spoken with several insurance companies that underwrite insurance policies for marinas. He stated that every underwriter that he has spoken to has advised him that the 24-hour linear access rule will increase individual marina owners' exposure to risk, their liability and consequently their respective insurance policy premiums. He stated that he has been advised that some of the premium increases will be considerable and onerous.

Worker's compensation rates for marina workers have been progressively increasing over the past few years due to the hazardous conditions at marinas. The State sets the worker's compensation rates, not the open insurance market. (105)

295. COMMENT: There are very real liability concerns that the Department is refusing to acknowledge. The landowner liability act does not apply in many circumstances. A simple oversight by a marina owner could be deemed as an act of negligence and they can be held liable for an injury. Since the November 6, 2006 proposal, a number of insurance organizations that have confirmed that insurance premiums will increase for marinas that are required to provide unlimited access to their properties. Nowhere is it shown that the Department fulfilled its obligation to study and set forth the financial impact and again, another increase in operational costs, despite the Department's refusal to acknowledge or study it. (21, 40, 49, 87, 88, 89, 105, 124, 137, 139, 190)

296. COMMENT: There are serious liability concerns, and increased costs associated with those concerns that the Department, it appears, fails to acknowledge. As part of the year-round public access requirement, it is clear that the liability of a marina owner will dramatically increase. Consequently, insurance premiums will significantly increase. (21)

297. COMMENT: In some cases, marinas are one of a town's higher ratables. Should the owners decide to sell the marina because of these rules, the town could lose considerable tax revenue causing an increase in taxes to all the residents to make up the deficit. (65)

298. COMMENT: Marinas in New Jersey sell fuel, repair boats and make a living renting slips. Marinas are no different than privately owned campgrounds that abut a forest. The Department has no right to require public access at marinas. The rule is not good for the betterment of the community. The rule will destroy the marina industry. (76)

299. COMMENT: There are plenty of areas where the public can access the water without stealing land from marina owners which will ultimately lead to them going out of business. (19)

300. COMMENT: The adopted rules and proposal will have a major impact on marina owners and their ability to provide a safe and secure waterfront environment for their customers, neighbors, family and community. (30, 73, 103, 132, 133, 196)

301. COMMENT: Marinas have a right and are obligated to protect their property and their customer's property as well as the ability to deny access to vandals or disorderly persons, and provide a safe and secure environment. (187, 195)

302. COMMENT: It is time to give small businesses a break. Most marinas and boatyards are family-owned and operated. They offer jobs and expansion of marinas would mean an increase in jobs which in the long run will help the economy. (129)

303. COMMENT: The rule will place unfair burdens on many boatyard owners. The idea behind the rule is good; provide access to New Jersey's waters. However, this proposal is flawed. The Department should listen to the marina, boatyard and boat owners. (67)

304. COMMENT: If the Department intends to eliminate more marinas, then these rules have their intended effect. When a marina is lost, the public loses a place where people seeking to recreate on the water can access the water. The general public loses a place to moor their vessels, have their vessels serviced, stored or more. A place for family and

friends to gather to enjoy the natural resources that living in New Jersey provides us is lost. Ultimately, public access to the water will be lost. The losses are enormous, and they will forever change the quality of life for all. (21, 40, 49, 87, 88, 89, 105, 124, 137, 139, 190)

305. COMMENT: This rule will cause the loss of marinas in this State that logistically and financially will not be able to comply with these regulations; this will undoubtedly further the loss of the recreational waterfront. (17, 186)

306. COMMENT: Loss of marinas means loss of jobs, no place for customers to have repairs or warranty work done, and no place to store their boats, since not all people can store them on their property. (6, 25, 33, 52, 61, 94, 118, 145, 151, 191)

307. COMMENT: The commenter opposes the State's proposal to create a 10-foot easement along all waterways including along the bulkheads in private marinas. He stated that if this plan is implemented, it would mean that he could no longer park behind his boat nor could he maintain the recreational facilities he now has like barbecues, picnic tables, tents and other things that make the boating experience fun. The commenter stated that he selected his marina because there is limited access to the site during periods when boat owners are not present, such as weekdays and during the winter. A walkway along the water would leave boat owners' expensive boats and equipment subject to vandalism and theft. Should a walkway be required and the marina no longer be safe, the commenter said that he might have to sell his boat and get out of boating altogether. (19)

308. COMMENT: The requirement of a 10-foot recorded easement along bulkheads 24 hours a day, 365 days a year is a direct invitation to those who like to take the opportunity to harass marina owners, boat owners, or to potentially pick a target for vandalism or theft. (95)

309. COMMENT: Passing a rule that requires all marinas to provide a 10-foot walkway and deed restrict it is like leaving the front door of your home ajar so that anyone could walk in. (168, 170)

310. COMMENT: Where does the Department think that marina patrons will park their cars when the area behind their boats is subject to a 10-foot public access easement? (110)

311. COMMENT: It is illogical and unreasonable to enforce public access on marina owners and boat owners that rely on marina owners to protect their boats when they are not there. A 10-foot easement along marina bulkheads would cause undue hardships on boat owners that rent slips. There would be no recourse if someone chooses to block access to someone's boat. There would be no recourse if someone decided to picnic behind one's slip and spend the day crabbing behind a boat. Some marinas already provide access through boat ramps. Public restrooms are also available. Forced compliance with a 10-foot public access easement on the marinas will only cause a lessening good relationship with the general public. (147)

312. COMMENT: There are significant consequences of the adoption of the rule on everyone that enjoys the water. Certain marinas will be forced to choose to not upgrade their facility or sell. These proposed rules will discourage marinas from improving their facilities resulting in a degrading marine infrastructure. This will ultimately result in a loss of even more access to the water for recreation and enjoyment. For many marina operators, the idea of complying with this proposal would be the impetus they need to get out of business altogether and sell to developers. (6, 20, 25, 33, 52, 54, 55, 61, 68, 81, 94, 107, 118, 119, 145, 151, 168, 189, 191)

313. COMMENT: The public access rule will only deter marinas from attempting to repair or upgrade their facility as it is difficult for most marinas to comply with. Marinas vary in size and some have physical limitations that may not allow them to accommodate the amount of access being required. (146, 205)

314. COMMENT: By requiring the provision of public access as a permit condition, the commenter indicated that he will not apply for new permits to upgrade his marina facility. (49)

315. COMMENT: The public access rules will delay the upgrades and repairs at New Jersey's marinas. (48)

316. COMMENT: Developers building waterfront condominiums and large corporate-owned marinas have financial power to build beautiful waterfront walkways. There are some who suspect that this is one of the underlying intentions of this regulation. They suspect that the Department is promoting larger and fewer marinas. Has the Department consulted with the New Jersey Department of Travel and Tourism regarding the amount of revenue generated by boating in the State? (20, 168)

317. COMMENT: The rules will prevent marina owners from upgrading their facilities in the future as it requires access which would be economically unfeasible to provide. This is due to the layouts of some marina basins and the access required to floating docks, which would require excessive security measures and fencing. Further, these rules prevent marina owners from acquiring a permit for dredging that can only be accomplished when the State has funds available to dredge navigation channels. This could prevent marinas from having a secure financial future. (32)

318. COMMENT: The proposed rules impose financial and operating burdens, additional responsibilities and regulations, as well as the invasion of the privacy of marina patrons, all of which discourage marina owners from making applications for the necessary permits to enable them to continue to operate their marina. (143, 164)

