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

Coastal Permit Program Rules; Coastal Zone Management Rules

Proposed Repeal and New Rule: N.J.A.C. 7:7E-8.11 : Public Access

Proposed New Rules: N.J.A.C. 7:7E-3.50 and 8A

Proposed Amendments: N.J.A.C. 7:7-1.3, 1.5, 7.5, through 7.14, 7.17, 7.18, 7.24, 7.26, and 7.29; 7:7E-1.8, 3.22, 3.23, 3.40, 3.43, 4.13, 7.2, 7.3, 7.4, 7.7 and 7.11

Authorized By: Lisa P. Jackson, Commissioner, Department of Environmental Protection

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

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

DEP Docket Number: 19-06-09/482

Proposal Number: PRN 2006-352

Public hearing concerning this proposal will be held as follows:

Tuesday, November 28, 2006 at 11:00 A.M.

Liberty State Park  
Central Railroad Terminal Building  
Blue Comet Auditorium  
1 Audrey Zapp Drive  
Jersey City, NJ 07305

Friday, December 1, 2006 at 11:00 A.M.

New Jersey Department of Environmental Protection  
Public Hearing Room  
401 East State Street  
Trenton, NJ 08060

Monday, December 4, 2006 at 11:00 A.M.

Richard Stockton College of New Jersey  
Townsend Residential Life Center Multi-Purpose Room  
Jimmy Leeds Road  
Pomona, NJ 08420

Submit written comments by January 5, 2007 to:

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Gary J. Brower, Esq.  
Office of Legal Affairs  
Attn: DEP Docket Number 19-06-09/482  
NJ Department of Environmental Protection  
401 East State Street  
P.O. Box 402  
Trenton, NJ 08625-0402

The Department of Environmental Protection (Department) requests that commenters submit comments on 3-1/2 inch diskettes as well as on paper. The Department will be able to upload the comments onto its office automation equipment. The Department will use the paper version of the comments to ensure that the uploading was accomplished successfully. Submittal of comments on diskette is not a requirement. The Department prefers Microsoft Word 6.0 or above; however, other word processing software that can be read or used by Microsoft Word 6.0 is acceptable. MacIntosh formats should not be used.

The proposal can be viewed or downloaded on the Department's web site at <http://www.state.nj.us/dep>.

The agency proposal follows:

### **Summary**

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

The public's rights of access to and use of tidal waterways and their shores, including the ocean, bays, and tidal rivers, in the United States predate the founding of this country. These rights are based in the common law rule of the Public Trust Doctrine. First codified by the Roman Emperor Justinian around 500 AD as part of Roman civil law, the Public Trust Doctrine establishes the public's right to full use of the seashore as declared in the following quotation from Book II of the Institutes of Justinian:

“By the law of nature these things are common to all mankind-the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden

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to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations.”

Influenced by Roman civil law, the tenets of public trust were maintained through English Common Law and adopted by the original 13 colonies, each in their own form. The grants that form the basis of the titles to private property in New Jersey never conveyed those public trust rights, which were reserved to the Crown. Following the American Revolution, the royal rights to tidal waterways and their shores were vested in the 13 new states, then each subsequent state, and have remained a part of law and public policy into the present time. Tidal waterways and their shores always were, and remain, subject to and impressed with these public trust rights. See *Arnold v. Mundy*, 6 N.J.L. 1, (1821); *Borough of Neptune v. Borough of Avon-by-the-Sea*, 61 N.J. 296 (1972); *Hyland v. Borough of Allenhurst*, 78 N.J. 190 (1978); *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984); *Slocum v. Borough of Belmar*, 238 N.J.Super. 179 (Law Div. 1989); *National Ass'n of Homebuilders v. State, Dept. of Env't'l Protect.*, 64 F.Supp.2d 354 (D.N.J. 1999); *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005).

Lands and waters subject to public trust rights include tidal waterways and their shores. The shores include lands both now or formerly below the mean high water line and certain portions of the shores above the mean high water line. See *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984); *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005). Tidal waterways and their shores are subject to the Public Trust Doctrine and are held in trust by the State for the benefit of all the people, allowing the public to fully enjoy these lands and waters for a variety of uses. As the Public Trust Doctrine has evolved over the years, courts have ruled that the dry sand and filled areas landward of the mean high water line are also subject to certain public rights under the Public Trust Doctrine. See *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984); *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005). New Jersey Supreme Court cases have held that various stretches of dry sand and filled areas above the mean high water line are subject to certain rights of access to and use by the public, in order to fully enjoy lands subject to public trust rights. The amount

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of dry sand varies depending upon a consideration of factors set forth in the New Jersey Supreme Court case *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984). Factors to be considered when determining the amount of dry sand available for public use include: (1) the location of the dry sand area in relation to the foreshore (the area below the mean high water line, also known as “wet sand beach”); (2) the extent and availability of publicly-owned upland sand area; (3) the nature and extent of the public demand; and (4) the usage of the upland sand by the owner. *Id.* at 326. See also *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005).

The Public Trust Doctrine serves as an extremely important legal principle that helps to maintain public access to and use of tidal waterways and their shores in New Jersey for the benefit of all the people. Further, it establishes the right of the public to fully utilize these lands and waters for a variety of public uses. 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. In New Jersey, the Public Trust Doctrine expressly recognizes and protects natural resources as well as public recreational uses such as swimming, sunbathing, fishing, surfing, walking and boating along the various tidal waterways and their shores.

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

Linear or lateral access refers to access along tidal waterways and their shores, which are subject to public trust rights. Under the Public Trust Doctrine and the rulings of cases that have enunciated it, the public has the right to use tidal waterways and their shores for activities including fishing, swimming, boating, walking and sunbathing. In addition, the public has the right of access to and use of a reasonable amount of the dry sand area landward of the mean high water line at beaches according to the factors set forth in the New Jersey Supreme Court case *Matthews v. Bay Head Improvement Association*, 95

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N.J. 306 (1984) listed above, as well as along the Hudson River as upheld by the decision of the United State District Court for the District of New Jersey case National Association of Home Builders v. NJDEP, 64 F. Supp. 2d 354 (D. NJ 1999).

Perpendicular access refers to the ability of the public to reach tidal waterways and their shores by corridors across land that may be publicly or privately owned. Examples include street ends that abut beaches or other shorelines, public access easements across private property, dune walkovers and trails or walkways that lead to tidal waterways and their shores. Without the ability to reach tidal waterways and their shores via perpendicular access, rights upheld by the Public Trust Doctrine are essentially lost to the public, exemplifying the importance of this type of access.

Through decisions in cases such as Hartz Mountain Industries, Inc. v. DEP (See In RE Waterfront Dev. Permit No-WD88-0443-1, 244 NJ Super. 426, 429-430 (App. Div. 1990)), the courts have recognized that the scope of public access includes rights of visual access. Visual access is the ability of the general public to have access to views of coastal resources without being unreasonably obstructed.

Reasonable, convenient and safe conditions at or around public access areas and public accessways often affect whether the public will be able to reach and use tidal waterways and their shores. Such conditions include informative signs marking public accessways, the absence of threatening or misleading signs, adequate facilities (such as restrooms) within a reasonable distance of tidal waterways and their shores, and sufficient parking located near public accessways. Additionally, special measures, such as ramps to provide barrier free access can be taken as appropriate to ensure that tidal waterways and their shores are accessible by all members of the public.

In recognition of the importance of the rights protected by the Public Trust Doctrine and the importance of perpendicular access to make public enjoyment of access rights a practical reality, the New Jersey has enacted protections for those across and on whose land public access is provided. Under the New Jersey Landowner Liability Act, N.J.S.A. 2A:42A-2 et seq., landowners who make their properties available for public access and use are offered limited protection from the liability they would normally face under common law. This includes the owners (or lessees/occupants) of premises upon which

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public access has been required as a condition of a regulatory approval of, or by agreement with, the Department of Environmental Protection; and the owners (or lessees/occupants) of premises on which a conservation restriction is held by the State, a local unit (for example, a municipality), a charitable conservancy, or premises upon which public access is allowed pursuant to a public pathway or trail easement held by one of these entities. This is an important protection for private landowners that can help to enhance coastal public access throughout the State.

As the New Jersey coastline continues to be developed and redeveloped, it is essential that development be conducted in such a way that retains the public's access to, and use of, tidal waterways and their shores. The current public access to the waterfront rule, N.J.A.C. 7:7E-8.11, requires that coastal development adjacent to coastal waters provide permanent perpendicular and linear access to the waterfront, to the maximum extent practical. In light of the importance of the rights protected by the Public Trust Doctrine and the constant development pressures threatening to reduce the public's access to the waters and shores protected by this doctrine, the proposed repeal and new rules and amendments will ensure that the public's rights continue to be protected and that improvements are accomplished, such as assuring that parking and restroom facilities are available, to provide families and others a realistic and meaningful opportunity to enjoy the public's resources.

In addition to the historic legal rights retained by the public to tidal areas, public funds are invested in numerous ways to protect these public resources and their adjacent lands. The lands and waters subject to public trust rights receive many State and Federal dollars which have been invested in beach replenishment, shore protection, road projects, water quality and monitoring programs, and solid waste monitoring. In part, as a result of this investment, the public has the right to use these resources. State funds are also used to acquire and develop lands for parks and recreation through the Department's Green Acres Program. These programs are financed not just by the communities within which these lands and waters subject to public trust rights are located, but by residents Statewide. Additionally, residents Statewide contribute to fund various Federal programs that protect and enhance lands and waters subject to public trust rights. The proposed

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repeal, new rules and amendments ensure that all residents who contribute to the protection of these lands and waters are able to exercise their rights to access and use the lands and waters. Further, the repeal, new rules and amendments are consistent with Federal programs which require projects utilizing Federal funds to provide public access upon receipt of funds. Further, the proposed new rules and amendments will ensure that increases in public access apply to lands and waters subject to public trust rights Statewide. See Coastal Zone Management Act, 16 USC § 1456 (2006).

Under this proposal, the existing Public access to the waterfront rule is being repealed and replaced with a new rule, N.J.A.C. 7:7E-8.11, Public trust rights. As explained in detail in the following section-by-section summary, the proposed new rule strengthens the Department's existing public access requirements and sets forth specific requirements for Shore Protection Program and Green Acres funding. In addition, a new special area rule is proposed as N.J.A.C. 7:7E-3.50, Lands and waters subject to public trust rights, that would protect tidal waterways and their shores and ensure public access to these lands is provided. Additionally, a new subchapter, N.J.A.C. 7:7E-8A, Information Required to Demonstrate Compliance with the Public Trust Rights Rule: Conservation Restrictions and Public Access Instruments, which contains the information necessary to demonstrate compliance with the strengthened standards of the rule, is being proposed.

The rules recognize that limitations to unlimited public access to all public trust areas are appropriate in certain circumstances to protect human health, safety and/or environment. However, even where such circumstances exist, the proposed repeal, rules and amendments seek to protect the public trust rights by assuring that the limitations are compensated for by creation of alternative areas for public access and use, as appropriate, and that the limitation only remains in effect as long as the condition constituting the threat to public health, safety and/or environment continues.

Through the proposed repeal, new rules and amendments, the Department will ensure that meaningful opportunities to enjoy the tidal waterways and shores subject to public trust rights are provided to families, the disabled and all residents.

The following is a summary of the proposed amendments and new rules:

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## **General**

As will be described in more detail below, throughout the Coastal Permit Program rules, N.J.A.C. 7:7, and Coastal Zone Management rules, N.J.A.C. 7:7E, reference to the public access to the waterfront rule, N.J.A.C. 7:7E-8.11, is being replaced with reference to the public trust rights rule, N.J.A.C. 7:7E-8.11, to reflect the heading of the proposed new section.

## **N.J.A.C. 7:7 Coastal Permit Program rules**

### **Subchapter 1. Introduction**

#### **N.J.A.C. 7:7-1.3 Definitions**

The definition of “coastal permit” is proposed for amendment. The current definition provides that the term includes permits or authorizations issued under New Jersey acts. The proposed amendments expand the current definition to provide that an “authorization” as that term is used in the definition of “coastal permit” includes a Federal Consistency Determination and Water Quality Certificate issued by the Department. The listing of statutes under this definition is being updated to include the statute under which the Department issues Federal Consistency Determinations, Section 307 of the Federal Coastal Zone Management Act, 16 U.S.C. §§ 1451 et seq. and Water Quality Certificates, Section 401 of the Federal Clean Water Act, 33 U.S.C. §§1251 et seq. Further, for the purposes of consistency, the definition of “coastal permit” contained in the Coastal Zone Management rules at N.J.A.C. 7:7E-1.8 is also being amended to reflect the above changes.

The definition of “conservation restriction” is also proposed for amendment. In accordance with the proposed public trust rights rule, at N.J.A.C. 7:7E-8.11(n), the area set aside for public access to tidal waterways and their shores shall be permanently dedicated for public use through the recording of a Department approved conservation restriction. To facilitate this requirement, the definition of “conservation restriction” is being amended to include reference to public access to and use of tidal waterways and



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their shores. The definition of conservation restriction at N.J.A.C. 7:7E-1.8 is also being amended for the purposes of consistency.

A new definition, for “public accessway,” is being proposed. This term is used in several of the coastal general permits at N.J.A.C. 7:7-7. “Public accessways” are routes that provide a means for the public to reach, pass along, and use lands and waters subject to public trust rights. Public accessways include streets, paths, trails, walkways, easements, paper streets, dune walkovers/walkways, piers and other rights-of-way. The same definition of public accessway is also being proposed at N.J.A.C. 7:7E-8.11(b).

### **N.J.A.C. 7:7-1.5 Permits and permit conditions**

N.J.A.C. 7:7-1.5(b) sets forth the conditions that apply to all coastal permits and provides that failure to comply with any of the conditions constitutes a violation. The Department is proposing to amend this provision to clarify that compliance with a permit and its conditions means compliance with all aspects of the permit, including conditions, requirements and limitations. In addition, language is being proposed to reiterate that, not only is compliance required, but failure to comply with any permit condition or approved plan constitutes a violation. Further, the amendments proposed at N.J.A.C. 7:7-1.5(b) clarify that the responsible party for the violation may include entities such as the permittee, site operator and contractor and therefore any or all of these entities may receive a penalty assessment as appropriate. This language is proposed to make it clear that all entities participating in development of a project subject to a coastal permit are obligated to ensure compliance with the permit and its conditions and are subject to penalties for failure to do so.

The Department is additionally proposing to add a new condition applicable to all coastal permits. Proposed N.J.A.C. 7:7-1.5(b)19 provides that the authorization of construction shall not constitute a relinquishment of public rights of access to and use of tidal waterways and their shores. This condition is being added to make it clear that tidal waterways and their shores are subject to public trust rights at all times and that these rights are not in anyway diminished or suspended upon authorization of construction.

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Further, the rights of access and use always apply to lands and waters subject to public trust rights, regardless of other authorized uses.

### **N.J.A.C. 7:7-7 General permits and permits-by-rule**

The Department is proposing amendments to various coastal general permits contained in Subchapter 7 of the Coastal Permit Program rules related to the new public access provisions proposed in the Coastal Zone Management rules, N.J.A.C. 7:7E. These proposed amendments update various general permits by replacing the existing reference to public access requirements under existing N.J.A.C. 7:7E-8.11 with reference to both proposed new N.J.A.C. 7:7E-3.50 and proposed new N.J.A.C. 7:7E-8.11. These same public access requirements are proposed to be added to other general permits, and amendments are proposed to four coastal general permits that pertain to development at a single family home or duplex.

On October 2, 2006, the Department published the proposed repeal and new Flood Hazard Area Control Act rules, N.J.A.C. 7:13 (see 38 N.J.R. 3950(a)). As part of that proposal, various coastal general permits contained in Subchapter 7 of the Coastal Permit Program rules are proposed for amendment. Four of the coastal general permits proposed for amendment in that proposal are also proposed for amendment herein. These include the coastal general permit for voluntary reconstruction of certain residential and commercial development, N.J.A.C. 7:7-7.7, coastal general permit for the development of a single family home or duplex, N.J.A.C. 7:7-7.8, coastal general permit for the expansion, or reconstruction (with or without expansion) of a single family home or duplex, N.J.A.C. 7:7-7.9, and the coastal general permit for the construction of support facilities at legally existing and operating marinas, N.J.A.C. 7:7-7.13. In both the proposed repeal and new Flood Hazard Area Control Act Rules and this proposal, the Department is proposing to add new subsections to these general permits. It is the Department's intention to adjust codification of the proposed amendments to these coastal general permits upon adoption to avoid any overlapping codification.

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As will be discussed in further detail in the summary for this section, proposed N.J.A.C. 7:7E-3.50 is a new special area rule, headed “Lands and waters subject to public trust rights.” Lands and waters subject to public trust rights are tidal waterways and their shores, including both lands now or formerly below the mean high water line and shores above the mean high water line. These are lands held in trust by the State for the benefit of all people under the Public Trust Doctrine. Proposed N.J.A.C. 7:7E-3.50 discourages development that adversely affects these areas and prohibits development that adversely affects or limits public access to or use of these areas, except as provided by the Public trust rights rule, N.J.A.C. 7:7E-8.11. Additional amendments are proposed to add requirements for submission of public access information as part of a permit application and to make other changes as described below.

Several coastal general permits with existing explicit public access requirements are being proposed for amendment. Particularly, coastal general permits for amusement pier expansion, N.J.A.C. 7:7-7.5, construction of support facilities at legally existing and operating commercial marinas, N.J.A.C. 7:7-7.13, construction of recreational facilities at public parks, N.J.A.C. 7:7-7.17, legalization of the filling of tidelands, N.J.A.C. 7:7-7.24, and construction of certain structures related to the tourism industry at hotels and motels, commercial developments and multi-family residential developments over 75 units, N.J.A.C. 7:7-7.26, currently contain public access standards. These coastal general permits are being amended at N.J.A.C. 7:7-7.5(a)10, 7.13(c)2, 7.17(b) and 7.24(a)3 to clearly state that public access shall be provided in accordance with the public trust rights rule, N.J.A.C. 7:7E-8.11, and the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50. This general permit standard will help ensure compliance with the Public Trust Doctrine.

To demonstrate compliance with N.J.A.C. 7:7E-3.50 and 8.11, an additional requirement at N.J.A.C. 7:7-7.5(b)1ii, 7.13(d)1v, 7.17(c)1iv and 7.24(c)1iv is proposed that requires an applicant to identify on the site plan all existing and proposed public access areas and public accessways to tidal waterways and their shores on the site.

In addition to the above proposed amendments, further amendments are proposed to the information required to be submitted in support of an application for the coastal

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general permit for the legalization of the filling of tidelands, N.J.A.C. 7:7-7.24.

Currently, a compliance statement demonstrating how the site complies with the public access to the waterfront rule, N.J.A.C. 7:7E-8.11, is required. This requirement is being amended to replace the reference to demonstrating compliance with the public access to the waterfront rule with reference to demonstrating compliance with N.J.A.C. 7:7-7.24(a). As a result of the above referenced proposed amendment to N.J.A.C. 7:7-7.24(a) to include reference to both N.J.A.C. 7:7E-3.50 and 8.11 in that subsection, this proposed amendment will ensure that the compliance statement demonstrates how the site complies with both the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50 and the public trust rights rule, N.J.A.C. 7:7E-8.11.

In addition to the above amendments, one other amendment is proposed to one of the coastal general permits containing existing public access requirements. The coastal general permit for the expansion of an existing amusement pier at N.J.A.C. 7:7-7.5(a)4 requires that the expansion will not eliminate or affect existing, direct public access from the boardwalk to the beach, unless for each access point eliminated another access point is provided immediately adjacent to the expanded amusement pier. The word “adversely” is being added to modify “affect” since only adverse effects are of concern. Further, there was previously no mitigation allowed for adversely affecting an access point, only for eliminating one. The rule is being amended to allow the same mitigation measures for actions which either eliminate or adversely affect access. This language is consistent with the requirements of proposed N.J.A.C. 7:7E-3.50(c) and 8.11(c).

In addition to updating references to the proposed new public access requirements in coastal general permits already containing explicit public access requirements, amendments are proposed to require public access be provided for coastal general permits not currently containing such a requirement. A new standard requiring that public access be provided in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and public trust rights rule, N.J.A.C. 7:7E-8.11, is being proposed to the following coastal general permits: coastal general permit for beach and dune maintenance activities, N.J.A.C. 7:7-7.6; coastal general permit for voluntary reconstruction of certain residential and commercial development, N.J.A.C. 7:7E-7.7;

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coastal general permit for construction of a bulkhead and placement of associated fill on a man-made lagoon, N.J.A.C. 7:7E-7.10; coastal general permit for the reconstruction of a legally existing functioning bulkhead, N.J.A.C. 7:7-7.14; and Coastal general permit for habitat creation and enhancement, N.J.A.C. 7:7-7.29. Public access requirements are proposed to be added to these coastal general permits because they address development on or adjacent to lands and waters subject to public trust rights, that is tidal waterways and their shores.

To demonstrate compliance with this new standard, additional information requirements are proposed to be added to the five coastal general permits listed above. The specific proposed information requirements vary depending upon the coastal general permit applied for. Applicants for the coastal general permits at N.J.A.C. 7:7-7.7, 7.10 and 7.14 would be required to identify on the required site plan all existing and proposed public access areas and public accessways to tidal waterways and their shores on site. For beach and dune maintenance activities subject to the coastal general permit for beach and dune maintenance activities at N.J.A.C. 7:7-7.6, applicants would be required to identify all tidal waterways and their shores on and adjacent to the site and all existing and proposed public access areas and public accessways to these tidal waterways and their shores adjacent to the site, such as streets, paths and dune walkovers. Additional information on access areas and public accessways adjacent to these sites is being required because these are typical routes providing access to beaches. Since the coastal general permit requires compliance with the lands and waters subject to public trust rights rule and the public trust rights rule, the identification of public accessways on or adjacent to the site is necessary.

Further, amendments are proposed to require applicants for the coastal general permit for beach and dune maintenance activities and coastal general permit for voluntary reconstruction of certain residential or commercial development, N.J.A.C. 7:7-7.7, to submit a compliance statement demonstrating how the proposed regulated activities comply with the standards of the coastal general permit, including, compliance with the Lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11.

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Finally, public access amendments are proposed to five coastal general permits that pertain to development at a single family home or duplex. Particularly, amendments are proposed to the coastal general permit for the development of a single family home or duplex, N.J.A.C. 7:7-7.8; coastal general permit for the expansion or reconstruction (with or without expansion) of a single family home or duplex, N.J.A.C. 7:7-7.9; coastal general permit for construction of a revetment at a single family home or duplex, N.J.A.C. 7:7-7.11; coastal general permit for the construction of gabions at a single family home or duplex, N.J.A.C. 7:7-7.12; and coastal general permit for bulkhead construction and placement of associated fill, N.J.A.C. 7:7-7.18. A standard requiring that public access be provided in accordance with the public trust lands rule is being added to each of these coastal general permits. In addition, while not addressing single family homes, duplexes and associated accessory developments or associated shore protection structures exclusively, the coastal general permits at N.J.A.C. 7:7-7.10 and 7.14 also apply to single family homes and duplexes. As discussed previously, these coastal general permits are also being amended to require the proposed development to comply with the public trust rights rule. The public trust rights rule, N.J.A.C. 7:7E-8.11, provides standards for single family homes, duplexes, associated accessory developments and associated shore protection structures that vary by waterway as discussed in detail in the section-by-section summary of proposed N.J.A.C. 7:7E-8.11.

The public trust rights rule, at proposed N.J.A.C. 7:7E-8.11(f)6, provides that the Department will not require public access for the development of a single family home, duplex or associated accessory development or associated shore protection structure where the development does not result in development of more than one single family home or duplex either solely or in conjunction with a previous development; no beach or dune maintenance activities are proposed; and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay, or Delaware Bay and their shores. This provision does not apply to the Hudson River Waterfront Area. Single family homes, duplexes, and associated accessory developments and shore protection structures that do not meet the exception criteria of proposed N.J.A.C. 7:7E-8.11(f)6 are required to provide public access on the beach and along the shore in accordance with

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proposed N.J.A.C. 7:7E-8.11(f)7. As noted above, these proposed amendments are discussed in detail in the section-by-section summary of proposed N.J.A.C. 7:7E-8.11. The additional information requirements of the coastal general permits at N.J.A.C. 7:7-7.8, 7.9, 7.10, 7.14 and 7.18 are also proposed for amendment to require that all existing and proposed public accessways on site be identified on the site plan. This information will be used to determine compliance with the coastal general permit standards and Public trust rights rule.

