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## **ENVIRONMENTAL PROTECTION**

### **LAND USE MANAGEMENT**

#### **Coastal Permit Program Rules**

#### **Proposed amendments: N.J.A.C. 7:7-2.2**

Authorized By: Bob Martin, Commissioner, Department of Environmental Protection.

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

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

DEP Docket Number: 02-15-03

Proposal Number:

**A public hearing** concerning this proposal, in accordance with N.J.S.A. 13:9A-3, will be held as follows:

Thursday, May 7, 2015 at 10:00 am  
Long Beach Township Municipal Building  
Brant Beach, NJ 08008

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Submit comments by June 5, 2015 electronically at

<http://www.nj.gov/dep/rules/comments>. The Department of Environmental Protection

(Department) encourages electronic submittal of comments. In the alternative, comments may be submitted on paper to:

Gary J. Brower, Esq.

Attn.: DEP Docket No. 02-15-03

Office of Legal Affairs

NJ Department of Environmental Protection

401 East State Street, 7th Floor

Mail Code 401-04L; P.O. Box 402

Trenton, NJ 08625-0402

This rule proposal may be viewed or downloaded from the Department's website at

<http://www.nj.gov/dep/rules>.

The agency proposal follows:

### **Summary**

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

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The Department is proposing amendments to the Coastal Permit Program rules, N.J.A.C. 7:7. Particularly, the Department is proposing to amend the boundaries reflected on coastal wetland maps applicable to the Holgate section of Long Beach Township, Ocean County, referenced at N.J.A.C. 7:7-2.2(c)3, as described below. This rulemaking reflects the Department's determination of current conditions in coastal wetlands reflected on Coastal Wetlands Maps 252-2112 and 259-2112 in response to a petition for rulemaking filed by the petitioners identified in the description of the petition for rulemaking below. Through the proposed amendments an area of approximately 1.15 acres currently mapped as coastal wetlands on the petitioners' property would no longer be classified as coastal wetlands, while an additional 1.09 acres (0.33 acres on petitioners' property and 0.76 acres on adjacent properties) not currently designated as coastal wetlands would be reclassified as such, resulting in a net reduction of approximately 0.06 acres of coastal wetlands.

#### Petition for Rulemaking

On March 10, 2014, the Department received a petition for rulemaking from Kevin J. Coakley, Esq. on behalf of Mark Davies Builders & Developers LLC, David Collins and Esther Tessel Collins, Kim Lambert, and Michelle Forte (petitioners) (see 46 N.J.R. 712(b); April 21, 2014). The petition requested that the Department amend Coastal Wetlands Maps 252-2112 and 259-2112 to exclude an approximate 2.2 acre portion of property designated as Block 1.63, Lot 1; Block 1.64, Lot 1; Block 1.66, Lot 1; Block 1.68, Lot 1; and Block 1.71, Lots 5 and 6 in the Holgate section of Long Beach Township, Ocean County. The property is presently undeveloped bayfront land bounded by Beck Avenue to the north, Starr Avenue to the south,

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South Bay Avenue (Ocean County Route 607) to the east, and the Barnegat Bay to the west. The petitioners asserted that the 2.2 acre portion of the above property does not meet the definition of coastal wetlands set forth in the Wetlands Act of 1970 (Act), N.J.S.A. 13:9A-1 et seq., at N.J.S.A. 13:9A-2. The petitioners submitted a report with exhibits in support of their assertion, including a survey entitled “Wetland Location Map, Lot 1, Block 1.64, Lot 1, Block 1.66, Lot 1, Block 1.68, and Lots 5 & 6, Block 1.71, Tax Map Sheet #7, Long Beach Township, Ocean County, New Jersey” dated September 24, 2013, revised February 27, 2014, and prepared by Horn, Tyson & Yoder, Inc. The survey depicted a proposed wetland boundary that excluded the 2.2 acre area. The survey additionally delineated the approximate location of the portion of the site that is one foot above local extreme high water and included spot elevation information.

#### Department’s Response to the Petition

The petitioners contend that Coastal Wetland Maps 252-2112 and 259-2112 do not reflect the current property conditions due to the presence of sand and, consequently, the area in question does not meet the definition of a coastal wetland under the Act. In response to the petition, the Department reviewed aerial imagery and conducted several site investigations.