319. COMMENT: Marina patrons work hard for the money to moor their boats at private marinas and should not be expected to subsidize the general public's use of amenities that they as marina patrons must pay for. (53)

320. COMMENT: Marina patrons pay for slips, electric water and bathroom facilities. Why should the public have the ability to access these amenities at no cost? (75, 153, 185)

321. COMMENT: The commenter opposes rules that require marinas provide the public with restrooms, showers and parking. (53)

322. COMMENT: Bathroom access is a common problem at all locations for tourists anywhere along the Jersey Shore. Restrooms at marinas should be a separate item funded by the State. (135)

323. COMMENT: Letting the general public have access to marina restrooms and showers is a travesty. Currently marina owners have a special password to get into locked restroom and shower facilities. The safety of children whose families patronize marinas is a concern when making the restroom facilities available to the public at night. (18, 29, 58, 170, 171)

324. COMMENT: The rule requires marinas provide on-site parking for the public. This will cause an over-flow parking problem due to the loss of parking required for boat owners. (65)

325. COMMENT: Two commenters oppose the requirement that marinas provide parking for the public. (78, 155)

326. COMMENT: Two commenters oppose unfettered 24-hour access to marina restrooms. (153, 162)

327. COMMENT: The commenter opposes the mandatory provision of secure 24-hour public parking and restroom facilities, as there would be an immense unfair financial burden for marina owners and their clients. (144, 176)

328. COMMENT: The public parking requirement is problematic. In addition to providing parking for its marina patrons, the Channel Club Marina must also accommodate parking for customers of a restaurant open to the public for lunch and dinner daily and also for its catering facility. During the summer months there is a severe shortage of parking with no possibility for expansion of the existing parking area. There is no additional private land available for purchase. On street parking in the Borough of Monmouth Beach is already overwhelmed by vehicles generated by the public accessing the beach. (32)

329. COMMENT: The requirement that marinas provide two parking spaces and public restrooms is ridiculous. (18)

330. COMMENT: The commenter opposes the mindset of the rule that “one-size-fits-all” to marinas when the only things marinas have in common are that they are on a waterway and cater to boats. (120)

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

In its discussion of N.J.A.C. 7:7E-8.11(f)6, which deals with single family homes or duplexes, the Department acknowledges that “the size of the property and density of development do not lend themselves to providing public access on-site.” This same situation applies to many marinas, particularly smaller ones. Yet the Department proposed to uniformly impose these onerous access obligations on these marinas. The rules need to be flexible enough to work with the property and allow the property owners

to be creative when the space with which to work is limited. This comment was previously submitted by the commenter on the Department's November 6, 2006 proposed new public access rules and amendments (see 38 N.J.R. 4570(a), November 6, 2006). The commenter has requested that this comment also be incorporated as a comment on this rulemaking. (21, 38, 205)

332. COMMENT: A "one-size-fits-all" approach towards providing access simply disregards the role waterfront businesses play in New Jersey's economy and in the overall quality of life of its citizens. A balance can be foraged that allows adequate access without saddling businesses and industries with unnecessary costs. (21)

333. COMMENT: The public access rule has many flaws and should be reconsidered. The rule should not be a blanket rule for all, but researched to evaluate each area as to the available access already in place and to remove the necessity to comply in order to get the permits necessary to keep all marinas safe and up to date. (65)

334. COMMENT: To require marina owners to deed a portion of their property for public use as a condition to a permit required to continue a business carried on, in many cases, over generations, is nothing short of an unauthorized attempt to trammel private property rights. Many marina owners have expended fortunes complying with existing regulations and improving their properties. (182)

335. COMMENT: To hold up marina permits when marinas are attempting to improve their properties or create new facilities is nothing more than administrative blackmail. (95, 124)

336. COMMENT: Requiring a private marina to develop public access paths in order to be granted future permits from the Department is a form of strong-armed in your face government at its very worst. (91)

337. COMMENT: The present proposal is a giant step towards the ultimate conversion of privately owned marinas into public property. (45)

338. COMMENT: Have we become a socialist State where everyone is entitled to anyone's property? It is ridiculous that the State's policy is apply for a permit and follow the public access rules. This is extortion. (2)

339. COMMENT: To require linear and perpendicular access year-round, as well as parking and to demand this access to be deed restricted when a marina requires coastal permits for improvement or enhancements really amounts to an unlawful taking of one's property. (188)

340. COMMENT: Once again, the short sightedness of government and State agencies burdens marine businesses through the public access requirements. (100)

341. COMMENT: The Department should consider the effect of the rules on marinas and other businesses that are adjacent to the water such as construction, boating, repairs, longshoreman activities and longshore productions. Why is the Department focusing on marinas? What are the judicial repercussions of focusing on discriminating against marinas? (88)

342. COMMENT: The focus of the Public trust rights rule on marinas is an attack on one of the very businesses that support, nurture and provide public access to New Jersey's waterways through private enterprise. (40)

343. COMMENT: The Department is not only hurting the marina industry but also the State as a whole. The Public trust rights rule will effect employment and decrease revenue from taxes. (76)

344. COMMENT: The public access rules should apply to all waterways, river, bays, oceans, tributaries, private homes, clubs, and associations. Upon applying for a permit

they should be required to comply with the access, parking and restroom requirements.
Why are marinas being singled out? (194)

345. COMMENT: Why are marinas being singled out for public access when there are many other businesses located along the waterfront? (90)

346. COMMENT: Marinas are unfairly being singled out by this rule. (91)

347. COMMENT: The incompetent FEMA-like behavior of a State agency trying to use privately owned marinas as tourist destinations is laughable. (158)

348. COMMENT: Instead of making it easier for marinas, which generate taxes, to operate, encourage new ones to flourish and easing their tax burden so they have revenue to make attractive improvements such as clubhouses, profitable restaurants where the public would be welcome, the Department is mandating that they become a public trust attraction simply because of their proximity to the water. (158)

349. COMMENT: The rules will have severe consequences for everyone that seeks to enjoy the waterways in New Jersey. Over 70 marinas provided written comments in opposition to these rules and nearly every comment was ignored or trivialized. Business owners that have been operating for decades were told by the Department that these rules will not add additional burdens and that they will not have a negative impact on these businesses. Saying something that is false many times does not make it true. A policy decision appears to have been made by the Department to ignore the realities of this situation and fabricate its own rationale and reality. The rules and proposed amendments are still arbitrary, capricious, unreasonable and contrary to law. Every marina owner that has commented has stated that these rules will have a serious and negative impact on their livelihood and on their property rights, and many of them are already in the process of selling. Yet the Department still refuses to acknowledge this and accept the fact that there will be marinas that will be unable to comply with these rules. They will simply choose to never upgrade or maintain their properties or they will simply sell to a private

developer of they can no longer remain in business. In light of its stated rationale in support of these rules, the Department seems willing to allow this to happen and place another hurdle in front of small business persons trying to run the very businesses that afford access to our marine resources. (21, 40, 49, 87, 88, 89, 105, 124, 137, 139, 190)

350. COMMENT: The commenter stated that he received a coastal permit for the construction of a new marina on August 10, 2004. He said that the permit required him to provide public access on a 24-hour basis and to construct walkways. He said that because of the public access requirement he has decided not to construct the marina and therefore a number of new marina slips will not be available to the public. The commenter also stated that he would probably sell the property to a developer who would build condominiums. (68)

351. COMMENT: When the marina industry is attacked, the boating industry, including boat manufacturing is attacked. Currently, the boating industry is suffering severely. A lot of boat manufacturers in New Jersey are closing and relocating to North Carolina where the work force is less expensive and the regulations less restrictive.

