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**ENVIRONMENTAL PROTECTION
LAND USE MANAGEMENT
LAND USE REGULATION PROGRAM
Coastal Zone Management
Public Access**

Proposed Amendments: N.J.A.C. 7:7-16.9

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

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

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

DEP Docket Number: 07-16-07

Proposal Number: PRN 2016-

A **public hearing** concerning this proposal will be held on Wednesday, September 28, 2016 at 6:00 P.M at:

City of Long Branch Municipal Building
Council Chambers
344 Broadway, 2nd Floor
Long Branch, NJ 07740

Written comments may also be submitted at the public hearing. It is requested (but not required) that anyone providing testimony at the public hearing submit a copy of any prepared text to the stenographer at the hearing.

Submit comments by November 5, 2016 electronically at

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

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

Gary J. Brower, Esq.
Attn.: DEP Docket No. 07-16-07
Department of Environmental Protection
Office of Legal Affairs
Mail Code 401-04L;
PO Box 402
401 East State Street, 7th Floor
Trenton, NJ 08625-0402

This rule proposal may be viewed or downloaded from the Department's web site 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.

The Department is proposing amendments to the rules that govern when and how it requires public access to tidal waters and their shorelines under the Coastal Zone Management Rules, N.J.A.C. 7:7. Public access to the waterfront is the ability of the public to pass physically and visually to, from, and along tidal waterways and their shores and to use such shores, waterfronts and waters for activities such as navigation, fishing, and recreational activities including, but not limited to, swimming, sunbathing, surfing, sport diving, bird watching,

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walking, and boating. The Coastal Zone Management Rules seek to protect the public's right to access the State's waters through a variety of mechanisms. One of the optional mechanisms provided by the rules is enactment of Municipal Public Access Plans (MPAP). While not required, municipalities are encouraged to develop and submit MPAPs to the Department for approval to allow access to occur in a manner that takes into account local planning initiatives, provided the proposed plan satisfies standards contained in the rules (see N.J.A.C. 7:7-16.9(c)).

Public access rights have recently been the subject of judicial interpretation and subsequent legislative action. In Hackensack Riverkeeper, Inc. and NY/NJ Baykeeper v. New Jersey Department of Environmental Protection, Docket No. A-1752-12T3 (App. Div. Dec. 22, 2015), the Superior Court, Appellate Division analyzed statutory authority granted to the Department and found that the Department did not possess the legislative authority to require public access as a condition of a permit approval granted pursuant to the Coastal Area Facility Review Act (CAFRA) N.J.S.A. 13:19-1 et seq., or the Waterfront Development Act (WDA), N.J.S.A. 12:5-3. In response to the court decision to invalidate the rules in their entirety, the Legislature passed and the Governor signed into law P.L. 2015, c. 260, which amended both CAFRA and the WDA to explicitly confirm the Department's longstanding authority and practice to require public access in its approval of CAFRA and WDA permit applications.

The enactment of P.L. 2015, c. 260 reaffirmed that the Department possessed and continues to possess the authority to require public access as a condition of a permit approval under CAFRA and the WDA. However, after consideration of the court's analysis in Hackensack Riverkeeper, Inc. and NY/NJ Baykeeper v. New Jersey Department of

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Environmental Protection, the Department has determined that it would be appropriate to amend N.J.A.C. 7:7-16.9 in several respects. Among other changes, summarized below, the Department proposes to amend N.J.A.C. 7:7-16.9(e), which addresses the process of Departmental approval of a MPAP, to make clear that the submission of such a plan to the Department by a municipality is entirely voluntary. While, as indicated above, the rules encourage municipalities to coordinate with the Department in planning for public access through adoption of MPAPs, the proposed amendments eliminate any possible misconception that the rules compel municipalities to pursue such planning. This approach is consistent with the Appellate Division ruling in Hackensack Riverkeeper, Inc. and NY/NJ Baykeeper v. New Jersey Department of Environmental Protection, and the provisions of P.L. 2015, c. 260. Encouraging local planning to coordinate with the Department's goals is also consistent with the public trust doctrine, which authorizes the Department to act as steward of the State's coastal resources, including assuring public access to tidal waters and their shorelines.