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

In addition to proposal of the new special area rule, N.J.A.C. 7:7E-3.50, Lands and waters subject to public trust rights, and the proposed repeal and new public trust rights rule, referenced above and discussed in more detail below, the Department is proposing amendments to various sections of the Coastal Zone Management rules, N.J.A.C. 7:7E. Other amendments proposed include amendments to update references to public access requirements to include both new sections, the addition of public access requirements to other sections, the addition of requirements related to applications for Shore Protection Program or Green Acres funding and other amendments to assure that public access rights are protected and access is improved. A section by section summary of these proposed amendments follows.

#### **Subchapter 1. Introduction**

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

As discussed in detail in the summary of amendments to N.J.A.C. 7:7-1.3 above, the definitions of “coastal permit” and “conservation restriction” are being amended as part of this proposal.

A new definition of Public Trust Doctrine is being proposed consistent with the discussion above. The term is used at N.J.A.C. 7:7E-3.50 and 8.11(a), (p), (q) and (r).

#### **Subchapter 3. Special areas**

##### **N.J.A.C. 7:7E-3.22 Beaches**

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The beaches special area rule sets forth standards for development on beaches. N.J.A.C. 7:7E-3.22(c) encourages public access and barrier free access to beaches and the waters edge, and prohibits development that unreasonably restricts public access. This provision is being amended to require that public access be provided in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11, rather than merely encourage access and in particular barrier free access. This proposed amendment makes it clear that public access for the beach must comply with all of the standards set forth at N.J.A.C. 7:7E-8.11.

### **N.J.A.C. 7:7E-3.23 Filled water's edge**

This rule establishes standards for development within filled water's edge areas. A filled water's edge area is an existing filled area lying between wetlands or water areas, and either the upland limit of fill, or the first paved public road or railroad landward of the adjacent water area, whichever is closer to the water. Existing N.J.A.C. 7:7E-3.23 requires all development on filled water's edge sites to comply with the public access to the waterfront rule, N.J.A.C. 7:7E-8.11, except for single family home or duplex residential lots that are not part of a larger development. Because filled water's edge sites contain lands and waters subject to public trust rights, N.J.A.C. 7:7E-3.23(i) is proposed for amendment to replace reference to the public access to the waterfront rule with reference to the proposed new public trust rights rule and to require that development comply with the new lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50. Further, it is proposed that the indication in existing N.J.A.C. 7:7E-3.23(i) that public access to the waterfront is not required at single family home or duplex residential lots along the waterfront which are not part of a larger development be deleted. As discussed in detail in the summary of the proposed public trust rights rule, N.J.A.C. 7:7E-8.11, while such a blanket exemption is applicable under the current rule, under the proposed new N.J.A.C. 7:7E-8.11, single family homes and duplexes are required to provide public access, except as provided at N.J.A.C. 7:7E-8.11(f)6 and 7.

### **N.J.A.C. 7:7E-3.43 Special urban areas**



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Special urban areas are those municipalities defined in urban aid legislation (N.J.S.A. 52:27D-178) qualified to receive State aid to enable them to maintain and upgrade municipal services and offset local property taxes. In accordance with existing N.J.A.C. 7:7E-3.43(c), housing, hotels, motels and mixed use residential development which comply with the public access to the waterfront rule and Hudson River waterfront area rule, where applicable, including those provisions relating to fishing access as appropriate, are acceptable only over large rivers where water dependent uses are demonstrated to be infeasible. This subsection is proposed for amendment to update the reference to N.J.A.C. 7:7E-8.11 and to also require that the above developments must comply with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50. Reference to compliance with the fishing access requirements of N.J.A.C. 7:7E-8.11 is being deleted since it is duplicative. N.J.A.C. 7:7E-8.11 contains specific standards pertaining to the provision of fishing access and therefore the additional reference at N.J.A.C. 7:7E-3.43(c) is not necessary.

In accordance with existing N.J.A.C. 7:7E-3.43(d), hotels, motels and mixed use development are acceptable in this special area provided the development is consistent with the filled water's edge rule, N.J.A.C. 7:7E-3.23 and public access is provided in accordance with the existing public access to the waterfront rule, N.J.A.C. 7:7E-8.11. This subsection is proposed for amendment to require that public access be provided in accordance with both the proposed lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the proposed public trust rights rule, N.J.A.C. 7:7E-8.11.

#### **N.J.A.C. 7:7E-3.48 Hudson River Waterfront Area**

This rule sets forth standards for waterfront development along the Hudson River. N.J.A.C. 7:7E-3.48(c) requires that development within this special area be consistent with all applicable Coastal Zone Management rules with particular attention focused on eight rules. The list of specific rule sections is proposed for amendment to update the reference to proposed new N.J.A.C. 7:7E-8.11 and to include the new special area rule for lands and waters subject to public trust rights, N.J.A.C. 7:7E-3.50, since this special area is located along the Hudson River.

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N.J.A.C. 7:7E-3.48(e) requires all waterfront development along the Hudson River to develop, maintain and manage a section of the Hudson Waterfront Walkway and sets forth walkway requirements. With the exception of water dependent industrial uses, N.J.A.C. 7:7E-3.48(e)1 requires that all Hudson River pier development provide unrestricted, landscaped public access as prescribed at N.J.A.C. 7:7E-3.48(d). For pier development, the rule requires public access be provided on a 24-hour basis. However, the Department may consider requests to limit late night access if the applicant submits an enforceable agreement ensuring that access will be maintained for the agreed upon hours. This subsection is proposed to be amended to require that public access to and along the main route of the Hudson Waterfront Walkway and on the adjacent piers be provided on a 24-hour basis, except as provided at N.J.A.C. 7:7E-8.11(f). N.J.A.C. 7:7E-8.11(f)1 allows modification of the public access requirement where the proposed development is an energy facility, industrial use, port use, or railroad and the Department determines that perpendicular access and a linear access area is not practicable. Proposed N.J.A.C. 7:7E-8.11(f)2 allows temporary closure of an area otherwise available for public access in the case of exigent circumstances of public safety or security, or repair, maintenance or construction relating to any public access infrastructure, or for the protection of endangered and threatened wildlife or vegetation species habitat or critical wildlife habitat. As areas along the walkway have become increasingly residential and the existing walkway has provided opportunities for the public to access and use these areas, the Department has determined that closure of the walkway is no longer warranted except in these very limited circumstances. Closure of the walkway to the public is contrary to the Public Trust Doctrine, limiting the rights of the public to access and use public trust lands and waters and therefore access is required on a 24-hour basis.

Further, N.J.A.C. 7:7E-3.48(e) is being amended to replace the term “conservation easement” with “conservation restriction” for the purposes of consistency of terminology throughout this chapter.

N.J.A.C. 7:7E-3.48(e)2 requires that water dependent industrial piers provide linear public access and/or public access observation nodes as feasible, consistent with public safety. This provision is proposed for deletion because the proposed amendments at

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N.J.A.C. 7:7E-3.48(e)1 apply to all development on piers. Accordingly, existing N.J.A.C. 7:7E-3.48(e)2 is no longer necessary. Existing N.J.A.C. 7:7E-3.48(e)3 is being recodified as paragraph (e)2 with no changes in text.

N.J.A.C. 7:7E-3.48(f) discourages applications that vary in detail from the standards of the rule, unless they provide greater public access and/or protection of natural or scenic resources than would be afforded by strict compliance with the rule. This provision is proposed to be amended to provide that regardless of any deviation from strict compliance with the standards of the rule, the proposed development must remain in compliance with the public trust rights rule, N.J.A.C. 7:7E-8.11. This will ensure that public access is not compromised.

#### **N.J.A.C. 7:7E-3.50 Lands and water subject to public trust rights**

As discussed previously, 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 people, allowing the public to fully enjoy these lands and waters for a variety of uses, including bathing, swimming, sunbathing, and walking along the tidal waterway and its shore. Because these lands and waters are so naturally valuable and important for human use, they merit the focused attention and special management afforded by a special area rule. Therefore, the Department is proposing a new special area rule, N.J.A.C. 7:7E-3.50, Lands and waters subject to public trust rights.

Proposed N.J.A.C. 7:7E-3.50(a) defines this special area as tidal waterways and their shores, including both the lands now and formerly below the mean high water line and shores above the mean high water line. As the Public Trust Doctrine has evolved over the years, courts have ruled that the dry sand areas landward of the mean high water line are also subject to certain public trust rights under the Public Trust Doctrine. New Jersey Supreme Court cases such as *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984), have held that various stretches of dry sand areas above the mean high water line are subject to certain rights of access to and use by the public. Therefore, this special area includes both tidal waterways and their shores.

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Development and other activities can adversely affect tidal waterways and their shores as well as access to and use of those lands and waters. An example of development adversely affecting tidal waterways and their shores is the construction of a building that shadows or is located directly alongside a public beach. The proximity of the building to the lands and waters subject to public trust rights serves to diminish the quality of the experience of the beach user, encouraging them to go elsewhere. In addition to the examples of development adversely affecting tidal waterways and their shores and access to those lands described in the rationale to proposed N.J.A.C. 7:7E-3.50, another example of such development would be the construction of an oceanfront condominium development that limited access to the beach to condominium owners and their guests.

As the holder of lands and waters subject to public trust rights, it is the duty of the State to not only allow and protect the public's right to use them, but also to ensure that there is adequate access to these sites. Therefore, proposed N.J.A.C. 7:7E-3.50(b) provides that development that adversely affects lands and waters subject to public trust rights is discouraged and proposed N.J.A.C. 7:7E-3.50(c) prohibits development that adversely affects or limits public access to lands and waters subject to the public trust rights, except as provided in the proposed public trust rights rule at N.J.A.C. 7:7E-8.11. Public trust rights include public access, which is the ability of the public to pass physically and visually to, from and along lands and waters subject to public trust rights (that is tidal waterways and their shores), and to use these lands and waters for activities such as fishing, swimming, sunbathing, birdwatching, walking and boating. Public trust rights also include the right to perpendicular and linear access. Public accessways and public access areas provide a means for the public to pass along and use lands and waters subject to public trust rights. N.J.A.C. 7:7E-8.11 sets forth the standards for public access. Accordingly, proposed N.J.A.C. 7:7E-3.50(d) requires that public access to this special area be provided in accordance with N.J.A.C. 7:7E-8.11.

Proposed N.J.A.C. 7:7E-3.50(e) contains the rationale for the rule.

## **7:7E-7.2 Housing use rules**

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The housing use rules set forth development standards for various types of housing such as single family homes, duplexes, multi-family units, apartments, town homes and mixed use developments. The standards for water area and water's edge housing are codified as N.J.A.C. 7:7E-7.2(b). N.J.A.C. 7:7E-7.2(b)2 contains the standards for new housing in special urban areas and along large rivers where water dependent uses are demonstrated to be infeasible. Under this paragraph, new housing is conditionally acceptable on structurally sound existing pilings or where piers have been removed as part of the harbor clean up program. N.J.A.C. 7:7E-7.2(b)2iii provides that new housing acceptable under this paragraph shall be consistent with N.J.A.C. 7:7E-8.11, including provisions of fishing access where appropriate.

Because water area and water's edge housing is located on or adjacent to tidal waterways and their shores, N.J.A.C. 7:7E-7.2(b)2iii is proposed for amendment to update the reference to proposed new N.J.A.C. 7:7E-8.11 and to require that the new housing also comply with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50. Lastly, the requirement that fishing access be provided when appropriate is being deleted because proposed new N.J.A.C. 7:7E-8.11 sets forth the requirements for fishing access at proposed developments.

In accordance with N.J.A.C. 7:7E-7.2(b)3, housing is conditionally acceptable in the filled water's edge provided the housing complies with the filled water's edge rule and the public access to the waterfront rule. The cross-reference to the public access to the waterfront rule, N.J.A.C. 7:7E-8.11, is being updated to reflect the proposed new heading of the rule.

N.J.A.C. 7:7E-7.2(e) and (f) set forth the standards for development of a single family home or duplex and/or accessory development. These standards are proposed for amendment to require, at N.J.A.C. 7:7E-7.2(e)5 and (f)5, that public access be provided in accordance with the public trust rights rule, N.J.A.C. 7:7E-8.11. Since N.J.A.C. 7:7E-8.11 provides the specific criteria for and exceptions to public access at individual single family homes and duplexes, which are incorporated by reference into N.J.A.C. 7:7E-3.50, the Department determined that it is not necessary to require compliance with N.J.A.C. 7:7E-3.50 for these developments. The public access standards for single family homes

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or duplexes at N.J.A.C. 7:7E-8.11 vary by waterway, for the reasons discussed in detail in the section-by-section summary of the public trust rights rule, N.J.A.C. 7:7E-8.11(f). Public access is not required at a single family home, duplex associated accessory development or associated shore protection structure where the development does not result in the development of more than one single family home or duplex either solely or in conjunction with a previous development; no beach or dune maintenance activities are proposed; and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and their shores. However, public access is required at single family homes located within the Hudson River Waterfront Area and single family homes that do not meet the above criteria for the reasons explained in the summary of proposed new N.J.A.C. 7:7E-8.11. Existing N.J.A.C. 7:7E-7.2(e)5 through 12 and (f)5 through 12 are being recodified as paragraphs (e)6 through 13 and (f)6 through 13 with no changes in text.

### **N.J.A.C. 7:7E-7.3 Resort/recreational use**

The standards for development of marinas are codified at N.J.A.C. 7:7E-7.3(d). In accordance with N.J.A.C. 7:7E-7.3(d)2iv, new marina facilities and expansions and renovations of existing marinas must comply with the public access to the waterfront rule, N.J.A.C. 7:7E-8.11. Because marinas are located on or adjacent to tidal waterways and their shores, N.J.A.C. 7:7E-7.3(d)2iv is proposed for amendment to update the reference to proposed new N.J.A.C. 7:7E-8.11 and to require that these marinas comply with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50.

N.J.A.C. 7:7E-7.3(e) sets forth the standards for development of amusement piers, parks and boardwalks. Amusement piers as defined at N.J.A.C. 7:7E-7.3(e)1 are an elevated, pile supported structure located on a beach and/or tidal water, seaward of a bulkhead of boardwalk, and perpendicular to the mean high water line on which amusements are located. Because amusement piers are located on or adjacent to tidal waterways and their shores, they are subject to the requirements of the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and must provide public access to ensure compliance with the Public Trust Doctrine. Therefore, N.J.A.C. 7:7E-7.3(e)2 is

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being amended to add a new standard at N.J.A.C. 7:7E-7.3(e)2vi that requires public access be provided in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11.

#### **N.J.A.C. 7:7E-7.4 Energy facility use**

The energy facility use rule contains the acceptability standards for the wide variety of energy facilities that may be proposed in the coastal area. N.J.A.C. 7:7E-7.4(b) contains the standards for siting of energy facilities. N.J.A.C. 7:7E-7.4(b)3 requires that public access to and use of the waterfront and tidal waters be maintained and enhanced where feasible, pursuant to N.J.A.C. 7:7E-8.11. This standard is being proposed to be deleted and replaced with a new standard that requires public access be provided in accordance with the public trust rights rule, N.J.A.C. 7:7E-8.11. The public trust rights rule generally requires development on or adjacent to all tidal waterways and their shores to provide on site, permanent, unobstructed public access to the tidal waterway and its shore at all times, including both physical and visual access. However, the Department recognizes that this may not always be feasible. Accordingly, as will be explained more fully in the summary below, proposed N.J.A.C. 7:7E-8.11(f)1 establishes criteria for modifying the public access requirement with respect to energy facilities.

#### **N.J.A.C. 7:7E-7.7 Industry use**

Industry uses are uses that involve industrial processing, manufacturing, storage or distribution activities. N.J.A.C. 7:7E-7.7(b) encourages industrial uses in special urban areas and elsewhere finds them conditionally acceptable provided they comply with all applicable location and resource rules, especially those that reserve the water's edge for water dependent uses and the public access to the waterfront rule. Special water's edge areas are those special areas located adjacent to tidal waterways. Because industrial uses are frequently located along tidal waterways and their shores, N.J.A.C. 7:7E-7.7(b) is proposed for amendment to require that industrial uses comply with N.J.A.C. 7:7E-3.50.

#### **N.J.A.C. 7:7E-7.11 Coastal engineering**

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N.J.A.C. 7:7E-7.11(d) contains the standards for beach nourishment projects.

N.J.A.C. 7:7E-7.11(d)iv requires public access be provided to the nourished beach in cases where public funds are used to complete the project. This requirement is being proposed for amendment to require that public access to nourished beaches be provided in accordance with the public trust rights rule, N.J.A.C. 7:7E-8.11, regardless of whether public funds were used to complete the project, since such projects are constructed in areas subject to the Public Trust Doctrine. Any coastal development or activity subject to the Coastal Zone Management rules must comply with all applicable sections of the rules. Therefore, N.J.A.C. 7:7E-7.11(d)iv is proposed for amendment to require provision of access in accordance with N.J.A.C. 7:7E-3.50 and 8.11.

N.J.A.C. 7:7E-7.11(e) contains the standards for structural shore protection. N.J.A.C. 7:7E-7.11(e)4 requires public access, including parking where appropriate, be provided to publicly funded shore protection structures and to waterfront lands created by public projects, unless public access would create a safety hazard to users. Physical barriers or local regulations that unreasonably interfere with access to, along or across a structure are prohibited. This provision is proposed for deletion and replacement with a requirement that public access to the shore protection structure be provided in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50 and the public trust rights rule, N.J.A.C. 7:7E-8.11. Public access to structural shore protection projects is required regardless of the funding source because they are constructed on and adjacent to tidal waterways and their shores, and thus subject to public trust rights and these rules contain the comprehensive standards for protection of public trust rights subject to the Public Trust Doctrine. Therefore, N.J.A.C. 7:7E-7.11(e)4 is proposed for amendment accordingly.

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

In light of the importance of the rights protected by the Public Trust Doctrine and the constant development pressures threatening to reduce the public's access to the waters and shores protected by this doctrine, the Department is proposing to repeal the existing public access rule and replace it with a new public trust rights rule. This proposed new



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rule will ensure that the public's rights continue to be protected and that improvements are accomplished, such as assuring that parking and restroom facilities are available, to provide families and others a realistic and meaningful opportunity to enjoy the public's resources. Further, this comprehensive rule contains standards for all coastal development as well as specific standards for municipalities participating in Shore Protection Program funding and for municipalities, counties and nonprofit organizations to be eligible to receive Green Acres Program funding.

The Public Trust Doctrine holds that rights to tidal waterways and their shores in the State are held by the State in trust for the benefit of all the people. It also establishes the right of the public to fully utilize these lands and waters for a variety of public uses. As interpreted in New Jersey, public rights protected under the public trust doctrine include environmental protection as well as recreational uses such as bathing, swimming, sunbathing and walking along the various tidal waterways and their shores. Therefore, public trust rights include both access to and use of tidal waterways and their shores. The heading of this rule is being changed from "Public access to the waterfront" to "Public trust rights" to more accurately reflect its derivation and intent.

Proposed N.J.A.C. 7:7E-8.11(a) describes public trust rights. Similar to the description of public access at existing N.J.A.C. 7:7E-8.11(a), public trust rights include public access, which is the ability of the public to pass physically and visually to, from and along tidal waterways and their shores. Language is being added to N.J.A.C. 7:7E-8.11(a) to make it clear that public trust rights also include the use of these lands and waters for activities such as fishing, swimming and sunbathing, and that public trust rights also include the right to perpendicular and linear access. In addition, language is being added to provide a nexus between the requirement of public accessways and access areas and the ability of the public to reach, pass along and use lands and waters subject to public trust rights, that is tidal waterways and their shores.

Proposed new N.J.A.C. 7:7E-8.11(b) includes definitions that are specific to this rule. The definitions of "Green Acres Program funding" and "Shore Protection Program funding" are used at proposed N.J.A.C. 7:7E-8.11(p) and (q) and in proposed new N.J.A.C. 7:7E-8A. These subsections contain specific standards for municipalities,

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counties and nonprofit organizations that participate in these funding programs. The Green Acres Program provides funding through loans or matching grants or both, to a local government unit, or matching grants to a nonprofit organization, for the acquisition of land or development of outdoor recreation and conservation facilities. Shore Protection Program funding is the monies from the Shore Protection Fund established by N.J.S.A. 13:19-16 and any other Department money for shore protection projects associated with the protection, stabilization, restoration or maintenance of the shore, including beach nourishment projects and land acquisitions. The term “held” when referring to land means those lands owned, leased or otherwise controlled by municipalities, counties or nonprofit organizations. This term is also used at proposed N.J.A.C. 7:7E-8.11(p) and (q) and 8A. “Natural” area is used in determining the scope of public accessways and areas along certain tidal waterways and their shores. Public access in these areas must be designed to minimize impacts to the natural area’s habitat value, vegetation and water quality, as described at proposed N.J.A.C. 7:7E-8.11(d)2. The term “paper streets” is used at N.J.A.C. 7:7E-8.11(p) and (q) and in proposed new N.J.A.C. 7:7E-8A. Paper streets are streets appearing on a recorded plan that have not been constructed. While the street itself has not been constructed, paper streets are a type of public accessway subject to preservation under the Public Access Instrument as described at N.J.A.C. 7:7E-8A.5. The term “public accessway” is used through proposed N.J.A.C. 7:7E-8.11. A public accessway is a route that provides a means for the public to reach, pass along, and use lands and waters subject to public trust rights. The term “State Aid Agreement” is used at proposed N.J.A.C. 7:7E-8.11(p) which sets forth the public access standards for Shore Protection Program funding. To participate in Shore Protection Program funding, a municipality must enter into a cost sharing agreement, known as State Aid Agreement, with the Department. For the purposes of proposed N.J.A.C. 7:7E-8.11(p)7 and 8, the State Aid Agreement describes the shore protection or beach nourishment project.

Existing N.J.A.C. 7:7E-8.11(b) requires that coastal development adjacent to coastal waters provide permanent perpendicular and linear access, including both visual and physical access, to the maximum extent practicable. Further, the existing subsection

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discourages development that limits public access and the diversity of the waterfront experiences. Under this proposal, existing N.J.A.C. 7:7E-8.11(b) is being recodified as subsections (c) and (d). Rather than discouraging development that limits public access, proposed new N.J.A.C. 7:7E-8.11(c) prohibits development that adversely affects or limits public trust rights to tidal waterways and their shores with limited exceptions. By replacing the terms “maximum extent practicable” and “discouraged” with the term “prohibited” with specific exceptions, the Department will be able to ensure that meaningful access is provided for all members of the public.

Proposed new N.J.A.C. 7:7E-8.11(d) requires that development on or adjacent to tidal waterways and their shores provide onsite, permanent, unobstructed public access to tidal waters and their shores at all times, including both visual and physical access. These standards are proposed to ensure that public trust rights to access and use tidal waterways and their shores are upheld. As described further below, proposed new N.J.A.C. 7:7E-8.11(f) sets forth the circumstances in which the public access provision of this rule may be modified.

Similar to existing N.J.A.C. 7:7E-8.11(b), proposed new N.J.A.C. 7:7E-8.11(d)1 provides that public accessways and public access areas include perpendicular access and a linear area along the waterfront. The proposed new paragraph further clarifies that public access applies to the entire tidal waterway and its shore. Proposed N.J.A.C. 7:7E-8.11(d)2 provides that public accessways and areas located in a natural area of a tidal waterway and its shore shall be designed to minimize impacts to the natural area’s habitat value, vegetation and water quality. For the purposes of this rule, a natural area is an area that has retained its natural character as evidenced by the presence of woody vegetation (trees, saplings, scrub-shrub vegetation) or rare or endangered plants. In accordance with the proposed definition of natural area at N.J.A.C. 7:7E-8.11(b), these areas need not be undisturbed and do not include maintained lawns or areas landscaped with non-native herbaceous plants. The allowance of some impact to natural areas provided impacts are minimized, reflects the Department’s attempt to strike an appropriate balance between the potentially conflicting goals of providing public access and the need to protect natural resources.