The money in the marina industry is not good. Marina owners are selling to private individuals for development of condominiums. The conversion of marinas to condominiums is hurting the boat manufacturers because they need a place for their boats to go and boat owners need a place to go and enjoy their boats. (93)

352. COMMENT: The Department must reconsider the implementation of these rules as they relate to marinas. Apply for a permit and follow the public access rules or stop improving the marina and allow it to deteriorate; the consequences will be the same for each. Financially, small marinas will be forced to sell most likely to a developer. (30, 103, 149, 106, 163)

353. COMMENT: The marina industry of New Jersey already faces a shortage of slips, storage, and repair facilities. Many operators will give serious thought to selling to

developers resulting in a loss of even more access to water for boating recreation and services. (34, 182, 194)

354. COMMENT: As a result of these rules, many marina owners may decide to sell to developers. Owning a marina is a difficult business, and this rule may simply drive them out. (11, 41, 195)

355. COMMENT: The proposed regulations will discourage marina owners from improving their facilities and make them sell their properties to developers which will remove current access to the water and diminish water access to the public. (9, 12, 20, 168, 156)

356. COMMENT: If marinas in New Jersey are sold off one-by-one out of frustration with the restrictions placed on them, there will be fewer boat owners. A great part of the economy at the shore communities with marinas is brought via boat owners. (147)

357. COMMENT: As a result of the public access rules, marinas will be sold for residential developments and the very basis for the new rules will be negated. (74, 83)

358. COMMENT: Marinas are fragile enough in the current environment. The land is ripe for housing. Slips are expensive and prices will go up to support the proposed rules, assuming that the marina is not sold to make way for more intensive development. (16)

359. COMMENT: As a result of this rule, the losers will be marina owners who lose income and property; boaters due to loss of facilities and even higher costs; and the State of New Jersey due to lower tax revenues. The winner will be the New Jersey Builders Association and high dollar developers because of the increased availability of waterfront properties vacated by present day marina owners. (173)

360. COMMENT: Marinas in New Jersey have been closing at a rapid pace. Many have sold out and become condominiums. Property taxes, insurance and the cost of ever-

increasing environmental regulations are making it increasingly difficult for marinas to make a reasonable profit. This new proposal would require hiring of 24-hour security, as well as the loss of precious square footage for winter boat storage. Without profit marina owners will sellout.

One small marina in Monmouth Beach was sold to a developer who constructed two waterfront mansions. Now two families enjoy the water where fifty families once could. When a marina closes a boat repair facility disappears as well. Thus even people with trailerable boats will give up their pastime, as they cannot locate someone to repair their vessel. This is another example of fewer residents accessing the water. (162)

361. COMMENT: These rules are a death penalty for waterfront small businesses, particularly boat yards and marinas. (18, 113)

362. COMMENT: Public access to the waterfront will decrease when residential development becomes the only economically viable alternative for marina properties. (32)

363. COMMENT: Boat owners will leave the State due to the increasing costs associated with this rule. If enough people leave the State, marinas will close, restricting access to the water. Marinas that remain will be further burdened by the requirements of the rule. Taxes, employment and local revenue will all be negatively impacted by this rule. (27, 58)

364. COMMENT: The Department is creating a hardship for marina owners and their customers. With the enforcement of this rule, decreasing the capacity of marina operations throughout the State, many facilities will most likely close their operations and/or sell to developers who will convert precious marina space to housing and other non-water dependent uses. (27, 73, 97, 150)

365. COMMENT: If these regulations are adopted, marinas will undoubtedly be sold, leaving unprotected land to be built on by developers who are not concerned with the environment. (104)

366. COMMENT: The real danger these rule represent is the permanent loss of marina space to the boating community. Once a marina gives way to private development, which the application of these rules will encourage, the marina is gone forever. (91, 137)

367. COMMENT: During the last 15 years, the amount of marina space has been decreasing as marinas give way to private development. This trend has resulted in decreased, not increased public access to the waterfront as former marinas become mega-mansions for the privileged few. The implementation of these rules will only serve to exacerbate this already bad situation, as marinas will choose to sell to private developers rather than comply with impractical regulations. (91, 199)

368. COMMENT: Adoption of these rules will force marinas owners to just close their businesses and sell to developers which will serve as a net decrease to the public access to the waterways. (2, 31, 102, 110, 121, 122, 152, 159, 188)

369. COMMENT: Marina owners would rather sell out to the waiting developers than give up the property rights that they have worked so hard for. (18)

370. COMMENT: Two likely outcomes of this rule will be either the purchase of marinas by private developers or not improving the marina property. Either option is unacceptable. (31)

371. COMMENT: In reality, with the sale of marina properties to developers there will only be more housing and condominium construction, blocking further both the view and access of the waterways. The result of this rule is the end of private marinas in New Jersey, the reduction of the boating public due to the lack of facilities and the loss of revenue both in taxes and in the monies spent by boaters at local businesses. (163)

372. COMMENT: Existing marinas, businesses that already provide meaningful and quality access to the public, should immediately be exempted from the rule. (2, 13, 21, 27, 30, 40, 49, 70, 87, 88, 89, 91, 103, 105, 121, 122, 124, 137, 139, 155, 163, 187, 190)

373. COMMENT: Existing marinas should be exempt from the public access rules. The economic and environmental consequences are simply more than a small marina can sustain and remain in business in New Jersey. (109)

374. COMMENT: While it is recognized that New Jersey's waterways should be enjoyed by everyone, these proposed rules should nonetheless exempt all of New Jersey marinas from the public access rule, as they will no doubt put both family owned and large corporate marinas out of business and cost New Jersey much needed revenues. (200)

375. COMMENT: All interests, specifically the right of public access to the waterway, should be served and protected as afforded by the Public Trust Doctrine. However, at times, certain rules may not be appropriate causing undue hardship and loss of its basic intentions. Small marina operators should be exempted from the rule. This relief will serve the public interest in allowing them to continue to exist and provide the public with the accommodations necessary to promote safe and continued growth in the boating industry. (201)

376. COMMENT: Marinas in New Jersey should not have to give a portion of their property to the State for the service of public access, which the marinas already provide, to obtain a permit. The Coastal Zone Management rules' public access rules should be repealed or revised to exclude marinas, as marinas already provide access and services to the public for the enjoyment of the waterways. (146)

377. COMMENT: Implementation of these marina access regulations, which have significant potential for driving boaters off New Jersey's waterways and marinas out of

business, appears to be counterproductive. Private marinas should be exempt from the rules. (14, 117)

378. COMMENT: Private marinas should be exempt from the public access requirements. If an exemption is not viable, then a formula for measuring the potential benefit of additional public access against the potential costs to small private marinas, their owners and clients and the communities in which they operate should be developed and a means and process for seeking individual marina exceptions should be realistically available to private marina owners. (176)

379. COMMENT: The stated purpose of the proposed amendments is to ensure access while ensuring that the required access does not create a dangerous condition for members of the general public seeking to enjoy the waterfront. There is a need to strike a better balance between public access rights and the conduct of water dependent uses such as marinas.

