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## **ENVIRONMENTAL PROTECTION**

### **LAND USE MANAGEMENT**

#### **LAND USE REGULATION PROGRAM**

##### **Coastal Zone Management**

###### **Public Access**

###### **Adopted Amendment: N.J.A.C. 7:7-16.9**

Proposed: September 6, 2016, at 48 N.J.R. 1752(a).

Adopted: August 22, 2017, by Bob Martin, Commissioner, Department of Environmental Protection.

Filed: August 24, 2017, as R.2017 d.174, **without change**.

Authority: N.J.S.A. 13:19-1 et seq., 12:3-1 et seq., and 12:5-3; and P.L. 2015, c. 260.

DEP Docket Number: 07-16-07.

Effective Date: September 18, 2017.

Expiration Date: November 14, 2021.

The Department of Environmental Protection (Department) is adopting amendments to the Coastal Zone Management (CZM) Rules that update several provisions in the Department's requirements to provide public access to tidal waterways and their shores to address the Superior Court, Appellate Division's decision in *Hackensack Riverkeeper, Inc. and NY/NJ Baykeeper v. New Jersey Department of Environmental Protection*, 443 N.J. Super. 293 (App. Div. 2015), *certif. denied* 226 N.J. 212 (2016) (*Hackensack*), subsequent amendments to the Coastal Area

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Facility Review Act (CAFRA), N.J.S.A. 13:19-1 et seq., and the Waterfront Development Act, N.J.S.A. 12:5-3, effectuated by P.L. 2015, c. 260.

The rule adoption can also be viewed or downloaded from the Department's website at [www.nj.gov/dep/rules](http://www.nj.gov/dep/rules).

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

The Department held one public hearing on the notice of proposal on Wednesday, September 28, 2016, at 6:00 P.M., at the City of Long Branch Municipal Building, Council Chambers, Long Branch. Ms. Virginia Kop'kash, Assistant Commissioner, Land Use Management, was the hearing officer for the public hearing. Nine persons provided written comments and/or oral comments at the public hearing. The hearing officer recommended that the amendments be adopted without change. The Department accepts the recommendation. The hearing record is available for inspection in accordance with applicable law by contacting:

Office of Legal Affairs

Attention: DEP Docket No. 07-16-07

Department of Environmental Protection

401 East State Street, 7th floor

Mail Code 401-04L

PO Box 402

Trenton, NJ 08625-0402

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

The following persons timely submitted comments on the notice of proposal:

1. Michael Arentoft
2. Dr. Kirk Barrett
3. Thomas Beaton
4. Margaret Betz-Cadigan
5. Edward Bonanno, Esq., Pringle Quinn Anzano, P.C.
6. Fred Brueggemann, Key Harbor Marina
7. Dennis Cafiero
8. Herbert Califano
9. Michael Cerra, New Jersey State League of Municipalities
10. Kyle Clonan, Monmouth County Division of Planning
11. Michael Coca
12. Harold Cox
13. Melissa Danko, Marine Trades Association
14. Raymond Deluca
15. Tim Dillingham, American Littoral Society
16. Roger Dreyling
17. Douglas Fleisher, Friends of Liberty State Park
18. Sally Jane Gellert
19. Elizabeth George-Cheniara, New Jersey Builders Association
20. Robert Greiss

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21. Craig Hall
22. Edward Harrison, III, Baywood Marina
23. Karen Hillberg
24. Dr. Michael Hozik
25. Samantha Jones, Chemistry Council of New Jersey
26. Paul Kiernan, Monmouth County Planning Board
27. Robert Kingsley
28. Dr. Robert Kinoian
29. Beth Kwart, Surfrider Foundation
30. Tom Leaming, Leaming's Marina
31. Richard Leister
32. Veronica Leone
33. Vince LePore
34. Andrea Leshak, Esq., Hackensack River Keeper and NY/NJ Baykeeper
35. Debbie Mans, NY/NJ Baykeeper
36. Dr. Jay Marowitz
37. Robert Moss
38. Susan Muller
39. Shirley Neill
40. Dennis Nicholson
41. Sam Pesin, Friends of Liberty State Park
42. Gloria Pinkney

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43. Thomas Robb
44. Dr. Lincoln Rowley
45. Captain Bill Sheehan, Hackensack Riverkeeper
46. Richard Sroczyński
47. Teresa Stimpfel
48. Laura Tracey-Coll
49. Jean Toher
50. Marion Tunney
51. Candi Vene
52. Christopher F. Vota
53. Robert Walden
54. William Weisgarber
55. Bill Williams, Surfrider Foundation
56. Wendy Williamson
57. Jamie Zaccaria, New Jersey Sierra Club
58. Andrew Zimmerman
59. The Sierra Club submitted an identical comment letter on behalf of 464 individuals. The Department has designated this standard letter as commenter 59. Where individuals added comments in addition to those appearing on the form letter, their names are listed separately in the commenter list.

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### **General Comments**

1. COMMENT: The readoption of the public access rules is supported. (30)

RESPONSE: The Department acknowledges this comment in support of the rules. The Department notes that the public access rules are part of the Coastal Zone Management Rules, N.J.A.C. 7:7, and subject to the expiration date applicable to that rule chapter. The amendments adopted at this time do not constitute readoption of the rules or change in any manner the chapter-wide expiration date.

2. COMMENT: The 2016 proposed public access rules revisit the disastrous policies of the past and mimic weaker Federal protection standards, threatening public access rights. (49)

3. COMMENT: The proposed rules are concerning because they are too similar to the prior rules that were opposed by the public. The rules should be amended to address more of the public's concerns, including more regulatory standards and enforcement provisions to ensure that more extensive public access is provided along New Jersey's tidal waters. (57)

4. COMMENT: The proposed rules do not provide sufficient safeguards for public access and do not address the public access concerns of working groups and stakeholders. (54)

5. COMMENT: The amendments to the public access regulations fail to reflect the concerns expressed by those who routinely access the coast but do not own waterfront property. In general, these rules continue to restrict the types and location of access associated with regulatory actions under CAFRA and the Waterfront Development Act. (15)

RESPONSE TO COMMENTS 2 THROUGH 5: The adopted rule, at N.J.A.C. 7:7-16.9(a), establishes that no authorization or approval under the CZM Rules shall be deemed to relinquish

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public rights of access to and use of lands and waters subject to public trust rights in accordance with N.J.A.C. 7:7-9.48. In addition, the adopted rule requires that public access be provided on a nondiscriminatory basis and provides universal goals for public access, including that all existing access must be maintained to the maximum extent practicable. The rules additionally provide guidance on the types of activities that will be considered to provide public access. The Department has amended provisions concerning Municipal Public Access Plans (MPAPs) and deleted the option for a municipality to create a Municipal Public Access Fund. The core provisions, principles, and requirements of the public access rules are maintained. The Department believes that the rules, as adopted, provide for meaningful public access when development is authorized under the CZM Rules and serve to encourage municipalities to voluntarily maintain and expand public access throughout the coastal zone. Therefore, the rules will not limit or reduce public access to the waterfront. Instead, the adopted rules will, at a minimum, maintain existing public access as well as enhance the public's enjoyment and use of the beaches, ocean, bays, and other tidal waterways in coastal municipalities with or without approved MPAPs.

6. COMMENT: Residents of both beach communities and urban centers along rivers and bays will be denied recreational opportunities as a result of the restricted public access proposed in these rules. (46)

7. COMMENT: The proposed rules allow municipalities and industry to limit public access to beaches even though public tax dollars are used to replenish and restore those beaches. (4, 12, 16, 21, 27, 39, 40, and 44)

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RESPONSE TO COMMENTS 6 AND 7: The rules are intended to provide a comprehensive means for the public to have broad, diversified, safe, and reasonable access to tidal waterways throughout the State and continue to protect access to New Jersey's beaches and waterways. The rules recognize the variations in geography and the differing needs of the public in different portions of the State subject to these rules. To strike a better balance between public access rights, public safety, and the conduct of various water-dependent uses, the rules allow alternative methods of access based upon the type of use proposed (i.e. commercial, industrial, or residential), and whether the development is new or part of an existing development, regardless of whether the development is in an urban area. For decades, the Department has required that beach nourishment projects and other shore protection projects built with public funds be open to the public. This requirement has not changed. In addition, the Department routinely works with the United States Army Corps of Engineers (USACE) on Federally funded shore protection projects to ensure that access is provided consistent with Federal requirements tailored to local considerations. This practice will continue under these rules.

8. COMMENT: The public access rules should provide increased, affordable beach access for disabled people. (14)

RESPONSE: The rules at N.J.A.C. 7:7-16.9(t) requires that development on or adjacent to tidal waterways and their shores provide barrier free access where feasible and warranted by the character of the site. For example, ramps could be included in walkway designs to make the beach wheelchair accessible. As discussed in the Response to Comments 9 through 11 below, in accordance with applicable statutory provisions at N.J.S.A. 40:61-22.20, municipalities



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bordering the Atlantic Ocean, tidal water bays, or rivers that own or have other legal right to lands bordering those waters are granted authority over those lands, including the right to charge and collect reasonable fees for use of those lands and any related facilities for access to the beach by those 12 years of age or older. N.J.S.A. 40:61-22.20.b allows such a municipality, at its discretion, to reduce or eliminate fees for enumerated classes of people, including persons who meet the disability criteria for disability benefits under Title II of the Federal Social Security Act, 42 U.S.C. § 401 et seq. In addition, and consistent with the Public Trust Doctrine and cases that stem from it, the rules at N.J.A.C. 7:7-16.9(v)1 provide that fees charged at any beach subject to the CZM Rules shall not exceed that which is necessary for the operation and maintenance of any bathing and recreational facilities and safeguards, taking into consideration basic support amenities, such as lifeguards, toilets, showers, and trash removal.