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Proposed new N.J.A.C. 7:7E-8.11(e) sets forth specific perpendicular and linear access requirements for sites located along the Arthur Kill, Kill Van Kull west of Bayonne Bridge, Newark Bay, Delaware River from the Trenton Makes Bridge to the CAFRA boundary, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, Cohansey River in Bridgeton City, and Maurice River in Millville City. Development along these major waterways is proceeding rapidly. Based on the Department's experience with and success of the Hudson River Waterfront Walkway, the Department is proposing specific accessway and access area requirements to accommodate residents and workers in densely developed urban waterfronts. The standards proposed at N.J.A.C. 7:7E-8.11(e)1 and 2 are based on the Hudson River Waterfront Walkway Plan and Design Guidelines in terms of the width of the linear and perpendicular accessways and areas, the width of areas subject to a conservation restriction, and the distance between perpendicular accessways. However, recognizing the varied nature of the waterways, the public accessway and public access area requirements proposed herein do not contain the same level of specificity as the Hudson River Waterfront Walkway Plan and Design Guidelines such as planting, lighting and seating requirements. In addition, the proposed requirements provide the ability to reduce the walkway width in order to protect endangered and threatened wildlife or vegetation species habitats, critical wildlife habitats, natural areas or existing infrastructure, if necessary.

Existing N.J.A.C. 7:7E-8.11(b)1 recognizes that a linear public access may not always be practicable on-site or for the entire shore and that an alternative route or area may be necessary. The Department has evaluated this standard and determined that additional circumstances may exist that warrant modification of the location, scope or timing of public access provisions. Accordingly, proposed N.J.A.C. 7:7E-8.11(f) sets forth seven situations, each with specific criteria, in which modification of the permanent on-site public access requirements that are set forth at proposed N.J.A.C. 7:7E-8.11(d) and (e) may be allowed. However, in keeping with the tenets of the Public Trust Doctrine, the rule provides that no modification of the public access requirements at a site relinquishes the public trust rights of access to and use of the tidal waterways and their

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shores. Thus the public trust rights of access to and use of these lands and waters are retained so that if circumstances change in the future, public access will be provided.

The first situation where the Department may modify the public access requirements at proposed N.J.A.C. 7:7E-8.11(d) and (e) is a situation for which documentation is provided of unique risks associated with late night access. Proposed N.J.A.C. 7:7E-8.11(f)1 provides that the Department may allow closure of a public access area late at night if it is provided with documentation that circumstances threaten public safety and warrant such closure. The circumstances must be identified, must be unique to the site and must be in addition to risks such as drowning associated with tidal waterways. The closure would only potentially be granted for specific hours late at night and at specific locations. This provision does not apply to the Arthur Kill, Kill Van Kull west of Bayonne Bridge, Newark Bay, Delaware River from the Trenton Makes Bridge to the CAFRA boundary, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, Cohansey River in Bridgeton City, or Maurice River in Millville City, along which the rule contemplates continuous public waterfront walkways with prescribed design that will function akin to a sidewalk that is always open to the public.

Under the proposed new N.J.A.C. 7:7E-8.11, the Department may also modify the public access requirements of proposed N.J.A.C. 7:7E-8.11(d) and (e) in circumstances that warrant temporary restrictions to public access, including closure of a public access area for a limited time, as reflected at proposed N.J.A.C. 7:7E-8.11(f)2. The Department may approve temporary closure of an area subject to public access where exigent circumstances of public safety or security, or repair, maintenance, or construction relating to public access infrastructure exist, as provided at proposed N.J.A.C. 7:7E-8.11(f)2i. In such case, the closure must cease as soon as the exigent circumstances cease. Examples of such conditions would include the imposition of limited or controlled access to waterfront areas of Liberty State Park during visits of heads of state, closure of a portion of a walkway to repair a collapsed section, or closure of limited waterfront areas during severe storm events that threaten public safety with flooding, waves or storm surge.

Temporary restrictions of public access, including closure of an area subject to public access, may be approved, required or imposed by the Department to protect endangered

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or threatened wildlife or plant species in accordance with proposed N.J.A.C. 7:7E-8.11(f)2ii. For example, the Department may approve temporary restrictions on specific activities, such as dog walking, or closure of a sandy beach during the nesting season for piping plover, a Federal and State endangered species.

Lastly, under proposed N.J.A.C. 7:7E-8.11(f)2iii temporary restrictions on public access may be approved or imposed when the Department determines that they are necessary to protect other critical wildlife resources, such as seasonal assemblages of wildlife in areas that provide critical feeding, roosting, resting or staging habitat. This rule could be utilized if it became necessary to temporarily close a section of bay beach used as a staging or roosting area for large numbers of shorebirds during their spring or fall migration, or close a walkway near a regionally significant resting area for wintering American Oystercatchers.

The third situation where the standards may be relaxed is set forth at proposed N.J.A.C. 7:7E-8.11(f)3. The proposed paragraph recognizes that certain activities occurring along the coast include hazardous operations and that injury may result where accommodation is not made to allow these necessary activities to occur. Such activities have been identified at energy facilities, industrial uses, port uses, airports, railroads and military facilities. Additionally, such facilities may contain existing obstructions that preclude access along the entire shore on-site, such as storage tanks and distribution tanks at oil refineries. Therefore, proposed N.J.A.C. 7:7E-8.11(f)3 stipulates that where one of these uses or facilities is proposed, the Department may modify the public access requirement at proposed N.J.A.C. 7:7E-8.11(d) or (e) if the Department determines that the risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions, make it impracticable to provide perpendicular access and a linear area along the entire shore, and that there are no measures that can be taken to avert the risks. In such cases, the Department will instead require equivalent public access either on-site or at a nearby off-site location, if it can not be accomplished on-site. Equivalent public access might take the form of an observation area along the waterfront, a public fishing pier or small boat/canoe launch along a tidal water body, creation of new public parking spaces at another access point, or passive recreational enhancements

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(seating areas, lighting, trash receptacles, interpretive signage, access ramps or stairways, etc.) at existing public access areas.

As noted previously, areas along the Hudson River Waterfront walkway have become increasingly residential and the existing walkway has provided opportunities for the public to access and use these areas along the Hudson River. The Walkway is a vital and active public accessway in the Hudson River Waterfront Area. Therefore, the Department has determined that closure of the walkway is no longer warranted except in the limited circumstances described above and therefore none of the remaining provisions for modification of the public access requirements proposed at N.J.A.C. 7:7E-8.11(f)3 through 7 apply to the Hudson River Waterfront Area.

The remaining four situations where the Department may modify the public access requirements at proposed N.J.A.C. 7:7E-8.11(d) and (e) are residential developments consisting of one, two or three units. Because access to the State's beaches and to its largest waterways, the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and Delaware Bay, is in such public demand and so important to the State's tourism industry, the permissible modifications to public access requirements at one, two or three unit residential developments depend on whether or not the site is located on or adjacent to one of these waterways and whether or not beach and dune maintenance is proposed.

Proposed N.J.A.C. 7:7E-8.11(f)4 and 5 pertain to two- or three- unit residential developments or associated accessory developments or shore protection structures. In accordance with proposed N.J.A.C. 7:7E-8.11(f)4, at these developments, the Department may allow provision of equivalent public access on-site or at a nearby off-site location provided that the site is not located on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay, and no beach or dune maintenance is proposed and provided the site is not located in the Hudson River Waterfront area or one of the major waterways described at N.J.A.C. 7:7E-8.11(e). The equivalent public access would be determined based on an evaluation of the size of the site, the character of the waterway and the availability and type of public access in the vicinity. The effect of this provision would be that, in lieu of providing perpendicular access to the waterway and shore at the site, and along the entire length of the site, a development might provide alternative

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access either on-site or off-site. For instance, where there is no public access to the waterway in the vicinity, on-site access will be promoted. In contrast, at a small site where there is nearby access, on-site access may not be required but rather it may be required that a nearby public accessway or public access area be enhanced. Another example of alternative on-site access would be the provision of a small pocket park at a discrete location along the shore of the site rather than a pathway along the entire shore on-site. Alternatively a combination of enhancements to public access may be required rather than providing access along the entire shore on-site. An example of this would be access to a limited area on-site coupled with enhancement of a nearby off-site area for fishing. Such modifications to the public access requirements at proposed N.J.A.C. 7:7E-8.11(d) are proposed due to the fact that at small sites or where there is already considerable access to the tidal waterway in the vicinity, enhancing access at an off-site location may provide more meaningful public access.

As noted, the above provision does not apply to the Arthur Kill, Kill Van Kull west of Bayonne Bridge, Newark Bay, Delaware River from the Trenton Makes Bridge to the CAFRA boundary, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, Cohansey River in Bridgeton City, or Maurice River in Millville City. Proposed N.J.A.C. 7:7E-8.11(f)5 contains the conditions for modification of public access at two- or three- unit residential developments or associated accessory developments or shore protection structures that are located on one of these waterways. Due to the limited scope of these projects, the Department has determined that on these waterways the width of the public access walkway along the waterway can be reduced from 16 feet to 10 feet, with a 20-foot rather than a 30-foot-wide easement. In addition, the width of the easement providing perpendicular access may be reduced from 20 feet to 10 feet, while maintaining the width of the perpendicular accessway at 10 feet. This will allow a continuous public accessway along these tidal waterways, which will foster redevelopment of these areas, and promote access to some of the State's largest tidal waters located in some of the most densely populated portions of the State, while accommodating the smaller scale of these developments.



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Existing N.J.A.C. 7:7E-8.11(c) provides that public access is not required at a single family home or duplex which is not part of a larger development. Under this proposed new rule, single family homes and duplexes would be required to provide public access in certain circumstances described below. Proposed N.J.A.C. 7:7E-8.11(f)6 and 7 pertain to single family homes and duplexes, and associated accessory developments or shore protection structures. As noted above, the permissible modifications to public access requirements at these residential developments depend on whether or not the site contains a beach that is located on or adjacent to the Atlantic Ocean, or Sandy Hook, Raritan or Delaware Bay and whether or not beach and dune maintenance is proposed. Proposed N.J.A.C. 7:7E-8.11(f)6 contains the standards for these residential developments when they do not include a beach for which beach and dune maintenance activities are proposed or located along one of these waterways, and proposed N.J.A.C. 7:7E-8.11(f)7 contains the standards for these residential developments that do include such a beach.

In accordance with proposed N.J.A.C. 7:7E-8.11(f)6, the Department will not require provision of public access for development consisting solely of a single family home or duplex, or associated accessory development or shore protection structure provided the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and provided that no beach or dune maintenance activities are proposed. This provision has been proposed because in many cases where one single family home is proposed, the size of the property and density of development do not lend themselves to providing public access on-site. However, given the extent of public demand for beach access and the importance of beach access to the State's economy, public access is required along the beach in accordance with proposed N.J.A.C. 7:7E-8.11(f)7 when a site contains a beach for which beach and dune maintenance activities are proposed. For the same reason, if a site includes a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and their shores then public access is required to that beach. However, unlike proposed N.J.A.C. 7:7E-8.11(f)4 and 5 for two- or three- unit residential developments, if a site along the Atlantic Ocean, Sandy Hook Bay, Raritan Bay, or Delaware Bay and their shores does not contain a beach, access will not be required as part of a coastal permit, although public trust rights

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will remain. This provision reflects the Department's anticipation that there will be considerably less demand for access to such a site than to a beach and the site will be smaller in size than a two- or three- unit development. Finally, both proposed N.J.A.C. 7:7E-8.11(f)6 and 7 contain language to make it clear that additional public access requirements may be imposed as a condition of funding under the State's Shore Protection Program, described fully at proposed N.J.A.C. 7:7E-8.11(q) below. For example, proposed N.J.A.C. 7:7E-8.11(p) requires that a municipality participating in a shore protection or beach nourishment project with Shore Protection program funding, acquire and record conservation restrictions for the beach and/or entire shore protection project that maintain public access to these areas in perpetuity.

Existing N.J.A.C. 7:7E-8.11(b)5 requires that all establishments which control access to tidal waters comply with the Law Against Discrimination, N.J.S.A. 10:5-1 et seq. This provision is being recodified as N.J.A.C. 7:7E-8.11(g) and amended to specifically include municipalities, counties, and condominium and homeowner associations in the list of examples of "establishments" to which this requirement applies. Although the list is not all inclusive and these entities are already required to comply with the Law against Discrimination under the existing paragraph, naming these three entities is an appropriate clarification because they frequently control tidal shores.

Whether a public accessway serves its intended function in allowing the public to reach and use tidal waterways and their shores can be influenced by various factors in the vicinity of the accessway. Public usage of public access areas is greatly enhanced where informative signage is present to inform the public of the availability of the access opportunity, and where adequate facilities such as restrooms and sufficient parking within a reasonable distance of tidal waterways and their shores are present. Proposed new N.J.A.C. 7:7E-8.11(h), (i), (j) and (k) contain standards relating to the public's ability to access and use tidal waterways and their shores by addressing signage, parking and barrier free access.

Existing N.J.A.C. 7:7E-8.11(b)3, which requires that public access be clearly marked, is being recodified as N.J.A.C. 7:7E-8.11(h) and further clarified. Under this proposed new rule, Department approved public access signs shall be installed and maintained in

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perpetuity, by the permittee and its successors in title and interest, at each accessway, public access area and/or public parking area at the site of the development. This clarification will ensure that the public is aware of the availability of these areas for public use. As discussed in further detail below, proposed new N.J.A.C. 7:7E-8.11(p) and (q) contain standards for municipalities, counties and nonprofit organizations that participate in Shore Protection Program and Green Acres Program funding.

Some activities have the effect of discouraging or preventing the public from exercising their rights under the Public Trust Doctrine. Examples of these activities include, but are not limited to, misleading signs, no trespassing signs, requiring photographic identification, requiring a liability waiver, requiring the purchase of drinks or food from a specific vendor, or prohibiting bringing beach equipment such as blankets or beach chairs. As stated previously, the Public Trust Doctrine provides that public rights to tidal waterways and their shores in the State are held by the State in trust for the benefit of all the people. Further, it establishes the right of the public to fully utilize these lands and waters for a variety of public activities. To ensure that the public is able to exercise their rights under the Public Trust Doctrine, proposed N.J.A.C. 7:7E-8.11(i) prohibits any activity that has the effect of discouraging or preventing the public from exercising their rights under the Public Trust Doctrine.

Parking is an important aspect of meaningful public access. Insufficient parking discourages public access to and use of tidal waterways and their shores. Parking requirements are currently contained at existing N.J.A.C. 7:7E-8.11(b)3. In addition, existing N.J.A.C. 7:7E-8.11(b)14 contains the mitigation requirements for developments that reduce existing on-street parking. Finally, existing N.J.A.C. 7:7E-8.11(b) discourages development that limits public access, which the Department interprets to discourage development that reduces onsite public parking. To ensure that the public has the ability to exercise their rights under the Public Trust Doctrine, proposed new N.J.A.C. 7:7E-8.11(j) requires developments provide parking, except where public access is not required in accordance with proposed N.J.A.C. 7:7E-8.11(f)6 or the project is limited in scope as described at N.J.A.C. 7:7E-8.11(f)7. Proposed N.J.A.C. 7:7E-8.11(j) also

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contains a cross-reference to proposed N.J.A.C. 7:7E-8.11(p) and (q) which contain specific parking requirements for Shore Protection Program and Green Acres funding.

Proposed N.J.A.C. 7:7E-8.11(j)1 through 3 set forth specific parking requirements for developments not utilizing Shore Protection Program or Green Acres funding. The requirements at existing N.J.A.C. 7:7E-8.11(b)14 to mitigate for loss of on-street parking are proposed to be recodified at N.J.A.C. 7:7E-8.11(j)1. Furthermore, because the reduction of existing parking off-street parking also limits the public's ability to access and use the lands and waters subject to the public trust rights, a specific mitigation requirement for loss of off-street parking is also being proposed at N.J.A.C. 7:7E-8.11(j)1. To ensure that the off-street parking for public access is preserved for the purposes it was intended in perpetuity, proposed new N.J.A.C. 7:7E-8.11(j)2 requires that the area set aside for off-street parking be dedicated for this purpose through the recording of a conservation restriction. As discussed in greater detail in the summary of proposed N.J.A.C. 7:7E-8.11(n), the conservation restriction is a legally binding agreement that limits certain types of uses, while allowing other uses to take place on a site, now and into the future. To ensure that the on-street parking provided as compensation for lost parking to satisfy this paragraph is dedicated for the purposes of providing public access to a tidal waterway and its shore, proposed N.J.A.C. 7:7E-8.11(j)3 requires that the on-street parking be dedicated for public access through a municipal ordinance.

In order ensure that tidal waterways and their shores are accessible by all members of the public, existing N.J.A.C. 7:7E-8.11(b)13, and proposed new N.J.A.C. 7:7E-8.11(k), require 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.

New Jersey's tidal waterways and their shores are popular for a variety of recreational activities including boating and fishing. Annually, more that 800,000 people participate in marine sport fishing and shellfishing in New Jersey. In a recent survey conducted by the National Marine Fisheries Service, New Jersey ranked first in harvest of the four of the five most important recreational species (summer flounder, bluefish, seabass and

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tautog) while it ranked second in the harvest of striped bass. New Jersey's recreational fishery is worth approximately \$1.5 billion annually to the economy of New Jersey. To ensure continued access to and use of New Jersey's tidal waterways and their shores for the purposes of boating and fishing, existing N.J.A.C. 7:7E-8.11(b)12 requires that development adjacent to coastal waters provide fishing access when feasible and warranted. This provision is proposed to be recodified as N.J.A.C. 7:7E-8.11(l) and amended to require development on or adjacent to tidal waterways and their shores incorporate fishing access and associated amenities to the maximum extent practicable within the area provided for public access. By requiring fishing amenities such as pole holders or fish cleaning stations in public access areas to the maximum extent practicable, the public's waterfront experience becomes more meaningful. For beaches, to avoid conflict between swimmers and fishermen, fishing access will not be required at beaches designated for swimming during designated swimming hours.

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

In a recent New Jersey Supreme Court case, the court held that the broad scope of the Department's authority includes jurisdiction to review fees proposed by a beach owner for the use of its dry beach (*See Raleigh Ave. Beach Association v. Atlantis Beach Club, Inc., et al., 185 N.J. 40 (2005)*). The Department's authority was found to be granted

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under the Coastal Area Facility Review Act (CAFRA), through the Coastal Permit Program rules, N.J.A.C. 7:7, and the Coastal Zone Management rules, N.J.A.C. 7:7E. Further, authority was found to be inherent in the Department's "power to promote health, safety and welfare of the public." Thus, N.J.S.A. 40:61-22.20 and this case provide the ability for the Department to review fees charged at both municipal and privately owned beaches. The court specified that the Department approved fees are unrelated to the "independent and inherent right of [the beach owner]" to determine fees for beach amenities such as cabanas, beach chair rentals and food concessions. Rather, the Department approved fees relate to fees for the use of the dry beach.

Currently, N.J.A.C. 7:7E-8.11(b)4 addresses fees for public access to or use of publicly owned waterfront facilities, including fees for parking, where appropriate. Given the findings in the Raleigh Ave. Beach Association v. Atlantis Beach Club, Inc., et al., 185 N.J. 40 (2005) case, and the requirements of N.J.S.A. 40:61-22.20, the Department proposes new fee provisions which will pertain to both public and privately owned beaches. Under proposed N.J.A.C. 7:7E-8.11(m), a fee may be charged for the use of bathing and recreational facilities and safeguards. Safeguards and facilities include lifeguards, toilets, showers and parking at publicly or privately owned beach or waterfront areas. However, specific conditions are proposed at N.J.A.C. 7:7E-8.11(m)1 through 6 pertaining to the fees. These conditions are described in detail below. Moreover, no fees shall be charged solely for access to or use of tidal waterways and their shores. This proposed language more closely reflects the language of N.J.S.A. 40:61-22.20.

Similar to existing N.J.A.C. 7:7E-8.11(b)4 and consistent with N.J.S.A. 40:61-22.20, proposed N.J.A.C. 7:7E-8.11(m)1 requires that the fee charged shall be no greater than that which is required to operate and maintain the facility, taking into account support amenities provided, such as lifeguards, restrooms/showers and trash pick-up. Consistent with the Raleigh Avenue Beach Association v. Atlantic Beach Club, Inc., et al. 185 N.J. 40 (2005) decision, this fee requirement applies to facilities and services directly associated with the use of the tidal waterway and its shore and does not apply to additional amenities such as cabanas, pools or restaurants.

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Similar to existing N.J.A.C. 7:7E-8.11(b)4, proposed N.J.A.C. 7:7E-8.11(m)2 requires that the fee not discriminate between residents and non-residents or on any other basis. However, existing N.J.A.C. 7:7E-8.11(b)4 allows municipalities to set a fee schedule that charges up to twice as much to nonresidents for use of marinas and boat launching facilities for which local funds provided 50 percent or more of the costs. This provision is being deleted because it sets a higher fee for non-residents.

Consistent with N.J.S.A. 40:61-22.20 and the finding of the Raleigh Avenue Beach Association v. Atlantic Beach Club, Inc., et al. 185 N.J. 40 (2005) decision, proposed N.J.A.C. 7:7E-8.11(m)3 requires that no fee be charged for children under the age of 12 at either publicly owned or privately owned beaches.

Although existing N.J.A.C. 7:7E-8.11(b) discourages development that limits public access, it does not list specific activities that the Department considers would limit access. Among the activities that limit access are availability of beach badges and requirements to provide identification. Proposed N.J.A.C. 7:7E-8.11(m)4 through 6 address the ability of the public to purchase badges or passes and further the public's rights to access and use tidal waterways and their shores under the Public Trust Doctrine. In accordance with proposed N.J.A.C. 7:7E-8.11(m)4, badges or passes must be available for sale at times and places that are reasonably convenient for the public. This will ensure that there is no discrimination between residents and non-residents. Proposed N.J.A.C. 7:7E-8.11(m)5 requires weekly, monthly or seasonal badges be transferable and proposed N.J.A.C. 7:7E-8.11(m)6 provides that public access may not be conditioned upon providing identification or signing or otherwise agreeing to any waiver or similar disclaimer of rights.

Existing N.J.A.C. 7:7E-8.11(b)11 provides that the Department may require some or all of the public access portion of the site to be dedicated for public use through measures such as a conservation restriction. Under proposed N.J.A.C. 7:7E-8.11(n), the public access portion of the site is required to be permanently dedicated for public use through the recording of a Department approved conservation restriction maintaining the publicly dedicated area in perpetuity. In accordance with the definition of conservation restriction at N.J.A.C. 7:7E-1.8, a conservation restriction may be in the form of a covenant,

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condition or easement, in any deed, will or other instrument. In the case of public access, the conservation restriction will likely be in the form of an easement. Conservation restrictions are recorded under the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1 et seq. and are being required to protect public access in perpetuity.

Proposed N.J.A.C. 7:7E-8.11(n) also cross-references the conservation restriction standards for municipalities, counties and nonprofit organizations that participate in the Shore Protection and Green Acres funding at proposed N.J.A.C. 7:7E-8.11(p) and (q), and indicates that proposed new N.J.A.C. 7:7E-8A.4 contains requirements for conservation restrictions required at proposed N.J.A.C. 7:7E-8.11(n), (p) and (q).

Because tidal waterways and their shores are subject to public trust rights at all times, it is important to specify that these rights are not in any way diminished or suspended upon authorization of construction. The rights of access and use under the Public Trust Doctrine always apply to lands and waters subject to public trust rights, regardless of other authorized uses. Therefore, proposed new N.J.A.C. 7:7E-8.11(o) provides that no authorization or approval under the Coastal Zone Management rules shall be deemed to relinquish public rights of access to and use of lands and waters subject to public trust rights. Even though the Department may not impose specific public access requirements in a coastal permit, the public trust rights of access to and use of these lands and waters remain. This reinforces the new coastal permit condition proposed at N.J.A.C. 7:7-1.5(b)19.

New Jersey's capital spending programs include its land acquisition program, within the Department's Green Acres Program, and its Shore Protection Program within the Department's Office of Engineering and Construction.

New Jersey's Shore Protection Program was created through State legislation (N.J.S.A. 12:6A-1) to provide for the protection of life and property along the coast, preserve the vital coastal resources of New Jersey, and maintain safe and navigable waterways throughout the State. The Shore Protection Program is administered through the Department's Office of Engineering and Construction. Among other things, this Office is responsible for administering beach nourishment and shore protection projects



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throughout the State. Projects vary in type and scope, including beach nourishment and dune creation projects, shorefront bulkheads, jetties, groins, and revetments.

The Department's Green Acres Program, created in 1961 to meet New Jersey's growing recreation and conservation needs, determines how funds may be spent for park and open space acquisition. The Green Acres Program uses a stable source of funding provided by the Garden State Preservation Trust Act.

In recognition of the importance of public access and the State's role to hold tidal waterways and their shores in trust for the public and to ensure that the public has access to and use of these lands and waters, existing N.J.A.C. 7:7E-8.11(b)2 provides that municipalities that do not currently provide, or have active plans to provide, access to the water will not be eligible for Green Acres or Shore Protection funding. Under this proposal, the Department is proposing additional standards for these funding programs to provide specificity with respect to public access conditions, including linear and perpendicular access to tidal waterways and their shores, the frequency of perpendicular access, and restroom and parking requirements.