Since marina operations are necessary for the public to be able to use their boats to enjoy the public's resources in a meaningful way, marinas are already furthering public access by providing the means for the public to enjoy boating, sunbathing, fishing and other water sports. (87)

380. COMMENT: Marinas in New Jersey are a unique and essential part of New Jersey's waterfront communities and by definition already provide and preserve public access. Marinas provide slips, boat ramps, fuel services, supplies, fishing access and more. They all provide important boating infrastructure and services that allow people seeking recreation on or near the water to safely begin and end their excursions. Marinas provide greatly different forms of access than beaches and amusement parks. (6, 21, 25, 32, 33, 38, 52, 54, 55, 61, 68, 81, 94, 118, 145, 147, 151, 191)

381. COMMENT: The proposed regulations constitute a diminution of the rights of the marinas owners, operators and customers and an expansion of the general public's rights. This proposed action constitutionally exceeds the authority afforded the executive

branch. There is no constitutional or legislative sanction for these proposed regulations. (21, 38)

382. COMMENT: Marinas already provide public access. They offer services which allow those seeking recreation on the water to participate in their activities safely and enjoyably. Their success depends on it. To give the public greater rights to marina property than marina customers is unfair and unreasonable. The Public trust rights rule and proposed amendments go well beyond the original intent of the rule. (49, 104, 205)

383. COMMENT: The Department should reconsider the public access rule as it pertains to marinas. Too many unintended negative consequences will result. Marinas are an important part of the New Jersey economy and already offer reasonable public access for the many boaters of the State. (20, 102, 168)

384. COMMENT: Marinas provide access to the water for the boating public and should not be forced to adopt these new rules. (121)

385. COMMENT: Marinas are already furthering access to the waters of New Jersey and the proposed amendments would only reduce the number of marinas and significantly increase the cost of docking and storing boats. (14, 17)

386. COMMENT: No marina disagrees with the forms of public access they already provide. This is created by the nature of the business, providing access to the water through slip rentals. The Department needs to find a better balance between public access that meets the specific site and the needs of the public. For example, you cannot swim in a marina because it is not safe. You cannot put a boat or kayak in the water at a swimming beach also due to safety issues. Some activity just does not work in all locations and this needs to be addressed. (87)

387. COMMENT: There are a number of examples and documents from Department staff which clearly outline the amount of public access that was being required for

marinas applying for coastal permits prior to the posting of these rules. Despite not having legislative or judicial sanction to do so, the Department created a new proposed rule, which has to some extent already been enforced. To the extent the Department has imposed certain of these proposed conditions on permit applicants, the Department has retrospectively implemented this new rule without going through the appropriate administrative process.

The Department has improperly and unlawfully been applying the proposed rules without being considered by the public. For example, Department staff has been improperly applying these rules by requiring a 10-foot wide walkway/path that must also be subject to a conservation restriction. (21, 38)

388. COMMENT: These regulations will result in a massive taking of land from small business owners who paid for, maintained and paid taxes on the affected land. Nowhere in the history of the application of the Public Trust Doctrine, or in New Jersey Common Law, has such a direct taking of utilized land from small businesspersons been proposed. Proposed new N.J.A.C. 7:7E-8.11 purports “to make it clear that public trust rights also includes the use of inter alia, marina property for various uses, and the right to largely unfettered perpendicular and linear access. In fact, it creates this new entitlement to the detriment of the rights of marina owners, operators and customers. (21, 38)

389. COMMENT: The public access rules are a taking of small businesses. The State is trying to steal marina owner’s land and put a deed restriction on the property that was purchased with grants to the State of New Jersey. (68)

390. COMMENT: The government is infringing on private property rights. Marina owners purchased their properties and the government under this rule is devaluing their property simply because it failed to provide services needed. (195)

391. COMMENT: The rules are “eminent domain” in that the State is taking property from marina owners and asking them to pay more for their insurance because of the

increased risk of injury and potential damage that could be caused by the public having access to the property. (130)

392. COMMENT: The rules require a surrender of marina owner's property rights. (78)

393. COMMENT: Marina owners are being forced to relinquish owned property to the State with zero compensation. (186)

394. COMMENT: The Department contends that the required unrestricted access to privately owned marinas and the required deed easement proposal is based on their interpretation of common law back to the Magna Carta and early Roman times. The Department chooses to ignore more recent landmark documents such as the Declaration of Independence, the U.S. Constitution and the Bill of Rights. It is quite clear that the 5th Amendment was adopted to prevent the taking of private property by the government. Hundreds of thousands of dollars in taxpayer money and hundreds of hours of State employee time will be wasted defending this blatantly unconstitutional action. (20, 168)

395. COMMENT: If the State takes a private property such as a marina for the purposes of public access, will the State have to purchase that property? (189)

396. COMMENT: The State has no right to take 10 feet of a marina's shoreline. This is property that was paid for through hard work and years of ownership. The State is setting a dangerous precedent. (58)

397. COMMENT: The application of public access rules on private marinas seems to be an unconstitutional taking of private property. All private property is private. (91)

398. COMMENT: The State is violating marina owners' property rights by taking their property for public access. The taking of property in the United States is illegal. (124)

399. COMMENT: The Department through these regulations proposes to take the private property of marina owners for public access without fair compensation. The Department has stated that it will deny marina owners any and all permits to develop and maintain their properties if the marina owners do not give away their waterfront for public access. It is wrong for the Department to ask marina owners to give away their waterfront property without fair compensation. It is also wrong for the Department to bully marina owners by withholding permits, thus preventing marina owners from developing and enjoying their businesses, livelihoods and properties. (98)

400. COMMENT: The public access rules and proposed amendments do not provide relief or protection for marina owners. The proposed amendments only provide flexibility to marinas in the route of the public boardwalk needed to satisfy the linear access requirement. The proposed amendments do not address the paramount issue of marina owners having to surrender private property rights through deed restrictions and liability concerns. (49)

401. COMMENT: The commenter stated that he is aware that he does not own the waterways. He stated that in the almost 50 years he has owned his marina he was never told that he did not own a portion of his property; he had to deed restrict five to ten feet of it for the purposes of public access; and he had no right to build on it. (40)

402. COMMENT: The commenter stated that marinas are just the first group of waterfront property owners to have their property taken away and that it is important for marina owners to fight against these regulations by whatever means are available. The commenter read into the hearing record the following quote by Martin Niemoller:

In Germany, the Nazis came for the Communists, and I didn't speak up because I wasn't a Communist. Then they came for the Jews, and I didn't speak up because I wasn't a Jew. Then they came for the trade unionists, and I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics, and I didn't speak up because I was Protestant. Then they came for me, and by that time, there was no one left to speak for me.