Based on a review of aerial imagery, specifically, “2012 Imagery (Natural)” taken March 14, 2012 by the New Jersey Office of Information Technology, Office of Geographic Information Systems and “2013 Imagery (Natural),” taken July 18, 2013 by the United States Department of Agriculture, Farm Service Agency Aerial Photography Field Office, comparing site conditions pre- and post- Superstorm Sandy, Department staff concluded that sand was deposited as a result of overwash from the storm event. Specifically, Superstorm Sandy caused a

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rush of water over the crest of the Atlantic Ocean beach and dune system resulting in the deposition of sand into the property's coastal wetlands.

The findings of a site investigation centered on examining the origin of the sand support this conclusion. Particularly, on April 23, 2014 a New Jersey Geological and Water Survey geologist sampled the sand and determined that the depositional characteristics indicate the material was deposited from Superstorm Sandy overwash events.

Excavations taken during the aforementioned site investigation and within areas representative of overall site conditions, revealed the depth of sand ranges from 2.3 feet to 5.4 feet. Therefore, areas which were previously low-lying, subject to tidal action, and were growing or were capable of growing coastal wetland plant species are now at an elevation which prevents tidal flow and subsequent growth of these species. Because tidal wetlands are the direct result of the relationship between elevation and the tide, any changes to these factors will impact the wetland.

The Act defines coastal wetlands as “any bank, marsh, swamp, meadow, flat or other low land subject to tidal action in the State of New Jersey along the Delaware Bay and Delaware River, Raritan Bay, Barnegat Bay, Sandy Hook Bay, Shrewsbury River including Navesink River, Shark River, and the coastal inland waterways extending southerly from Manasquan Inlet to Cape May Harbor, or at any inlet, estuary or tributary waterway or any thereof, including those areas now or formerly connected to tidal waters whose surface is at or below an elevation of one foot above local extreme high water, and upon which may grow, or is capable of growing, some, but not necessarily all, of the following: Salt meadow grass (*Spartina patens*), spike grass (*Distichlis spicata*), black grass (*Juncus gerardi*), saltmarsh grass (*Spartina alterniflora*),

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saltworts (*Salicornia Europaea*, and *Salicornia bigelovii*), Sea Lavender (*Limonium carelinianum*), saltmarsh bulrushes (*Scirpus robustus* and *Scirpus Paludosus var. atlanticus*), sand spurrey (*Spergularia marina*), switch grass (*Panicum virgatum*), tall cordgrass (*Spartina pectinata*), hightide bush (*Iva frutescens var. oraria*), cattails (*Typha angustifolia*, and *Typha latifolia*), spike rush (*Eleocharis rostellata*), chairmaker's rush (*Scirpus americana*), bent grass (*Agrostis palustris*), and sweet grass (*Hierochloe odorata*).” The Act at N.J.S.A. 13:9A-1b. required the Commissioner to make an inventory and maps including boundaries of all tidal wetlands within the State. As a result, in the early 1970s the Department delineated tidal wetlands by interpreting aerial photography and conducting representative field inspections to verify the delineation.

The definition of a coastal wetland under the Act specifically references areas whose surface is at or below an elevation of one foot above local extreme high water. The term “local extreme high water” is not defined by the Act. However, in applying the Act, the Department equates “local extreme high water” to “extreme high water spring,” which is the highest excursion of the spring tides. In an effort to observe a close equivalent of local extreme high water conditions, Department staff conducted another site investigation on September 9, 2014 on a full moon event during which tides are at their highest. The event provided the Department the opportunity to ascertain which areas exhibited hydrologic conditions necessary for the growth of coastal wetland species. Generally, areas with free standing water within 12 inches of the surface are assumed to be capable of supporting the root systems of coastal wetland species. Therefore, since the area of sand deposition has been denuded of vegetation, the Department relied on the presence of hydrology within 12 inches of the surface. The Department utilized the

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petitioners' proposed wetlands boundary as a benchmark and modified the location of the wetlands boundary based on observed hydrologic conditions.

Based on these investigations, the Department determined that overwash from Superstorm Sandy resulted in the loss of a portion of the property's coastal wetlands and therefore granted the petition (see 46 N.J.R. 2199(b); November 3, 2014).

Subsequent to grant of the petition, the Department conducted further investigations to determine the appropriate coastal wetlands boundary to be reflected on the coastal wetlands maps to be amended. The Department determined, based upon a December 3, 2014 site inspection, an examination of aerial photography pre- and post-Superstorm Sandy, and an examination of the draft 2012 DEP Land Use/Land Cover data, that two areas previously designated as isolated uplands located on the Block 1.63, Lot 1 portion of petitioners' property and identified on Coastal Wetland Maps 252-2112 and 259-2112 now meet the definition of a coastal wetland pursuant to the Act.