The Coastal Zone Management Rules specify public access goals to be met as well as optional means for applicants to provide either onsite or offsite access (see N.J.A.C. 7:7-16.9(b)). Where a municipality chooses to seek Department approval of a MPAP, the rules currently provide, at N.J.A.C. 7:7-16.9(f), that the municipality may, as part of its MPAP, require a monetary contribution to be used for the provision of offsite public access in lieu of onsite public access. The existing subsection specifies how contributions are to be calculated and directs that such monetary contributions be deposited in a dedicated Public Access Fund to be established by the municipality. The Appellate Division determined that inclusion of establishment of a

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dedicated municipal Public Access Fund as a mechanism for local utilization of monetary contributions in lieu of onsite public access in the Coastal Zone Management Rules is beyond CAFRA's jurisdiction and contrary to the "Municipal Land Use Law," N.J.S.A. 40:55D-1 et seq. In light of the foregoing, the Department is proposing to repeal N.J.A.C. 7:7-16.9(f). The Department also proposes to amend existing N.J.A.C. 7:7-16.9(m) (proposed to be recodified as N.J.A.C. 7:7-16.9(j) as a result of other proposed amendments) to delete language that allows the Department to revoke its approval of a MPAP based upon a finding that the municipality has engaged in the inappropriate expenditure of dedicated Public Access Fund monies for purposes other than public access. However, municipal conversion of areas dedicated for public access to other use and failure to maintain existing public access signage would continue to constitute good cause to revoke approval of a MPAP by the Department. Additionally, a reference to the Public Access Fund and requirements for information should an MPAP include a provision for monetary compensation in lieu of onsite public access in accordance with N.J.A.C. 7:7-16.9(f) at N.J.A.C. 7:7-16.9(e)5 is also proposed for repeal consistent with the proposal to repeal N.J.A.C. 7:7-16.9(f).

The Department proposes to recodify existing N.J.A.C. 7:7-16.9(g), which currently enumerates eight standards for specific types of development for which public access requirements may not be varied in a MPAP, as subsection (f) with amendments. Whereas current subsection (g) identifies MPAP standards for different types of developments that may not be varied by a municipality, the recodified subsection would permit the Department to approve a MPAP that meets or exceeds those standards. As modified, this subsection recognizes

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that municipalities may impose public access requirements that exceed the Department's under their authority pursuant to the Municipal Land Use Law (N.J.S.A. 40:55D-1 et seq.), general police powers (N.J.S.A. 40:48-1 et seq.), or the authority of municipalities bordering on the Atlantic Ocean, tidal water bays or rivers to exercise exclusive control over municipal beaches and other facilities (N.J.S.A. 40:61-22.20). However, should an applicant propose to the Department a public access project related to one of the development types listed in proposed N.J.A.C. 7:7-16.9(f)1-8 that satisfies the standards contained in the Coastal Zone Management Rules in a municipality which has adopted a MPAP with requirements in addition to this chapter, the Department will not deny a CAFRA or WFD permit based upon the public access not satisfying the additional requirements specified in the MPAP. In such a case, enforcement of the additional local requirements would be left to the municipality through necessary approvals granted at the local level

In order to clarify the Department's role and to streamline the Department's role in the MPAP approval process, the proposal also deletes the provisions of N.J.A.C. 7:7-16.9(h), which presently require a municipality filing an application for Department approval of their MPAP to submit such an application to the county planning board, as well as to any regional planning entities that may have jurisdiction over any portion of the municipality affected by the Municipal Access Plan. The amendment clarifies that the Department's role in the MPAP approval process is separate from, and is crafted in such a way so as not to intrude upon the planning powers vested in municipalities pursuant to the Municipal Land Use Law. The Department anticipates that municipalities will comply with any such independent obligations imposed by the Municipal

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Land Use Law or any other statutes when municipalities adopt a MPAP and incorporate it into the municipal master plan.