9. COMMENT: The public access rules seem to discriminate against the less affluent people of New Jersey, providing little free or affordable access in deference to developers and those who can afford to live along the shore. (4, 7, 14, 21, 23, 24, 28, 36, and 52)

10. COMMENT: For the elderly residents of New Jersey, the public access rules should provide free, convenient access with plenty of services. (47)

11. COMMENT: Badges should not be required to access the beach. (50)

RESPONSE TO COMMENTS 9 THROUGH 11: In 1955, a statute was enacted that authorized New Jersey municipalities bordering the Atlantic Ocean, tidal water bays, or rivers that own or have easement rights to lands bordering on those waters to charge a fee to beachgoers to account for maintenance and safety costs associated with them. N.J.S.A. 40:61-22.20 grants

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municipalities “exclusive control, government and care” of any municipally owned lands on the Atlantic Ocean, tidal waters, bays, or rivers and boardwalks, bathing and recreational facilities, safeguards, and equipment. This law requires that fees charged for access to the beach and recreational grounds must be reasonable and prohibits fees for children under the age of 12 years. Municipalities covered by the statutory provision are provided the authority to reduce or eliminate, at the municipality’s discretion, fees for specifically enumerated groups of individuals, including those over 65 or those who are disabled. The 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. The rules, at N.J.A.C. 7:7-16.9(v), ensure that fees are reasonable at all beaches subject to the CZM Rules and that no fee is charged solely for access to or use of tidal waterways and their shores. See *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc. et al*, 185 N.J. 40 (2005) (addressing the Department’s ability to review beach fees).

12. COMMENT: The rules should promote increased public access and clean beaches/facilities for the public to enjoy, which will create much needed jobs. (20)

RESPONSE: The principal benefit of the rules, as amended, is to maintain a regulatory framework, consistent with recent court rulings and subsequent responsive legislation, to ensure coastal development provides public access to tidal waterways and their shores. Expenditures on public access provide an investment in New Jersey’s coastal tourism industry, which makes a major contribution to the State’s economy and supports thousands of jobs. Public access to New Jersey’s beaches is an important component of the tourism industry, and the rules, as amended,

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will confirm and strengthen the continuation of that access. The rules provide the most cost-effective means to meet the State's public access obligations while also supporting New Jersey's coastal tourism industry.

### **Public Hearing**

13. COMMENT: Scheduling only one public hearing for the rule proposal excludes the northern and extreme southern parts of the State. It is very difficult for the people who are most concerned about their rights under the Public Trust Doctrine to travel from Hudson, Bergen, Essex, Atlantic, and Cape May Counties to Long Branch during rush hour to comment on these rules.

(45)

14. COMMENT: By holding only one public hearing on rules that may prevent public access, the Department appears to be catering to the wealthy. (1)

RESPONSE TO COMMENTS 13 AND 14: While neither the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 et seq., nor the statutory provisions authorizing this proposal required a public hearing for this proposal, due to the extensive comments received in response to the 2012 rule, the Department recognized the public interest in this matter and nonetheless held a public hearing and selected Long Branch as a central location that is also accessible via public transportation. The Department, in accordance with the APA, provided a 60-day public comment period on the proposal from September 6, 2016, to November 5, 2016, during which time written comments on the proposal were accepted. Because the public hearing was held early in the comment period, persons who were unable to attend the hearing but wanted to express their opinion had over one month after the public hearing to submit their comments. The Department

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believes that adequate opportunity for comment was provided, allowing all commenters to review the proposal and comment taking into account the complexity of this proposal without the need for further public hearings.

15. COMMENT: The public hearing in Long Branch should have been better publicized. (56)

RESPONSE: In addition to publication of the notice of proposal in the New Jersey Register, the Department provided additional notice of the rulemaking on its website, to media outlets maintaining a press office to cover the State House Complex, to 180 other media outlets throughout the State, and by e-mail to the Department's rulemaking listserv. The notice provided through each of these methods included information on the date, time, and location of the public hearing. To subscribe to receive notice of Department rulemaking through the Department's listserv, see <http://www.nj.gov/dep/rules/subscribe.html>.

### **Public v. Private Beaches**

16. COMMENT: Stronger public access rules are needed. All beaches and waterways should be public, not reserved for the private use of a limited group. (18, 24, 27, and 48)

17. COMMENT: The Department should ensure that there is mandatory, enforceable public access at all of New Jersey's beaches. (58)

RESPONSE TO COMMENTS 16 and 17: The Department has the authority, through review of a CAFRA or Waterfront Development permit application, to require public access to tidal waterways and their shores as a condition of approving development in the coastal zone. The adopted rule reinforces the Department's commitment to providing public access by laying out a

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framework with requirements to provide meaningful public access to the beaches and tidal waterways that must be satisfied for issuance of a permit both in municipalities with Department-approved MPAPs and those without. The adopted rule continues to uphold Public Trust case law requiring public access to be provided on a nondiscriminatory basis and provides universal goals for public access, including maintenance of all existing access to the maximum extent practicable, and guidance on the types of activities that will be considered to provide public access. However, the Department does not have the authority to simply mandate public access at all beaches in New Jersey.

18. COMMENT: The rules should prohibit rebuilding homes adjacent to the beach because beaches should not be owned by private individuals or families. (50)

RESPONSE: Permits issued by the Department under CAFRA or the Waterfront Development Law cannot grant ownership rights nor do the statutes authorize the Department to abrogate pre-existing ownership rights. Thus, the Department cannot alter whether a beach is privately or publicly owned. The Department has been delegated oversight authority of any development within the CAFRA area, including any structures on or adjacent to a beach. However, CAFRA, at N.J.S.A. 13:19-5.2.b, exempts from regulation the reconstruction of any development that is damaged or destroyed, in whole or in part, by fire, storm, natural hazard, or act of God, provided that such reconstruction is in compliance with existing requirements or codes of municipal, State, and Federal law.

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19. COMMENT: Tidal lands cannot be held by individuals or corporations because they shift over time and cannot be defined. Yet, when storm events occur, individuals and special interest groups seek State and Federal funds, collected from taxpayers, to restore and reclaim these lands. The State of New Jersey is supposed to be a fiduciary, but the Department is not performing its job by denying public access. (44)

RESPONSE: Although the location of tidally flowed lands is not static, the extent of these lands, past and present, may be determined using a variety of resources, including historical maps, deed descriptions, property surveys, vegetation, and aerial photography.

In accordance with the Public Trust Doctrine, the State holds all lands currently or formerly flowed by the tide in trust for the public. All lands now or formerly below the mean high water line and shores above the mean high water line are subject to public trust rights. Absent a riparian grant previously sold by the State to a property owner, land flowed by the tide is not owned by individuals or corporations. Tidal lands not subject to a riparian grant may be licensed or leased from the State to be used for development such as docks, but the State continues to be the owner of such lands. Access to lands and waters subject to public trust rights must be provided in accordance with the public access rule at N.J.A.C. 7:7-16.9, in accordance with the special area rule at N.J.A.C. 7:7-9.48.

The Department does not allow access to areas of the shore that are replenished following storm events to be denied. Instead, as explained in the Response to Comments 6 and 7, the Department requires beach nourishment projects and other shore protection projects built with public funds to be open to the public. In addition, the Department routinely works with the USACE on Federally funded shore protection projects to ensure that access is provided

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consistent with Federal requirements tailored to local considerations. This practice will continue under these rules.

Beach replenishment has a public benefit and therefore is beneficial not only to the individuals immediately adjacent to the nourished beach but also to the public as a whole. New Jersey's beaches not only provide recreation for beachgoers and fishermen and support a multi-billion-dollar tourism industry, but also play a much more critical role when the State is faced with a coastal storm. Healthy beaches provide protection from these natural disasters by acting as a buffer between the pounding surf and the homes, businesses, and infrastructure along the coast.

20. COMMENT: The rules should clarify that the public is at least allowed to cross the beach at private waterfront properties. (18)

RESPONSE: As noted in the Response to Comments 16 and 17 above, the Department lacks the authority to simply mandate or enforce public access on upland properties. The Department can, however, review and require public access, potentially even over upland property, in accordance with its authority when issuing a CAFRA or Waterfront Development permit.

The specific rights and protections recognized under the Public Trust Doctrine continue to develop through individual court decisions. For that reason, the amended 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 Department recognizes that the factors described in the *Matthews vs. Bay Head Improvement Association*, 95 N.J. 306 (1984) Supreme Court case may be applicable to a particular piece of property and these

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factors are applied on a case-by-case basis in the context of determining how much public access will be required in a CAFRA or Waterfront Development permit.

### **Legal Compliance**

21. COMMENT: The Department's decision to amend the public access rules to comport with the *Hackensack* decision is supported. (9)

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

22. COMMENT: The public access rules are unlawful and will not withstand judicial scrutiny. The New Jersey Superior Court, Appellate Division's December 2015 opinion invalidated the Department's 2012 public access rules. See *Hackensack Riverkeeper, Inc. v. N.J. Dep't of Env'tl. Prot.*, 443 N.J. Super. 293 (App. Div. 2015), *certif. denied* 226 N.J. 212 (2016). By proposing amendments to those invalid rules, the Department is ignoring the Court's decision and initiating a program for which it has no legislative authorization. While the proposed amendments are consistent with aspects of the Appellate Division ruling, the ruling also clearly identified a lack of legal backing for the entirety of the Department's 2012 rules, finding that the Coastal Area Facility Review Act (CAFRA) "cannot justify the broad and pervasive regulatory regime imposed by the Rules taken as a whole" and concluding that "the Rules must be stricken." Thus, the expansive nature of the 2012 rules, characterized by various exemptions and lacking any legislative guidance, caused the Court to strike down the rules as *ultra vires*. While the Court recognized the Department's underlying permitting authority to require public access as a condition of granting site-specific development permits and the Legislature explicitly granted this authority to the Department in P.L. 2015, c. 260, enacted in January 2016, the passage of



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P.L. 2015, c. 260 did not address several aspects of the Appellate Division's opinion, including the coercive nature of the Municipal Public Access Plan (MPAP) program, the lack of authority for a Public Access Fund, and importantly, the "broad and pervasive" nature of the Department's 2012 rules. In February 2016, the Department filed a motion requesting that the Appellate Division reconsider its opinion based on the Department's argument that the legislative changes in P.L. 2015, c. 260 had retroactively authorized its 2012 rules. The Appellate Division denied the Department's motion for reconsideration on March 10, 2016. Subsequently, on June 14, 2016, the New Jersey Supreme Court denied the Department's petition for certification and lifted a stay of the opinion previously granted by the Appellate Division. As such, the 2012 rules are no longer in effect, and the Legislature in P.L. 2015, c. 260 did not provide the Department with the authority to promulgate sweeping public access rules. (5, 31, 34, 35, and 45)