The commenter stated that the Department is coming for his marina property and in a very short time will most likely be coming for other waterfront properties. The commenter states that he is standing up for the right of marina owners to keep their property and run their businesses in a safe and appropriate manner. In addition, the commenter stated that he is also speaking for all waterfront property owners, even homeowners. The commenter stated that as a waterfront property owner he has the right to quiet enjoyment of things that belong to him and that the Department's rule is contrary to this bit of common sense. (98)

403. COMMENT: The Public trust rights rule and amendments are supposed to enhance public access; however, they are driving a wedge between those that can afford boats, and those that cannot. The rule is a taking of land for public use. If the intention of the rule is to have the average income person be able to walk behind boats at marinas that they can not afford, then the rule has served its purpose. (139)

404. COMMENT: The public access rules are nothing more than a land grab. These rules are not going to help the public at all. Marinas provide services to the public such as pumpout services and in some cases this service is provided free of charge. Marinas provide restrooms. If this proposal is adopted, such practices will stop. (9)

405. COMMENT: The commenter opposes the Stormwater Management rules that require marina owners to get a coastal permit for their boat washing facilities. The requirement for a coastal permit then triggers the need for a marina to provide public access. (80)

406. COMMENT: The discharge of hull pressure wash wastewater will soon be prohibited under the Department's stormwater regulations. In most cases, this will require the marina operator to install a specialized boat wash wastewater recycling system, which typically includes the construction of a subsurface catch basin. To install a catch basin, a coastal permit is required which in turn triggers the public access rule's conservation restriction, parking and 24-hour access requirements. These systems will

significantly improve water quality, sediment quality and the health of the biota in the adjacent receiving waters.

Why does such a minimal impact that has a positive environmental benefit of eliminating toxic paint discharges, have to subject the public to the seemingly unrelated public access rule? The Department's holding up the installation of these systems by requiring public access is counter to the Department's mission as a steward for the environment. Enhanced public access is a laudable goal; however the reality of the new public access rule is that it will result in the continued discharge of hull pressure wash wastewater until it is prohibited in 2009. In this case, the Department is implementing a public access program at the expense of the environment. (48)

407. COMMENT: Would beachfront homeowners in Loveladies and Beach Haven allow the public access to their private properties? Why are marinas different than these properties? (76, 158, 179, 180)

408. COMMENT: Will oceanfront property owners be required to provide restroom facilities as are marinas under this rule? (158)

409. COMMENT: If the public access rules apply to marinas, then they should apply to all waterfront development whether it be club or residential. (138)

410. COMMENT: Forcing marinas to provide public access means that wealthy beachfront property owners will not have to do so and will never be asked to do so, right? (128)

411. COMMENT: The State has apparently chosen to draw the line when it comes to requiring public access at single family homes. Why are marinas required to provide access when single family homes are not? (101)

412. COMMENT: Why must marinas incur additional expense and impact to their private properties when the privileged few who live in waterfront homes on large lots are not required to provide public access? (91)

413. COMMENT: In-depth signage will be required to distinguish between the location of the public access easement and private property at marinas. (137)

414. COMMENT: The public access rules emanated from a court case involving the actions of hotels along the shore in North Jersey charging unreasonable amounts for people to access the beaches in front of their property. The rules go beyond the intentions of the court case which directed the Department to issue rules to preclude hotels along New Jersey's beaches from effectively barring the public from the beaches. Therefore, the public access rules should not apply to marinas. (143, 164)

415. COMMENT: The Federal Standards Analysis for the public access rules proposed on November 6, 2006 and adopted December 17, 2007 (see 38 N.J.R. 4750(a), November 6, 2006) and for the amendments proposed on December 17, 2007 (see 39 N.J.R. 5145(a), December 17, 2007) conclude that the new rules and proposed amendments do not exceed any Federal standards or requirements. This is false. The requirements greatly exceed any Federal requirements by partially taking property and by the creation of a misleadingly titled "Conservation Easement." The US Army Corps of Engineers is involved in many dredging projects that impact these marinas. Nowhere do they require that the marina owners and operators surrender property to the general public. (21, 40, 49, 87, 88, 89, 105, 124, 137, 139, 190)

416. COMMENT: The development of private homes that limit access to large areas of waterway to only the homeowners is of much greater consequence than privately owned marinas that offer thousands of people in Monmouth County access to the water. (11)

RESPONSE TO COMMENTS 91 THROUGH 416: The Public Access and Marina Safety Task Force Act, N.J.S.A. 13:19-38 et seq., signed into law on September 10, 2008,

imposes a moratorium on the implementation of the provisions of N.J.A.C. 7:7E-3.50, 7.3, and 8.11, as applied to marinas, as such rules and regulations were adopted by the Department on December 17, 2007. The law establishes the Public Access and Marina Safety Task Force and charges it with the evaluation and study of the efficacy, practicability and feasibility of the December 17, 2007 amendments to these regulations and the amendments proposed on December 17, 2007 that are subject to this adoption as they relate to public access at marinas. The task force is also charged with ascertaining the most reasonable and equitable manner in which to proceed with a public access and marina use policy. The task force is required to report to the Governor and Legislature by December 31, 2010. The legislation delays implementation of the applicability of the amendments to the public access rule related to marinas until January 1, 2011. In light of this legislation, the Department is not adopting the proposed amendments at N.J.A.C. 7:7E-8.11(f)8 and 9, which pertained only to marinas, and which allowed the public access area to be reconfigured in certain situations. The Department is amending the rule at N.J.A.C. 7:7E-8.11(c) on adoption to clarify that, as a result of the Public Access and Marina Safety Task Force Act, the Public trust rights rule, adopted on December 17, 2007 (see 39 N.J.R. 5222(a)), does not apply to marinas, but the Public access to the waterfront rule N.J.A.C. 7:7E-8.11 that was in effect prior to that date, which has been incorporated on adoption as Appendix 6 to this chapter, does apply. The Department is also amending the rule at N.J.A.C. 7:7E-3.50(c) on adoption to clarify that, as a result of the Public Access and Marina Safety Task Force Act, the Lands and waters subject to public trust rights rule, adopted on December 17, 2007 (see 39 N.J.R. 5222(a)), does not apply to marinas until January 1, 2011.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

Federal Standards Analysis

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. require that State agencies which adopt, readopt or amend State regulations that exceed Federal standards or requirements include in the rulemaking document a comparison with Federal law. The

Federal Coastal Zone Management Act (16 U.S.C. §§1450 et seq.) was signed into law on October 27, 1972. The Act does not set specific regulatory standards for development in the coastal zone; rather, it provides broad guidelines for states developing coastal management programs. These guidelines are found at 15 CFR Part 923. The guidelines do not specifically address the review standards that should be applied to new coastal development in order to preserve and protect coastal resources and to concentrate the pattern of coastal development. They simply provide a planning and management process, without establishing development standards for development in the coastal area. Therefore, the Department has concluded that the amendments being adopted at this time do not exceed any Federal standards or requirements of the Federal Coastal Zone Management Act.

Many shore protection projects subject to the Public trust rights rule are conducted through a joint funding agreement between the State of New Jersey and the United States Army Corps of Engineers (Corps), and often include local governments as well. Such projects are authorized by Congress through Federal Water Resources Development Acts, generally passed annually. In a document entitled “Water Resources Policies and Authorities: Federal Participation in Shore Protection,” released June 1989 (Corps Regulation CECW-PR Regulation No.1165-2-130, ER 1165-2-130), the Corps established standards for federal participation in shore protection, paramount among them the requirement for public use of the shore protection projects. The Corps requires that for Federal participation in any shore protection project, perpendicular accessways be provided at one-half mile intervals within the area of the project. For a project located along the Atlantic Ocean, Raritan, Sandy Hook or Delaware Bay, the adopted rule requires that perpendicular accessways be provided at one-quarter mile intervals for the entire waterway on which the project is proposed. The Department amendments adopted at this time do not change the one-quarter mile interval but change the spatial extent of the accessways to the area of the project. Since this is consistent with the federal standards as it relates to the area within which accessways must be provided, no further analysis is required.