The Department also proposes to recodify N.J.A.C. 7:7-16.9(j) as subsection (h) with amendments. This subsection conditions Department approval of a MPAP upon incorporation of the plan into the municipal Master Plan authorized pursuant to the provisions of the Municipal Land Use Law, at N.J.S.A. 40:55D-28(b). Consistent with the Appellate Division ruling in Hackensack Riverkeeper, Inc. and NY/NJ Baykeeper v. New Jersey Department of Environmental Protection, proposed N.J.A.C. 7:7-16.9(h) will continue to require that a Department-approved MPAP must be incorporated in the municipal master plan. However, the Department is proposing to amend the subsection to simplify the requirement that a municipality provide five-year updates to the Department. In addition to eliminating requirements related to reporting receipts and expenditures from any dedicated Public Access Fund in light of the proposed repeal of Public Access Fund provisions from the rules, the Department is proposing to eliminate the requirement that any problems encountered be detailed and instead simply require that municipalities with approved MPAPs report on the status of access projects undertaken in accordance with the MPAP. This streamlined and less-burdensome requirement provides the Department with the information necessary to determine progress toward achievement of the MPAP's objectives and goals without requiring formal and detailed reports. To further ensure that the Department is informed of any developments that might impact achievement of those objectives and goals, a new paragraph is proposed at N.J.A.C. 7:7-16.9(h)5 which directs municipalities to notify the Department within 90 days and seek Department approval of any

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changes to an approved MPAP that impact the location or type of public access provided. This requirement recodifies an existing mandate at N.J.A.C. 7:7-16.9(l) that requires Department review and approval of any such change to a MPAP and adds the 90 day timeframe for submission of this information. Updated information is sought so that the Department knows whether the voluntary MPAP is still viable and accomplishing the intended public access goals and objectives. If the change does not accomplish those goals and objectives, the Department will work with the municipality to make appropriate adjustments. In the rare case where resolution is not possible, the Department will act to revoke approval of the MPAP.

As noted above, in addition to recodifying the current requirement regarding Department review and approval of changes to the MPAP from existing N.J.A.C. 7:7-16.9(l) to proposed N.J.A.C. 7:7-16.9(h)5 and amending that requirement to simply require notification of changes, the Department proposes to delete the remainder of N.J.A.C. 7:7-16.9(l) which specifies the procedural requirements previously imposed on a municipality concerning the submission of information to the Department to support a proposed change to the MPAP, Department review of a proposed change, and subsequent municipal adoption of the proposed change into the municipal Master Plan.

Lastly, in light of the proposed repeal of existing N.J.A.C. 7:7-16.9(f), (h), and (l), the Department proposes to sequentially recodify the remaining subsections of the section and to update cross-references contained throughout the section to reflect these recodifications with no change in text.

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Social Impact

Public access to and use of tidal waterways and their shores in New Jersey for the benefit of all the people is a protected right. State and Federal courts recognize that modern uses of tidal waterways and their shores include recreational uses such as swimming, sunbathing, fishing, surfing, walking and boating. By ensuring that new public access is provided, as appropriate, or that existing public access is protected, maintained, and in some cases improved, the Department advances the goals of the Coastal Zone Management rules and amended statutes, and provides a positive social impact. The proposed rule amendments at N.J.A.C. 7:7-16.9 clarify the public's right to access and use tidal waterways and their shores, and incorporate options that can be used to protect these rights when development is proposed on, and adjacent to, the State's tidal waterways and their shores.

The proposed amendments will continue to require public access in appropriate situations when development is proposed along tidal waterways and their shores. Consistent with the Appellate Division ruling in Hackensack Riverkeeper, Inc. and NY/NJ Baykeeper v. New Jersey Department of Environmental Protection and P.L. 2015, c. 260, enacted in response to that decision, the proposed amendments provide municipalities with the entirely voluntary option to prepare a local public access plan suited specifically to the needs of that community. It is the Department's intent that if and when a MPAP is completed and approved, most Department-approved development along tidal waterways and their shores will provide public access consistent with the municipal plan. In those cases in which the Department only conditions

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permits on compliance with the standards set forth in N.J.A.C. 7:7-16.9, municipalities may, in exercising their own statutorily granted powers, require additional on- or off-site public access.

Therefore, the proposed rules will have a positive social impact by providing flexibility that ensures that public access is provided, while recognizing that it may be appropriate for different types of development to provide different types of public access, and by allowing municipalities to develop voluntary plans that tailor public access to local conditions and community needs.