23. COMMENT: The Department does not have the proper authority from the Legislature to enact these public access rules. (43)

24. COMMENT: The proposed rules are concerning because they are too similar to the prior rules that were rejected by the court. (57)

25. COMMENT: The Department's proposed public access rules are opposed because they ignore mandates and implement positions that are not in the interest of environmental protection. (51)

26. COMMENT: The proposed rules ignore the 2015 New Jersey Superior Court opinion (*Hackensack*) that invalidated the Department's 2012 public access rules and are an attempt to initiate flawed public access regulations that the Department has no legislative authority to enact. (17, 29, 33, 41, 54, and 55)

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RESPONSE TO COMMENTS 22 THROUGH 26: The amended public access rules adopted at this time are not unlawful. The amendments to the public access rules were proposed in response to the Appellate Division's December 2015 decision in *Hackensack* and the Legislature's prompt and unanimous enactment in response to that decision. While the Appellate Division questioned the Department's ability to require public access in its CAFRA permits, *see supra*, 443 N.J. Super. 293 (noting restrictions such as requiring signage and permanent set asides of areas for public access), under P.L. 2015, c. 260, the Legislature expressly granted the Department the authority under both CAFRA and the Waterfront Development Law to consider and require public access in its permitting decisions.

The Department also disagrees that the rule amendments have resulted in public access rules that are too sweeping. Following the enactment of P.L. 2015, c. 260, the Department now holds the express authority to regulate public access through its development permitting decisions as well as the implied powers necessary to effectuate the intent of the Legislature in that enactment. The public access rule amendments implement this grant of authority, and the rules set forth when and what type of public access will be required in the Department's permitting decisions. If the Department has approved a municipality's MPAP, the Department will generally defer to the municipality's MPAP in determining what type of public access would be required in its permitting decision, except for those types of developments identified at N.J.A.C. 7:7-16.9(f)1 through 8. While a municipality may impose public access requirements that exceed the Department's under their authority pursuant to the Municipal Land Use Law (N.J.S.A. 40:55D-1 et seq.), general police powers (N.J.S.A. 40:48-1 et seq.), or the authority of municipalities bordering on the Atlantic Ocean, tidal water bays, or rivers to exercise exclusive

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control over municipal beaches and other facilities (N.J.S.A. 40:61-22.20), the Department will not deny a permit based upon the public access not satisfying the additional requirements specified in the MPAP. In such a case, enforcement of the additional local requirements would be left to the municipality through necessary approvals granted at the local level.

Nevertheless, the adopted amendments respond to the Appellate Division's concerns on several fronts. By recognizing the right of municipalities to require additional public access beyond those specified in the Department's rules, the adopted amendments acknowledge the authority of municipalities in the implementation of public access pursuant to the Municipal Land Use Law, general police powers, and the authority of municipalities bordering on the Atlantic Ocean, tidal water bays, or rivers to exercise exclusive control over municipal beaches and other facilities. The rule amendments also remove provisions pertaining to municipal public access funds, as the Appellate Division found those unauthorized by the Municipal Land Use Law, and the funds were not addressed by the Legislature in P.L. 2015, c. 260. Additionally, the adopted amendments further reinforce that, while municipal input in public access planning through the MPAP process is encouraged, MPAPs are entirely discretionary. For those municipalities that choose to seek Department approval of an MPAP, the adopted amendments simplify reporting requirements for implementation.

The Department also considered the Appellate Division's concerns regarding the availability of Green Acres funding and general permits, but did not amend the regulations. As explained further in the Response to Comment 47, the Green Acres funding requirement is simply that municipalities provide, or have active plans to provide, public access that complies with the requirements of the CZM Rules to be eligible for Green Acres funding. While obtaining

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Department approval of an MPAP necessarily satisfies the demonstration that the municipality has “active plans to provide, public access to the waterfront and to tidally-flowed and dry sand areas subject to the Public Trust Doctrine, consistent with the requirements of the Coastal Zone Management Rules,” since MPAPs are not a requirement under the public access rule, municipalities can comply with the public access rule without having to adopt an MPAP. Similarly, although municipalities must have an adopted MPAP to obtain a general permit for beach and dune maintenance, municipalities without an MPAP can obtain an individual permit to conduct the same activities; the only difference is the amount of application paperwork to be submitted and the application fee. Therefore, neither the Green Acres funding nor the general permit provisions of the rule are coercive.

The rules, as amended, are consistent with the Appellate Division’s decision, P.L. 2015, c. 260, and the Public Trust Doctrine. The rules additionally provide a simplified process to allow municipal participation in crafting and implementing public access solutions that address the particular needs of that area.

27. COMMENT: The Department’s proposed amendments, like its 2012 rules, violate *Borough of Avalon v. N.J. Dep’t of Env’tl. Prot.*, 403 N.J. Super. 590, 608 (App. Div. 2008), *certif. denied* 199 N.J. 133 (2009), in which the Court invalidated challenged portions of the Department’s public access rules. Specifically, the Court found the requirement that a municipality must allow public access to tidal waterways and their shores “at all times,” unless the Department grants permission to close an area, to fall outside the Department’s authority. The Court found that the “at all times” rule infringed on the broad general police power that the Legislature had delegated

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to municipalities (*Id.* at 598, citing *McGovern v. Borough of Harvey Cedars*, 401 N.J. Super. 136 (App. Div. 2008)). The Court held that in CAFRA, the Legislature did not give the Department sweeping powers to regulate the public's access to Public Trust Doctrine tidal lands (*Borough of Avalon*, 403 N.J. Super. at 601, 607); those powers ultimately remain with the New Jersey Legislature. This holding was confirmed by the Court in *Hackensack* (443 N.J. Super. at 310). Thus, when the Legislature delegates broad power to municipalities, as it has done with police and zoning powers, the Department cannot infringe on that authority unless the Legislature has explicitly directed it to do so. To date, the Legislature has taken no action, including under P.L. 2015, c. 260, to give the Department the explicit authority that it would need in order to promulgate the current rule proposal. (5, 31, 34, 35, and 45)

RESPONSE: The Department disagrees that the rule amendments are inconsistent with the Appellate Division's ruling in *Borough of Avalon v. N.J. Dep't of Env'tl. Prot.* The Appellate Division's ruling in *Borough of Avalon* was limited to the Department's rules requiring municipalities to provide 24-hour access to tidal waters and requirements regarding parking and restroom facilities. The proposed rule amendments do not require 24-hour access or impose any general requirements regarding parking or public restrooms; rather, any public access requirements are imposed only in the context of CAFRA and Waterfront Development permitting decisions. As explained in the Response to Comments 22 through 26 above, the rule amendments are consistent with Appellate Division's ruling in *Hackensack* and the subsequent legislative response to that ruling, which reaffirmed the Department's authority to require public access in CAFRA and Waterfront Development permits.

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28. COMMENT: The Department's proposed public access rules reestablish an ill-conceived, general approach to public access along tidal waters. The Department should adopt public access regulations that require case-by-case, individualized determinations made in the context of coastal permit applications, ensuring an appropriate balance between the public's rights under the Public Trust Doctrine and private property rights. The factors and framework for such individualized determinations, established in the New Jersey Supreme Court's decisions of *Matthews vs. Bay Head Improvement Association*, 95 N.J. 306 (1984) and *Raleigh Ave. v. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005), should include the demand for public access in a particular area, the character and nature of the development in the area, the nature and extent of access traditionally afforded in the area, and the availability of public beaches and their adequacy to meet demand. Implementing rules that impose public access requirements that do not follow the framework established by the New Jersey Supreme Court would be contrary to the Public Trust Doctrine. (19)

RESPONSE: In order to create a predictable and efficient permitting process, the Department must establish standards for providing public access at developments in the coastal zone. The Department does not consider the adopted rules to be too general; the adopted rules establish a framework to provide meaningful public access to the State's citizens and encourage municipalities to develop plans that ensure this access while considering each locality's specific circumstances. The rules also provide a number of options that an applicant may choose from to provide public access, thus providing flexibility to the applicant and an opportunity for consideration of the nature of the proposed development and site. While the factors listed by the commenter do influence the type of public access that may be provided on a site or throughout a

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municipality, general requirements to provide and/or preserve access are necessary to ensure that development does not inhibit the public from exercising their rights under the Public Trust Doctrine.

### **Senate Resolution 2490**

29. COMMENT: The Legislature is going to be addressing public access issues in S2490, the passage of which will make the proposed amendments, public hearings, and written statements moot. It is troubling that the Department is proceeding with this matter considering this event.

(33)

30. COMMENT: The Department should rescind the proposal and instead support the efforts of the Public Access Task Force and the resulting consensus bill, S2490/A4092, that would provide the Department with the legislative authority to promulgate public access rules that protect the public's longstanding rights under the Public Trust Doctrine as well as the interests of the regulated community. The consensus bill, resulting from months of deliberations among the Public Access Task Force, which is comprised of more than 60 advocates, business community representatives, and citizens, is a commendable first step toward crafting comprehensive public access legislation. Yet, at the joint Senate Environment and Energy Committee and Assembly Environment and Solid Waste Committee hearing on August 18, 2016, where the consensus public access bill was discussed, the Department was the only party that testified in strong opposition to it, claiming that a consensus bill is impossible. The Department's opposition to S2490/A4092 undermines the hard work of the Public Access Task Force and the efforts of the Legislature in drafting and introducing the consensus bill. It appears the Department is strongly

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opposed to any consensus bill, even if a range of stakeholders, including advocates, fishing groups, the business community, and municipalities, were to agree. The Department's refusal to work with stakeholders and the Legislature to address legal and policy issues is incomprehensible and may ultimately prevent the State from addressing this important issue. (5, 11, 29, 31, 32, 34, 35, 38, 41, 42, 43, 45, 53, 54, 55, and 57)

RESPONSE TO COMMENTS 29 AND 30: Comments regarding proposed legislation are beyond the scope of this rulemaking, which includes amendments to the Department's public access rules consistent with the currently existing legislative scheme. The Department proposed these rules to implement P.L. 2015, c. 260, and to amend its rules consistent with that legislative delegation and the Appellate Division's *Hackensack* decision. While alternate means of achieving the goals of protecting public trust rights and improving public access opportunities may be identified in the future, either through legislative enactment or through cooperative efforts, the Department does not believe that it is appropriate to delay implementation of efforts to improve public access while awaiting any such action. In particular, the substance of possible future amendments and/or new legislation is uncertain at this time. Should further public access legislation be enacted, the Department will propose new amendments if and as necessary to implement that legislation.