CHAPTER 7E

COASTAL ZONE MANAGEMENT RULES

7:7E-3.50 Lands and waters subject to public trust rights

(a) – (b) (No change.)

(c) *[(Reserved)]* *In accordance with the moratorium imposed under the Public Access and Marina Safety Task Force Act, N.J.S.A. 13:19-38 et seq., the requirements of this section shall not apply to marinas until January 1, 2011.*

(d) – (e) (No change.)

7:7E-8.11 Public trust rights

(a) – (b) (No change.)

(c) *[(Reserved)]* *In accordance with the moratorium imposed under the Public Access and Marina Safety Task Force Act, N.J.S.A. 13:19-38 et seq., the requirements of this section shall not apply to marinas until January 1, 2011. Prior to January 1, 2011 marinas shall be subject to the requirements of this section in effect as of December 16, 2007, incorporated by reference herein as Appendix 6.*

(d)– (e) (No change.)

(f) The permanent on-site public access required at (d) and (e) above may be modified in the following circumstances. However, in no case shall such modification constitute permanent relinquishment of public trust rights of access to and use of tidal waterways and their shores.

1. – 6. (No change from proposal.)

7. Where development of a new, or at an existing single family home, duplex, or associated accessory development, or associated shore protection structure is proposed that meets (f)6i above and is located on a site that includes a beach on which beach and dune maintenance activities are proposed or a beach on or adjacent to the Atlantic Ocean,

Sandy Hook Bay, Raritan Bay or Delaware Bay and their shores, public access along and use of the beach and the shore shall be provided. Additional requirements may be imposed as a condition of Shore Protection Program funding, pursuant to (p) below; *or*

*[8. Where development at a legally existing commercial marina, including marinas operated by public agencies, commissions and authorities, is proposed and the Department determines that a linear public access area along the entire shore of the tidal waterway is not practicable based on site constraints, the linear public access that would be required in accordance with (d)1 above shall be reconfigured and enhanced to accommodate site constraints. This provision does not apply where the marina includes more than one dwelling unit, or non-marine related commercial uses, such as restaurants;

9. Where development of or at a marina is proposed and the Department determines that a fork lift, travel lift or other heavy boat moving equipment precludes a continuous linear public access area along the entire shore of the tidal waterway, the linear public access area shall follow the shortest possible alternate route around the lift or similar operation; or]*

[10.] *8.* Where development impacting a facility subject to a Federal or State homeland security statutory scheme is proposed and the Department determines, upon consultation with the Office of Homelands Security and Preparedness, that perpendicular public access and/or a linear public access area along the entire shore if the tidal waterway is not practicable because it poses an unacceptable homeland security risk:

i. The linear public access that would be required in accordance with (d) above on site shall be reconfigured and enhanced to address such homeland security risk; or

ii. If public access is site is not practicable in accordance with (f)8i above, alternate public access of comparable use to the public shall be provided at a nearby off-site location.

(g) –(i) (no change.)

(j) Parking shall be provided for the public to access tidal waterways and their shores, except where public access is not required in accordance with (f)6 above or the project is limited in scope in accordance with (f)7. Subsection (p) below contains the

parking standards for municipalities that participate in Shore Protection Program funding. Subsection (q) below contains the parking standards for municipalities, counties and nonprofits that receive Green Acres funding for a Green Acres project site. All other development shall provide parking as follows:

1. For developments which propose to reduce existing on-street or off-street parking that is used by the public for access to tidal waterways and their shores, mitigation for the loss of these public parking areas shall be required at a minimum creation to loss ratio of 1:1. This mitigation shall occur through the creation of new parking spaces within the proposed development site or at another location within 250 feet of the proposed development site, except as provided at (j)1i below:

i. For public roadway projects, where mitigation cannot be accomplished within 250 feet of the proposed development site, mitigation shall occur within one-quarter mile of the proposed development site;

2. – 3. (No change.)

(k) – (o) (No change.)

(p) Municipalities that participate in Shore Protection Program funding through a State Aid Agreement shall:

1. (No change.)

2. Comply with (c) through (m) above, as applicable for municipally held lands on or adjacent to tidal waterways and their shores. Compliance with (e) above will be required only at a shore protection project, including beach nourishment proposed along one of the waterways listed at (e) above and not for other municipally held lands;

3. Prior to commencement of construction, including beach nourishment, provide public access to all tidal waterways and their shores on or adjacent to lands held by the municipality;

4. Prior to commencement of construction, including beach nourishment, adopt the ordinance and record the Public Access Instrument approved by the Department pursuant to (p)1 above;

5. Prior to commencement of construction, including beach nourishment, repeal any ordinance that limits access to or use of tidal waterways and their shores or is in conflict

with the Public Trust Doctrine;

6. (No change.)

7. For shore protection projects, including beach nourishment, described in the State Aid Agreement and located on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and their shores:

i. Prior to commencement of construction, including beach nourishment, record in accordance with N.J.A.C. 7:7E-8A.4, a Department-approved conservation restriction that maintains the following areas for public access in perpetuity:

(1) The entire shore protection project, except those portions of jetties and groins on which public access is not required in accordance with (p)7ii below, and where the shore protection project is a structure, the entire beach or shore outshore of the project;

(2) – (3) (No change.)

ii. Immediately upon completion of project construction, including beach nourishment, provide public access to the entire shore protection project, and where the shore protection project is a structure, the entire beach or shore outshore of the project. Public access is not required to those portions of jetties and groins where it is demonstrated that access poses an extraordinary risk of injury;

iii. Immediately upon completion of construction, including beach nourishment, provide public accessways to the shore protection project, and where the shore protection project is a structure, the entire beach or shore outshore of the project. The linear distance between public accessways shall not exceed one-quarter mile for the length of the shore protection project, as measured generally parallel to the beach/shore, except as provided at (p)7iii(1) below. In areas where existing public accessways, including, but not limited to, streets, roads, paper streets, paths, trails, easements, dune walkovers/walkways, piers and other dedicated public rights-of-way are closer than one-quarter mile apart, the number of existing access points shall not be reduced;

(1) The linear distance between public accessways can exceed one-quarter mile provided:

(A) The average interval between public accessways to the shore protection project within the municipality is one-quarter mile; and

(B) (No change.)

iv. Immediately upon completion of *project* construction, *[including beach nourishment,]*the public restroom facilities that are identified in the approved public access plan required in accordance with (p)1 above *[, for the length of the shore protection project and within one quarter mile of the shore protection project,]* *and located within the project area and within one-quarter mile of the project area, as measured generally parallel to the beach/shore,* shall be open to the public for use. The restroom facilities shall be open to the public for use from the beginning of Memorial Day weekend through September 30, at minimum.

v. Immediately upon completion of *project* construction, *[including beach nourishment]* provide parking sufficient to accommodate public demand to access the *[shore protection]* project and the beach capacity of all beaches *[within and outshore of the shore protection project]* within the municipality *along that portion of the waterway on which the project occurs*. The Department may allow a reduction in the number of parking spaces required upon documentation that the municipality has exhausted all possibilities to provide the required number of parking spaces. Alternative methods of providing adequate parking that must be considered include land acquisition, restriping or reconfiguring parking, removing existing parking restrictions and providing remote/offsite parking with shuttle service; and

vi. Immediately upon completion of construction, including beach nourishment, install Department approved public access signs at each public accessway to the shore protection project, except at jetties and groins that are not designed for public use. Signs shall be maintained in perpetuity by the participant in Shore Protection Project funding;