Economic Impact

The principal benefit of the proposed amendments is to maintain a regulatory framework, consistent with recent court rulings and subsequent responsive legislation, whereby public access is provided to tidal waters and their shorelines in a cost effective manner. Expenditures on public access provide an investment in New Jersey's coastal tourism industry, which makes a major contribution to the State's economy and supports thousands of jobs. Public access to New Jersey's beaches is an important component of the tourism industry, and the proposed amendments will confirm and strengthen the continuation of that access. The areas of the State that benefit most from coastal tourism are those same communities subject to the public access rules, and therefore any additional costs borne by development in those communities will be offset by the preservation and expansion of the local tourism economy. The proposed amendments will therefore provide the most cost-effective means to meet the State's public access obligations in a manner that also supports New Jersey's coastal tourism industry.

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The proposed amendments continue the ability of communities to voluntarily establish public access plans, which provide a cost-effective way to maintain an important policy objective, namely the provision of public access to lands and shorelines subject to public trust rights. The universe of facilities and locations subject to public access remains unchanged, and the measures needed to provide such access will continue to depend on the type voluntary MPAP and local project.

The cost of plan implementation will continue to depend on the projects selected by the municipality for inclusion in the plan, and on local and site-specific physical conditions. As such, no generalizations can be made regarding these costs. Some municipalities may already have a considerable level of public access and may require little or no incremental expenditure. Some municipalities may adopt plans that require the acquisition of privately-owned land, and such plans may be more expensive to implement. Since the cost of land varies from municipality to municipality and from neighborhood to neighborhood within municipalities, it is impossible to generalize regarding the cost of MPAP implementation.

Federal Standards Statement

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995 c. 65) require State agencies which adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis. The Federal Coastal Zone Management Act (P.L. 92-583) was signed into law on October 27, 1972. The Act does not set specific regulatory standards for development in the coastal zone;

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rather it provides broad guidelines for states developing coastal management programs. These guidelines are found at 15 C.F.R. Part 923. The guidelines do not specifically address the review standards that should be applied to new coastal development in order to preserve and protect coastal resources and to concentrate the pattern of coastal development. The guidelines simply provide a planning and management process, without establishing development standards for development in the coastal area. Therefore, the Department has concluded that the proposed amendments do not exceed any Federal standards or requirements of the Federal Coastal Zone Management Act.

Many shore protection and beach nourishment projects subject to amendments will be conducted through a joint funding agreement between the State of New Jersey and the United States Army Corps of Engineers (Corps), which agreements often include local governments. Such projects are authorized by Congress through Federal Water Resources Development Acts, generally passed annually. In a document entitled ACOE Planning Guidance Notebook Section IV– Hurricane and Storm Damage Prevention (CECW-P Engineer Regulation 1105-2-100, April 22, 2000) the Corps establishes standards for Federal participation in shore protection, paramount among them the requirement for public use of the shore protection projects. These Federal standards require that the shores be available for public use on equal terms to all, and for a reasonable fee. The standards cite sufficient parking facilities for the general public located reasonably nearby and with reasonable public access to the project, as requirements. The Federal standards say that parking should be provided every one-half mile or less. The proposed amendments do not alter the Federally-established maximum distance of one-half mile between

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access points for projects to be conducted under the guidance of, and with participation by, the ACOE. Therefore, the proposed amendments are as stringent as, but do not exceed, Federal standards for public access.

Environmental Impact

The proposed amendments to the public access requirements do not affect the type, quantity of, or ability to construct, development proposed on, or adjacent to, the State's tidal waterways and their shores. Development projects, which include public access conditions, must satisfy all applicable environmental standards of the Coastal Zone Management rules. The amendments do not alter the requirement that public access located in natural areas along tidal waterways be designed to minimize impacts to habitats, vegetation and water quality. Consequently, irrespective of whether public access is provided in accordance with a MPAP or in accordance with the Department's rule criteria, the proposed amendments are not expected to have either a positive or negative environmental impact.

Jobs Impact

The Department does not anticipate any measurable impacts on employment from the proposed amendments. The travel and tourism industry in New Jersey generated \$37.3 billion of the State's gross domestic product and directly supported 318,330 jobs in the year 2015 (see New Jersey Department of State, 2015 Tourism Economic Impact Study <http://www.state.nj.us/state/pdf/2015-nj-economic-impact.pdf>). Moreover, the tourism industry depends in part, on the ability of tourists to access and use tidal waterways and their shores for

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activities such as boating, fishing, swimming and sunbathing. Therefore, the proposed amendments will maintain the base of the State's coastal tourism industry, which is a major employer in New Jersey.