### **Public Trust Doctrine**

31. COMMENT: The proposed rules, the MPAPs, and the enforcement of public access are so flawed they violate the Public Trust Doctrine. (33)



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32. COMMENT: The proposal violates the Public Trust Doctrine and is invalid because the Department has breached its duty to ensure that all New Jersey residents have equal and full access to New Jersey's waterfront areas. Under the Public Trust Doctrine, the State and municipalities hold their tidal waterfront areas in trust for all New Jersey citizens to use (*Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 303 (1972)). Here, in assuming a duty it had never been delegated by the Legislature, the Department has breached that coopted duty by failing to ensure that all residents have equal access to New Jersey's waterfront areas. In proposing this rulemaking, the Department has demonstrated why it is the role of the Legislature to guarantee the rights and needs of all New Jersey residents under the Public Trust Doctrine. (5, 31, 34, 35, and 45)

33. COMMENT: The proposed changes to the public access rules exceed the requirements necessary to comply with recent court and legislative actions, weakening the ability of the State to protect the public's rights to access under the Public Trust Doctrine. At worst, the rules will prevent the public from accessing the waters and shorelines of the State. At best, the rules fail to advance opportunities to address the growing need for access and to incorporate policies to effectively carry out the State's responsibility as the public's trustee by protecting and enhancing the public's ability to access tidal waters and shorelines in a meaningful way. (15)

RESPONSE TO COMMENTS 31 THROUGH 33: The rule amendments do not violate the Public Trust Doctrine. The rule amendments are consistent with Department authority the Legislature reaffirmed in P.L. 2015, c. 260, to consider and require public access in permits issued under CAFRA and the Waterfront Development Law. The rule amendments apply equally along all tidal waters, both in the Coastal Area and in other tidal waters, including in the northern

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portion of the State and along tidal rivers, while providing an opportunity for local municipalities to participate in tailoring public access opportunities to ensure that the best possible opportunities are provided to meet the needs of that local area. The rules also continue to be consistent with public trust case law requiring that public access be provided on a non-discriminatory basis and that all levels of government in New Jersey seek to create and enhance opportunities for public access to tidal waterways and their shores, on a non-discriminatory basis (see, for example, N.J.A.C. 7:7-16.9(b)1, (t), and (y)2). The public access rules will result in increased, not decreased, public access along all tidal waters throughout the State, and are consistent with the Public Trust Doctrine.

34. COMMENT: The rights of the public under the Public Trust Doctrine are not fully represented in the proposed rules, which give more weight to the financial concerns of developers, property owners, beach clubs, and municipalities than to the public's right to access waterways and beaches. The rules will allow the least expensive public access option, which will provide the least access. For example, citing excessive costs, municipalities will only be compelled to construct walkways to fulfill access requirements under the rules rather than investing resources in providing parking, restrooms, boat launches, or docks or developing waterfront park facilities. (57)

35. COMMENT: The New Jersey Supreme Court has ruled that all tidal waters belong to the people of New Jersey, but the proposed changes to the CZM Rules violate the Public Trust Doctrine by allowing municipalities and industry to restrict access, infringing on the public's

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right to access those waterways. The proposed rules must be withdrawn immediately. (1, 2, 4, 7, 8, 12, 14, 16, 18, 21, 23, 24, 27, 28, 36, 39, 40, 44, 46 through 50, 52, 56, 58, and 59)

36. COMMENT: In 2010, Executive Order No. 2 set common sense principles with the goal of achieving a better balance between protecting the public and nurturing free enterprise. However, common sense principles cannot supplant the tenets of the Public Trust Doctrine. In these proposed rules, the Department is disregarding public trust rights to perpendicular access to the water under the Public Trust Doctrine by replacing the term “public trust rights” with the term “public access” and supporting the establishment of private, for-profit businesses, such as restaurants, bars, and other recreational and amusement facilities, along tidal waterways as legitimate public access opportunities. (43)

RESPONSE TO COMMENTS 34 THROUGH 36: The adopted rules do not limit the rights the public has under the Public Trust Doctrine. The rules incorporate options to protect these rights when development is proposed on and/or adjacent to the State’s tidal waterways and their shores. In order to strike a better balance between public access rights, public safety, and the conduct of various desirable water-dependent uses, the adopted rules allow alternative methods of access based upon the type of use proposed, such as commercial, industrial, or residential, and whether the development is new or part of an existing development.

In addition, the adopted rules do not give control of public access to the municipalities. The rules establish goals and basic requirements for public access and are intended to encourage municipalities to take an active role in designing and ensuring public access to beaches and tidal waters in ways that will work best for their respective circumstances. The municipality must obtain the Department’s approval of the MPAP in order for the plan to be operational. The

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adopted rules enhance public access opportunities by encouraging municipalities to work with the Department to develop plans to help ensure that the public's access needs are met in a comprehensive and systematic approach. The Department will work with the municipalities on development of their access plan, and the plan will be required to meet the goals of the public access rules.

### **Parking**

37. COMMENT: Whenever public access is required, there should also be a requirement to provide local parking. (8)

38. COMMENT: The public access rules should be revised to address the limitations to the public's ability to access the water. Parking at public access sites is costly, and in some towns, residents do not even benefit from parking revenues, which are instead paid to private property owners. Other towns curb public access by imposing time limits on parking. (4)

39. COMMENT: Public access to New Jersey's shoreline is almost non-existent because parking at access sites is extremely difficult. (28)

RESPONSE TO COMMENTS 37 THROUGH 39: The Department recognizes the importance of adequate parking to facilitate public access to tidal waterways and their shores. Additional public parking for those utilizing access points is one option to fulfill public access obligations under adopted N.J.A.C. 7:7-16.9(b)3i(5).

Shore protection and/or beach nourishment projects undertaken with a Federal partner must meet standards for Federal financial participation in shore protection, which require

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sufficient parking facilities for the general public located reasonably nearby and with reasonable public access to the project. The Federal standards provide that parking should be provided every one-half mile or less. In addition, through MPAPs, the Department can work with municipalities to address existing practical limitations to public access such as restrictions on parking availability and duration, and recommend improvements to access with a focus on parking availability.

### **Municipal Public Access Plans**

40. COMMENT: The Department needs to explain how it will address public access requirements for development applications in municipalities that already have a Department-approved MPAP. (19)

RESPONSE: The requirements in municipalities with a Department-approved MPAP remain the same. In instances where a Department-approved MPAP has been adopted into the municipality's Master Plan, any public access required through a Department permit would be consistent with the MPAP, except in certain cases where public access is provided in accordance with N.J.A.C. 7:7-16.9(f)1 through 8. In such cases, the Department will not deny an application for a State coastal permit that is consistent with the standards contained in the CZM Rules, even if public access does not comply with any additional requirements contained in the applicable MPAP, with enforcement of the more stringent municipal requirement left to the municipal approval process (see the Response to Comment 61). If the MPAP is not incorporated into the Master Plan, the public access requirements at N.J.A.C. 7:7-16.9(k) apply for commercial, residential, industrial, and public development, and for homeland security facilities and ports. In

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all municipalities, whether there is a Department-approved MPAP or not, public access for marinas, piers, beach and dune maintenance activities, and shore protection projects must be provided in accordance with N.J.A.C. 7:7-16.9(m), (n), (o), and (p), respectively.

41. COMMENT: MPAPs should be mandatory. (2)

42. COMMENT: MPAPs should be mandatory, not voluntary, with penalties under the rules for municipalities that have MPAPs but do not implement them. Municipalities still receive financial aid and permits even if they have not implemented their MPAP. Because the proposed rules are not tied to any permitting requirements or public financing, there is no incentive for municipalities to implement the plans. (1, 4, 7, 8, 12, 14, 16, 18, 21, 23, 24, 27, 28, 36, 39, 40, 44, 47, 48, 49, 52, and 57, 58, and 59)

43. COMMENT: MPAPs should be mandatory. Businesses suffer in municipalities without adequate public access because people do not spend their money in towns where the beaches are closed to them. (14)

44. COMMENT: MPAPs should be mandatory, and the rules should provide incentives for towns to implement those plans through permitting requirements or public financing. (46)

45. COMMENT: The proposed rules should be revised to incentivize public access through policy and investment. (2)

RESPONSE TO COMMENTS 41 THROUGH 45: MPAPs include a vision for how public access will be provided in a municipality so each municipality has the ability to direct Department-required public access to fit its specific needs. The Department only holds the

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statutory authority to require public access to be provided when a proposed development requires a CAFRA or Waterfront Development permit. The Department does not have statutory authority to require a municipality to adopt an MPAP. However, the Department's Coastal Zone Management regulations do provide incentives for municipalities to develop MPAPs.

Municipalities with a Department-approved MPAP will be given a greater say in how and where public access is provided within the municipality when the Department issues CAFRA or Waterfront Development permits for development in that municipality. Municipalities with MPAPs are also eligible for CAFRA general permits to conduct beach and dune maintenance activities. Municipalities without MPAPs can still conduct beach and dune maintenance activities but must obtain a CAFRA individual permit, which requires a more in-depth application and a higher fee. The Department will also provide technical support and guidance to help municipalities who request such aid in developing MPAPs that meet the rules while reflecting local public access needs and priorities.