8. For shore protection projects, including beach nourishment projects, described in the State Aid Agreement and located on or adjacent to waterways other than the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and their shores:

i. Prior to commencement of construction, including beach nourishment, record in accordance with N.J.A.C. 7:7E-8A.4, a Department-approved conservation restriction that maintains the following for public access in perpetuity:

(1) The entire shore protection project, except for those portions of jetties and groins on which public access is not required in accordance with (p)8ii below;

(2) The public accessways held by the municipality that lead to or provide access to the shore protection project and are not listed in the Public Access Instrument approved by the Department pursuant to (p)1 above, including paths, trails, dune walkovers/walkways, and piers, and public accessways proposed pursuant to iii below; and

(3) (No change.)

ii. Immediately upon completion of construction, including beach nourishment, permit public access to the entire shore protection project. Public access is not required to those portions of jetties and groins where it is demonstrated that access poses an extraordinary risk of injury;

iii. Immediately upon completion of construction, including beach nourishment, provide accessways along a linear shore protection project, including a beach nourishment project, of one-half mile or more in length at an interval not to exceed one-quarter mile as measured parallel to the shore protection project structure or nourished beach;

iv. Immediately upon completion of *project* construction, *[including beach nourishment]* provide parking sufficient to accommodate public demand to access the entire *[shore protection]* project, taking into account the availability of existing public parking; and

v. Immediately upon completion of construction, install Department approved public access signs at the site of the shore protection project, except at jetties or groins that are not designed for public use. Signs shall be maintained in perpetuity by the participant in Shore Protection Project funding;

9. Within 180 days of completion of an emergency shore protection project, including beach nourishment, comply with (p)1 through 8 above; and

10. (No change.)

(q) To be eligible for Green Acres funding for a Green Acres project site, a municipality, county, or nonprofit organization shall comply with (q)1 through 5 below. For the purposes of this subsection, the “Green Acres project site” is the land that is the subject of an application for Green Acres funding that contains or is adjacent to tidal waterways and their shores. Applicants for Green Acres funding for a Green Acres

project site shall:

1. Submit to the Department for approval, as part of an application for Green Acres funding for a Green Acres project site, a public access plan that meets the requirements at N.J.A.C. 7:7E-8A.2 and 8A.3, and if the applicant is a municipality, a Public Access Instrument that meets the requirements of N.J.A.C. 7:7E-8A.5. In lieu of these documents, any applicant may submit a certification described at (q)1i below.

i. The certification shall certify that, within 90 days of receipt of the letter from the letter from the Department pursuant to N.J.A.C.7:36 notifying the applicant that its application for Green Acres funding has been approved, the applicant shall:

(1) Submit such public access plan;

(2) Comply with (q)2 through 5 below; and

(3) For an applicant that is a municipality, submit a Public Access Instrument complying with N.J.A.C. 7:7E-8A.5;

ii. An applicant that is a municipality or county shall also submit with the plan, a draft ordinance adopting the public access plan;

2. If not submitted as part of an application for Green Acres funding for a Green Acres project site all documents at (q)1i and ii above, within 90 days of receipt of the letter from the Department pursuant to N.J.A.C. 7:36 notifying the applicant that its application for Green Acres funding has been approved, submit to the Department for approval. The Department will not enter into a Green Acres project agreement pursuant to N.J.A.C. 7:36 prior to Department approval of the public access plan and Public Access Instrument. As applicable;

Recodify existing 2. – 4. as 3. – 5. (No change in text.)

6. In addition to complying with (q)1 through 5 above, an applicant that is a municipality shall:

i. (No change in text.)

ii. Prior to disbursement of Green Acres funding for a Green Acres project site, adopt the ordinance adopting the public access plan required at (q)1ii above and record the Public Access Instrument approved by the Department pursuant to (q)1 or 2 above, respectively;

7. In addition to complying with (q)1 through 5 above, prior to disbursement of

Green Acres funding for a Green Acres project site, an applicant that is a county shall adopt an ordinance adopting the public access plan approved by the Department pursuant to (q)1 and 2above;

Recodify existing 7. – 9. as 8. - 10. (No change in text.)

11. Immediately upon disbursement of Green Acres funding for a Green Acres project site, record a Department-approved conservation restriction maintaining the following areas for public access in perpetuity. All lands held by the municipality or county for recreation and conservation purposes also must be listed on the Recreation and Open Space Inventory for the municipality and county, respectively, as required by Green Acres as a condition of funding pursuant to N.J.A.C. 7:36.

- i. The project site;
- ii. The public accessways held by the municipality that lead to or provide access to tidal waterways and their shores and are not listed in the Public Access Instrument, including paths, trails, dune walkovers/walkways, and piers and public accessways pursuant to (q)9 above; and
- iii. All parking areas identified in (q)12 below;

Recodify existing 11. and 12. as 12. and 13. (No change in text.)

SUBCHAPTER 8A INFORMATION REQUIRED TO DEMONSTRATE COMPLIANCE WITH THE PUBLIC TRUST RIGHTS RULE, N.J.A.C. 7:7E-8.11; CONSERVATION RESTRICTIONS AND PUBLIC ACCESS INSTRUMENTS

7:7E-8A.2 Information requirements for public access plans submitted by municipalities to participate in Shore Protection Program funding or be eligible for Green Acres funding.

- (a) (No change.)
- (b) A public access plan shall include the following:
 1. – 3. (No change.)
 4. A fee schedule for use of bathing and recreational facilities and safeguards, at tidal waterways and their shores held by the municipality if fees are charged.

i. For shore protection projects, including beach nourishment, a fee schedule shall also be provided for lands subject to a conservation restriction at N.J.A.C. 7:7E-8.11(p)7i(1) and 8i, if a fee is charged;

5. – 7. (No change.)

(c) In addition to the information required in (b) above, a public access plan required pursuant to N.J.A.C. 7:7E-8.11(p) shall include the following:

1. (No change.)

[2. A current tax map identifying all existing and proposed restrooms and parking held by the municipality and made available to the public to access and use tidal waterways and their shores;]

[3.] *2.* For shore protection *[projects, including]* *and* beach nourishment, *projects* located on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and their shores, a *[site plan]* *current tax map* identifying:

i. All existing and proposed public restrooms *within the municipality* located within one-quarter mile of the landward edge of the beach *or* dune *[or shore protection project for the length of the shore protection project and one quarter mile beyond each end of the shore protection project]* *along the waterway on which the project occurs*. The site plan shall provide that:

(1) There is at least one restroom facility every one-half mile*[for the length of the shore protection project]* *within the municipality* as measured generally parallel to the beach except in accordance with *[3i(3)]* *(c)2i(4)* below;

(2) A restroom facility shall be located within one-quarter-mile of each municipal boundary. The one-quarter mile from the municipal boundary can be increased provided the one-quarter mile maximum distance from the landward edge of the beach or dune to the restroom is reduced by the amount the one quarter mile is increased and the distance from the municipal boundary is no greater than three-eighths mile;

[(2)] *(3)* Each restroom facility shall be located within one-quarter mile of the landward edge of the beach *or* dune *[or shore protection structure, whichever is most landward]*; *and*

[(3)] *(4)* The one-half mile interval between restrooms required at

(c) *3i(1)**2i(1)* above can be increased provided:

(A) The average interval between restrooms *within the municipality* is one-half mile, as measured generally parallel to the beach;

(B) The one-half mile maximum distance from the landward edge of the beach, *or* dune *[or shore protection structure, whichever is most landward,]* to the restroom is reduced by the amount the distance between restrooms is increased; and

(C) (No Change.)