Agriculture Industry Impact

Agriculture located adjacent to tidal waterways will be subject to the proposed rules and amendments if conducting a development activity that requires a coastal permit. Aquaculture activities occurring waterward of the mean high water line generally require a waterfront development permit. Aquaculture activities occurring upland of the mean high water line are regulated as industrial development within the entire CAFRA zone and up to 500 feet inland when outside the CAFRA zone. The proposed amendments do not affect whether a project requires a coastal permit, but rather establish public access requirements based upon the type of development proposed.

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 builders and property owners that may be affected by the proposed rule amendments may be "small businesses" as defined in the Act. The Department has determined that the amendments will not impose additional reporting or recordkeeping requirements on small businesses, nor increase the need for professional services. The proposed amendments will continue to apply to anyone proposing a regulated activity along a tidal waterway within the coastal zone. The proposed amendments do not affect whether a

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project requires a coastal permit. Rather, the proposed amendments continue public access requirements based upon the type of development proposed. Consequently, if a small business proposes a new development to be located on or along a tidal waterway, it will be required to provide public access. While provision of public access imposes a cost on small businesses, the costs will vary depending upon the type of public access to be provided and the area within which access must be provided. Because these requirements are established to ensure that development is conducted in a manner that preserves the public right to access and use tidal waterways and their shores, lesser requirements are not proposed for small businesses. The proposed amendments do not impose any new costs.

Housing Affordability Impact

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 amendments to determine their impact, if any, on the affordability of housing. The current rules already require public access as a condition of permit approval in most cases. Further, the public access requirement does not apply to single family homes or duplexes, but only to those that are part of a larger, residential subdivision where public access is required either on or off-site where there is 500 linear feet or less of water frontage and onsite where the property has at least 500 linear feet of water frontage. Therefore, the Department believes there is an extreme unlikelihood that the proposed amendments would evoke a change in the average costs associated with housing.

Smart Growth Development Impact

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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 amendments to determine their impact, if any, on smart growth development. The existing rules, which uniformly require public access for all proposed development, have neither caused a change in housing production within planning areas 1 or 2, nor had any apparent impact on the availability of affordable housing. For example, in the existing rules, if the residential development is located within planning areas 1 or 2 or within Designated Centers in a municipality with an approved MPAP, public access requirements should accord with the needs of the specific municipality as specified in the MPAP. Therefore, if a municipality determines that more housing is needed, affordable or otherwise, the MPAP may be drafted to require offsite public access for residential developments, thereby potentially increasing the number of residential units that could be constructed on a given site. In municipalities located within planning areas 1 or 2 or within Designated Centers, without an approved MPAP, the Department will continue to require residential developments to provide public access. There will, however, be flexibility in the form of the public access required. It is unlikely that in those municipalities without an approved MPAP the proposed amendments will negatively affect housing production since the need to provide public access is not changing. Therefore, the Department believes there is an extreme unlikelihood that the proposed rule amendments will evoke a negative change in housing production within planning areas 1 or 2 or within Designated Centers. Further, the Department does not believe the rules will decrease or result in any significant change in the availability of affordable housing in the coastal area.

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

7:7-16.9 Public access

(a) (No change.)

(b) In addition to the broad coastal goals outlined at N.J.A.C. 7:7-1.1(c), public access shall be provided in a manner designed to achieve the following public access goals:

1. – 2. (No change.)

3. New development shall provide opportunity for public access to tidal waterways and their shores on or offsite;

i. Public access proposed by an applicant may include any one or combination of the following:

(1) A public accessway designed in accordance with [(x)] (**u**) below, located parallel to the shoreline with perpendicular access;

(2) – (5) (No change.)

ii. (No change.)

4. – 5. (No change.)

(c) Development proposed on sites which are located on or adjacent to tidal waterways and their shores shall provide public access in accordance with (c)1 through 4 below. Municipalities are

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encouraged to develop and submit to the Department an application for approval of a Municipal Public Access Plan. Public transportation agencies and counties are encouraged to submit to the Department an application for approval of a Transportation Public Access Plan.