Based on the results of the Department's overall investigation of the petitioners' property, approximately 1.15 acres of mapped coastal wetlands which abut South Bay Avenue are no longer at or below an elevation of one foot above local extreme high water and, as a result, are no longer growing, or are capable of growing, the vegetative species identified by the Act. Further, approximately 0.33 acre of the property that is currently not mapped as coastal wetlands is now proposed to be mapped as coastal wetlands, as this area meets the definition of a coastal wetland under the Act. Accordingly, the overall effect of the proposed mapping revisions on the petitioners' property is a net reduction of 0.82 acres of coastal wetlands. The following table

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compares the existing area of mapped coastal wetlands to the proposed area of coastal wetlands to be mapped on the petitioners' property by block and lot.

Block and Lot	Acreage of parcel	Acreage of existing mapped coastal wetlands	Acreage proposed to be mapped as coastal wetlands under the Act	Acreage of change (+\ -)
Block 1.71 Lot 5	.06	0	0	0
Block 1.71 Lot 6	.06	0	0	0
Block 1.63, Lot 1	19.33	19.19	19.25	.06
Block 1.68 Lot 1	1.62	1.46	.90	-.56
Block 1.66 Lot 1	1.79	1.27	.68	-.59
Block 1.64 Lot 1	1.66	1.06	1.33	.27

As part of this rulemaking, the Department also reviewed the existing coastal wetlands boundary line on properties owned by others, including Block 1.61, Lot 1 and Block 1.71, Lot 4, as these properties are immediately adjacent to the petitioners' property. Through an examination of aerial photography pre- and post-Superstorm Sandy, an examination of the draft 2012 DEP Land Use/Land Cover data, and a visual inspection of the properties from the petitioners' property and public roadways conducted by Department staff on December 3, 2014, the Department has determined revisions to the coastal wetlands boundary line on these neighboring blocks and lots are required. Specifically, on Block 1.71, Lot 4, 0.02 acres of uplands are proposed to be classified as coastal wetlands and on Block 1.61, Lot 1, 0.74 acres of non-mapped coastal wetlands are proposed to be classified as coastal wetlands and mapped

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accordingly. Currently, Block 1.61, Lot 1 contains both coastal wetlands mapped pursuant to the Wetlands Act of 1970 and freshwater wetlands. Revisions to the coastal wetlands boundary on Block 1.61, Lot 1 will result in the reclassification of freshwater wetlands as coastal wetlands. For illustrative purposes, the Department has prepared two maps, Figures 1 and 2 that are available from the Department Division of Land Use Regulation's website at [nj.gov/dep/landuse/coastal/cp\\_map\\_prom.html](http://nj.gov/dep/landuse/coastal/cp_map_prom.html). The maps contain an approximate representation of the existing and proposed wetlands boundaries superimposed on aerial photography of the area with Figure 1 depicting the existing coastal wetlands boundary, and Figure 2 depicting the proposed coastal wetlands boundary. The proposed coastal wetlands boundary is depicted on an overlay to Coastal Wetlands Maps 252-2112 and 259-2112, available for review at the Department's Division of Land Use Regulation, 501 East State St., Trenton, NJ 08625, (609) 984-0162.

### Conclusion

Accordingly, the Department is proposing to revise the upper wetlands boundary on Coastal Wetlands Maps 252-2112 and 259-2112 to exclude an area of wetlands which the Department has determined no longer meets the definition of a coastal wetland as set forth in the Act, and to include areas not currently mapped as wetlands which the Department has determined now meet the definition of a coastal wetland as set forth in the Act. The upper wetlands boundary as defined at N.J.A.C. 7:7-4.2(a)7ii(1)(I) is the upland or landward limit of wetlands. As discussed above, this mapping exercise would result in an overall net reduction of 0.82 acres of coastal wetlands mapped under the Act on the petitioners' property.