46. COMMENT: The new rules providing for voluntary MPAPs should clarify whether or not the Department will enforce these plans to ensure that municipalities with an MPAP actually provide public access. (21)

RESPONSE: The adopted rules at N.J.A.C. 7:7-16.9(h)4 require a municipality with an approved MPAP to update the Department on the status of all projects undertaken in accordance with the MPAP every five years. Through this mechanism, the Department monitors the municipality's efforts to meet the goals set forth in the MPAP. In accordance with N.J.A.C. 7:7-16.9(j), the Department can revoke its approval of an MPAP for good cause. Cause for revocation includes,

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but is not limited to, failure to implement the MPAP and failure to maintain existing public access and signage.

47. COMMENT: N.J.A.C. 7:36-3.2(a)4, which excludes local governments that do not have Department-approved MPAPs from receiving Green Acres funding, represents a *de facto* mandate on local governments to adopt MPAPs and therefore violates Article VIII, § II, ¶ 5 of the New Jersey Constitution (the State mandate, State pay amendment). (9)

RESPONSE: Municipalities without an MPAP are eligible for Green Acres funding. The cited Green Acres regulation only lists as an “ineligible applicant” as “any local government unit that does not currently provide, or have active plans to provide, public access to the waterfront and to tidally-flowed and dry sand areas subject to the Public Trust Doctrine, consistent with the requirements of the Coastal Zone Management Rules . . . and governing law.” The CZM Rules do not require an MPAP, but rather make it an option for the municipality. There is thus no requirement that a municipality garner Department approval of an MPAP to satisfy the Green Acres requirement that a municipality provide public access or have plans to do so.

In addition, there is no entitlement or requirement that a municipality apply for or receive Green Acres funding. Thus, requiring a municipality to provide public access consistent with the public trust doctrine and the Department’s rules to be eligible for Green Acres funding does not constitute an unfunded mandate.

48. COMMENT: N.J.A.C. 7:7-15.11(g)2 requires public access be provided to structural shore protection and/or storm damage reduction measures conducted using monies from the Shore



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Protection Fund and/or any other Department monies in accordance with the public access rule, which has the practical effect of mandating local governments to adopt an MPAP and therefore violates Article VIII, § II, paragraph 5 of the New Jersey Constitution (the State mandate, State pay amendment). (9)

RESPONSE: This provision does not mandate local governments to adopt an MPAP and thus does not constitute an unfunded mandate. The public access rule requires access be provided to State-funded beach nourishment projects and shore protection projects. In addition, the Department routinely works with the USACE on Federally funded shore protection projects to ensure that access is provided consistent with Federal requirements tailored to local considerations, in accordance with N.J.A.C. 7:7-16.9(p). These requirements apply regardless of whether a municipality has a Department-approved MPAP or not. While the Department encourages each coastal municipality to voluntarily develop an MPAP and the rules establish standards and procedures to do so, no provision of the CZM Rules mandates the adoption of an MPAP. The Department has required public access at shore protection projects funded with public funds for decades and will continue to do so under these rules.

49. COMMENT: While the use of MPAPs are supported as the appropriate mechanism to ensure meaningful public access locations that specifically suit the conditions and needs of a particular municipality, it may not be feasible for municipalities to develop MPAPs without adequate funding and technical support from the Department. Developing MPAPs will be an onerous undertaking for already constrained municipalities, which may dissuade those municipalities from their preparation and adoption. Municipalities should have the option to use existing maps,

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including tax maps, aerial photographs from the Department archives, and zoning maps, in lieu of producing new maps. Municipalities should also be able to amend their Master Plans to assist in implementation of the public access strategy. (19)

RESPONSE: Since the ability to seek approval of an MPAP was adopted into the CZM Rules in 2012, the Department has offered assistance to all municipalities interested in pursuing the MPAP option on multiple occasions. The current Department-approved MPAPs represent extensive collaboration between the Department and municipal officials (see <http://www.nj.gov/dep/cmp/access/mpaplans.htm>). In preparing draft MPAPs, municipalities may use any existing maps or other relevant documents as long as all of the information referenced in N.J.A.C. 7:7-16.9(e)4 is available on those maps or other documents.

The adopted rules, as well as the rules prior to adopting these amendments, require municipalities to incorporate a Department-approved MPAP in their municipal master plans in order for the MPAP to be used in coastal permit decisions made by the Department (see N.J.A.C. 7:7-16.9(h)1 and 3).

50. COMMENT: The review of MPAPs should occur more frequently than every five years, perhaps every two years. Municipal governments lag on public access issues, and these amendments do nothing but support their role in public access decisions and enforcement. (33)

RESPONSE: The Department does not anticipate that noncompliance with Department-approved MPAPs will be a significant issue because it has not been a significant issue in the five years that MPAPs have been an option under the CZM Rules. The Department does agree that compliance needs to be monitored and that a mechanism is necessary to enable the Department to act

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expeditiously when noncompliance is discovered. The requirement to update the Department every five years was chosen to allow enough time for plans to come to fruition and avoid burdening municipalities with too-frequent reporting. Municipalities are required to review their master plans every 10 years. Requiring review of actions under the MPAP halfway between reviews of the municipal master plan and concurrent with review of the municipal master plan facilitates thoughtful planning. While it is anticipated that municipalities will fully comply with the terms of a Department-approved MPAP that they voluntarily sought to implement, the rules do include provisions that would allow the Department to revoke its approval of an MPAP for good cause should that become necessary, as discussed in the Response to Comment 46.

51. COMMENT: The proposed rules that streamline municipalities' reporting obligations for their MPAPs are supported. (19)

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

52. COMMENT: The Department seems to believe that replacing restrictive proscriptive regulatory requirements with MPAPs will provide better access. However, the creation of MPAPs was instigated by municipalities and land owners. While they argued that they know best how to plan for their own needs and that the plans constitute reasonable access requirements that recognize local conditions and costs, municipalities that develop plans will have greater control over public access within their boundaries, including access hours and parking. (43)

53. COMMENT: While public access planning that originates with municipal governments is supported as a means of promoting coordinated goals, policies, and standards, such municipal

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planning must respect State policies on public access and the Public Trust Doctrine. Under the doctrine, the State is the trustee of the public's rights along the shore, an obligation that cannot be delegated. Yet, N.J.A.C. 7:7-16.9(c)1 goes beyond coordination, representing a *de facto* delegation of the State's responsibility and authority over where and how public access must be provided for activities subject to State regulatory programs to municipalities with MPAPs. The Department seems to acknowledge it is delegating these decisions by only reserving for itself the right to define public access requirements for a limited number of activities at N.J.A.C. 7:7-16.9(c)3 and 4, which notably exclude residential development, the most contentious area of management and regulation when it comes to public access. Since MPAPs no longer include offsite mitigation funds, the rules need to clarify how onsite access will be provided and what limitations MPAPs have in terms of influencing where offsite public access is provided. The Department is proposing to bind itself to the municipal decisions contained within the MPAP, creating an opportunity for municipalities to define "no access zones" where the Department will be constrained from requiring public access through coastal permits and leaving itself no discretion to review and make alternative decisions on regulatory permit applications that might better protect the public's rights under the Public Trust Doctrine. Decisions regarding where access can be provided should not be left solely to the municipality. (15)

RESPONSE TO COMMENTS 52 AND 53: Under adopted N.J.A.C. 7:7-16.9, the Department does not yield control of public access to the municipalities. The rules establish goals and basic requirements for public access and are intended to encourage municipalities to take an active role in designing and ensuring public access to beaches and tidal waters in ways that will work best for their respective circumstances. The adopted rules require a municipality to obtain approval of

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its MPAP from the Department to allow the Department to ensure that the plan will be effective; the contents of the plan are not left solely to the municipality. The Department will work with the municipalities on the development of their access plan and the plans will be required to meet the goals of the public access rules.

Under the adopted rules, MPAPs cannot restrict public access and must maintain existing access. In order to be approved by the Department, an MPAP must meet all of the requirements at N.J.A.C. 7:7-16.9(e) and subsequent requirements, including the requirement to update the Department on the implementation of the plan every five years. In accordance with adopted N.J.A.C. 7:7-16.9(j), the Department can revoke its approval of an MPAP for good cause. Cause for revocation includes, but is not limited to, failure to implement the MPAP and failure to maintain existing public access and signage. Absent a circumstance that warranted an exception under the regulations, such as a designated Homeland Security site, the general designation of “no access zones” intended solely to keep the public from exercising their public trust rights would not be approved in an MPAP and if implemented by a municipality with an MPAP would be cause for the Department to revoke its approval.

In the *Hackensack* decision, the court ruled that municipalities lack the statutory authority to create municipal public access funds. Therefore, the rules no longer provide for the creation of these funds. The Department will work with municipalities to identify future public access sites in the municipality and to facilitate public access to be implemented at these sites when offsite public access is required as a condition of a CAFRA or Waterfront Development permit.

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54. COMMENT: The Department needs to revise the rules to include mandatory standards for MPAPs that will guarantee genuine public access. (2)

55. COMMENT: Due to the lack of standards for MPAPs within the proposed rules, municipalities could use the plans to limit public access. (1, 4, 7, 8, 12, 14, 16, 18, 21, 23, 24, 27, 28, 36, 39, 40, 44, 47, 48, 49, 52, 56, 58, and 59)

RESPONSE TO COMMENTS 54 AND 55: Any MPAP that includes provisions to limit public use of a public access area that is currently utilized by the public will not be approved by the Department. The rule allows reasonable restriction of access in very specific cases. Access may only be restricted if the use of the area would cause a public health or safety concern, would cause environmental harm, or would be a Homeland Security risk. Any MPAP that includes provisions to limit public access for any other reason will not be approved by the Department.

56. COMMENT: The criteria established by the Department at N.J.A.C. 7:7-16.9(b) and (i) as review standards for MPAPs do not necessarily reflect all the regulatory criteria that the Department applies in the absence of an MPAP and are too broad, failing to take into account specific considerations that might occur at the site of the particular permit application and that might bear upon an individualized permit evaluation. (15)

RESPONSE: While municipalities can participate in tailoring public access to local needs via MPAPs, an MPAP is only operational if it is approved by the Department. As indicated at N.J.A.C. 7:7-16.9(d) and (g), to be approved, any MPAP must meet the broad coastal goals described at N.J.A.C. 7:7-1.1(c), the goals for public access at N.J.A.C. 7:7-16.9(b), and all other requirements contained in N.J.A.C. 7:7-16.9. Furthermore, the Department may revoke its

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approval of an MPAP for good cause as provided at N.J.A.C. 7:7-16.9(j). MPAPs allow municipalities to establish public access priorities and standards that address local needs while complying with the CZM Rules. Therefore, MPAPs also allow municipalities to develop public access standards that are more individualized and suited to specific considerations within the municipality than the general requirements that apply when a municipality does not develop an MPAP.