The Shore Protection Program funds shore protection and beach nourishment projects through either a Federal-State-local cost share or a State-local cost share. Stable funding for state-sponsored shore protection projects is \$25 million annually, with the funds arising from the realty transfer fee. In addition, there is a significant Federal contribution of funds to beach nourishment and shore protection projects. The dollar amount varies annually. As an example, the Federal government provided \$17,032,972 in funding for the Absecon Island beachfill conducted in 2004, which was 65 percent of the total project cost. In part as a result of this investment and because these beach nourishment and shores protection projects are built on and adjacent to tidal waterways and their shores, the public has the right to use these resources. Additionally, the Federal government requires that public access be provided by the owner of a shore protection or beach nourishment project when Federal funds are used. This requirement is contained in contracts, Federal guidance documents, and coastal zone consistency determinations.

Since shore protection projects are constructed along areas subject to the Public Trust Doctrine and significant amounts of public funds are invested in these projects, the

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Department is proposing at N.J.A.C. 7:7E-8.11(p) specific public access requirements that must be met by municipalities seeking to participate in the Shore Protection Program. As discussed previously, to participate in Shore Protection Program funding, a municipality must enter into a State Aid Agreement which is a cost sharing agreement. These regulations will ensure that municipalities meet their obligations under the Public Trust Doctrine and take steps to enhance public access to tidal waterways and their shores within the municipality. These steps include identification of lands and waters subject to the public trust, identification of access to these lands, consideration of fees charged to access these lands, provision of facilities to enhance use of these lands, and enactment of measures to ensure continued implementation of public access provisions. These standards carry through and expand the standards in existing N.J.A.C. 7:7E-8.11(b)6. The specific standards are as follows.

Proposed N.J.A.C. 7:7E-8.11(p)1 requires that municipalities submit to the Department a draft public access plan and a draft Public Access Instrument, along with a draft ordinance adopting the public access plan. As discussed in more detail in the summary of proposed N.J.A.C. 7:7E-8A.2 and 8A.3, a public access plan is a document that demonstrates how the municipality will comply with the requirements of N.J.A.C. 7:7E-8.11(p) which in turn requires compliance with subsections (c) through (m) as described in detail in the following paragraph. It contains information such as ordinances, maps of tidal waterways and streets and other accessways leading to them, and a fee schedule, as well as a statement demonstrating compliance with this rule. The requirements of the public access plan are set forth at N.J.A.C. 7:7E-8A.2 and 8A.3 and described more fully below. A Public Access Instrument is a conservation restriction recorded by municipalities to maintain in perpetuity the municipal streets and other dedicated public rights-of-way leading to tidal waterways and their shores that are identified in the public access plan. The requirements of the Public Access Instrument are prescribed at N.J.A.C. 7:7E-8A.5 and described more fully there. In order to ensure that the public access plan is implemented by the municipality, proposed N.J.A.C. 7:7E-8.11(p)1 requires submission of a draft ordinance that would adopt the public access plan and proposed N.J.A.C. 7:7E-8.11(p)4 requires that the approved ordinance be adopted

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and the Public Access Instrument be recorded prior to beginning construction of the shore protection or beach nourishment project.

As described in the general summary for this proposal, all tidal waterways and their shores in the State are held by the State in trust for the benefit of all of the people. The Public Trust Doctrine establishes the right of the public to fully utilize these lands and waters for a variety of activities, including swimming, fishing, and boating. Therefore, proposed N.J.A.C. 7:7E-8.11(p)2, 3, 5 and 6, respectively, require that a municipality participating in Shore Protection Program funding through a State Aid Agreement: meet the public trust rights rule requirements of subsections (c) through (m) for municipally held lands on or adjacent to tidal waterways and their shores, provide public access to all tidal waterways and their shores that are on or adjacent to lands held by the municipality, repeal any ordinance that limits access to or use of tidal waterways and their shores or otherwise conflicts with the Public Trust Doctrine, and not enact or adopt ordinances or engage in activities in conflict with public access to or use of tidal waterways and their shores. The requirement to meet the requirements of subsections (c) through (m) will ensure that public access is provided at all times to municipally held lands that are subject to public trust rights, including linear and perpendicular access. This will also ensure that meaningful public access is readily available. Only if the shore protection or beach nourishment is proposed along one of the major waterways listed in subsection (e), will the design requirements of subsection (e) calling for a 16-foot-wide waterfront walkway and a 10-foot-wide perpendicular accessway to the water apply, and then only at the project site. This will ensure that the component of the continuous public waterfront walkways will be incorporated into the project site, while not imposing specific design requirements on municipally held land that is not a part of the project. Examples of ordinances and activities that might have the effect of conflicting with public use of tidal waterways include parking restrictions, limiting access to residents, and placement of structures that would block access.

In addition to the above standards that apply to all municipalities participating in Shore Protection Program funding through a State Aid Agreement regardless of the tidal waterway on which the project is located, standards are proposed that would apply based

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on the proposed location of the project. Proposed N.J.A.C. 7:7E-8.11(p)7 contains the additional standards for shore protection and beach nourishment projects located on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay, whereas proposed N.J.A.C. 7:7E-8.11(p)8 contains the additional standards for shore protection and beach nourishment projects not located on or adjacent to those waterways. For the purposes of N.J.A.C. 7:7E-8.11(p)7 and 8 described in detail below, the State Aid Agreement describes the shore protection or beach nourishment project.

Proposed N.J.A.C. 7:7E-8.11(p)7i and 8i set forth the conservation restrictions that are required prior to starting construction or nourishment. In comparison, the current N.J.A.C. 7:7E-8.11(b)11 provides that the Department may require some or all of the public access portion of the site to be dedicated for public use through a conservation restriction. The conservation restrictions are documents that must be recorded in accordance with N.J.A.C. 7:7E-8A.4 prior to a permit becoming effective, and that set aside the identified areas for public access in perpetuity. They are required to ensure continued access to the tidal waterways and shores subject to the Public Trust Doctrine. For a project on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay, the areas subject to conservation restriction in accordance with N.J.A.C. 7:7E-8.11(p)7i(1) and (2) are the entire project, except for those portions of jetties and groins where it is demonstrated in accordance with N.J.A.C. 7:7E-8.11(p)7ii that access would pose an extraordinary risk of injury, and all beaches in the municipality along whichever of these waterways the project occurs, as well as all public accessways held by the municipality that lead to or provide access to tidal waterways, unless the accessway is listed in the Public Access Instrument. Paths, trails, and dune walkovers are all examples of such accessways. Similarly, for a project that is not located on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay, a conservation restriction is required for the entire project, except for those portions of jetties and groins where it is demonstrated in accordance with N.J.A.C. 7:7E-8.11(p)8ii that access would pose an extraordinary risk of injury. However, a conservation restriction is required for the nourished beach rather than for all beaches along the waterway where the project is proposed, as well as for public accessways held by the municipality that lead to or

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provide access to the shore protection project or nourished beach rather than all tidal waterways. This distinction is made due to the fact that the scope of a shore protection or beach nourishment project along the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay is expected to be much greater, often conducted in multiple phases over extended periods of time, and because there is a tremendous demand for access to beaches along these waterways. However, the Department recognizes that there will be cases where, despite a municipality's best efforts, it is unable to obtain conservation restrictions to all privately held beaches outside of the project area along one of these four waterways. In balancing the inability to obtain these conservation restrictions against the need for and benefit of shore protection and beach nourishment projects to protecting health, safety and welfare in the remainder of the municipality and providing recreational opportunities for the public, the Department has determined that a project may proceed where the municipality or State has entered into a condemnation or other legal proceeding to diligently obtain the necessary easements.

To ensure that the beach or shore protection project is open to the public, as required by the conservation restrictions for the project and beach, proposed N.J.A.C. 7:7E-8.11(p)7ii and 8ii require that public access be provided to the entire project immediately upon completion of construction and to all beaches along the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay. While the Public Trust Doctrine ensures the public's right to access tidal waterways and their shores, there are situations where there is an extraordinary risk of injury on a jetty or groin and thus public access should not be required. Accordingly, proposed N.J.A.C. 7:7E-8.11(p)7ii and 8ii do not require that public access be provided to those portions of jetties and groins where it is demonstrated that access poses an extraordinary risk of injury. In making such determination, factors to be considered include the elevation and configuration of the structure. In addition, to ensure tidal waterways and their shores can be reached, proposed N.J.A.C. 7:7E-8.11(p)7iii requires that public accessways be provided to the entire project and to all beaches within the municipality along the waterway on which the project occurs immediately upon completion of project construction, whereas N.J.A.C. 7:7E-8.11(p)8iii requires accessways along linear shore protection or beach nourishment projects of oe-

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half mile or more in length. In each case, the rule specifies that the distance between public accessways shall not exceed one-quarter mile as measured generally parallel to the beach or project structure. However, recognizing the developed nature of shorefront communities, the rule provides flexibility in achieving the goal of one-quarter mile access, providing at N.J.A.C. 7E-8.11(p)7iii(1) for a municipality to adjust the location of proposed accessways provided that the one-quarter mile distance between accessways is met on average and the distance between accessways does not exceed three-eighths mile. This will ensure that the frequency of access points is sufficient to accommodate the public. Due to the demand for access to the beaches along the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and Delaware Bay, proposed N.J.A.C. 7:7E-8.11(p)7iii does not allow municipalities to reduce the existing access points leading to these waterways where they are closer than one-quarter mile apart.

Municipalities participating in a shore protection or beach nourishment project on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay under the State's Shore Protection Program through a State Aid Agreement will be required to provide public restroom facilities to accommodate beachgoers during the active beach season, the beginning of the Memorial Day weekend through September 30. The existing rule does not contain specific restroom requirements. Proposed N.J.A.C. 7:7E-8.11(p)7iv requires that public restroom facilities be provided immediately upon completion of project construction along that portion of the waterway on which the project occurs. The restroom facilities must be located within one-half mile of one another, measuring the distance generally parallel to the beach/shore, and shall be located within one-quarter mile of the edge of the beach. This will provide the municipality flexibility in the siting of the restroom facilities while making certain that the restrooms are located close enough to the beach and to one another for use by beach patrons. The provision of restrooms is required both for public health reasons and to provide meaningful public access.

The existing rule at N.J.A.C. 7:7E-8.11(b)3 requires parking where appropriate. The provision of adequate parking is important in ensuring that the public can access and use tidal waterways and their shores. Accordingly, proposed N.J.A.C. 7:7E-8.11(p)7v and

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8iv require municipalities participating in a shore protection or beach nourishment project to provide public parking. Where the project is located on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay, the parking must be sufficient to accommodate public demand to access the project and the beach capacity of all beaches within the municipality along that portion of the waterway on which the project occurs and must be provided immediately upon completion of project construction. Those projects that are not located on or adjacent to one of the four waterways listed above may or may not be located along a beach, and the comparable requirement at proposed N.J.A.C. 7:7E-8.11(p)8iv recognizes variability by requiring parking sufficient to accommodate public demand to access the entire project. A reduction in the parking requirement at N.J.A.C. 7:7E-8.11(p)7v may be permitted by the Department only if the municipality documents that there are no possible means to provide the parking. The rule sets forth at N.J.A.C. 7:7E-8.11(p)7v various alternatives that must be considered by the municipality, including land acquisition to construct additional parking lots, reconfiguration of existing parking that could resize or reorient parking to provide additional spaces, removing existing parking restrictions, and remote or offsite parking with a shuttle service. Provision of public parking is imposed to secure public access to the tidal waterways and shores that the State holds in trust for the public and that are paid for with public funds.

In order to make the public aware of where the public access areas discussed above are located, proposed N.J.A.C. 7:7E-8.11(p)7vi and 8v require the installation of signs immediately upon completion of project construction and maintaining the signs in perpetuity. These signs inform the public of beach access points.

At times, shore protection or beach nourishment projects must be carried out immediately in response to an emergency situation such as beach erosion caused by a severe storm. In such cases, it would not be appropriate for the Department to delay the project while awaiting compliance with the standards discussed above. Therefore, proposed N.J.A.C. 7:7E-8.11(p)9 provides that in such cases, compliance with proposed N.J.A.C. 7:7E-8.11(p)1 through 8 instead be achieved within 180 days of project completion. This will allow for the necessary emergency action, provide the municipality

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time to take the steps needed to comply with these standards, and protect the public trust rights.

The final standard of proposed N.J.A.C. 7:7E-8.11(p) provides a remedy for failure to comply with the standards applicable to a municipality that participates in Shore Protection Program funding. It is proposed to enforce the Public Trust Doctrine and to ensure appropriate use of public funds and codifies existing remedies for failure to adhere to any obligation under a State Aid Agreement. Proposed N.J.A.C. 7:7E-8.11(p)9 states that if such a municipality takes an action that the Department determines is in conflict with this regulation or the Public Trust Doctrine, it shall be required to correct that action within 30 days of notification by the Department. If no action is taken, or the action taken is not adequate, the Department may: withhold Shore Protection Program funding, terminate the State Aid Agreement, demand immediate repayment of the funding for the project or projects in which the municipality participated, and/or pursue any other remedies specified in the State Aid Agreement.

As discussed previously, the Green Acres Program uses a stable source of funding for open space acquisition and recreational development. The Green Acres Local and Nonprofit funding programs provide low interest loans and grants to municipal and county governments and matching grants to nonprofit organizations to acquire open space and develop outdoor recreation facilities. Over 600,000 acres have been protected and hundreds of recreation development projects throughout the State have been financed through these programs. Many of the municipalities, counties and nonprofit organizations receive Green Acres funding for park development projects or land acquisition projects that contain or are located adjacent to tidal waterways and their shores. In addition, municipalities frequently hold other lands that are on or adjacent to tidal waterways and their shores and thus are impressed by public trust rights. To ensure that Green Acres funded development projects and acquisitions located on these tidal waterways and their shores provide access to lands and waters subject to public trust rights, and that municipalities, counties and nonprofit organizations fulfill their obligations under the Public Trust Doctrine for lands that they control, proposed new N.J.A.C. 7:7E-8.11(q) sets forth additional requirements for municipalities that receive



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Green Acres funding. These standards carry through and expand the standards in the existing rule at N.J.A.C. 7:7E-8.11(b)6. These standards complement the requirement contained in the Green Acres Program rules at N.J.A.C. 7:36-3.2(a)4, that provides that 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 at N.J.A.C. 7:7E-8.11 and governing law, is ineligible for Green Acres funding. The specific standards of proposed N.J.A.C. 7:7E-8.11(q) are as follows. For the purposes of proposed N.J.A.C. 7:7E-8.11(q), Green Acres project site is the land that is subject of an application for Green Acres funding that contains or is adjacent to tidal waterways and their shores.

Proposed N.J.A.C. 7:7E-8.11(q)1 requires that municipalities, counties and nonprofit organizations submit to the Department a draft public access plan in order to be eligible to apply for Green Acres funding. As stated previously, a public access plan is a document that demonstrates how the municipality, county or nonprofit organization will comply with the requirements of N.J.A.C. 7:7E-8.11(q), which in turn requires compliance with subsections (c) through (m) as described in detail in the following paragraph. It contains information such as maps of tidal waterways and streets, and other accessways leading to them, a beach fee schedule, if applicable; and a statement demonstrating compliance with this rule. The requirements of the public access plan are set forth at N.J.A.C. 7:7E-8A.2 for municipalities and N.J.A.C. 7:7E-8A.3 for counties and nonprofit organizations. In order to ensure that the public access plan is implemented, proposed N.J.A.C. 7:7E-8.11(q)1i requires municipalities and counties to submit a draft ordinance that would adopt the public access plan document and proposed N.J.A.C. 7:7E-8.11(q)5iii and 6 require that the approved ordinance be adopted prior to disbursement of Green Acres funding.

Because all lands and waters subject to public trust rights in the State are held by the State in trust for the benefit of all of the people, the public has the right to fully these lands and waters for a variety of activities, including swimming, fishing, and boating. To preserve these public rights under the Public Trust Doctrine, proposed N.J.A.C. 7:7E-

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8.11(q)2, 3 and 4, respectively, require that for a municipality, county or nonprofit organization to be eligible for Green Acres funding, it must meet the Public trust rights rule requirements of subsections (c) through (m), as applicable, provide public access to all tidal waterways and their shores that are on or adjacent to lands held by the municipality, county or nonprofit organization, and not enact or adopt ordinances or engage in activities in conflict with public access to or use of tidal waterways and their shores. Ordinances and activities that might have such effect include parking restrictions, limiting access to residents only, and placement of structures that would block access.

The requirement to comply with N.J.A.C. 7:7E-8.11(c) through (m) will ensure that public access, including linear and perpendicular access, is provided at all times to the lands subject to public trust rights held by the applicant seeking Green Acres funding. This will ensure that meaningful public access is readily available. For project sites proposed along one of the major waterways listed in subsection (e), the design requirements of subsection (e) requiring a 16-foot-wide waterfront walkway and a 10-foot-wide perpendicular accessway to the water will apply. This will ensure that the component of the continuous public waterfront walkways will be incorporated into the project site.

Proposed N.J.A.C. 7:7E-8.11(q)5 sets forth requirements in addition to those at paragraph (q)1 through 4 described above, for municipalities to be eligible for Green Acres funding. Similar to proposed N.J.A.C. 7:7E-8.11(p)1, proposed N.J.A.C. 7:7E-8.11(q)5i requires municipal applicants submit a draft Public Access Instrument that meets the requirements of N.J.A.C. 7:7E-8A.5. Again, the Public Access Instrument is a conservation restriction recorded by the municipality to ensure maintenance in perpetuity of the municipal streets and other dedicated public rights-of-way leading to tidal waterways and their shores that are identified in the public access plan. The Public Access Instrument is required to guarantee that the public will continue to be able to reach lands and waters subject to the public trust for generations to come, by transferring to the Department any rights of the municipality or county to vacate, divert or dispose of these areas. In order to ensure that the Public Access Instrument is recorded by the municipality, proposed N.J.A.C. 7:7E-8.11(q)5iii requires that the approved Public

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Access Instrument be recorded prior to disbursement of Green Acres funding. Additional measures that are imposed to ensure compliance with the Public Trust Doctrine, include proposed N.J.A.C. 7:7E-8.11(q)5ii, which requires that a municipality repeal any ordinance that limits access to or use of tidal waterways and their shores or is in conflict with the Public Trust Doctrine.

Proposed N.J.A.C. 7:7E-8.11(q)7 through 10 contain requirements that must be satisfied by the recipient of Green Acres funding immediately upon disbursement of funds. Proposed N.J.A.C. 7:7E-8.11(q)7 requires that public access along the tidal waterway and its entire shore at the project site be provided. Proposed N.J.A.C. 7:7E-8.11(q)8 requires that the recipient provide at least one public accessway to the tidal waterway, its shore and the project site across land held by the recipient of Green Acres funding. This means that, at a minimum, one public accessway such as a path would be provided on the project site for people to reach the shore. If the site is not adjacent to a public street, such that the accessway cannot extend from the street to the shore, but is adjacent to other lands held by the municipality, county or non-profit receiving the Green Acres funds, then the path would cross those lands to the shore. Additional accessways are required as necessary, based on the size, location and proposed use of the site. In order to make the public aware of locations where they can access tidal waterways and their shores, proposed N.J.A.C. 7:7E-8.11(q)9 requires the installation of signs.

Proposed N.J.A.C. 7:7E-8.11(q)10 sets forth the conservation restrictions that are required immediately upon disbursement of Green Acres funding. The conservation restrictions are documents that must be recorded in accordance with N.J.A.C. 7:7E-8A.4 and that set aside the identified areas for public access in perpetuity. They are required to ensure continued access to the tidal waterways and shores subject to the public trust doctrine. The areas subject to a conservation restriction include the project site, proposed accessways to the project site and the tidal waterways and shore at or adjacent to the site, as well as all public accessways held by the municipality that lead to or provide access to tidal waterways, unless the accessway is listed in the Public Access Instrument. As discussed above, the Public Access Instrument is used to maintain in perpetuity the municipal streets and other dedicated public rights-of-way that lead to lands and waters

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subject to public trust rights. Additionally, proposed N.J.A.C. 7:7E-8.11(q)10iii requires conservation restrictions for parking areas if parking areas are required to provide access to the project site pursuant to N.J.A.C. 7:7E-8.11(q)11. Proposed N.J.A.C. 7:7E-8.11(q)10 also reiterates the requirement in the Green Acres Program rules, N.J.A.C. 7:36, that all land held by the municipality or county for recreation and conservation purposes be listed on the Recreation and Open Space Inventory for the municipality or county.

In accordance with proposed N.J.A.C. 7:7E-8.11(q)11, within 10 days of completion of a Green Acres funded development or within 180 days of disbursement of Green Acres funding for acquisition, municipalities, counties and nonprofit organizations are required to provide public restrooms and parking for the project site as determined by the Department. This determination will be based on the proposed use of the project site and nature and extent of public demand. For example, a project site acquired or developed for active recreation such as ball fields or playgrounds may be required to provide restrooms and parking whereas a site acquired for wildlife conservation may not require the provision of either restrooms or parking other than that which exists on nearby streets.

Similar to proposed N.J.A.C. 7:7E-8.11(p), the final standard of proposed N.J.A.C. 7:7E-8.11(q) provides that municipalities, counties and nonprofit organizations that fail to comply with the standards of proposed N.J.A.C. 7:7E-8.11(q) will be required to take corrective action. This provision is proposed to ensure that the Public Trust Doctrine is enforced and that public funds are appropriately utilized. Proposed N.J.A.C. 7:7E-8.11(q)12 states that if such a municipality, county or nonprofit organization takes an action that the Department determines is in conflict with this regulation or the Public Trust Doctrine, it shall be required to correct that action within 30 days of notification by the Department. If no action is taken, or the action taken is not adequate, the Department may: withhold Green Acres funding, terminate the Green Acres project agreement executed pursuant to N.J.A.C. 7:36, and/or demand immediate repayment of all Green Acres funding that has been disbursed to the funding recipient. These remedies for violation of public access requirements are in addition to remedies for violation of the Green Acres rules at N.J.A.C. 7:36.

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Existing N.J.A.C. 7:7E-8.11(b)7 and 9 require that a development located within the Hudson River Waterfront and Atlantic City special areas comply with the additional requirements of their special area rules at N.J.A.C. 7:7E-3.48 and 3.49 respectively. N.J.A.C. 7:7E-3.48 and 3.49 contain additional public access requirements for developments located within these special areas. N.J.A.C. 7:7E-8.11(b)7 and 9 are being deleted because any regulated development within these special areas must comply with all applicable sections of the Coastal Zone Management rules.

Existing N.J.A.C. 7:7E-8.11(b)8 requires development along the Raritan Bay within Monmouth County be consistent with the Bayshore Waterfront Access Plan. Similarly, existing N.J.A.C. 7:7E-8.11(b)10 requires any development located elsewhere in the coastal zone conform with any adopted municipal, county or regional waterfront access plan, provided the plan is consistent with the Coastal Zone Management rules. Approval from the Department does not relieve a development from complying with all applicable municipal, county or regional waterfront access plans. Because a proposed development must also receive approvals from the county and municipality in which the development is located, N.J.A.C. 7:7E-8.11(b)8 and 10 are not necessary and are, therefore, being deleted.

The rule rationale at existing N.J.A.C. 7:7E-8.11(d) is being continued as N.J.A.C. 7:7E-8.11(r) and revised to reflect the concepts proposed within the new rule.

### **N.J.A.C. 7:7E-8A, Information Required to Demonstrate Compliance with the Public Trust Rights Rule, N.J.A.C. 7:7E-8.11; Conservation Restrictions and Public Access Instruments**

Proposed new N.J.A.C. 7:7E-8A contains the information requirements for an applicant for Shore Protection Program funding or Green Acres funding to demonstrate compliance with the public trust rights rule, N.J.A.C. 7:7E-8.11. This new subchapter also contains information pertinent to the recording of conservation restrictions and requirements for Public Access Instruments.

#### **N.J.A.C. 7:7E-8A.1 Purpose and scope**

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Proposed N.J.A.C. 7:7E-8A.1(a) contains the purpose and scope of this subchapter and provides a roadmap to N.J.A.C. 7:7E-8A.2, 8A.3, 8A.4 and 8A.5.