(4) Where a shore protections project extends to or beyond a municipal boundary, a restroom facility shall be located within one-quarter mile of the municipal boundary in each municipality. The one-quarter mile from the municipal boundary can be increased provided the one-quarter mile maximum distance from the landward edge of the beach or dune to the restroom is reduced by the amount the one-quarter mile is increased and the distance from the municipal boundary is no greater than three-eighths mile; and]

ii. *[All existing and proposed parking for the public to access the shore protection project , and where the shore protection project is a structure, the entire beach or shore outshore of the project]* *All existing and proposed parking for the public to access the project and the beach along the waterway on which the project occurs*; and

4. *3.* For shore protection *[projects, including]* *and* beach nourishment*[,]* *projects* located on or adjacent to waterways other than the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and their shores, a site plan identifying all existing and proposed parking for the public to access the entire shore protection project *and/or nourished beach*.

(d) (No change.)

*APPENDIX 6

PUBLIC ACCESS REQUIREMENTS FOR MARINAS THROUGH DECEMBER 31, 2010

(a) 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.

(b) Coastal development adjacent to all coastal waters, including both natural and developed waterfront areas, shall provide permanent perpendicular and linear access to the waterfront to the maximum extent practicable, including both visual and physical access. Development that limits public access and the diversity of the waterfront experiences is discouraged.

1. All development adjacent to water shall, to the maximum extent practicable, provide, within its site boundary, a linear waterfront strip accessible to the public. If there is a linear waterfront accessway on either side of the site and the continuation of which is not feasible within the boundaries of the site, a pathway around the site connecting to the adjacent parts, or potential parts of the waterfront path system in adjacent parcels shall be provided.

2. Municipalities that do not currently provide, or have active plans to provide, access to the water will not be eligible for Green Acres or Shore Protection funding.

3. Public access must be clearly marked, provide parking where appropriate, be designed to encourage the public to take advantage of the waterfront setting, and must be barrier free where practicable.

4. A fee for access, including parking where appropriate, to or use of publicly owned waterfront facilities shall be no greater than that which is required to operate and maintain the facility and must not discriminate between residents and non-residents except that municipalities may set a fee schedule that charges up to twice as much to non-residents for use of marinas and boat launching facilities for which local funds provided 50 percent or more of the costs.

5. All establishments, including marinas and beach clubs, which control access to tidal waters shall comply with the Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

6. Public access, including parking where appropriate, shall be provided to publicly funded shore protection structures, beaches nourished with public funds and to waterfronts created by public projects unless such access would create a safety hazard to the user. Physical barriers or local regulations which unreasonably interfere with access to, along or across a structure or beach are prohibited.

7. Development located within the Hudson River Waterfront Special Area shall

comply with the additional requirements of the Hudson River Waterfront rule, N.J.A.C. 7:7E-3.48.

8. Development along Raritan Bay within Monmouth County shall be consistent with the Bayshore Waterfront Access Plan (Monmouth County Planning Board and the Trust for Public Land for NJDEP, 1987).

9. Development within the Atlantic City Special Area shall comply with the additional requirements of the Atlantic City rule at N.J.A.C. 7:7E-3.49.

10. Development elsewhere in the coastal zone shall conform with any adopted municipal, county or regional waterfront access plan, provided the plan is consistent with the Coastal Zone Management rules.

11. The Department may require some or all of the public access portion of a site to be dedicated for public use through measures such as a conservation restriction.

12. Development adjacent to coastal waters shall provide fishing access within the provision of public access wherever feasible and warranted.

13. Development adjacent to coastal waters shall provide barrier free access within the provisions of public access wherever feasible and warranted by the characteristics of the access area.

14. For developments which reduce existing on-street parking that is used by the public for access to the waterfront, mitigation for the loss of these public parking areas is required at a minimum of 1:1 within the proposed development site or other location within 250 feet of the proposed project site.

(c) At sites proposed for the construction of single family or duplex residential dwellings, which are not part of a larger development, public access to the waterfront is not required as a condition of the coastal permit.

(d) Rationale: New Jersey's coastal waters and adjacent shorelands are a valuable limited public resource. they are protected by New Jersey's Shore Protection Program and patrolled by the New Jersey Marine Police which are both financed by all State residents.

Existing development often blocks the waters from public view and/or makes physical access to the waterfront difficult or impossible. In addition, private ownership

of land immediately inland from publicly owned tidelands often limits public access to those lands and the waters which flow over them. This has limited access to and enjoyment of public resources by citizens who, through taxes, support their protection and maintenance.

The Public Trust Doctrine, which was enunciated by the New Jersey Supreme Court in Neptune v. Avon-by-the-Sea 61 NJ 296 (1972) and reaffirmed and expanded in Van Ness v. Borough of Deal 78 NJ 174 (1978) requires that tidal water bodies be accessible to the general public for navigation, fishing and recreation. The New Jersey Supreme Court, in Matthews v. Bay Head Improvement Association has extended the public right established by these cases to beaches which, though privately owned, are leased to an improvement association and are operated in a public manner. The most significant aspect of the decision is that it was not based entirely on the quasi-public nature of the Bay Head Improvement Association, but on the unique importance of the public's right of access to the shore, regardless of ownership. The Court said "recognizing the increasing demand for our State's beaches and the dynamic nature of the Public Trust Doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary. While the public's rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the Public Trust Doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand." DEP, therefore, has an obligation to ensure that the common law right is not abridged. This obligation remains even after the State has conveyed tidelands to a private owner.

The Public Trust Doctrine requires that access be provided to publicly funded shore protection structures and that such structures not be used to impede access. The New Jersey Supreme Court in Borough of Neptune v. Avon-by-the-Sea 61 NJ 296 1972) held that:

"...at least where the upland sand area is owned by a municipality a political subdivision and creature of the state and dedicated to public beach purposes, a modern court must take the view that the Public Trust Doctrine dictates that the

beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible. (61 N.J. at 308-309, emphasis added).”

Such structures, when located on wet sand beaches, tidally-flowed or formerly tidally-flowed lands are subject to the Public Trust Doctrine. Once built, most publicly funded shore protection structures become municipal property and are, therefore, subject to the Doctrine in the same manner as municipally owned beaches. The developed waterfront, due to its past industrial utilization, has been closed to the people that live adjacent to the waterfront. DEP intends to promote a horizontal network of open space at the water which could be visualized as a narrow strip used for walking, jogging, bicycling, sitting or viewing, which is contiguous, even if the path must detour around existing or proposed industry due to security needs or the lack of pre-existing access. These linear walkways will connect future and existing waterfront parks, open space areas, and commercial activities. The goal of the rule is the piecing together of a system that will provide continuous linkages and access along the entire waterfront.*