57. COMMENT: The standards in the proposed rules are concerning because they mirror the Federal standards for public access, which is one access point per every mile, rather than the stricter standards that New Jersey had in the 2007 rules, which required one access point per every quarter mile. (1, 4, 7, 8, 12, 14, 16, 18, 21, 23, 24, 27, 28, 36, 39, 40, 44, 47, 48, 49, 52, and 56-59)

RESPONSE: N.J.A.C. 7:7-16.9 does not specify an overall requirement for how much access must be provided in a municipality. Both in its review of MPAPs and individual permit applications, the Department will endeavor to maintain and increase public access to the waterfront.

For decades, the Department has required that beachfills and other shore protection projects built with public funds be open to the public. This requirement has not changed under the adopted rules. In addition, the Department routinely works with the USACE on Federally funded shore protection projects to ensure that access is provided consistent with Federal requirements tailored to local considerations, and it should be noted that the USACE requires a perpendicular access point at least every half mile, such that any person standing on the shore

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will never be more than one-quarter mile from an access point. This practice will continue under the adopted rules.

Under previous rules, adopted in 2009, the Department had sought to condition expenditure of State shore protection money upon municipalities providing additional public access amenities (for example, parking, restrooms, and perpendicular access). In light of the *Avalon* decision, the Department has determined that it is no longer appropriate to condition State funding upon the provision of such amenities.

58. COMMENT: By proposing to delete the provisions of N.J.A.C. 7:7-16.9(h), which presently require a municipality seeking Department approval of their MPAP to submit their application to the county planning board as well as any regional planning entities that may have jurisdiction, the Department is undermining regional coordination, exacerbating inefficiencies in regulatory reviews, and failing to take advantage of the positive role that county or regional planning might play in increasing, managing, and enhancing public access to the coastline. This reporting requirement was an opportunity to evaluate how municipal plans might integrate into regional plans, such as the Bayshore Walkway Trail. The Public Access Task Force agreed that more robust planning that was integrated and coordinated between the different levels of government was needed, so by removing the requirement, the Department is failing to meet the public's growing needs and demands for access to the water. (15)

RESPONSE: In response to the *Hackensack* decision, the Department has sought to clarify its role in the municipal planning process. The adopted rules clarify that the Department's role in reviewing and approving MPAPs for compliance with the public trust doctrine and the



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Department's rules is separate from the municipal planning process, which is governed by the Municipal Land Use Law. The Department will continue to require that municipalities include MPAPs into their master plans to enable municipalities to implement those plans, which was upheld in the *Hackensack* decision.

Further, pursuant to N.J.A.C. 7:7-16.9(g)1ii, the Department retains a listserv of individuals who have requested notice of applications for approval of MPAPs. The Department will add to the listserv county planning boards, regional planning agencies, and anyone else who expresses interest in receiving notice of MPAP applications, which will ensure that these entities and individuals will have an opportunity to provide comments on such applications.

59. COMMENT: Providing municipalities with the independent authority to impose greater requirements for their planning purposes is appreciated. Nevertheless, proposed N.J.A.C. 7:7-16.9(f), which specifies that the Department will not deny coastal permits for development projects "based upon the public access not satisfying the additional requirements specified in the Municipal Public Access Plans," provided the public access project is consistent with the standards specified at proposed N.J.A.C. 7:7-16.9(f)1 through 8, is strongly supported as is the clarification that public access concerns beyond those specified in the proposed rules should be addressed at the local level. (19)

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

60. COMMENT: The rules should provide more clarity regarding the enforcement of municipal public access requirements that are more stringent than the proposed regulations. The

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Department can achieve that clarity by adding the following statement from the proposal summary to the end of N.J.A.C. 7:7-16.9(f): “In such a case, enforcement of the additional local requirements would be left to the municipality through necessary approvals granted at the local level.” (37)

RESPONSE: The Department has determined that the suggested additional language is not necessary and is already covered by existing rules. The existing standard condition at N.J.A.C. 7:7-27.2(c)3, applicable to all CAFRA and Waterfront Development permits, states that “[t]he permittee shall obtain all applicable Federal, State, and local approvals prior to commencement of regulated activities authorized under a coastal permit.” The municipality or any other governing board issuing approvals with conditions more stringent than those contained in a permit issued by the Department is responsible for enforcing those conditions.

61. COMMENT: Proposed N.J.A.C. 7:7-16.9(c)1, which states that "... public access requirements shall be satisfied in accordance with Municipal Public Access Plans," is inconsistent with proposed N.J.A.C. 7:7-16.9(f) and is contrary to the Department's stated intention not to deny a permit application that satisfies the standards set forth in subsection N.J.A.C. 7:7-16.9(f). The Department must further clarify, and amend as needed, N.J.A.C. 7:7-16.9(c)1 to reflect N.J.A.C. 7:7-16.9(f). (19)

RESPONSE: The commenter is correct that N.J.A.C. 7:7-16.9(f) provides that the Department will not deny an application for a State coastal permit if public access is provided in accordance with N.J.A.C. 7:7-16.9(f)1 through 8 for the specific listed activities even if public access does not comply with any additional requirements contained in the MPAP in effect in the municipality

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where the development is proposed. While it is anticipated that, where the approved MPAP contains access requirements for development falling under N.J.A.C. 7:7-16.9(f) that exceed the requirements contained in the CZM Rules, practical considerations will result in applicants designing projects that comply with the more stringent municipal requirements, as further discussed in the Response to Comments 62 and 63 below, the requirement at N.J.A.C. 7:7-16.9(c)1 is intended to further encourage applicants to comply with the applicable MPAP. Because MPAPs are incorporated into a municipality's master plan in accordance with N.J.A.C. 7:7-16.9(h), it is in the applicant's best interest for purposes of obtaining any necessary municipal approvals to provide public access in accordance with the MPAP where one exists. For those activities not listed in N.J.A.C. 7:7-16.9(f)1 through 8, the MPAP's requirements must be met as stipulated at N.J.A.C. 7:7-16.9(c)1.

62. COMMENT: Proposed N.J.A.C. 7:7-16.9(c)2, which states that "coastal permit applications shall include a project specific access plan that provides for public access in accordance with all applicable requirements," may lead to unwarranted requirements, including by the municipality, in contravention of N.J.A.C. 7:7-16.9(f). The subsection should be revised to ensure consistency with the Federal and State case law and other regulatory provisions, such as the Public Trust Doctrine. (19)

63. COMMENT: While the proposed rules allow municipalities to create access plans that exceed the State's requirements, the Department will impede municipalities who want to expand or enhance public access beyond the State minimums by refusing to enforce the municipal requirements in the State's permitting decisions. Proposed N.J.A.C. 7:7-16.9(f) only creates the

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appearance that municipalities are allowed to assume a bigger leadership role in providing access to the coast, but that will be undercut by the Department as soon as a developer does not wish to follow the municipality's more stringent standards. Not only does this undermine efforts to promote quality public access, it also contributes to uncoordinated and conflicting policies between levels of government that will exacerbate inefficiencies in regulatory reviews. The practical effect is that municipalities are unlikely to exceed the Department's minimums; thus, the proposed rules serve to protect developers from progressive municipalities. (15)

RESPONSE TO COMMENTS 62 AND 63: The adopted rules do not impede municipalities from expanding or enhancing public access beyond that required by the Department's rules. The rules simply recognize a municipality's independent authority to address local needs in a manner that may exceed the minimum standards provided under the CZM Rules. From a practical standpoint, the Department anticipates developments will in most, if not all, cases be designed to meet the most stringent applicable standards. Accordingly, the Department anticipates that applications for permits for development in a municipality with a Department-approved MPAP containing more stringent public access standards than those in the CZM Rules will generally reflect designs meeting the more stringent municipal standards. Those designs will therefore be what is incorporated into the Department permit with which the applicant must comply or face potential Department enforcement action for violating the terms of the permit. However, in the rare case where an applicant chooses to seek Department approval of a design that does not satisfy the standards necessary to obtain necessary local approvals, it is entirely appropriate that the rules reflect that, just as the municipality must enforce any other standard contained in its ordinances in implementing its land use approval powers, the municipality bears the

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responsibility for enforcing public access requirements that are part of its ordinances and Master Plan. Unlike the prior rules, the adopted rules expressly allow municipalities to include additional requirements beyond those required or enforced by the Department for development falling under N.J.A.C. 7:7-16.9(f) in their MPAPs.

64. COMMENT: The new provision at N.J.A.C. 7:7-16.9(f) is supported because it clarifies and protects local governments' prerogative to exercise general police powers and authority over tidal areas under the Municipal Land Use Law. (9)

RESPONSE: The Department acknowledges this comment in support of the adopted rules. However, it should be noted that the State maintains ownership and authority over all currently or formerly flowed tidal lands that have not been conveyed via a valid riparian grant.

65. COMMENT: It was appropriate for the Department to remove itself from some of the decision-making processes delegated to municipalities under the Municipal Land Use Law. (15)

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

66. COMMENT: Proposed N.J.A.C. 7:7-16.9(f)5, which relates to public access at "existing residential development or new development where the development consist solely of the construction of one single family home or duplex," should be amended to be consistent with N.J.A.C. 7:7-6.4, general permit 4, which regulates the "development of one or two single family homes or duplexes and/or accessory development (such as garages, sheds, pools, driveways, grading, filling, and clearing, excluding shore protection structures) ...." (19)

RESPONSE: Under general permit 4, public access is required in accordance with the public trust rights rule, N.J.A.C. 7:7-9.48, and the public access rule, N.J.A.C. 7:7-16.9. Where two single-family

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homes or duplexes are proposed, public access is required pursuant to N.J.A.C. 7:7-16.9(k)2. Public access at two single-family homes or duplexes is required to ensure adequate access to the water due to the length of waterfront area impacted by the construction of two single-family homes or duplexes on two waterfront lots. It should be noted that the public access rule recognizes that providing onsite access is not always feasible for these types of development, and therefore, in accordance with N.J.A.C. 7:7-16.9(k)2iii(1) and (2), the applicant can provide offsite access if the total water frontage is 500 linear feet or less.