Proposed N.J.A.C. 7:7E-8A.1(b) contains the definitions of “Green Acres project site,” “held” and “paper street.” The definitions of “held” and “paper street” are the same as those proposed at N.J.A.C. 7:7E-8.11(b). For the purposes of determining eligibility for Green Acres funding, the term “Green Acres project site” means the Green Acres funded parkland that contains or is adjacent to tidal waterways and their shores.

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

Proposed N.J.A.C. 7:7E-8A.2(a) describes the public access plan required for a municipality to participate in Shore Protection Program funding or to be eligible for Green Acres funding. A public access plan demonstrates how compliance with N.J.A.C. 7:7E-8.11(p) or (q) will be achieved. This document can not be modified or repealed without prior approval from the Department.

Proposed N.J.A.C. 7:7E-8A.2(b) sets forth the contents of the public access plan. The public access plan has eight components. First, a current tax map is required that identifies all tidal waterways and their shores within the municipality and all lands held by the municipality adjacent thereto, all as well as existing and proposed accessways held by the municipality. Copies of all existing and proposed conservation restrictions required pursuant to N.J.A.C. 7:7E-8.11(p)7i and 8i and (q)10 must be included in the public access plan, as must a draft Public Access Instrument required pursuant to N.J.A.C. 7:7E-8.11(p)1ii and (q)5i. A fee schedule for use of bathing and recreational facilities and safeguards at tidal waterways is another component of the public access plan. The fee schedule must be provided for lands held by the municipality and, since shore protection projects may occur on privately held land, subject only to a conservation restriction, a fee schedule is also required for those lands. Draft ordinances required pursuant to N.J.A.C. 7:7E-8.11(p)1i and (q)1i as applicable, and copies of all ordinances addressing the use of the beaches, tidal waterways and their shores and associated

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parking must also be included in the public access plan. The final component of a public access plan is a compliance statement including supplemental documents demonstrating how the municipality and the proposed project comply with N.J.A.C. 7:7E-8.11(p) and/or (q), as applicable. The draft ordinances required in this section shall provide that they can not be modified or repealed without prior approval from the Department.

In addition to the information required at proposed N.J.A.C. 7:7E-8A.2(b), proposed N.J.A.C. 7:7E-8A.2(c) contains public access plan content requirements specific to municipalities participating in Shore Protection Program funding. Regardless of the location of the shore protection or beach nourishment project, all municipal public access plans must include copies of all prior State Aid Agreements. For shore protection and beach nourishment projects located on the Atlantic Ocean, Sandy Hook, Raritan or Delaware Bay and their shores, proposed N.J.A.C. 7:7E-8A.2(c)2 requires a current tax map identifying existing and proposed public restrooms and parking. With respect to restrooms, proposed N.J.A.C. 7:7E-8.11(c)2i requires that the tax map identify all existing and proposed public restrooms located within one-quarter mile of the landward edge of the beach or dune along the waterways in which the project occurs. To ensure that beachgoers have to travel no more than one-half mile from the beach to a restroom facility, proposed N.J.A.C. 7:7E-8A.2(c)2i(1) through (3) require that there be at least one restroom every one-half mile within the municipality, a restroom be located within one-quarter mile of each municipal boundary, and each restroom facility be located within one-quarter mile of the landward edge of the beach or dune. However, recognizing the developed nature of shorefront communities, the rule provides flexibility in achieving the goal that restrooms be available within one-half mile of any point on the beach. The rule provides that the one-quarter mile from the municipal boundary can be increased provided the restrooms is located closer to the beach by the same distance that the one-quarter mile is increased and the restroom is within three-eighths mile of the municipal boundary. Similarly, the rule provides at N.J.A.C. 7E-8A.2(c)2i(4) for a municipality to adjust the location of proposed restrooms provided that the one-quarter mile distance between restrooms is met on average and the distance between restrooms does not exceed five-eighths mile. The rule also requires that the distance that the

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restroom is located landward of the beach be reduced by an amount at least equal to the distance between restrooms. Thus, if the distance between restrooms in a particular area of the beach is increased from one-half mile (2,640 feet) to 3,000 feet, the restrooms could not be located one-quarter mile (1,380 feet) landward of the beach. Rather they would have to be located within 500 feet (1,320 feet – 240 feet ) landward of the beach. This is intended to ensure that restrooms are located within a reasonable distance for individuals to make the roundtrip walk from the beach to a restroom. This information will demonstrate compliance with proposed N.J.A.C. 7:7E-8.11(p)7iv and v. For shore protection and beach nourishment projects located on or adjacent to waterways other than the above listed waterways and their shores, proposed N.J.A.C. 7:7E-8A.2(c)3 requires a site plan identifying all existing and proposed public access parking for the public to access the project and the beach along the waterway on which the project occurs. This information will demonstrate compliance with proposed N.J.A.C. 7:7E-8.11(p)7iv.

In addition to the information required at proposed N.J.A.C. 7:7E-8A.2(b), proposed N.J.A.C. 7:7E-8A.2(d) contains the public access plan contents that must be supplied by municipalities to be eligible for Green Acres funding. Under this paragraph, a municipality must submit a site plan identifying all tidal waterways and their shores located on or adjacent to the site, all existing and proposed public accessways on site and municipally held public accessways within ¼ mile of the site, and all existing and proposed restrooms and parking held by the municipality within one-quarter mile of the site. This information will be used to demonstrate compliance with N.J.A.C. 7:7E-8.11(q)8 and 11.

### **N.J.A.C. 7:7E-8A.3 Information requirements for public access plans submitted by counties or nonprofit organizations to be eligible for Green Acres funding**

Proposed N.J.A.C. 7:7E-8A.3(a) describes the public access plan required for a county or nonprofit organization to be eligible for Green Acres funding. This plan demonstrates how compliance with N.J.A.C. 7:7E-8.11(q) will be achieved. The public access plan can not be modified or repealed without prior approval of the Department.



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The contents of a county or nonprofit organization's public access plan are set forth at proposed N.J.A.C. 7:7E-8A.3(b). Pursuant to proposed N.J.A.C. 7:7E-8.11(b)1, the public access plan must include a site plan of the project site that identifies: all tidal waterways and their shores on or adjacent to the site; all existing and proposed public accessways such as streets and paths located on the project site; and all existing and proposed public restrooms and parking for the public to access the project site. This information will be used to determine compliance with proposed N.J.A.C. 7:7E-8.11(q)8 and 11.

Proposed N.J.A.C. 7:7E-8A.3(b)2 requires that the public access plan also include copies of all existing and proposed conservation restrictions required pursuant to N.J.A.C. 7:7E-8.11(q)10. Proposed N.J.A.C. 7:7E-8A.3(b)4 requires a compliance statement demonstrating how the county or nonprofit organization and proposed project complies with N.J.A.C. 7:7E-8.11(q) to be submitted. These requirements are the same as the municipal requirements at proposed N.J.A.C. 7:7E-8A.2(b)2 and 8.

Proposed N.J.A.C. 7:7E-8A.3(b)3 requires an applicant that is a county to include a draft ordinance adopting the public access plan. A draft ordinance will provide the Department the opportunity to review the ordinance to verify that it will ensure that access is provided once the ordinance is adopted by the County.

#### **N.J.A.C. 7:7E-8A.4 Conservation restriction form and recording requirements**

This subsection sets forth the conservation restriction form and recording requirements for restrictions required pursuant to N.J.A.C. 7:7E-8.11(n), (p) and (q). Conservation restrictions are required to ensure that the required public access measures are maintained in perpetuity. This section ensures that the conservation restrictions are in the proper form, properly recorded and timely so that they are enforceable. Proposed N.J.A.C. 7:7E-8A.4(a) requires that the conservation restriction be maintained in the chain of title. This recording requirement is consistent with the New Jersey Supreme Court case, *Island Venture Associates v. NJDEP*, 179 N.J. 485 (2004), and is necessary to ensure that restrictions appear in the chain of title and therefore are enforceable against successors in title.

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Proposed N.J.A.C. 7:7E-8A.4(b) sets forth the form and recording requirements of the conservation restriction. Proposed N.J.A.C. 7:7E-8A.4(b)1 requires that the conservation restriction be in the form and terms specified and approved by the Department as appropriate to the site and in accordance with the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1 et seq.. Proposed N.J.A.C. 7:7E-8A.4(b)2 requires that the conservation restriction be recorded in accordance with the New Jersey Recording Act, N.J.A.C. 46:15-1.1 et seq. Proposed N.J.A.C. 7:7E-8A.4(b)3 requires that the conservation restriction run with the property and be binding upon the property owner and the successors in interest in the property or in any part thereof.

Proposed N.J.A.C. 7:7E-8A.4(c) addresses the timeframes for recording the conservation restriction required pursuant to N.J.A.C. 7:7E-8.11(n), (p) and (q) and provides that a permit is not effective until the conservation restriction(s) is recorded.

Proposed N.J.A.C. 7:7E-8A.4(d) requires proof that the conservation restriction has been recorded in the Office of the County Clerk or registrar of deeds and mortgages of the county in which the development, project or project site is located. Proof that the conservation restriction was recorded must be submitted to the Department prior to commencement of site preparation or construction or permit effectiveness, with two exceptions. For developments receiving Green Acres funding that do not require a permit and acquisitions receiving Green Acres funding, proof that the conservation restriction was recorded must be submitted to the Department within 90 days of the disbursement of Green Acres funds.

Proposed N.J.A.C. 7:7E-8A.4(e) provides that, except for developments receiving Green Acres funding that do not require a permit, authorization and approvals issued by the Department are not valid authority to begin site preparation or construction until the Department approved conservation restriction is recorded.

#### **N.J.A.C. 7:7E-8A.5 Public Access Instrument requirements**

Proposed N.J.A.C. 7:7E-8A.5(a) describes a Public Access Instrument. A Public Access Instrument is a conservation restriction recorded by a municipality. It is required

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by N.J.A.C. 7:7E-8.11(p) for municipalities participating in Shore Protection Program funding through a State Aid Agreement and N.J.A.C. 7:7E-8.11(q) for municipalities to be eligible for Green Acres funding. The Public Access Instrument is used to maintain in perpetuity the municipal streets and other dedicated public rights-of-way, described in N.J.A.C. 7:7E-8A.5(b) below, that lead to tidal waterways and their shores. The Public Access Instrument accomplishes this by transferring to the Department the municipality's right to vacate, dispose of, or divert certain lands listed in proposed N.J.A.C. 7:7E-8A.5(b) to a use that precludes public access to tidal waterways and their shores at those lands.

Proposed N.J.A.C. 7:7E-8A.5(b) describes the lands that are subject to the Public Access Instrument. The Public Access Instrument must list and identify all public streets, roads, paper streets, easements, or other dedicated public rights-of-way held by the municipality that lead to tidal waterways and their shores. The Department has determined that all such lands are important accessways to lands subject to the Public Trust Doctrine and that this function must be preserved and these lands must be well-identified. Furthermore, some of these paper streets are themselves beach or dune and therefore are not appropriate for development. Accordingly, the Public Access Instrument will list and identify these lands by location and by tax map designation. The Public Access Instrument shall list the lot, block and property owner of lands on which each street, road, easement, paper street or other dedicated public right-of-way is located, and the lot, block and property owner of lots that abut each street, road, easement, paper street or other dedicated public right-of-way. This requirement is being imposed so that the Public Access Instrument can be indexed by these lots, blocks and property owners, such that the restriction on vacating, disposing of or diverting these streets and other dedicated public rights-of-way is detected by a title company if the municipality or county tries to convey these rights to a third party. In order to ensure that all paper streets, easements or other dedicated rights of way that are beach or dune are preserved for public access purposes, they must be subject to the Public Access Instrument. In addition, those portions of the street, road, paper street, easement, or other dedicated public right-of-way that are located between the beach or dune and the first cross street are required to be

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identified in the Public Access Instrument. Where no cross-street is present within one-quarter mile of the landward edge of the beach or dune, only that portion of the street, road, paper street, easement, or other dedicated public right-of-way within one-quarter mile landward of the beach or dune must be identified in the Public Access Instrument. If no beach or dune is present, the portion of the street, road, paper street, easement, or other dedicated public right-of-way within one-quarter mile of the mean high water line must be identified in the Public Access Instrument. This will ensure that a sufficient portion of these streets and other dedicated accessways is preserved to provide access to tidal waterways in perpetuity.

An additional requirement is proposed at N.J.A.C. 7:7E-8A.5(b)2 for municipalities to be eligible for Green Acres funding. The provision requires that all municipally held lands that are held for recreation and conservation purposes must be listed on the Recreation and Open Space Inventory. This rule provision reiterates the requirement in the Green Acres Program rules, N.J.A.C. 7:36.

Proposed N.J.A.C. 7:7E-8A.5(c) provides that the Public Access Instrument is a conservation restriction and therefore requires that it meet the requirements for recording of conservation restrictions at proposed N.J.A.C. 7:7E-8A.4.

### **Social Impact**

The proposed new rule at N.J.A.C. 7:7E-3.50 and the proposed repeal and new rule at N.J.A.C. 7:7E-8.11 will enhance the positive social impact of the Coastal Zone Management rules because they clarify the public's rights to access and use tidal waterways and their shores, rights which are afforded by the Public Trust Doctrine, and incorporate standards to maintain these rights when developing on and adjacent to the State's tidal waterways and their shores.

By designating lands and waters subject to the public trust as a special area in N.J.A.C. 7:7E-3.50 and revising N.J.A.C. 7:7E-8.11, through the proposed repeal and new rule, the Department clearly identifies which lands it holds in trust for the benefit of the public and affords these lands and their accessways protection from adverse development. Such protection serves the public good in ensuring that they will have

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access to and use of these common lands, while development adjacent to them may continue, provided there is no adverse impact. The public's right to access and use such lands is not only important for the recreational opportunities offered along the coast it is an essential public right that has been established for centuries.

The proposed amendments and new rules not only ensure that access be provided when undertaking various development and State funded projects, but they also ensure that the public will be able to locate access points by signage and find adequate parking near accessways. They also strive to protect the public from being subject to activities and fees that would limit or discourage public access by detailing and prohibiting such actions, which currently keep the public from accessing some public trust lands. All of these actions help to ensure that the public will be able to reach and use lands and waters subject to the public trust at all times.

Proposed new N.J.A.C. 7:7E-8.11 helps to clarify the existing rule, proposed for repeal, in a way that better protects the public's right to access and use tidal waterways and their shores while creating a more comprehensible process for those seeking to develop in the coastal zone. By describing the required public access provisions as a condition of development, as well as detailing relevant exceptions, the new rule helps to streamline the permitting process for those developing adjacent to public trust lands.

The new rule will enable better consistency in how public access is managed by different agencies within the Department. The rule will serve as a central guide for public access to tidal waterways and their shores for projects that are approved and/or undertaken by the Division of Land Use Regulation, Green Acres Program, and Shore Protection Program. By providing one set of requirements to demonstrate compliance with the rule, the process by which public access is planned becomes more uniform and streamlined, which will help both the Department and those who apply for permits and funding.

Further, the proposed new rule requires greater interaction on public access issues between the Department and municipal and county governments, as well as between the Department and nonprofit organizations that seek State funding through the Green Acres or Shore Protection Programs. The requirements enlist these entities in ensuring that

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public trust rights are upheld, which will positively impact the public and the parties involved.

### **Economic Impact**

The economic impact of the travel and tourism industry in New Jersey is dynamic, contributing \$36.3 billion in economic activity in 2005, a 12.5 percent increase over 2004. The travel and tourism industry employs 433,000 making it the second largest private sector employer. The gaming industry in Atlantic City alone employed 50,000 and took in \$4.8 billion in 2004, a 7.1 percent increase over the previous year. In 2005, 72.2 million people visited New Jersey, an increase of over 4.2 percent from 2004, due to a nearly 9 percent increase in overnight visitors. That same year tourism activity generated \$3.7 billion in state and local government revenues, accounting for \$1.9 billion in state tax revenue and \$1.7 billion in local government tax revenue.

Nowhere is the impact of the travel and tourism industry more evident than at the Jersey Shore, which encompasses 127 miles of ocean beaches with scenic views that run from Sandy Hook to Cape May. Just off the sand are classic coastal communities that provide hospitality, entertainment and recreation for hundreds of thousands of visitors each year. Atlantic, Cape May, Ocean and Monmouth Counties alone account for more than 67 percent or \$20 billion in annual economic activity. Tourism employment in these counties is significant. The Jersey Shore is a magnet for visitors and is less than one tank of gas from more than one-quarter of the U.S. population. Key factors that influence people to vacation at the Jersey Shore include recommendations by family and friends, nearly endless family activities, nightlife, live entertainment, the world-class hotel-casino resorts and shopping. The importance of the Shore beaches cannot be overstated. The beaches offer swimming, fishing, surfing, sailing and other ocean-related activities. Many towns like Point Pleasant Beach, Ocean City, Seaside Heights, Atlantic City and the Wildwoods offer fully developed boardwalks that attract young and old alike for oceanside fun and entertainment.

Accordingly, it is important from an economic standpoint that access to and use of tidal waterways and their shores is protected. In the long term, the proposed new rules

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and amendments could serve to have a positive economic impact as increased public access in coastal areas could enhance the tourism industry in various locales. As greater public access is afforded, the public will be more likely to visit areas where access had previously been denied. More frequent visits to such municipalities could result in an increase in revenue generated by the visiting public.

To receive the substantial public funds available through participating in a shore protection or beach nourishment project, municipalities may incur costs associated with the one-quarter mile access and restroom requirements. While most municipalities already provide access every one-quarter- mile, some municipalities will be required to provide additional accessways. Municipalities may incur costs with obtaining easements to meet the one-quarter mile requirement. However, the Department has determined that this is appropriate since significant public funds are used for shore protection and beach nourishment projects. With regard to the restroom requirement, the rule provides for flexibility by allowing restrooms to be located one-quarter mile landward of the beach. Municipalities may make available restrooms at existing public or other similar facilities to meet the requirements of the rule at no additional cost to the municipality. Alternatively, portable toilets can be used at an estimated cost of \$600 to \$800 per season per portable toilet. Although municipalities may incur costs to provide access every one-quarter mile and restrooms every one-half mile, the Department plans to assist the municipalities in funding these facilities as part of the cost share agreement for the State Aid Agreement.

Public access is required under the existing public access to the waterfront rule. The proposed new rule at N.J.A.C. 7:7E-3.50 and the proposed repeal and new rule at N.J.A.C. 7:7E-8.11 will have little to no effect on the total amount of development in the waterfront development area or the CAFRA area but rather will affect how development is done in these regions. Both the proposed rules and proposed amendments discourage development that adversely affects lands and waters subject to public trust rights and prohibits development that adversely affects access to them. These changes will not lead to a reduction in the amount of development that occurs along tidal waters, but it will ensure that such development is constructed with provisions for public access.

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There is a likelihood that a small loss of revenue could occur in municipalities that currently discourage public access through adverse activities that include unfavorable parking ordinances, lack of amenities, and unfair beach fees. The proposed amendments attempt to thwart such activities by requiring ordinances that ensure adequate parking, amenities and fair beach fees. The number of municipalities participating in adverse activities that would be required to make significant changes is expected to be low and the economic impact low. However, municipalities will bear the cost of preparing a public access plan in order to be eligible for Shore Protection Program or Green Acres funding.

### **Environmental Impact**

The proposed new rules and amendments provide that public accessways and public access areas located in a natural area along a tidal waterway shall be designed to minimize the impacts to the natural area and tidal waterway including habitat value, vegetation and water quality. The proposed amendments also allow for temporary closure of an area when necessary to protect endangered and threatened wildlife or vegetation species. Thus, the new rules and amendments are expected to have a positive environmental impact.

### **Federal Standards Analysis**

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

The Federal Coastal Zone Management Act (16 U.S.C. §§1450 et seq.) was signed into law on October 27, 1972. The Act does not set specific regulatory standards for development in the coastal zone; rather, it provides broad guidelines for states developing coastal management programs. These guidelines are found at 15 CFR Part 923. The guidelines do not specifically address the review standards that should be applied to new coastal development in order to preserve and protect coastal resources and to concentrate the pattern of coastal development. They simply provide a planning and management



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process, without establishing development standards for development in the coastal area. Therefore, the Department has concluded that the proposed new rules and amendments do not exceed any Federal standards or requirements.

Many shore protection and beach nourishment projects subject to the new rules and amendments will be conducted through a joint funding agreement between the State of New Jersey and the United States Army Corps of Engineers (Corps), and often include local government as well. Many of the standards at proposed N.J.A.C. 7:7E-8.11 apply to these projects. Such projects are authorized by Congress through Federal Water Resources Development Acts, generally passed annually. In a document entitled "Water Resources Policies and Authorities: Federal Participation in Shore Protection," released June 1989 (Corps Regulation CECW-PR Regulation No.1165-2-130, ER 1165-2-130), the Corps 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 lack of sufficient parking facilities for the general public located reasonably nearby and with reasonable public access to the project, as requirements. The standards state that parking should be sufficient to accommodate the lesser of the peak hour demand or the beach capacity, but allow for public transportation to supplement or substitute for such parking. Furthermore, the standards tie reasonable public access to the recreational use objectives of the particular area. They require public access points within one-half mile of one another. The proposed amendments exceed the Federally established maximum distance of one-half mile between access points, establishing a maximum distance of one-quarter mile.

The Corps standard is a national standard that applies to Federal participation in any shore protection project in the nation. The Department has determined that a more stringent standard is warranted here. New Jersey is the most densely populated state in the nation, with a population exceeding 8.5 million, all of whom live within 55 miles of the shore. As noted above, the travel and tourism industry in New Jersey contributed \$36.3 billion in economic activity in 2005, while the travel and tourism industry employs 433,000 people making it the second largest private sector employer. In 2004, more than

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70 million people visited New Jersey and tourism activity generated \$3.7 billion in state and local government revenues. The ability of tourists to access the State's tidal waterways and shorelines is crucial. New Jersey's tidal waterways and their shores offer swimming, boating, fishing, surfing, sailing and other water-related activities. Accordingly, the Department determined that it is necessary and appropriate to exceed the Corps' national standard regarding maximum distance between access points.

### **Jobs Impact**

As noted in the Economic Impact statement above, the travel and tourism industry in New Jersey contributes \$30 billion in economic activity each year and generates 416,000 jobs, making it the second largest private sector employer. Atlantic, Cape May, Ocean and Monmouth Counties alone account for more than 67 percent or \$20 billion in annual economic activity and tourism employment travel and tourism is particularly significant in these counties. Moreover, the tourism industry is dependent in part on the ability of tourists to access and use tidal waterways and their shores for activities such as boating, fishing, swimming and sunbathing. Insofar as these new rules and amendments secure and enhance public access, they will have a positive impact on jobs.

The proposed rules and amendments may create an opportunity for a small amount of job growth in municipalities where public access increases at a high rate, significantly enhancing tourism. Such a change could lead to an increase in the number of jobs within those municipalities to cater to an increase in visitors.

The Department anticipates that the proposed rules and amendments will have little to no impact on the number of consulting jobs in the State. Because the proposed rules and amendments are not expected to affect the number of developments proposed, coastal permit applications or State funding applications, there should be no affect on the number of jobs affected by these actions.

### **Agriculture Industry Impact**

The proposed new rules and amendments are expected to have little to no impact on the agriculture industry. Farms located adjacent to tidal waterways will be subject to the

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proposed rules and amendments if conducting a development activity that requires a coastal permit, but not to continue farming.

### **Regulatory Flexibility Analysis**

In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has determined that some of the builders and property owners that may be affected by these provisions may be “small businesses” as defined in the Act. The Department has determined that the new rules and amendments will not impose additional reporting or recordkeeping requirements on small businesses, nor increase the need for professional services. The proposed new rule and amendments will apply to anyone proposing a regulated activity along a tidal waterway within the coastal zone.

The proposed new rules and amendments do not affect whether a project requires a coastal permit, and no new reporting or recordkeeping requirement is proposed for small businesses. Under the current rules, small businesses that require a coastal permit and are located on or along a tidal waterway are required to provide public access. While provision of public access imposes a cost on small businesses, these costs are not expected to increase as a result of these proposed amendments. The proposed new rules and amendments provide more specificity for proposed developments. Because these requirements are established to ensure that development is conducted in a manner that preserves the public trust rights to access and use tidal waterways and their shores, lesser requirements are not proposed for small businesses.

### **Smart Growth Impact**

Executive Order No. 4(2002) requires State agencies that adopt, amend or repeal State regulations to include in the rulemaking document a Smart Growth Impact statement that describes the impact of the proposed rule on the achievement of smart growth and implementation of the State Development and Redevelopment Plan (State Plan).