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In addition to analyzing the impacts of Superstorm Sandy on the property that was the subject of the rulemaking petition, the Department analyzed the impacts on adjacent properties to determine if the coastal wetlands reflected on Coastal Wetland Maps 252-2112 and 259-2112 should be amended to reflect current conditions in this area. As a result of this review, the Department determined that revisions to the upper wetlands boundary on certain blocks and lots abutting the petitioners' property, specifically, Block 1.71, Lot 4 and Block 1.61, Lot 1 are required. As described above, the proposed revisions to the upper wetlands boundary on these properties will result in a net increase of 0.76 acres of wetlands that meet the definition of a coastal wetland set forth in the Act. Because the coastal wetlands maps are promulgated by rule, the Department must undertake rulemaking to revise the maps.

#### Public Notice

In accordance with the Act at N.J.S.A. 13:9A-3, the Department has provided individual notice of the proposed wetland boundary revision to each owner having a recorded interest in such wetlands by mail. In addition, as set forth above, in accordance with N.J.S.A. 13:9A-3, a public hearing is scheduled for Thursday, May 7, 2015, and notice of the hearing will be published in a newspaper of general circulation in the municipality in which the property is located.

#### **Social Impact**

The Department anticipates that for the petitioners there may be a positive impact associated with the reclassification of a portion of their property from coastal wetlands to

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uplands as these areas would no longer be subject to the Wetlands Act of 1970. Further, the property owner of Block 1.61, Lot 1 may experience a positive impact as a result of the mapping changes since the wetlands on that site would no longer be subject to the transition area requirements of the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A. The reclassification may have a negative impact on the surrounding community due to the loss of open space, should the site be developed in the future. The property owner of Block 1.71, Lot 4 may experience a negative impact as a result of a 0.02 acre portion of the property being reclassified from uplands to coastal wetlands since that portion of the property will become subject to the limitations applicable to coastal wetlands.

### **Economic Impact**

Through the proposed amendments an area of approximately 1.15 acres currently mapped as coastal wetlands on petitioners' property would no longer be classified as coastal wetlands, while an additional 1.09 acres (0.33 acres on petitioners' property and 0.76 acres on adjacent properties) not currently designated as coastal wetlands would be reclassified as such, resulting in a net reduction of approximately 0.06 acres of coastal wetlands. The Department does not anticipate any impact to the State's economy as a result of this proposed change. The proposed change in the mapped coastal wetlands is anticipated to have a positive economic impact on petitioners whose property will contain a smaller area of coastal wetlands. The proposed change could have a positive economic impact on owners of the property on which area currently mapped as freshwater wetlands would be reclassified as coastal wetlands as the area currently subject to transition area requirements under the Freshwater Wetlands Protection Act Rules,

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N.J.A.C. 7:7A, would no longer be subject to freshwater wetland transition area limitations after the area is reclassified. The property owner of Block 1.71, Lot 4 may experience a negative economic impact as a result of a 0.02 acre portion of the property being reclassified from uplands to coastal wetlands since that portion of the property will become subject to the limitations applicable to coastal wetlands. Overall, the economic impact is dependent upon the intended use of the properties affected and could also be impacted by local land use ordinances. In any case, the area of land subject to the proposed change is small and it is anticipated that any resulting economic impact will also be small.

### **Environmental Impact**

The Department considers coastal wetlands to be one of the most environmentally valuable land areas within the coastal zone. Coastal wetlands provide various functions including: primary food web for estuarine and marine ecosystems; breeding, nesting, feeding and foraging habitat for turtles, waterfowl, small mammals, finfish and shellfish; storm surge protection; flood water and sediment storage; pollution filtration; and a buffer from human activities. Recognition of the environmental value of coastal wetlands led to the passing of the Act. The Department continues to foster the goals of the Act by regulating activities within mapped coastal wetlands. As a result of Superstorm Sandy, a natural storm event, approximately 1.15 acre area of mapped coastal wetlands on the petitioners' property adjacent to South Bay Avenue no longer meets the Act's coastal wetland definition. However, an area of approximately 0.33 acres on petitioners' property of previously non-mapped coastal wetlands now meets the definition of a coastal wetland under the Act. The proposed revisions to the upper

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wetlands boundary reflect the current conditions on the petitioners' property and ensure that areas appropriately classified as coastal wetlands are protected.