## **General Permit 2**

67. COMMENT: While the amendments that purport to make adoption of MPAPs voluntary are appreciated, the proposed rules represent a *de facto* mandate on local governments to adopt MPAPs. N.J.A.C. 7:7-6.2(b) is particularly concerning because only those municipalities with a Department-approved MPAP qualify for general permit 2 for beach and dune maintenance activities under this provision. As a *de facto* mandate, N.J.A.C. 7:7-6.2(b) violates Article VIII, § II, paragraph 5 of the New Jersey Constitution (the State mandate, State pay amendment).

The Council on Local Mandates has developed a three-prong test to identify unconstitutional unfunded mandates.

First, the statute, rule, or regulation must impose a “mandate” on a unit of local government. The Council has ruled in previous cases that the State imposes a mandate when its actions remove local discretion by forcing local government action. Beach and dune maintenance activities are not discretionary since municipalities along the Atlantic Ocean must conduct some form of maintenance at least once every year. N.J.A.C. 7:7-6.2(b) imposes an actionable mandate

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on local government by requiring adoption of an MPAP before permission will be granted to perform non-discretionary beach and dune maintenance.

Second, a statute, rule, or regulation represents an unconstitutional unfunded mandate if “additional direct expenditures [are] require[d] for the implementation of the law or rule or regulation.” MPAPs are sophisticated documents that require significant research and study, necessitating procuring the services of engineers, planners, and attorneys to develop and adopt. The costs of these services would constitute “additional direct expenditures.”

Lastly, an unconstitutional unfunded mandate fails to “authorize resources, other than the property tax, to offset the additional direct expenditures.” The proposed rules do not provide any additional funding to cover the costs associated with developing MPAPs. Because the requirement at N.J.A.C. 7:7-6.2(b) violates the State mandate, State pay amendment, this provision should be removed from the rules prior to adoption. (9)

RESPONSE: General permit 2 for beach and dune maintenance activities offers an incentive for municipalities to create MPAPs by providing a streamlined permitting process. However, the Department can still issue an individual permit for such activities in municipalities without an MPAP provided the activities comply with the applicable provisions of N.J.A.C. 7:7-16.9 and 7:7-10, and any other applicable provisions of the CZM Rules. The requirement in general permit 2 that municipalities have a Department-approved MPAP does not create an unfunded mandate on municipalities because general permit 2 is not the only mechanism for permitting beach and dune maintenance activities.

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68. COMMENT: County-infrastructure projects should be exempt from the general permit requirement for a Department-approved MPAP, specifically under general permit 2 for beach and dune maintenance activities. Counties have no jurisdiction to require their municipalities prepare an MPAP, and denying a permit for a County project will not likely act as an impetus for a municipality to develop one. Recently, certain provisions, such as N.J.A.C. 7:7-6.2(b), have delayed County projects; therefore, it is important that permits for County projects not be contingent upon a municipality's development of an MPAP. (10 and 26)

RESPONSE: As explained in the Response to Comment 67 above, the Department can issue an individual permit for beach and dune maintenance activities in municipalities without an MPAP where general permit 2 cannot be utilized. The streamlined permitting process offered by general permit 2 is appropriate where the activity is occurring in a municipality with a Department-approved MPAP because the Department is satisfied that public access throughout the community has been thoughtfully planned and will be maintained and improved through the implementation of the MPAP. Where activities are occurring in municipalities that do not have an approved MPAP, the Department must review the activity more intensively to ensure all applicable requirements of the CZM Rules, including public access requirements, will be met.

**N.J.A.C. 7:7-16.9(k)**

69. COMMENT: The requirement for "visual access" for commercial and residential developments at N.J.A.C. 7:7-16.9(k)1 and 2 is opposed as it is beyond the scope of the Public Trust Doctrine. (19)



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RESPONSE: The enactment of P.L. 2015, c. 260 reaffirmed that the Department possessed and continues to possess the authority to require public access as a condition of a permit approval under CAFRA and the Waterfront Development Law. The adopted rules represent the Department's efforts to address key coastal goals and uphold all aspects of the Public Trust Doctrine. "Meaningful public access to and use of tidal waterways and their shores" is a goal of New Jersey's Federally approved coastal management program, as stated at N.J.A.C. 7:7-1.1. This goal includes preserving and enhancing views of the coastal landscape to enrich aesthetic and cultural values and vital communities.

70. COMMENT: The Department should amend proposed N.J.A.C. 7:7-16.9(k) to include whether or not public access is even warranted under particular circumstances as a critical consideration. Such a case-by-case approach is consistent with the Public Trust Doctrine as developed and implemented by applicable New Jersey Supreme Court case law. Thus, in applying this approach to N.J.A.C. 7:7-16.9(k)2, if public access is not warranted on the site, the Department should not require "equivalent offsite public access ... on the same waterway within a neighboring municipality." (19)

RESPONSE: The commenter does not cite any specific cases, and the Department does not consider the suggested approach consistent with New Jersey Supreme Court case law or State statutes. 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 determination of whether public access is "warranted" depends on the type of development and activities proposed. The

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rules are intended to ensure that the CZM Rules promote the coastal goal of “meaningful public access to and use of tidal waterways and their shores” (see N.J.A.C. 7:7-1.1(c)).

71. COMMENT: As commercial development can also include residential units, a distinction should be made at N.J.A.C. 7:7-16.9(k)1 between a development that is strictly "commercial" and a “mixed use" development that is comprised of both commercial and residential components to appropriately reflect the scope and ranges of development activities. (19)

RESPONSE: Public access is required for both new residential and new commercial development, and the public access options for new residential and new commercial development are similar in that they both must provide visual and physical access. The public access requirements for a mixed use development will be determined on a case-by-case basis depending upon the development adjacent to the waterfront. For example, if the residential portion of the development is adjacent to the waterway, the public access requirements for residential developments would apply. Because the development is new, it is assumed that public access can be incorporated into the project design. In those rare situations when the applicant demonstrates to the Department’s satisfaction that onsite access is not feasible, the Department will consider offsite access on a case-by-case basis.

72. COMMENT: Under Federal case law, the State cannot mandate alternative public access where onsite public access is not feasible or practicable. The rules that are specifically opposed on these grounds are N.J.A.C. 7:7-16.9(k)2iii(1), requiring offsite public access on the same waterway within the same municipality as the residential development when onsite public access

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is not feasible for residential developments with a total combined water frontage of 500 linear feet or less and N.J.A.C. 7:7-16.9(k)2iii(2), where if there are no sites available within the municipality, then offsite public access is required "on the same waterway within a neighboring municipality where the access is consistent" with the neighboring municipality's MPAP. (19)

RESPONSE: The commenter does not cite to any specific cases, and the Department is unaware of any case law that prohibits the State from requiring reasonable offsite alternative access if access is not feasible onsite. The Department continues to include provisions for offsite access to provide an alternative mechanism for individuals with public access obligations to meet those obligations.

73. COMMENT: Although not specifically proposed for public comment, the Department's public access requirements for residential developments at N.J.A.C. 7:7-16.9(k)2iii and (iv) are inappropriately inconsistent with one another. Without basis, the Department continues to limit developments with greater than 500 linear feet of water frontage to providing onsite public access while developments with less than 500 linear feet of water frontage may provide public access either onsite or offsite. The Department should consider site specific circumstances, which may indicate that public access will not be feasible or even practicable onsite in every residential development even if there is more than 500 linear feet of water frontage. (19)

RESPONSE: The Department recognizes that residential development of more than one single-family home or duplex on a smaller property (one defined as having 500 linear feet or less of frontage on the water) may have practical limitations making onsite public access not feasible. Accordingly, while onsite public access is generally required for this type of development, the

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rules do allow an applicant an opportunity to demonstrate that, based on the size of the site, the character of the waterway, environmental impact, or benefits achieved by providing offsite access, onsite access is not feasible. The Department must be convinced that onsite access is truly not feasible, utilizing these factors, or onsite access will be required. If the applicant is able to demonstrate onsite access is not feasible, the rules limit where offsite access can be provided to assure that the alternative access is provided to the same waterway in a geographic area most likely to be utilized by those who would have utilized access provided onsite. Larger parcels (that is, those having more than 500 linear feet of frontage on the water, which is a distance roughly equivalent to one city block) have a greater ability and more options available to address public access onsite. It has been the Department's experience that parcels having this amount of frontage can accommodate onsite access and allowance for the possibility of offsite access is not necessary.

### **Municipal Public Access Fund**

74. COMMENT: The Department was appropriately responsive to the Court's ruling in the *Hackensack* decision in removing the municipal Public Access Fund for offsite mitigation. (15)

75. COMMENT: Under N.J.S.A. 40A:4-39, municipalities may, with the approval of the Division of Local Government Services, dedicate specific funds by rider. The "public access funds" in the prior public access rules created a separate, and somewhat confusing, legal structure. Removing the reference to "public access funds" in the proposed rules is appreciated because it clarifies that any dedication by rider regarding MPAPs must be done in conformity with N.J.S.A. 40A:4-39. (9)

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76. COMMENT: The repeal of N.J.A.C. 7:7-16.9(e)5 and (f), which pertained to dedicated municipal Public Access Funds for monetary contributions in lieu of onsite public access, is supported, given the concerns with the funds, their calculation formula, and fiscal impact. (19)

RESPONSE TO COMMENTS 74, 75, AND 76: The Department acknowledges these comments in support of the rule.

77. COMMENT: With the dissolution of the Municipal Public Access Fund, the Department should clarify if other options for monetary compensation in lieu of onsite public access will be available. (10 and 26)

RESPONSE: There are no other options for monetary compensation in lieu of onsite public access in the Department's public access rules. The *Hackensack* ruling established that the Department does not have authority to establish a system for providing monetary compensation in lieu of public access for use by municipal governments.