The proposed new rules and amendments further numerous statewide policies of the State Plan. Notably, the State Plan policy for coastal resources contains a public access

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policy. This policy mandates the promotion of recreational opportunities and public access, and encouragement of tourism along the oceanfront, bay front and rivers of the coastal area by protecting public access rights. The open space and recreational lands policy advocates open space and waterway corridors. Additional State Plan policies carry out this theme. The urban revitalization policy calls for improved access to waterfront areas. The State Plan contains a policy for infrastructure investment that calls for enhancement of tourism that capitalizes on the State's natural resources and recreational amenities, while the policy on Historic, Cultural, and Scenic Resources provides that new development be compatible with scenic values and provide passive and active recreational opportunities. The proposed new rules and amendments will aid the State in achieving these goals. The proposed new rules and amendments will promote smart growth by ensuring that public access is provided in development and redevelopment projects located along tidal waterways, and ensuring that the public can reach and use Green Acres funded sites and State funded shore protection projects.

**Full text** of the rule proposed for repeal may be found in the New Jersey Administrative Code at N.J.A.C. 7:7E-8.11.

**Full text** of the proposed amendments and new rules follows (addition indicated in boldface **thus**;) deletions indicated in brackets [thus]:

## **CHAPTER 7 COASTAL PERMIT PROGRAM RULES**

### **7:7-1.3 Definitions**

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

...

“Coastal Permit” or “permit” means a permit or an authorization, including a Federal Consistency determination and Water Quality Certificate, [or permit] issued by the

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Department under this chapter pursuant to any of the following statutes: the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 et seq., the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq., [or] the Waterfront Development Law, N.J.S.A. 12:5-3[.]; Section 307 of the Federal Coastal Zone Management Act, 16 U.S.C. §§1451 et seq.; or Section 401 of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq.

...

“Conservation restriction” means a restriction, easement, covenant, or condition, in any deed, will or other instrument, other than a lease, executed by or on behalf of the owner of the land, appropriate to retaining land or water areas predominantly in their natural state, scenic or open or wooded condition, or for conservation of soil or wildlife, or for outdoor recreation or park use, or for public access to tidal waterways and their shores, or as suitable habitat for fish or wildlife, to forbid or limit any or all of the following:

1. – 7. (No change.)

...

“Public accessway” means a route that provides a means for the public to reach, pass along, and/or use lands and waters subject to public trust rights. Public accessways include streets, paths, trails, walkways, easements, paper streets, dune walkovers/walkways, piers and other rights-of-way.

...

“Public Trust Doctrine” means a common law principle that recognizes that the public has particular inalienable rights to certain natural resources. These resources include but are not limited to tidal waterways, the underlying submerged lands and the shore waterward of the mean high water line, whether owned by a public, quasi-public or private entity. In the absence of a grant from the State, submerged lands under tidal

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waterways and the shore of tidal waterways waterward of the mean high water line are owned by the State. Regardless of the ownership of these resources, under the Public Trust Doctrine the public has rights of access to and use of these resources, as well as a reasonable area of shoreline landward of the mean high water line. Under the Public Trust Doctrine, the State is the trustee of these publicly owned resources and public rights for the common benefit and use of all people without discrimination. As trustee, the State has a fiduciary obligation to ensure that its ownership, regulation and protection of these properties and rights will safeguard them for the enjoyment of present and future generations. The public rights to use these resources extend both to traditional activities such as navigation and fishing, but also to recreational uses such as swimming, sunbathing, fishing, surfing, walking and boating. The specific rights recognized under the Public Trust Doctrine, a common law principle, continue to develop through individual court decisions. See, for example, *Arnold v. Mundy*, 6 N.J.L. 1 (1821); *Borough of Neptune v. Borough of Avon-by-the-Sea*, 61 N.J. 296 (1972); *Hyland v. Borough of Allenhurst*, 78 N.J. 190 (1978); *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984); *Slocum v. Borough of Belmar*, 238 N.J.Super. 179 (Law Div. 1989); *National Ass'n of Homebuilders v. State, Dept. of Env't'l Protect.*, 64 F.Supp.2d 354 (D.N.J. 1999); *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005); *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

...

#### **7:7-1.5 Permits and permit conditions**

(a) (No change.)

(b) The following conditions shall apply to all coastal permits. [Failure to comply with any of the following shall constitute a violation.] The permittee or responsible party, such as the site operator or contractor, shall comply with all conditions, requirements, and limitations of any coastal permit issued pursuant to this chapter.

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Failure to comply with any permit, condition, or approved plan shall constitute a violation and shall subject the permittee or responsible party to enforcement action pursuant to this chapter.

1. – 18. (No change.)

19. Authorization of construction shall not constitute a relinquishment of public rights to access and use tidal waterways and their shores.

(c) - (e) (No change.)

#### **7:7-7.5 Coastal general permit for amusement pier expansion**

(a) This coastal general permit authorizes the expansion of an existing, functional amusement pier as defined at N.J.A.C. 7:7-1.3 provided that the expansion complies with the following:

1. – 3. (No change.)

4. The expansion will not eliminate or adversely affect existing, direct public access from the boardwalk to the beach, unless for each access point eliminated or adversely affected another access point is provided immediately adjacent to the expanded amusement pier;

5. - 7. (No change.)

8. The expanded amusement pier shall continue to be used only for amusements; [and]

9. The expansion is consistent with the Water Quality Management Plan adopted pursuant to N.J.A.C. 7:15[.]; and

10. Public access shall be provided in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11.

(b) In addition to the application and information required under N.J.A.C. 7:7-7.3, the following information shall be submitted:

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1. Three copies of a site plan(s) showing the following:

i. (No change.)

ii. Existing and proposed direct public access points from the boardwalk to the beach and all public accessways to the beach on the amusement pier and expansion;

iii – iv. (No change.)

2. (No change.)

### **7:7-7.6 Coastal general permit for beach and dune maintenance activities**

(a) This coastal general permit authorizes beach and dune maintenance activities provided:

1. The beach and dune maintenance activities are conducted in accordance with Best Management Practices as defined by the Department in the Coastal Zone Management rules at N.J.A.C. 7:7E-3A.2, 3A.3 and 3A.4 (routine beach maintenance, emergency post-storm beach restoration, and dune creation and maintenance, respectively); [and]

2. The beach and dune maintenance activities shall not be conducted in any wetlands[.]; and

3. Public access to the beach shall be provided in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11.

(b) In addition to the application and information required under N.J.A.C. 7:7-7.3, the following information shall be submitted:

1. Three copies of a site plan(s) showing:

i. [the]The specific location of all proposed beach and dune maintenance activities;

ii. All tidal waterways and their shores on and adjacent to the site; and

iii. All existing and proposed public access areas and public accessways to tidal waterways and their shores including streets, paths, trails, easements, streets shown on a recorded plan but never built (paper streets), dune walkovers/walkways, piers and other dedicated public rights-of-way on and adjacent to the site; and



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2. The name, title, address and telephone number of the person(s) responsible for supervising the proposed activities to ensure compliance with N.J.A.C. 7:7E- 3A.2, 3A.3 and 3A.4; [and]

3. The schedule for conducting the specific beach and dune maintenance activities[.]; and

4. A Compliance Statement prepared in accordance with N.J.A.C. 7:7-6, demonstrating how the beach and/or dune maintenance activities comply with (a) above, including supplemental documents as appropriate, such as beach fee schedules, maps or surveys.

#### **7:7-7.7 Coastal general permit for voluntary reconstruction of certain residential or commercial development**

(a) This coastal general permit authorizes the voluntary reconstruction of a non-damaged legally constructed, currently habitable residential or commercial development landward of the existing footprint of development provided:

1. – 4. (No change.)

5. The reconstruction does not result in additional impacts to Special Areas as defined at N.J.A.C. 7:7E-3; [and]

6. The reconstruction does not increase the area covered by buildings and/or asphalt or concrete pavement[.]; and

7. Public access shall be provided in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11.

(b) (No change.)

(c) In addition to the application and information required under N.J.A.C. 7:7-7.3, the following information shall be submitted:

1. Three copies of a site plan(s) clearly depicting:

i. [the] The locations and dimensions of all existing and proposed structures[.];

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ii. [existing] Existing site conditions (including all Special Areas as defined at N.J.A.C. 7:7E-3)[, and];

iii. All existing and proposed public accessways to tidal waterways and their shores on the site; and

iv. [all] All proposed filling, grading, excavation and clearing;

2. In the case of residential reconstruction, documentation that there will not be an increase in the number of dwelling units; [and]

3. In the case of commercial reconstruction, documentation that there will not be an increase in the number of parking spaces or equivalent parking area associated with the proposed reconstruction[.];and

4. A Compliance Statement prepared in accordance with N.J.A.C. 7:7-6, demonstrating how the proposed development complies with (a) above, including supplemental documents as appropriate, such as maps or surveys.

#### **7:7-7.8 Coastal general permit for the development of a single family home or duplex**

(a) – (d) (No change.)

(e) Development under this coastal general permit shall comply with N.J.A.C. 7:7E-3.31, Coastal bluffs, if the site is located on the Atlantic Ocean, Delaware Bay, Raritan Bay, or Sandy Hook Bay. Coastal bluffs are defined at N.J.A.C. 7:7E-3.31(a). If the site is not located on one of the four water bodies listed above, the development shall comply with setback requirements at [(l)1] (m)1 below, unless the development meets either (e)1 or 2 below:

1.- 2. (No change.)

(f) (No change.)

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(g) Except as provided in (g)1 below, public access shall be provided in accordance with the public trust rights rule, N.J.A.C. 7:7E-8.11. Additional requirements may be imposed as a condition of Shore Protection Program funding, pursuant to N.J.A.C. 7:7E-8.11(p).

1. In accordance with N.J.A.C. 7:7E-8.11(f)6, the Department shall not require public access for the development under this coastal general permit provided no beach and dune maintenance activities are proposed and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or their shores. This provision does not apply to the Hudson River Waterfront Area at N.J.A.C. 7:7E-3.48.

Recodify existing (g) - (k) as (h) - (l) (No change in text.)

[(l)](m) Development under the coastal general permit shall comply with the following setbacks:

1. – 2. (No change.)

3. On a non-oceanfront site with existing or proposed shore protection structures, the single family home or duplex and/or accessory structures (except decks) shall be set back at least 15 feet from existing or proposed shore protection structures. If the single family home or duplex and/or accessory structures cannot be located at least 15 feet landward of the shore protection structure, the Department shall reduce the required setback if an engineering certification is submitted demonstrating that, after the proposed development has been constructed, the shore protection structure can be replaced within 18 inches of the existing shore protection structure and a conservation restriction in a form approved by the Department is recorded for the property which states that any reconstruction of a shore protection structure shall be within 18 inches of the existing shore protection structure. A site with coastal bluffs shall instead comply with [(l)1] (m)1 above;

[(m)] (n) (No change in text.)

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[(n)] (o) In addition to the application and information required under N.J.A.C. 7:7-7.3, the following information shall be submitted:

1. Three copies of a site plan(s) showing the following:

i. – iii. (No change.)

iv. All existing and proposed development, including all structures, public accessways, grading, clearing and limits of disturbance; and

v. (No change.)

2. A Compliance Statement prepared in accordance with N.J.A.C. 7:7-6, demonstrating how the proposed development complies with (a) through [(m)] (n) above, including supplemental documents as appropriate, such as maps or surveys.

**7:7-7.9 Coastal general permit for the expansion, or reconstruction (with or without expansion) of a single family home or duplex**

(a) – (d) (No change.)

(e) Development under this coastal general permit shall comply with N.J.A.C. 7:7E-3.31, Coastal bluffs, if the site is located on the Atlantic Ocean, Delaware Bay, Raritan Bay, or Sandy Hook Bay. Coastal bluffs are defined at N.J.A.C. 7:7E-3.31(a). If the site is not located on one of the four water bodies listed above, the development shall comply with setback requirements at [(l)1] (m)1 below, unless the development meets either (e)1 or 2 below:

(g) Except as provided in (g)1 below, public access shall be provided in accordance with the Public trust rights rule, N.J.A.C. 7:7E-8.11. Additional requirements may be imposed as a condition of Shore Protection Program funding, pursuant to N.J.A.C. 7:7E-8.11(p).

1. In accordance with N.J.A.C. 7:7E-8.11(f)6, the Department shall not require public access for the development under this coastal general permit provided no beach and dune maintenance activities are proposed and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or their

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shores. This provision does not apply to the Hudson River Waterfront Area at N.J.A.C. 7:7E-3.48.

Recodify existing (g) - (k) as (h) - (l) (No change in text.)

[(l)](m) Development under the coastal general permit shall comply with the following setbacks:

1. – 2. (No change.)

3. On a non-oceanfront site with existing or proposed shore protection structures, the single family home or duplex and/or accessory structures (except decks) shall be set back at least 15 feet from existing or proposed shore protection structures. If the single family home or duplex and/or accessory structures cannot be located at least 15 feet landward of the shore protection structure, the Department shall reduce the required setback if an engineering certification is submitted demonstrating that, after the proposed development has been constructed, the shore protection structure can be replaced within 18 inches of the existing shore protection structure and a conservation restriction in a form approved by the Department is recorded for the property which states that any reconstruction of a shore protection structure shall be within 18 inches of the existing shore protection structure. A site with coastal bluffs shall instead comply with [(l)1] (m)1 above;

[(m)] (n) (No change in text.)

[(n)] (o) In addition to the application and information required under N.J.A.C. 7:7-7.3, the following information shall be submitted:

1. Three copies of a site plan(s) showing the following:

i. – iii. (No change.)

iv. All existing and proposed development, including all structures, public accessways, grading, clearing and limits of disturbance; and

v. (No change.)

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2. A Compliance Statement prepared in accordance with N.J.A.C. 7:7-6, demonstrating how the proposed development complies with (a) through [(m)] (n) above, including supplemental documents as appropriate, such as maps or surveys.

**7:7-7.10 Coastal general permit for construction of a bulkhead and placement of associated fill on a manmade lagoon**

(a) This coastal general permit authorizes the construction of a bulkhead on a lot located on a substantially developed manmade lagoon, provided that the bulkhead complies with the following:

1. – 4. (No change.)

5. A minimum 10-foot return shall be constructed at each end of the bulkhead unless it is tied into an existing adjacent bulkhead; [and]

6. Clean fill from an upland source shall be used for backfill[.] ; and

7. Public access shall be provided in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11. Additional requirements may be imposed as a condition of Shore Protection Program funding, pursuant to N.J.A.C. 7:7E-8.11(p).

i. In accordance with N.J.A.C. 7:7E-8.11(f)6, the Department shall not require public access for the development under this coastal general permit provided no beach and dune maintenance activities are proposed and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or their shores. This provision does not apply to the Hudson River Waterfront Area at N.J.A.C. 7:7E-3.48.

(b) In addition to the application and information required under N.J.A.C. 7:7-7.3, the following information shall be submitted:

1. Three copies of a site plan(s) showing the following:

i. – ii. (No change.)

iii. Bulkheads or other retaining structures on adjacent properties; [and]

iv. (No change.)

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v. All existing and proposed public accessways to tidal waterways and their shores on the site; and

2. (No change.)

**7:7-7.11 Coastal general permit for the construction of a revetment at a single family home or duplex lot**

(a) –(b) (No change.)

(c) Except as provided in (c)1 below, public access shall be provided in accordance with the Public trust rights rule, N.J.A.C. 7:7E-8.11. Additional requirements may be imposed as a condition of Shore Protection Program funding, pursuant to N.J.A.C. 7:7E-8.11(p).

1. In accordance with N.J.A.C. 7:7E-8.11(f)6, the Department shall not require public access for the development under this coastal general permit provided no beach and dune maintenance activities are proposed and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or their shores. This provision does not apply to the Hudson River Waterfront Area at N.J.A.C. 7:7E-3.48.

[(c)] (d) In addition to the application and additional information required under N.J.A.C. 7:7-7.3, the following information shall be submitted:

1. (No change.)

2. A Compliance Statement prepared in accordance with N.J.A.C. 7:7-6, demonstrating how the proposed revetment complies with (a) [and (b)] through (c) above, including supplemental documents as appropriate, such as maps or surveys.

**7:7-7.12 Coastal general permit for the construction of gabions at a single family/duplex lot**

(a) – (b) (No change.)

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(c) Except as provided in (c)1 below, public access shall be provided in accordance with the Public trust rights rule, N.J.A.C. 7:7E-8.11. Additional requirements may be imposed as a condition of Shore Protection Program funding, pursuant to N.J.A.C. 7:7E-8.11(p).

1. In accordance with N.J.A.C. 7:7E-8.11(f)6, the Department shall not require public access for the development under this coastal general permit provided no beach and dune maintenance activities are proposed and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or their shores. This provision does not apply to the Hudson River Waterfront Area at N.J.A.C. 7:7E-3.48.

[(c)] (d) In addition to the application and additional information required under N.J.A.C. 7:7-7.3, the following information shall be submitted:

1. Three copies of a site plan(s) showing the following:
  - i. – vi. (No change.)
2. A Compliance Statement prepared in accordance with N.J.A.C. 7:7-6, demonstrating how the proposed gabion system complies with (a)[and (b)] through (c) above, including supplemental documents as appropriate, such as maps or surveys.

**7:7-7.13 Coastal general permit for the construction of support facilities at legally existing and operating commercial marinas**

(a) – (b) (No change.)

(c) The construction of support facilities listed at (b)1 through 7 above shall also comply with the following:

1. (No change.)
2. [Public access shall be provided in accordance with the public access to the waterfront rule, N.J.A.C. 7:7E-8.11] Public access shall be provided in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11;



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3. – 4. (No change.)

(d) In addition to the application and information required under at N.J.A.C. 7:7E-7.3, the following information shall be submitted:

1. Three copies of a site(s) plan showing the following:

i. –iv. (No change.)

v. [The location of all] All existing and proposed public access areas and public accessways to tidal waterways and their shores on the site; and

vi. (No change.)

2. – 3. (No change.)

#### **7:7-7.14 Coastal general permit for reconstruction of a legally existing functioning bulkhead**

(a) (No change.)

(b) The reconstruction of a legally existing bulkhead as described in (a) above is acceptable provided that:

1. (No change.)

2. [With the exception of individual single family/duplex properties which are not part of a larger development, public access shall be maintained or provided in accordance with the public access to the waterfront rule (N.J.A.C. 7:7E-8.11)] Except as provided in (b)2i below, public access shall be provided in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11. Additional requirements may be imposed as a condition of Shore Protection Program funding, pursuant to N.J.A.C. 7:7E-8.11(p).

i. In accordance with N.J.A.C. 7:7E-8.11(f)6, the Department shall not require public access for the development under this coastal general permit provided no beach and dune maintenance activities are proposed and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or their shores. This provision does not apply to the Hudson River Waterfront Area at N.J.A.C. 7:7E-3.48.

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3. – 7. (No change.)

(c) In addition to the application and information required under N.J.A.C. 7:7-7.3, the following information shall be submitted:

1. Three copies of a site plan(s) showing the following:

i. – iv. (No change.)

v. [The location of all] All existing and proposed public access areas and public accessways to tidal waterways and their shores on the site; and

2. (No change.)

#### **7:7-7.17 Coastal general permit for the construction of recreational facilities at public parks**

(a) (No change.)

(b) Public access shall be provided in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11.

[(b)] (c) In addition to the application and information required under N.J.A.C. 7:7-7.3, the following information shall be submitted:

1. Three copies of a site plan(s) showing the following:

i. (No change.)

ii. The proposed development including all limits of disturbance, structures, grading and clearing; [and]

iii. (No change.)

iv. All existing and proposed public access areas and public accessways to tidal waterways and their shores on-site; and

2. A Compliance Statement prepared in accordance with N.J.A.C. 7:7-6, demonstrating how the proposed recreational facility complies with (a) and (b) above, including supplemental documents as appropriate such as maps or surveys.

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**7:7-7.18 Coastal general permit for bulkhead construction and placement of associated fill**

(a) This coastal general permit authorizes the construction of a bulkhead and associated fill at a single family/duplex lot on a natural water body provided that the proposed bulkhead complies with the following:

1. – 8. (No change.)

9. The placement of rip-rap along the seaward toe of the bulkhead structure may qualify for this coastal general permit if the Department determines that such rip rap is required to limit scour potential and the areas and volume of rip rap are minimized; [and]

10. There shall be no disturbance to wetlands during construction; and

11. Except as provided in (a)11i below, public access shall be provided in accordance with the public trust rights rule, N.J.A.C. 7:7E-8.11. Additional requirements may be imposed as a condition if Shore Protection Program funding is utilized, pursuant to N.J.A.C. 7:7E-8.11(p).

i. In accordance with N.J.A.C. 7:7E-8.11(f)6, the Department shall not require public access for the development under this coastal general permit provided no beach and dune maintenance activities are proposed and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or their shores. This provision does not apply to the Hudson River Waterfront Area at N.J.A.C. 7:7E-3.48.

(b) (No change.)

(c) In addition to the application and information required under N.J.A.C 7:7-7.3, the following information shall be submitted:

1. Three copies of a site plan(s) showing the following:

i. – ii. (No change.)

iii. Existing features both at the site and on adjacent waterfront sites including all waterfront structures and existing bulkhead and other retaining structures; [and]

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iv. (No change.)

v. All existing and proposed public access areas and public accessways to tidal waterways and their shores on-site; and

2. (No change.)

#### **7:7-7.24 Coastal general permit for the legalization of the filling of tidelands**

(a) This coastal general permit authorizes the legalization of the filling of any lands formerly flowed by the tide provided:

1. -2. (No change.)

3. Public access shall be provided in accordance with the [public access to the waterfront rule (N.J.A.C. 7:7E-8.11)] lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11;

(b) (No change.)

(c) In addition to the application and information required under N.J.A.C. 7:7-7.3, the following information shall be submitted:

1. Three copies of a site plan(s) showing the following:

i. (No change.)

ii. The location of all existing and proposed public access areas and public accessways to tidal waterways and their shores on-site;

2. (No change.)

3. A Compliance Statement prepared in accordance with N.J.A.C. 7:7-6, demonstrating how the site complies with [the Public Access to the Waterfront rule, N.J.A.C. 7:7E-8.11] (a) above, including supplemental documents as appropriate, such as maps or surveys.

#### **7:7-7.26 Coastal general permit for the construction of certain structures related to the tourism industry at hotels and motels, commercial developments and multi-family residential developments over 75 units**

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(a) This coastal general permit authorizes the construction of structures such as equipment storage containers and sheds, stage platforms, bleachers, portable restrooms, food concession stands, gazebos, lockers, canopied shelters, and wooden walkways related to the tourism industry, at hotels and motels, commercial developments and multi-family residential developments over 75 units provided:

1. - 8. (No change)

9. [Public access shall be maintained or provided in accordance with the public access to the waterfront rule, N.J.A.C. 7:7E-8.11; and] Public access shall be provided in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11; and

10. (No change.)

(b) In addition to the application and information required under N.J.A.C. 7:7-7.3, the following information shall be submitted:

1. Three copies of a site plan(s) showing the following:

i. (No change.)

ii. The location and type of all proposed structures; [and]

iii. (No change.)

iv. All existing and proposed public access areas and public accessways to tidal waterways and their shores on the site; and

2. (No change.)

(c) (No change.)

#### **7:7-7.29 Coastal general permit for habitat creation and enhancement activities**

(a) –(e) (No change.)

(f) Public access shall be provided in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11.

Recodify existing (f) and (g) as (g) and (h) (No change in text.)

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## CHAPTER 7E

### COASTAL ZONE MANAGEMENT

#### 7:7E-1.8 Definitions

(a) The Coastal Zone Management rules are stated in terms of actions that are encouraged, required, acceptable, conditionally acceptable, discouraged, or prohibited. Some rules include specific conditions that must be met in order for an action to be deemed acceptable. Within the context of the Coastal Zone Management rules and the principles defined in N.J.A.C. 7:7E-1.5(a), the following words have the following meanings.

...

“Coastal Permit” or “permit” means a permit or an authorization, including a Federal Consistency determination and Water Quality Certificate, [or permit] issued by the Department under this chapter pursuant to any of the following statutes: the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 et seq., the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq., [or] the Waterfront Development Law, N.J.S.A. 12:5-3[.] ; Section 307 of the Federal Coastal Zone Management Act, 16 U.S.C. §§ 1451 et seq.; or Section 401 of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq.

...