Further, as explained above, as part of this rulemaking the Department also determined that revisions to the existing upper wetlands boundary line on Block 1.61, Lot 1 and Block 1.71, Lot 4 are required. Specifically, on Block 1.71, Lot 4, 0.02 acres of non-mapped coastal wetlands are proposed to be classified as coastal wetlands and, on Block 1.61, Lot 1, 0.74 acres of non-mapped coastal wetlands are proposed to be classified as coastal wetlands and mapped accordingly. Currently, Block 1.61, Lot 1 contains both coastal wetlands mapped pursuant to the Wetlands Act of 1970 and freshwater wetlands. Revisions to the coastal wetlands boundary on Block 1.61, Lot 1 will result in the reclassification of freshwater wetlands as coastal wetlands. The reclassification of these wetlands is not anticipated to have a significant environmental impact as the wetlands continue to provide the functions of a wetland described above.

### **Federal Standards Statement**

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. require State agencies that adopt, readopt, or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis. The Federal Coastal Zone Management Act, 16 U.S.C. §§ 1451 et seq., (Federal CZMA) does not set specific regulatory standards or requirements for development in the coastal zone; rather, it provides broad guidelines for states developing coastal management programs. The general requirements for what a state coastal management program must include are found at 15 CFR Part 923. The requirements do not specifically address the mapping of coastal wetlands and the standards

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which apply to the protection or development of this coastal resource. The guidelines simply provide a planning and management process, without establishing development standards for development in the coastal area. Therefore, the proposed revisions to Coastal Wetlands Maps 252-2112 and 259-2112 do not exceed any Federal standards or requirements of the Federal CZMA.

### **Jobs Impact**

The Department anticipates that the proposed revisions to Coastal Wetlands Maps 252-2112 and 259-2112 will not have an impact on the number of jobs in the State. Should the 1.15 acre area proposed to no longer be mapped as coastal wetlands as a result of overwash from Superstorm Sandy be developed as a result of this rulemaking, it is anticipated that any effect of such development on jobs would be minimal and temporary.

### **Agriculture Industry Impact**

In general, all development or disturbance within coastal wetlands is restricted under the Coastal Permit Program Rules, N.J.A.C. 7:7 and the Coastal Zone Management Rules, N.J.A.C. 7:7E, except for the continued production of commercial salt hay or other agricultural crops on lands utilized for these purposes on or before April 13, 1973. The proposed revisions to Coastal Wetlands Maps 252-2112 and 259-2112 will not have an effect on the agricultural industry as the mapped coastal wetlands subject of the remapping have not been in continuous commercial salt hay or other agricultural production since April 13, 1973.

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### **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 the proposed amendments of Coastal Wetlands Maps 252-2112 and 259-2112 will have an impact on a small business as the contract purchaser of the petitioner's property is a small business as defined in the Act. The requirements applicable to any potential development on the site would be the same as those imposed on any applicant proposing a regulated development within the coastal area and include the costs associated with the submission of an application to the Department. The requirements of the rules applicable to this property and small business are the minimum determined to be appropriate to protect public health, safety and the environment. Accordingly, no differentiation in requirements applicable to this small business is provided.

### **Housing Affordability Impact Analysis**

In accordance with N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the proposed revision to Coastal Wetlands Maps 252-2112 and 259-2112 to determine the impact, if any, on the affordability of housing. The proposed revisions to the Coastal Wetlands Maps will result in the reclassification of an approximately 1.15 acre area of coastal wetlands to uplands and is not anticipated to have any effect on housing affordability. The Department believes that it is extremely unlikely that the reclassification of 1.15 acres would evoke a change in the average costs associated with housing.

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### **Smart Growth Development Impact Analysis**

In accordance with N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the proposed revisions to Coastal Wetlands Maps 252-2112 and 259-2112 to determine the impacts, if any, on housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan (State Plan).

The site on which the reclassification of coastal wetlands as uplands would occur, located in Long Beach Township, Ocean County, is within Planning Area 5B (environmentally sensitive planning area), under the State Plan. Accordingly, the reclassification of approximately 1.15 acres of coastal wetlands to uplands within this Planning Area will not evoke a change in housing production in Planning Areas 1 or 2 or within designated centers.

**Full text** of the proposal follows (additions indicated in boldface **thus**).

#### 7:7-2.2 Wetlands

(a) – (b) (No change.)

(c) The Wetlands Order promulgated by the Commissioner of Environmental Protection in April 1972, any amendments thereto, and these rules shall be applicable only in those areas shown waterward of the upper wetland boundary on the following wetlands maps:

1. – 2. (No change.)

3. Ocean County

**AGENCY NOTE: The following maps are proposed to be altered.**

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**252-2112**

...

**259-2112**

...

4. – 11. (No change.)