### **Marinas**

78. COMMENT: Although there are no changes to the public access requirements for marinas in the proposed public access rules, the readoption of these rules is supported because they represent a reasonable and balanced approach to access at marinas. Marinas are unique; the very nature of their business operations ensures that the public has use of public trust waters.

However, in order to operate, marinas must be able to reasonably control and manage their properties. In 2007, the CZM Rules imposed serious mandates on marina owners by forcing them to provide unlimited public access on their properties without taking into consideration the

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access and services they already provided. The rules also required a permanent walkway across the entire waterfront of the property regardless of the configuration or operation of the marina. Marina owners could not expand or improve without revising the entire facility to increase the access to the water they already provided. The rules resulted in increased security concerns, reduced revenues, and increased costs beyond the financial ability of most marinas. Such unlimited access requirements, liability and safety issues, and restrictions on expanding facilities are potentially disastrous to an already shrinking and struggling industry. The proposed rules, however, take into consideration the family run marina business, the access marinas already provide, and the need for a reasonable, realistic, and affordable permitting process that does not unduly burden already distressed marina owners and operators when essential maintenance and upgrades become necessary. New Jersey needs more marinas in order to provide the desired access to our waterways, and these rules will ensure the future growth and health of the recreational boating industry. (13)

79. COMMENT: The readoption of the 2012 public access rules pertaining to marinas is supported. (22)

80. COMMENT: The 2012 rules allowed marinas to operate without the restraint of providing unlimited access, day and night. Marinas offer public access, but owners need to be able to control the property in the evening and the places where people are moving around during the day. The readoption of these rules is imperative for the survival of the marina industry. (6)

81. COMMENT: The public access rules are supported. The needs of marinas must continue to be considered when promulgating public access rules or many of them will not survive. (3)

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RESPONSE TO COMMENTS 78 THROUGH 81: The Department acknowledges these comments in support of the adopted rules. The Department notes that, while the requirements applicable to marinas continue without amendment through this rulemaking, the rulemaking is not technically a readoption of the existing CZM Rules, which continue to have a November 14, 2021 expiration date.

### **Exemptions**

82. COMMENT: New and existing critical infrastructure, which includes facilities designated as such by the New Jersey Domestic Security Preparedness Act, facilities regulated by the Department's Toxic Catastrophe Prevention Act or Discharge Prevention Program, and facilities regulated by the U.S. Department of Homeland Security's Chemical Facility Anti-Terrorism Standards or Maritime Transportation Security Act, should not be required to provide either onsite or offsite public access due to health and safety concerns, the threat of terrorist activities, and/or physical obstructions that cannot be modified. In the spirit of Governor Christie's Executive Order No. 2, New Jersey should strive to lessen the regulatory burden on industrial facilities, which will in turn encourage new investment and growth in the State, providing no less of a public benefit than access to the water. All new and existing critical infrastructure should be exempt from the public access rules, regardless of what regulated activity is performed and whether or not a municipality has an approved MPAP. (25)

83. COMMENT: Since it is not in the public's best interest to access hazardous sites, even if they are not considered critical infrastructure, all sites undergoing activities directly related to the remediation of a contaminated media should be exempt from the public access rules. Allowing

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the public to access these sites and, therefore, be exposed to contaminants should not be encouraged. (25)

RESPONSE TO COMMENTS 82 AND 83: Both the State and Federal government have enacted laws and implemented protective measures to address homeland security. These laws may require measures at certain facilities to protect against potential terrorism that may impact an applicant's ability to provide onsite public access. However, the Department believes that all existing public access must be maintained or replaced. If any "critical" or "hazardous" development project triggers the requirement to provide public access, the applicant has a responsibility to ensure that the public continues to have public access to the water itself and the area adjacent to tidal waters. 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 onsite due to existing site constraints, hazardous operations, risk of injury, or homeland security risks; the rule includes provisions to address these situations. In such cases, offsite public access is required. The Department does not expect the public to be allowed to access sites that would pose a risk to public health or national security and so provides the option to provide offsite access where site conditions preclude safe onsite access.



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84. COMMENT: Green Acres-funded properties should not be exempt from the public access rules. Allowing municipalities to receive permits and State funding for these properties without having to provide public access violates the Public Trust Doctrine. Green Acres properties are held in trust for the public, which should give the public the right to access them. (57)

RESPONSE: Public access to Green Acres-funded properties is governed by the Green Acres Program rules, which provide that land acquired or developed with Green Acres funding must be open to the public for recreation or conservation purposes in accordance with the requirements of N.J.A.C. 7:36. Please see the Green Acres Program rules at N.J.A.C. 7:36 for further explanation of access requirements under that chapter.

85. COMMENT: Existing commercial and industrial buildings, sewer plants, and other large facilities should not be exempt from providing public access to waterways, denying New Jersey's urban residents and environmental justice communities recreational opportunities along rivers and bays. This exemption not only undermines public access but hurts urban revitalization and redevelopment. When these facilities restrict public access, they should be required to provide financial compensation to create access at another location. (1, 2, 4, 7, 8, 12, 14, 16, 18, 21, 23, 24, 27, 28, 36, 39, 40, 44, 47, 48, 49, 52, 58, and 59)

RESPONSE: The Department requires public access when a permit is issued for development. The Department does not have the authority to retroactively require existing developments to provide public access where none exists. However, when activities requiring a Department permit are performed at existing developments, some public access requirements do apply.

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For existing commercial development, any public access onsite must be maintained or equivalent onsite access must be provided. Equivalent access means opportunities to participate in the same activities, in the same manner, and by the same number of people as the existing access. The Department believes that these requirements ensure that existing access onsite is maintained and not degraded by activities at existing commercial developments. However, the standards for “new commercial development” apply to the conversion of any existing development to a commercial development and any change in an existing commercial development, which results in greater than a cumulative 50 percent increase in the area covered by buildings, asphalt, or concrete paving, or results in development outside of the parcel containing the existing development. For these activities, access must be provided onsite regardless of whether access is currently provided. Different requirements apply if a development is in the Hudson River Waterfront Area to address the unique conditions and access needs of this special urban area (see N.J.A.C. 7:7-9.46(d) and (e)).

Similarly, existing industrial development must maintain existing public access onsite or provide equivalent onsite access. New industrial development, including the conversion of an existing development to an industrial development, must provide onsite access unless doing so is not practicable based on the risk of injury from proposed hazardous operations, substantial permanent obstructions, or upon documentation of a threat to public safety due to unique circumstances concerning the subject property, and no measures can be taken to avert these risks. In that case, access must be provided offsite in the same municipality or, if there are no available sites in the same municipality, in a neighboring municipality. Again, different requirements apply if a development is in the Hudson River Waterfront Area to address the unique conditions

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and access needs of this special urban area (see N.J.A.C. 7:7-9.46(d) and (e)). These provisions ensure that industrial developments do not interfere with safe access to the State's tidal waterways and their shores.

86. COMMENT: The proposed rules would allow for the regulated community to provide equivalent access if new commercial developments or upgrades at existing facilities would block access that is currently provided to the public. Equivalent access is not necessarily equal access.

(57)

RESPONSE: The possibility of providing equivalent access to satisfy public access obligations under the CZM Rules for commercial development is addressed at N.J.A.C. 7:7-16.9(k). In accordance with N.J.A.C. 7:7-16.9(k)1i, an applicant proposing maintenance, rehabilitation, renovation, redevelopment, or expansion that remains entirely within the parcel containing the existing development must maintain any existing public access or provide equivalent public access onsite. Equivalent public access, as stated at N.J.A.C. 7:7-16.9(k)1i, shall include access that provides for opportunities to participate in the same activities, such as fishing, swimming and passive recreation, in the same manner and by the same number of people as in the existing public access area. These requirements, in conjunction with the requirement that all access be provided on a nondiscriminatory basis, ensure that the equivalent access provides the same type and level of access opportunity as the existing access that the equivalent access is replacing.

With reference to new commercial development, which includes development outside the parcel containing existing development, pursuant to N.J.A.C. 7:7-16.9(k)1ii, access is required to be provided onsite, at minimum during normal operating hours. The only exception to this

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requirement is the recognition that sites along the Hudson River and on adjacent piers in the Hudson River Waterfront Area are required to satisfy the public access requirements tailored specifically to that area, which are codified at N.J.A.C. 7:7-9.46, the Hudson River waterfront area rule. Such access would be required to satisfy all requirements applicable to public access under the CZM Rules.

### **Federal Standards Statement**

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c. 65), require State agencies that adopt, readopt, or amend State rules that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis. The Federal Coastal Zone Management Act (Pub. L. 92-583) was signed into law on October 27, 1972. The Act does not set specific regulatory standards for development in the coastal zone; rather it provides broad guidelines for states developing coastal management programs. These guidelines are found at 15 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. The guidelines simply provide a planning and management process, without establishing development standards for development in the coastal area. Therefore, the Department has concluded that the adopted amendments do not exceed any Federal standards or requirements of the Federal Coastal Zone Management Act.

Many shore protection and beach nourishment projects subject to amendments will be conducted through joint funding agreements between the State of New Jersey and the United States Army Corps of Engineers (Corps), which agreements often involve local governments.

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Such projects are authorized by Congress through Federal Water Resources Development Acts, generally passed annually. In a document entitled ACOE Planning Guidance Notebook Section IV– Hurricane and Storm Damage Prevention (CECW-P Engineer Regulation 1105-2-100, April 22, 2000), the Corps establishes standards for Federal participation in shore protection, paramount among them, the requirement for public use of the shore protection projects. These Federal standards require that the shores be available for public use on equal terms to all, and for a reasonable fee. The standards cite sufficient parking facilities for the general public located reasonably nearby and with reasonable public access to the project, as requirements. The Federal standards say that perpendicular access should be provided every one-half mile or less. The adopted amendments do not alter the Federally established maximum distance of one-half mile between access points for projects to be conducted under the guidance of, and with participation by, the ACOE. Therefore, the adopted amendments are as stringent as, but do not exceed, Federal standards for public access.

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

(No change from proposal.)