“Conservation restriction” means a restriction, easement, covenant, or condition, in any deed, will or other instrument, other than a lease, executed by or on behalf of the owner of the land, appropriate to retaining land or water areas predominantly in their natural state, scenic or open or wooded condition, or for conservation of soil or wildlife, or for outdoor recreation or park use, or for public access to tidal waterways and their shores, or as suitable habitat for fish or wildlife, to forbid or limit any or all of the following:

1. – 7. (No change.)

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...

### **7:7E-3.22 Beaches**

(a) – (b) (No change.)

(c) Public access [and barrier free access to beaches and the water's edge is encouraged. Coastal development that unreasonably restricts public access is prohibited.] shall be provided in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11.

(d) (No change.)

### **7:7E-3.23 Filled water's edge**

(a) – (h) (No change.)

(i) On all filled water's edge sites, development must comply with the [Public Access to the Waterfront Rule (N.J.A.C. 7:7E-8.11)] lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11. [Public access to the waterfront will not be required at single family or duplex residential lots along the waterfront, which are not part of a larger development.]

(j) (No change.)

### **7:7E-3.43 Special urban areas**

(a) – (b) (No change.)

(c) Housing, hotels, motels and mixed use development, which is consistent with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, [Public Access to the Waterfront] the public trust rights rule, [(N.J.A.C. 7:7E-8.11)], and the Hudson River Waterfront Area rule, [(N.J.A.C. 7:7E-3.48)], where applicable, [including those

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provisions relating to fishing access as appropriate] are acceptable only over large rivers where water dependent uses are demonstrated to be infeasible. These uses are conditionally acceptable on structurally sound existing pilings, or where at least one of the following criteria is met:

1. – 3. (No change.)

(d) Housing, hotels, motels and mixed use development are acceptable in filled water's edge areas, provided that development is consistent with the filled water's edge rule at N.J.A.C. 7:7E-3.23 and [public access is provided for, as required by the public access to the waterfront rule at N.J.A.C. 7:7E-8.11] public access is provided in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11.

(e) (No change.)

#### **7:7E-3.48 Hudson River Waterfront Area**

(a) – (b) (No change.)

(c) Hudson River Waterfront Area development shall be consistent with all other applicable Coastal Zone Management rules with particular attention given to N.J.A.C. 7:7E- 3.40, Public open space, N.J.A.C. 7:7E-3.41 Special hazards areas, N.J.A.C. 7:7E-3.43, Special urban areas, N.J.A.C. 7:7E-3.50, Lands and waters subject to public trust rights, N.J.A.C. 7:7E-7.14 High rise structures, N.J.A.C. 7:7E-8.11, [Public access to the waterfront] Public trust rights, N.J.A.C. 7:7E-8.12, Scenic resources and design, and N.J.A.C. 7:7E-8.4, Water quality.

(d) (No change.)

(e) All waterfront development along the Hudson River shall develop, maintain and manage a section of the Hudson Waterfront Walkway coincident with the shoreline of the



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development property. The developer shall, by appropriate instrument of conveyance, create a conservation [easement] **restriction** in favor of the Department. The conservation [easement] **restriction** shall define the physical parameters of the walkway and the allowable uses, address the maintenance and management duties and identify the responsible party. Development of each project's public access system shall conform to this special area policy and to the Hudson Waterfront Walkway Planning and Design Guidelines (1984) and the Hudson Waterfront Walkway Design Standards (1989), subject to the following clarification:

1. [With the exception of water dependent industrial uses, all Hudson River pier development shall provide unrestricted, landscaped public access as required by (d) above. Public access on piers shall be on a 24-hour basis, but the Department will consider requests to limit access late at night if the applicant submits an enforceable agreement to ensure that access will be maintained for the agreed upon hours.] Public access to and along the main route of the Hudson Waterfront Walkway and on the adjacent piers shall be on a 24-hour basis, except as provided by N.J.A.C. 7:7E-8.11(f).

[2. Water dependent industrial piers shall provide linear public access and/or public access observation nodes as feasible, consistent with public safety.]

[3.] 2. (No change in text.)

(f) Applications which vary in detail from the standards of this rule are discouraged, but will be considered for approval if they would provide greater public access and/or protection of natural or scenic resources than would be afforded by strict compliance with this rule and the development, as proposed, would remain in compliance with the public trust rights rule, N.J.A.C. 7:7E-8.11. Applicants proposing a development which varies in detail from the standards of this rule are encouraged to contact the Department for guidance when conceptual plans have been prepared.

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

(a) Lands and waters subject to public trust rights are tidal waterways and their shores, including both lands now or formerly below the mean high water line, and shores

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above the mean high water line. Tidal waterways and their shores are subject to the Public Trust Doctrine and are held in trust by the State for the benefit of all the people, allowing the public to fully enjoy these lands and waters for a variety of public uses.

(b) Development that adversely affects lands and waters subject to public trust rights is discouraged.

(c) Development that adversely affects or limits public access to lands and waters subject to public trust rights is prohibited, except as provided at N.J.A.C. 7:7E-8.11.

(d) Public access to lands and waters subject to public trust rights shall be provided in accordance with the public trust rights rule, N.J.A.C. 7:7E-8.11.

(e) Rationale: The public's rights of access to and use of tidal waterways and their shores, including the ocean, bays, and tidal rivers, in the United States predate the founding of this country. These rights are based in the common law rule of the Public Trust Doctrine. First codified by the Roman Emperor Justinian around 500 AD as part of Roman civil law, the Public Trust Doctrine establishes the public's right to full use of the seashore as declared in the following quotation from Book II of the Institutes of Justinian:

“By the law of nature these things are common to all mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations.”

Influenced by Roman civil law, the tenets of public trust were maintained through English Common Law and adopted by the original 13 colonies, each in their own form. The grants that form the basis of the titles to private property in New Jersey never conveyed those public trust rights, which were reserved to the Crown. Following the American Revolution, the royal rights to tidal waterways and their shores were vested in the thirteen new states, then each subsequent state, and have remained a part of law and public policy into the present time. Tidal waterways and their shores always were, and

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remain, subject to and impressed with these public trust rights. See *Arnold v. Mundy*, 6 N.J.L. 1 (1821); *Borough of Neptune v. Borough of Avon-by-the-Sea*, 61 N.J. 296 (1972); *Hyland v. Borough of Allenhurst*, 78 N.J. 190 (1978); *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984); *Slocum v. Borough of Belmar*, 238 N.J.Super. 179 (Law Div. 1989); *National Ass'n of Homebuilders v. State, Dept. of Env'tl Protect.*, 64 F.Supp.2d 354 (D.N.J. 1999); *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005).

The Public Trust Doctrine serves as an extremely important legal principle that helps to maintain public access to and use of tidal waterways and their shores in New Jersey for the benefit of all the people. Further, it establishes the right of the public to fully utilize these lands and waters for a variety of public uses. 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. In New Jersey, the Public Trust Doctrine expressly recognizes and protects natural resources as well as public recreational uses such as swimming, sunbathing, fishing, surfing, walking and boating along the various tidal waterways and their shores.

The Public Trust Doctrine is an example of common law authority that is continually developing through individual court cases. The first published court case in New Jersey to discuss the Public Trust Doctrine was in 1821. See *Arnold v. Mundy*, 6 N.J.L. 1 (1821). Within the past three decades, several New Jersey court decisions have clarified the public rights of access to and use of areas above the mean high water line as needed for access to and use of tidal waterways and their shores, under the Public Trust Doctrine. See for example, *Arnold v. Mundy*, 6 N.J.L. 1 (1821); *Borough of Neptune v. Borough of Avon-by-the-Sea*, 61 N.J. 296 (1972); *Hyland v. Borough of Allenhurst*, 78 N.J. 190 (1978); *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984); *Slocum v. Borough of Belmar*, 238 N.J.Super. 179 (Law Div. 1989); *National Ass'n of Homebuilders v. State, Dept. of Env'tl Protect.*, 64 F.Supp.2d 354 (D.N.J. 1999); *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005).

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

Development and other measures can adversely affect tidal waterways and their shores as well as access to and use of those lands. One example of adversely affecting tidal waterways and their shores would be the development of a building that "shadows" a public beach. The proximity of the building serves to diminish the quality of the experience of the beachgoer, encouraging them to go elsewhere. Development that adversely affects or limits public access to tidal waterways and their shores includes building over traditional accessways, putting up threatening signs, eliminating public parking, and physically blocking access with fences or equipment.

In addition to cases involving physical barriers to access, there have been instances where municipalities and local property owner associations have attempted to limit use of recreational beaches to their residents and members through methods designed to exclude outsiders. In the majority of these cases, New Jersey courts have ruled that these actions violate the Public Trust Doctrine because lands that should be available for the general public's recreational use were being appropriated for the benefit of a select few. The decision in *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984) recognized that, under the Public Trust Doctrine, not only does the public have the right to use the land below the mean high water mark, but also they have a right to use a portion of the upland dry sand area on quasi-public beaches. "...where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner." Id. at 325. The New Jersey Supreme Court recognized that this principle also applies to private beaches, in *Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc. et al.*, 185 N.J. 40 (2005).

## **7:7E-7.2 Housing use rules**

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(a) (No change.)

(b) Standards relevant to water area and water's edge housing are as follows:

1. (No change.)

2. In special urban areas and along large rivers where water dependent uses are demonstrated to be infeasible, new housing is also acceptable on structurally sound existing pilings, or where piers have been removed as part of the harbor clean up program, the equivalent pier area may be replaced in the same or another location.

i. -ii. (No change.)

iii. New housing acceptable under this rule shall be consistent with the [Public Access to the Waterfront Rule (N.J.A.C. 7:7E-8.11), including provisions of fishing access as appropriate] lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11.

3. Housing is conditionally acceptable in the filled water's edge, provided that it meets the requirements of the Filled Water's Edge rule, [(N.J.A.C. 7:7E-3.23)] and the Public Access to the Waterfront Rule (N.J.A.C. 7:7E-8.11)], lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11. The residential development shall comply with the requirements for impervious cover and vegetative cover that apply to the site under N.J.A.C. 7:7E-5 and either N.J.A.C. 7:7E-5A or 5B, except on bay islands where the requirements of the Bay Island Corridor rule (N.J.A.C. 7:7E-3.21) shall apply.

4. - 7. (No change.)

(c) - (d) (No change.)

(e) Standards relevant to the development of a single family home or duplex and/or accessory development (such as garages, sheds, pools, driveways, grading, excavation, filling, and clearing, excluding shore protection structures) which does not result in the development of more than one single family home or duplex either solely or in conjunction with a previous development as defined at N.J.A.C. 7:7-2.1(b)8, and provided the single family home or duplex and accessory development are located

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landward of the mean high water line are as follows:

1. – 4. (No change.)

5. Except as provided in (e)5i below, public access shall be provided in accordance with the Public trust rights rule, N.J.A.C. 7:7E-8.11. Public access requirements may also be imposed as a condition of Shore Protection Program funding, pursuant to N.J.A.C. 7:7E-8.11(p).

i. In accordance with N.J.A.C. 7:7E-8.11(f)5, the Department shall not require public access for the development listed under (e) above provided no beach and dune maintenance activities are proposed and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or their shores.

Recodify existing 5. – 12. as 6. – 13. (No change in text.)

(f) Standards relevant to the expansion, or reconstruction (with or without expansion) of a legally constructed habitable single family home or duplex and/or accessory development (such as garages, sheds, pools, driveways, grading, excavation, filling, and clearing, excluding shore protection structures) which does not result in the development of more than one single family home or duplex either solely or in conjunction with a previous development as defined at N.J.A.C. 7:7-2.1(b)8, and provided the single family home or duplex and accessory development are located landward of the mean high water line are as follows:

1. – 4. (No change.)

5. Except as provided in (e)5i below, public access shall be provided in accordance with the Public trust rights rule, N.J.A.C. 7:7E-8.11. Public access requirements may also be imposed as a condition of Shore Protection Program funding, pursuant to N.J.A.C. 7:7E-8.11(p).

i. In accordance with N.J.A.C. 7:7E-8.11(f)5, the Department shall not require public access for the development listed under (f) above provided no beach and dune maintenance activities are proposed and the site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay or their shores.

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Recodify existing 5. – 12. as 6. – 13. (No change in text.)

(g) (No change.)

### **7:7E-7.3 Resort/recreational use**

(a) - (c) (No change.)

(d) Standards relevant to marinas are as follows:

1. (No change.)

2. New marinas or expansion or renovation (including, but not limited to, dredging, bulkhead construction and reconstruction, and relocation of docks) of existing marinas for recreational boating are conditionally acceptable if:

i. – iii. (No change.)

iv. New marina facilities and expansions and renovation of existing marinas shall provide public access in accordance with the [Public Access to the Waterfront Rule (N.J.A.C. 7:7E-8.11)] lands and waters subject to the public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11.

3. – 11. (No change.)

(e) Standards relevant to amusement piers, parks and boardwalks are as follows:

1. (No change.)

2. New amusement piers are prohibited, except in areas with privately held riparian grants, where they are discouraged. Expanded or extended amusement piers, parks, and boardwalks at the water's edge or in the water, and the on-site improvement or repair of existing amusement piers, parks and boardwalk areas are discouraged unless the proposed development meets the following conditions:

i. – iii. (No change)

iv. Th pier expansion is constructed on pilings at the same elevation as the existing pier; [and]

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v. The pier expansion includes a provision for public seating and viewing at the terminal end of the expansion [.] and

vi. Public access shall be provided in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11;

3. – 4. (No change.)

#### **7:7E-7.4 Energy facility use rule**

(a) (No change.)

(b) Standards relevant to siting of new energy facilities, including all associated development activities, are as follows:

1. – 2. (No change.)

3. [Public access to and use of the waterfront and tidal waters shall be maintained and, where feasible, enhanced in the siting of energy facilities, pursuant to N.J.A.C. 7:7E-8.11] Public access shall be provided in accordance with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11; and

4. (No change.)

(c) – (s) (No change.)

#### **7:7E-7.7 Industry use**

(a) (No change.)

(b) Industrial uses are encouraged in special urban areas. Elsewhere, industrial uses are conditionally acceptable provided they comply with all applicable location and resource rules. Particular attention should be given to location rules which reserve the water's edge for water dependent uses (N.J.A.C. 7:7E-3.16 and 7:7E-3.32); to the buffers and compatibility of uses rule, N.J.A.C. 7:7E-8.13, which requires that the use be compatible with existing uses in the area or adequate buffering be provided; and the [public access to the waterfront rule] Lands and waters subject to public trust rights rule,



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N.J.A.C. 7:7E-3.50 and the Public trust rights rule, N.J.A.C. 7:7E-8.11, which places public access requirements upon the use.

(c) - (g) (No change.)

### **7:7E-7.11 Coastal engineering**

(a) – (c) (No change.)

(d) Standards relevant to beach nourishment are as follows:

1. Beach nourishment projects, such as non-structural shore protection measures, are encouraged, provided that:

i. – iii. (No change.)

iv. Public access to the nourished beach is provided in [cases where public funds are used to complete the project] accordance with the lands and waters subject to the public trust rights rule, N.J.A.C. 7:7E-3.50, and the public trust rights rule, N.J.A.C. 7:7E-8.11.

2. (No change.)

(e) Standards relevant to structural shore protection are as follows:

1. – 3. (No change.)

4. [Public access, including parking where appropriate, must be provided to publicly funded shore protection structures and to waterfront land created by public projects, unless public access would create a safety hazard to users. Physical barriers or local regulations which unreasonably interfere with access to, along or across a structure are prohibited.] Public access to the shore protection project is provided in accordance with the Lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50 and the Public trust rights rule, N.J.A.C. 7:7E-8.11.

5. – 6. (No change.)

### **7:7E-8.11 Public trust rights**

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(a) Public trust rights to tidal waterways and their shores (public trust rights) established by the Public Trust Doctrine include public access which is the ability of the public to pass physically and visually to, from and along lands and waters subject to public trust rights as defined at N.J.A.C. 7:7E-3.50, and to use these lands and waters for activities such as fishing, swimming, sunbathing, bird watching, walking and boating. Public trust rights also include the right to perpendicular and linear access. Public accessways and public access areas provide a means for the public to pass along and use lands and waters subject to public trust rights.

(b) When used in this section, the following words and terms have the following meanings, unless the context clearly indicates otherwise:

“Green Acres funding” means a loan or matching grant, or both, to a local government unit, or a matching grant to a nonprofit, for the acquisition of land or the development of outdoor recreation and conservation facility(ies) provided by the Department’s Green Acres Program in accordance with N.J.A.C. 7:36.

“Held” when used with reference to land means owned, leased, or otherwise controlled.

“Natural area” means an area that has retained its natural character, as evidenced by the presence of woody vegetation (trees, saplings, scrub-shrub vegetation) or rare or endangered plants. A disturbed area may be considered a natural area if such vegetation is present. A natural area does not include maintained lawns or areas landscaped with non-native herbaceous plants.

“Paper street” means the street shown on a recorded plan but never built.

“Public accessway” means a route that provides a means for the public to reach, pass along, and/or use lands and waters subject to public trust rights. Public accessways include streets, paths, trails, walkways, easements, paper streets,

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dunewalkovers/walkways, piers and other rights-of-way.

“Shore Protection Program funding” means monies from the Shore Protection Fund established by N.J.S.A. 13:19-16 and any other Department money provided for shore protection projects associated with the protection, stabilization, restoration or maintenance of the shore and adjacent land, including beach nourishment projects and land acquisitions. A State Aid Agreement is the means by which a municipality participates in Shore Protection Program funding.

“State Aid Agreement” means a cost sharing agreement entered into by the Department and a municipality for the construction of a shore protection or beach nourishment project. The State Aid Agreement shall describe the project and project area for purposes of compliance with (p)7ii through vi and (p)8ii through v below in recognition of the phasing of a large-scale or multi-phase shore protection or beach nourishment project.

(c) Development that adversely affects or limits public trust rights to tidal waterways and their shores is prohibited, except as otherwise provided in this section.

(d) Except as otherwise provided at (f) below, development on or adjacent to all tidal waterways and their shores shall provide on-site, permanent, unobstructed public access to the tidal waterway and its shores at all times, including both visual and physical access. Specific requirements for sites located along the Arthur Kill, Kill Van Kull west of Bayonne Bridge, Newark Bay, Delaware River from the Trenton Makes Bridge to the CAFRA boundary, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, Cohansey River in Bridgeton City, and Maurice River in Millville City are found at (e) below. Public accessways and public access areas shall:

1. Include perpendicular access and a linear area along the tidal waterway and its entire shore; and
2. If located in a natural area of a tidal waterway, be designed to minimize the

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impacts to the natural area and tidal waterway including impacts to habitat value, vegetation and water quality.

(e) Except as provided in (f) below, in addition to the requirements of (d) above, the perpendicular access and linear area provided for sites located along the Arthur Kill, Kill Van Kull west of Bayonne Bridge, Newark Bay, Delaware River from the Trenton Makes Bridge to the CAFRA boundary, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, Cohansey River in Bridgeton City, and Maurice River in Millville City, shall comply with the following. The standards for public access along the Hudson River Waterfront Area are set forth at N.J.A.C. 7:7E-3.48.

1. The linear area shall consist of a walkway that meets the following:

i. The minimum width of walkway free of obstruction shall be 16 feet; and

ii. An area a minimum of 30 feet wide, including the walkway area, shall be permanently protected by a conservation restriction; and

2. The perpendicular access shall consist of a walkway that meets the following:

i. The minimum width of the walkway free of obstruction shall be 10 feet;

ii. An area a minimum of 20 feet wide, including the walkway area shall be permanently protected by a conservation restriction; and

iii. The linear distance between perpendicular accessways shall not exceed one-half mile as measured generally parallel to the waterway; and

3. The Department may reduce the walkway width requirements at (e)1i and 2i above, as necessary to protect endangered and threatened wildlife or vegetation species habitat, critical wildlife habitat as defined at N.J.A.C. 7:7-3.39, natural areas or existing infrastructure.

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

1. Public access to tidal waterways and their shores shall be available at all times.

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However, the Department may allow closure of an area otherwise available for public access during specified late night hours upon documentation of unique circumstances, other than the risk associated with tidal waterways, that threaten public safety and warrant such closure. In no case shall physical barriers be used to close public access. This exception does not apply to the Hudson River Waterfront Area or to the waterways listed in (e) above;

2. The Department may allow, require or impose temporary restrictions to public access, including closure of an area otherwise subject to public access, when it determines:

i. Exigent circumstances of public safety or security, or repair, maintenance, or construction relating to any public access infrastructure such as a walkway or boardwalk exist, with such closure to terminate immediately when such exigent circumstances cease to exist;

ii. Restrictions are necessary to protect endangered or threatened wildlife or plant species from disturbance or destruction; or

iii. Restrictions are necessary to protect other critical wildlife resources such as seasonal assemblages of wildlife in areas that provide critical feeding, roosting, resting or staging habitat;

3. Where an energy facility, industrial use, port use, airport, railroad, or military facility is proposed and the Department determines that perpendicular access and/or a linear area along the entire shore of the tidal waterway is not practicable based on the risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions, and no measures can be taken to avert these risks, the Department shall require:

i. Equivalent public access on-site; or

ii. Equivalent public access at a nearby off-site location, if equivalent public access on-site is not practicable;

4. Where a two-unit (excluding duplexes) or three- unit residential development, or associated accessory development or associated shore protection structure is proposed, the Department may allow the provision of equivalent public access on-site or at a nearby

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offsite location based on an evaluation of the size of the site, the character of the waterway, and the availability and type of public access in the vicinity, provided i through iii below are met. This paragraph does not apply to the Hudson River Waterfront Area and the waterways listed at (e) above. Public access requirements may be imposed as a condition of Shore Protection Program funding, pursuant to (p) below.

i. The development does not result in the development of more than three residential units either solely or in conjunction with a previous development as defined at N.J.A.C. 7:7-2.1(b)8;

ii. No beach and dune maintenance activities are proposed; and

iii. The site is not located on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and their shores;

5. Where a two- unit or three- unit (excluding duplexes) residential development, or associated accessory development, or associated shore protection structure is proposed that meets (f)4i above and is located on a site that is located along the Arthur Kill, Kill Van Kull west of Bayonne Bridge, Newark Bay, Delaware River from the Trenton Makes Bridge to the CAFRA boundary, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, Cohansey River in Bridgeton City, and Maurice River in Millville City, linear and perpendicular public access shall be provided in accordance with the following:

i. The linear area shall consist of a walkway, that meets the following:

(1) The minimum width of walkway free of obstruction shall be 10 feet; and

(2) An area a minimum of 20 feet wide, including the walkway area shall be permanently protected by a conservation restriction; and

ii. The perpendicular access shall consist of a walkway that meets the following:

(1) The minimum width of the walkway free of obstruction shall be 10 feet;

(2) An area a minimum of 10 feet wide, including the walkway area shall be permanently protected by a conservation restriction;

6. Except as provided in (f)7 below, the Department shall not require public access where a single family home, duplex, or associated accessory development or associated shore protection structure is proposed, provided (f)6i through iii below are met. Public

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access requirements may be imposed as a condition of Shore Protection Program funding, pursuant to (p) below. This paragraph does not apply to the Hudson River Waterfront Area at N.J.A.C. 7:7E-3.48.

i. The development does not result in the development of more than one single family home or duplex either solely or in conjunction with a previous development as defined at N.J.A.C. 7:7-2.1(b)8;

ii. No beach and dune maintenance activities are proposed; and

iii. The site does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and their shores; or

7. Where a single family home, duplex, or associated accessory development, or associated shore protection structure is proposed that meets (f)6i above and is located on a site that includes a beach on which beach and dune maintenance activities are proposed or a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay or Delaware Bay and their shores, public access along and use of the beach and the shore shall be provided. Additional requirements may be imposed as a condition of Shore Protection Program funding, pursuant to (p) below.

(g) Public access must be available on a nondiscriminatory basis. All establishments, including municipalities, counties, marinas, condominium associations, homeowner associations and beach clubs, which control access to tidal waterways and their shores shall comply with the Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

(h) Public access to tidal waterways and their shores shall be clearly marked. Department approved public access signs shall be installed at each public accessway, public access area and/or public parking area at the development site and maintained in perpetuity by the permittee and its successors in title and interest., N.J.A.C. 7:7E-8.11(p) contains the standards for signs for municipalities that participate in Shore Protection Program funding. Subsection (q) below contains the standards for signs for municipalities, counties and nonprofits that receive Green Acres funding.

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(i) Activities that have the effect of discouraging or preventing the exercise of public trust rights are prohibited. These activities include, but are not limited to, requiring photographic identification, requiring a liability waiver, requiring the purchase of drinks or food from a specific vendor, or prohibiting bringing beach equipment such as blankets or beach chairs.

(j) Parking shall be provided for the public to access tidal waterways and their shores, except where public access is not required in accordance with (f)6 above. Subsection (p) below contains the parking standards for municipalities that participate in Shore Protection Program funding. Subsection (q) below contains the parking standards for municipalities, counties and nonprofits that receive Green Acres funding. All other development shall provide parking as follows:

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

2. The area set aside for off-street parking shall be dedicated for public access parking through the recording of a conservation restriction maintaining the parking spaces in perpetuity; and

3. The area set aside for on-street parking shall be dedicated for public access parking through municipal ordinance.

(k) Development on or adjacent to tidal waterways and their shores shall provide barrier free access where feasible and warranted by the character of the site.

(l) Development on or adjacent to tidal waterways and their shores shall incorporate fishing access and associated amenities to the maximum extent practicable within the



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area provided for public access. In the case of a beach, fishing access shall not be required in areas designated for swimming during hours designated for swimming.

(m) A fee for use of bathing and recreational facilities and safeguards, such as lifeguards, toilets, showers, and parking, at publicly or privately owned beach or waterfront areas, may be charged in accordance with (m)1 through 6 below. However, no fees shall be charged solely for access to or use of tidal waterways and their shores. The fee schedule and documentation of compliance with this paragraph shall be submitted to the Department by the permittee, Shore Protection Program participant or Green Acres funding recipient and its successors in title and interest upon request.

1. Fees shall be no greater than that which is required to operate and maintain the facility, taking into consideration basic support amenities provided, such as lifeguards, restroom/shower facilities and trash pickup. This requirement applies to facilities and services directly associated with using the tidal waterways and their shores and does not apply to additional amenities such as cabanas, pools, or restaurants;

2. Fees shall not discriminate between residents and non-residents or on any other basis, except as allowed by this rule or other law;

3. Fees shall not be charged for children under the age of 12 years;

4. Badges or passes must be available for sale at times and places that are reasonably convenient for the public. Badges and passes shall be offered for sale in person at the beach or waterfront area during the hours that the beach is staffed. In addition, if the entity that owns or operates the beach or waterfront area offers private memberships, public badges or passes must be offered for sale to the public in the same manner, times and places as private memberships;

5. Weekly, monthly or seasonal badges or passes shall be transferable at the discretion of the badge or pass holder; and

6. Public access to and use of tidal waterways and their shores may not be conditioned upon providing identification or signing or otherwise agreeing to any waiver or similar disclaimer of rights.

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(n) The areas set aside for public access to tidal waterways and their shores shall be permanently dedicated for public use through the recording of a Department approved conservation restriction under the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1 et seq., maintaining the publicly dedicated areas in perpetuity. Subsection (p) below contains the conservation restriction standards for municipalities that participate in Shore Protection Program funding. Subsection (q) below contains the conservation restriction standards for municipalities, counties and nonprofits that receive Green Acres funding. N.J.A.C. 7:7E-8A.4 contains the recording requirements for all conservation restrictions.

(o) No authorization or approval under this chapter shall be deemed to relinquish public rights of access to and use of lands and waters subject to public trust rights.

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

1. Submit the following to the Department for approval prior to issuance of a coastal permit:

i. A draft public access plan that meets the requirements of N.J.A.C. 7:7E-8A.2 and 8A.3 and a draft ordinance adopting the public access plan; and

ii. A draft Public Access Instrument that meets the requirements of N.J.A.C. 7:7E-8A.5;

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

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

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

5. Prior to commencement of construction or nourishment, repeal any ordinance that

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limits access to or use of tidal waterways and their shores or is in conflict with the Public Trust Doctrine;

6. Not enact or adopt ordinances or engage in activities in conflict with public access to or use of tidal waterways and their shores, such as the placing of signs, structures, vegetation, parking restrictions or any other means, that limit access to or use of tidal waterways and their shores;

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

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

(1) The entire project, except those portions of jetties and groins on which public access is not required in accordance with ii below, and all beaches within the municipality along the waterway on which the project occurs. If a municipality cannot obtain the required conservation restriction for all privately held beaches outside of the project area within the municipality along the waterway on which the project occurs, the shore protection or beach nourishment project can proceed only if the municipality or State has entered into condemnation or other legal proceedings to diligently obtain the necessary easements;

(2) The public accessways held by the municipality that lead to or provide access to tidal waterways and their shores and are not listed in the Public Access Instrument approved by the Department pursuant to (p)1 above, including paths, trails, dune walkovers/walkways, and piers, and public accessways proposed pursuant to (p)7iii below; and

(3) All parking areas identified in (p)v below;

ii. Immediately upon completion of project construction, provide public access to the entire project and to all beaches within the municipality along the waterway on which the project occurs. Public access is not required to those portions of jetties and groins where it is demonstrated that access poses an extraordinary risk of injury;

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iii. Immediately upon completion of project construction, provide public accessways to the project and to all beaches within the municipality along the waterway on which the project occurs. The linear distance between public accessways shall not exceed one-quarter mile as measured generally parallel to the beach/shore, except as provided at (p)7iii(1) below. In areas where existing public accessways, including, but not limited to, streets, roads, paper streets, paths, trails, easements, dune walkovers/walkways, piers and other dedicated public rights-of-way are closer than one-quarter mile apart, the number of existing access points shall not be reduced;

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

(A) The average interval between public accessways within the municipality along the waterway on which the project occurs is one-quarter mile; and

(B) In no case is the interval between public accessways greater than three-eighths mile;

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

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

vi. Immediately upon completion of project construction, install Department

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approved public access signs. Signs shall be maintained in perpetuity by the participant in Shore Protection Project funding at each public accessway and/or public access area along the waterway on which the project occurs;

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

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

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

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

(3) All parking areas identified in (p)8iv below;

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

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

iv. Immediately upon completion of project construction, provide parking sufficient to accommodate public demand to access the entire project, taking into account the availability of existing public parking; and

v. Immediately upon completion of project construction, install Department approved public access signs. Signs shall be maintained in perpetuity by the participant in Shore Protection Project funding at the site of the project, except at jetties and groins that are

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not designed for public use;

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

10. Any municipality that participates in Shore Protection Program funding after {the effective date of this rule}, that undertakes any action that is determined by the Department to be in conflict with this section or the Public Trust Doctrine, will be required to take corrective action within 30 days of notification by the Department of the conflict with this regulation or the Public Trust Doctrine. If the Shore Protection Program funding participant does not take corrective action, or if the corrective action taken is not adequate, then the Department may:

i. Withhold Shore Protection Program funding;

ii. Terminate the State Aid Agreement;

iii. Demand immediate repayment to the Shore Protection Fund of all Shore Protection Program funding for the project(s) in which the municipality participated; and/or

iv. Pursue any other specific remedies in the State Aid Agreement.

(q) To be eligible for Green Acres funding, a municipality, county, or nonprofit organization shall comply with (q)1 through 4 below. For the purposes of this subsection, the “Green Acres project site” is the land that is the subject of an application for Green Acres funding that contains or is adjacent to tidal waterways and their shores. Applicants for Green Acres funding shall:

1. Submit to the Department for approval, prior to application for Green Acres funding, a public access plan that meets the requirements at N.J.A.C. 7:7E-8A.2 and 8A.3.

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

2. Comply with (c) through (m) above, as applicable. Compliance with (e) above will be required only where the project site is located along one of the waterways listed at (e) above.

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3. Provide public access to all tidal waterways and their shores on or adjacent to lands held by the applicant;

4. Not enact or adopt ordinances or engage in activities in conflict with the Public Trust Doctrine, such as the placing of signs, structures, vegetation, parking restrictions or any other means, that limit access to or use of tidal waterways and their shores.

5. In addition to complying with (q)1 through 4 above, an applicant that is a municipality shall:

i. Prior to application for Green Acres funding, submit to the Department for approval, a draft Public Access Instrument that meets the requirements of N.J.A.C. 7:7E-8A.5;

ii. Prior to disbursement of Green Acres funding, repeal any ordinance that limits access to and use of tidal waterways and their shores or is in conflict with the Public Trust Doctrine; and

iii. Prior to disbursement of Green Acres funding, adopt the ordinance and record the Public Access Instrument approved by the Department pursuant to (q)1i and 5i above, respectively.

6. In addition to complying with (q)1 through 4 above, prior to disbursement of Green Acres funding, an applicant that is a county shall adopt an ordinance adopting the public access plan approved by the Department pursuant to (q)1 above;

7. Immediately upon disbursement of Green Acres funding, provide public access along the tidal waterway and its entire shore at the Green Acres project site;

8. Immediately upon disbursement of Green Acres funding, provide at least one accessway to the tidal waterway, its shore and the project site across land held by the recipient of Green Acres funding. Additional accessways shall be provided as necessary given the size, location, and proposed use of the site;

9. Immediately upon disbursement of Green Acres funding, install and maintain in perpetuity Department approved public access signs at each public accessway and/or public access area at the project site;

10. Immediately upon disbursement of Green Acres funding, record a Department-approved conservation restriction maintaining the following areas for public access in

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perpetuity. All lands held by the municipality or county for recreation and conservation purposes also must be listed on the Recreation and Open Space Inventory for the municipality and county, respectively, as required by Green Acres as a condition of funding pursuant to N.J.A.C. 7:36.

i. The project site;

ii. The public accessways held by the municipality that lead to or provide access to tidal waterways and their shores and are not listed in the Public Access Instrument, including paths, trails, dune walkovers/walkways, and piers and public accessways pursuant to 8 above; and

iii. All parking areas identified in (q)11 below;

11. Within 10 days of completion of a Green Acres funded development or within 180 days of disbursement of Green Acres funding for acquisition, provide public restrooms and parking for the project site as directed by the Department based on the proposed use of the project site and the nature and extent of public demand; and

12. Any Green Acres funding recipient that, after the effective date of this rule, undertakes any action that is determined by the Department to be in conflict with the Public Trust Doctrine, will be required to take corrective action within 30 days of notification by the Department of the conflict with the Public Trust Doctrine. If the Green Acres funding recipient does not take corrective action, or if the corrective action taken is not adequate, then the Department may:

i. Withhold Green Acres funding;

ii. Terminate the Green Acres Project Agreement executed pursuant to N.J.A.C. 7:36; and/or

iii. Demand immediate repayment of all Green Acres funding that has been disbursed to funding recipient.

(r) Rationale: The Public Trust Doctrine states that natural resources, including but not limited to tidal waterways and their shores, air and wildlife in this State are held by the State in trust for the benefit of all of the people. Further, the Public Trust Doctrine



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establishes the right of the public to fully utilize these natural resources for a variety of public uses. The original purpose of the doctrine was to assure public access to waters for navigation, commerce and fishing. In the past two centuries, State and Federal courts in New Jersey have recognized that public uses guaranteed by the Public Trust Doctrine also include public recreational uses such as bathing, swimming, sunbathing and walking along the various tidal shores.

As the trustee of the public rights to natural resources, including tidal waterways and their shores, it is the duty of the State not only to allow and protect the public's right to use them, but also to ensure that there is adequate access to these natural resources. As the State entity managing public access along the shore, the Department has an obligation to ensure that this occurs. Access ensured by the Public Trust Doctrine can be classified into different types, including linear/lateral access, perpendicular access, and visual access.

Reasonable, convenient and safe conditions at or around public access areas and public accessways often affect whether the public will be able to reach and use tidal waterways and their shores. Such site conditions include informative signage marking public accessways, the absence of threatening or misleading signage, adequate facilities (such as restrooms and fish cleaning tables) within a reasonable distance of tidal waterways and their shores and sufficient parking located near public accessways. Additionally, special measures, such as ramps installed in accordance with the Americans with Disabilities Act, can be taken to ensure that coastal lands and waters are accessible by all members of the public.

Development can block tidal waters from public view and/or make physical access to tidal waterways and their shores difficult or impossible. Tidal shore areas located in residential areas or within private beach areas are sometimes fenced, blocked or otherwise obstructed, further complicating access to these sites. In addition, municipalities have at times sold portions of the public beaches and vacated public streets and street ends to private owners. The private ownership of land immediately inland from tidal waterways and their shores can limit public access to tidal waterways and their shores. This leads to limited access to and enjoyment of public resources by citizens who

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have rights of access and use recognized and protected by the Public Trust Doctrine. Furthermore, public funds have been used to support protection and maintenance of these resources. Barriers to access also negatively affect tourism, which is one of the top revenue producing industries in New Jersey.

The developed waterfront, due to its past industrial utilization and long history of development, has been largely closed to the public, limiting their ability to exercise their public trust rights. In an effort to encourage public access, the Department intends to promote a continuous linear network of open space along the shore of all tidal waters that may be used for fishing, walking, jogging, bicycling, kayaking, sitting, viewing and similar recreational activities. The path will be continuous but may detour around existing or proposed industry due to risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions. These linear walkways will connect future and existing waterfront parks and open space areas. The goal of the rule is to assemble a system, through acquisitions and easements, that will provide continuous linkages and access along the waterfront, enabling the State to adhere to its responsibilities to safeguard public rights of access to and use of all tidal waterways and tidal waterfront areas in New Jersey. Where easements are secured from landowners for public access purposes, the New Jersey Landowner Liability Act (N.J.S.A. 2A: 42A-2 et seq.) offers limited protection from the liability they would normally face under the common law.

In addition to the historic legal rights retained by the public to tidal areas, public funds are invested in numerous ways to protect these public resources and their adjacent lands. The lands and waters subject to public trust rights receive many State and Federal dollars which have been invested in beach replenishment, shore protection, road projects, water quality and monitoring programs, and solid waste monitoring. In part as a result of this investment, the public has the right to use these resources. State funds are also used to acquire and develop lands for parks and recreation through the Department's Green Acres Program. These programs are financed not just by the communities within which these lands and waters subject to public trust rights are located, but by residents Statewide. Additionally, residents Statewide contribute to fund various Federal programs

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that protect and enhance lands and waters subject to public trust rights. The rule ensures that all residents who contribute to the protection of these lands and waters are able to exercise their rights to access and use the lands and waters. Further, they are consistent with Federal programs which require projects utilizing Federal funds to provide public access upon receipt of funds and will ensure that increases in public access apply to lands and waters subject to public trust rights Statewide.

The Public Trust Doctrine is an example of common law authority that is continually developing through individual Court cases. In addition to cases involving physical barriers to access, there have been instances where municipalities and local property owner associations have attempted to limit use of recreational beaches to their citizens and members through methods designed to exclude outsiders. In the majority of these cases, New Jersey courts have ruled that these actions violate the Public Trust Doctrine because lands that should be available for the general public's recreational use were being appropriated for the benefit of a select few.

New Jersey Supreme Court cases including *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296 (1972) and *Van Ness v. Borough of Deal*, 78 N.J. 174 (1978) held that municipalities could not discriminate between residents and non-residents using municipally owned beaches through differential fees or by setting aside separate areas for each. The decision in the case *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984) recognized that, under the Public Trust Doctrine, not only does the public have the right to use the land below the mean high water mark, but also they have a right to use a portion of the upland dry sand area, on quasi-public beaches, "...where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner."

Most recently, the Court's ruling in *Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc., et al.*, 185 N.J. 40 (2005) used the criteria established in the *Matthews* case, and recognized that this principle also applies to the upland dry sand of a wholly privately owned and operated beach. The decision also confirms that the Department has the authority to regulate fees charged for use of beaches under CAFRA. The decisions in

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these cases guide the Department in upholding the Public Trust Doctrine and providing adequate public access. Other such cases include *Arnold v Mundy*, 6 N.J.L. 1, 3 (Sup. Ct. 1821); *Bell v. Gough*, 23 N.J.L. 624 (E. & A. 1852); *Martin v. Waddell's Lessee*, 41 U.S. 367, 10 L.Ed. 997 (1842); *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894); *Slocum v. Borough of Belmar*, 238 N.J.Super. 179, 185 (Law Div. 1989).

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

7:7E-8A.1 Purpose and scope

(a) This subchapter sets forth information that shall be included in the public access plan developed in accordance with subsections (p) and (q) of the public trust rights rule. N.J.A.C. 7:7E-8A.2 sets forth the information requirements for the public access plan that is required for municipalities to participate in Shore Protection Program funding or to be eligible for Green Acres funding. N.J.A.C. 7:7E-8A.3 sets forth the information requirements for the public access plan that is required for counties and nonprofit organizations to be eligible for Green Acres funding. N.J.A.C. 7:7E-8A.4 sets forth the requirements for the form and recording of conservation restrictions required pursuant to the N.J.A.C. 7:7E-8.11(n), (p) and (q). N.J.A.C. 7:7E-8A.5 sets forth the requirements for Public Access Instruments required pursuant to the N.J.A.C. 7:7E-8.11(p) and (q).

(b) When used in this section, the following words and terms have the following meanings, unless the context clearly indicates otherwise:

“Green Acres project site” means the land that is the subject to an application for Green Acres funding that contains or is adjacent to tidal waterways and their shores.

“Held” when used with reference to land means owned, leased or otherwise controlled.

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“Paper street” means the street shown on a recorded plan but never built.

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

(a) A public access plan is required pursuant to N.J.A.C. 7:7E-8.11(p)1 and (q)1 for a municipality to participate in Shore Protection Program funding or be eligible for Green Acres funding. A public access plan demonstrates how compliance with N.J.A.C. 7:7E-8.11(p) and (q) will be achieved. A public access plan shall not be modified or repealed without prior approval of the Department.

(b) A public access plan shall include the following:

1. A current tax map identifying:

i. All tidal waterways and their shores within the municipality and all lands held by the municipality adjacent thereto;

ii. All existing and proposed public accessways to tidal waterways and their shores including streets, roads, paths, trails, easements, paper streets, dune walkovers/walkways, piers, and other public dedicated rights-of way held by the municipality;

2. Copies of all existing and proposed conservation restrictions required pursuant to N.J.A.C. 7:7E-8.11 (p)7i and 8i, and (q)10;

3. A draft Public Access Instrument as described at N.J.A.C. 7:7E-8A.5 and required pursuant to N.J.A.C. 7:7E-8.11(p)1ii and (q)5i;

4. A fee schedule for use of bathing and recreational facilities and safeguards, at tidal waterways and their shores held by the municipality if fees are charged.

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

5. Draft ordinances required pursuant to N.J.A.C. 7:7E-8.11(p)1i or (q)1i as applicable. The ordinances shall provide that they may not be modified or repealed without prior approval of the Department;

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6. Copies of all ordinances addressing use of the beach, tidal waterways and their shores and parking proximity to tidal waterways and their shores; and

8. A compliance statement, including supplemental documents as needed, demonstrating how the municipality and the proposed project comply with N.J.A.C. 7:7E-8.11 (p) or (q) as applicable;

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

1. Copies of prior State Aid Agreements;

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

i. All existing and proposed public restrooms within the municipality located within one-quarter mile of the landward edge of the beach or dune along the waterway on which the project occurs. The plan shall provide that:

(1) There is at least one restroom facility every one-half mile within the municipality as measured generally parallel to the beach except in accordance with (c)2i(4) below;

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

(3) Each restroom facility shall be located within one-quarter mile of the landward edge of the beach or dune; and

(4) The one-half mile interval between restrooms required at (c)2i(1) above can be increased provided:

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

(B) The one-half mile maximum distance from the landward edge of the beach or dune to the restroom is reduced by the amount the distance between restrooms is

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increased; and

(C) In no case is the interval between restrooms greater than five-eighths mile, as measured generally parallel to the beach; and

ii. All existing and proposed parking for the public to access the project and the beach along the waterway on which the project occurs; and

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

(d) In addition to the information required in (b) above, a public access plan required pursuant to N.J.A.C. 7:7E-8.11(q) shall also include a site plan for the Green Acres project site identifying:

1. All tidal waterways and their shores located on or adjacent to the Green Acres project site;

2. All existing and proposed public accessways to tidal waterways and their shores including streets, roads, paths, trails, easements, paper streets, dune walkovers/walkways, piers and other dedicated public rights-of-way located on the site, and municipally held public accessways within one-quarter mile of the Green Acres project site; and

3. All existing and proposed restrooms and parking held by the municipality for the public to access tidal waterways and their shores on and within one-quarter mile of the Green Acres project site.

7:7E-8A.3 Information requirements for public access plans submitted by counties or nonprofit organizations to be eligible for Green Acres funding

(a) A public access plan is required pursuant to N.J.A.C. 7:7E-8.11(q) for a county or nonprofit organization to be eligible for Green Acres funding. A public access plan demonstrates how compliance with N.J.A.C. 7:7E-8.11(q) will be achieved. A public access plan shall not be modified or repealed without prior approval of the Department.

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(b) A public access plan under this section shall include the following:

1. A site plan of the Green Acres project site identifying:

i. All tidal waterways and their shores located on or adjacent to the Green Acres project site;

ii. All existing and proposed public accessways to tidal waterways and their shores including streets, paths, trails, easements, paper streets, dune walkovers/walkways, piers and other dedicated public rights-of-way located on the Green Acres project site;

iii. All existing and proposed restrooms and parking for the public to access tidal waterways and their shores on the Green Acres project site;

2. Copies of all existing and proposed conservation restrictions required pursuant to N.J.A.C. 7:7E-8.11(q)10;

3. For an applicant that is a county, a draft ordinance required pursuant to N.J.A.C. 7:7E-8.11(q)1; and

4. A compliance statement demonstrating how the county or nonprofit organization and the proposed project comply with N.J.A.C. 7:7E-8.11(q);

7:7E-8A.4 Conservation restriction form and recording requirements

(a) A conservation restriction required at N.J.A.C. 7:7E-8.11(n), (p) or (q) shall be recorded in the chain of title for all properties affected by the restriction.

(b) A conservation restriction shall:

1. Be in the appropriate form and terms as specified and approved by the Department and in accordance with the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1 et seq.,

2. Be recorded in accordance with the New Jersey Recording Act, N.J.S.A. 46:15-1.1 et seq., and

3. Run with the property and be binding upon the property owner and the successors in interest in the property or in any part thereof.



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(c) A conservation restriction required pursuant to N.J.A.C. 7:7E-8.11(n), (p) and (q) shall be recorded within the time frames specified therein and prior to any Department permit becoming effective.

(d) Proof that a conservation restriction required in (c) above has been recorded in the office of the clerk of the county or the registrar of deeds and mortgages of the county in which the development, project, or project site is located shall be submitted to the Department prior to the commencement of site preparation or construction, or permit effectiveness except as provided at (d)1 and (d)2 below:

1. For developments receiving Green Acres funding that do not require a coastal permit, proof that the conservation restriction has been recorded shall be submitted within 90 days of the disbursement of Green Acres funding; and

2. For acquisitions receiving Green Acres funding, proof that the conservation restriction has been recorded shall be submitted within 90 days of the disbursement of Green Acres funding.

(e) Authorizations and approvals issued by the Department shall not be valid authority to begin site preparation or construction until the Department approved conservation restriction is recorded, except as provided at (d)1 above.

#### 7:7E-8A.5 Public Access Instrument requirements

(a) A Public Access Instrument required pursuant to N.J.A.C. 7:7E-8.11(p)1i and (q)5i is a conservation restriction recorded by a municipality that transfers to the Department the municipality's right to vacate, dispose of, or divert the lands listed and identified in (b) below to a use that precludes public access to tidal waterways and their shores at those lands.

(b) The Public Access Instrument shall list and identify by name all streets, roads, paper streets, easements, or other dedicated public rights-of-way held by the municipality that lead to tidal waterways and their shores. These shall be listed by block, lot and

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property owner on which the street, road, paper street, easement, or other dedicated public right-of-way is located and the lot, block and property owner of the lots that abut the street, road, paper street, easement, or other dedicated public right-of-way.

1. The portion of the street, road, paper street, easement, or other dedicated public right-of-way subject to the Public Access Instrument is:

i. Where a beach or dune is present:

(1) The portion of a street, road, paper street, easement, or other dedicated public right-of-way located on the beach or dune; and

(2) The portion of a street, road, paper street, easement, or other dedicated public right-of-way extending landward of the beach or dune to the first cross street or for a distance of one-quarter mile whichever is less; or

ii. Where no beach or dune is present:

(1) The portion of a street, road, paper street, easement, or other dedicated public right-of-way extending landward of the mean high water line to the first cross street or for a distance of one-quarter mile whichever is less.

2. To be eligible for Green Acres funding, all lands held by a municipality for recreation and conservation purposes also must be listed on the Recreation and Open Space Inventory required by Green Acres as a condition of funding pursuant to N.J.A.C. 7:36.

(c) The Public Access Instrument is a conservation restriction and shall comply with N.J.A.C. 7:7E-8A.4.