1. In municipalities from which the Department has received a resolution incorporating a Department-approved Municipal Public Access Plan into the municipality's Master Plan in accordance with [(k)] **(i)** below on or before the date of receipt of a permit application by the Department, public access requirements shall be satisfied in accordance with the Municipal Public Access Plan;

2. In municipalities from which the Department has not received a resolution incorporating a Department-approved Municipal Public Access Plan into the municipality's Master Plan in accordance with [(k)] **(i)** below on or before the date of receipt of a permit application by the Department, access shall be provided in accordance with [(n)] **(k)** below, for commercial, residential, industrial and public development, for homeland security facilities and ports. Coastal permit applications shall include a project specific access plan that provides for public access in accordance with all applicable requirements; and

3. In all municipalities, regardless of whether the Department has received a resolution incorporating a Department-approved Municipal Public Access Plan into the municipality's Master Plan in accordance with [(k)] **(i)** below, access shall be provided in accordance with [(p)] **(m)** below for marinas, [(q)] **(n)** below for piers, [(r)] **(o)** below for beach and dune maintenance activities, and [(s)] **(p)** below for shore protection projects. Coastal permit applications shall

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include a project specific access plan that provides for public access in accordance with all applicable requirements.

4. In all municipalities, regardless of whether the Department has received a resolution incorporating a Department-approved Municipal Public Access Plan into the municipality's Master Plan in accordance with (d) below, public access for public highways shall be provided in accordance with [(o)] **(l)** below.

(d) **Department approved** Municipal Public Access Plans shall satisfy the goals specified at N.J.A.C. 7:7-1.1(c) and the public access goals at (b) above. Municipal Public Access Plans shall additionally meet the requirements at (d)1 through 4 below, as well as all other requirements of this section.

1. – 2. (No change.)

3. Municipal Public Access Plans shall require installation and maintenance of appropriate public access signage in accordance with N.J.A.C. 7:7-16.9[(u)] **(r)**.

4. (No change.)

(e) A municipality [seeking] **may seek** approval of a Municipal Public Access Plan [shall file] **by filing** an application for approval with the Department. The application shall include a proposed Municipal Public Access Plan consisting of the following elements:

1. – 4. (No change.)

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5. An implementation strategy that:

i. – ii. (No change.)

iii. Identifies proposed tools to implement the municipal public access plan measures, including, but not limited to, the adoption or amendment of municipal ordinances, [the creation of a Public Access Fund established in accordance with (f) below to be used solely for the development and enhancement of public access,] and the development of other municipal programs that ensure reasonable access to the water, and water dependent and water oriented activities along all tidal waterways and their shores;

[(1) If the Municipal Public Access Plan includes a provision for monetary compensation in lieu of onsite public access in accordance with (f) below, this portion of the plan shall specify the location and/or type of uses, for example, residential, commercial, industrial, homeland security, and/or public highways, for which a monetary contribution shall be required;]

iv. – xi. (No change.)

6. (No change.)

[(f) A Municipal Public Access Plan may require a monetary contribution to be used to provide new or enhanced public access elsewhere in the municipality or outside the municipal boundaries

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along the same waterway as part of a joint project with a county or adjacent municipal governmental body in lieu of onsite public access. Municipalities that require a monetary contribution shall establish a dedicated Public Access Fund into which all funds collected shall be deposited. A Municipal Public Access Plan containing a monetary contribution requirement shall specify the circumstances in which such contribution will be required in accordance with (e)5iii(1) above.

1. For projects other than linear projects, the amount of the contribution shall be based upon a determination of the costs that would be incurred if land was purchased for creating access and the access was provided in the form of a walkway, using the following formula:

Total Contribution = TWC + LAC

where:

TWC = total walkway cost

LAC = land acquisition cost

i. The TWC is calculated by first adding the length of the perpendicular access, as measured in feet along the shorter property line, running from the non-waterward property boundary to waterward property boundary, to the length of the waterfront portion of the property as measured in feet. This total accessway length is multiplied by 10 feet, the minimum walkway width (subsection (x) below), to give the total square feet of walkway. The TWC is determined by

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multiplying the total square feet of walkway by \$ 7.00 (approximate average cost per square foot for walkway construction).

ii. The LAC is calculated by dividing the equalized assessed land value of the property by the total square footage of the property and multiplying the resulting value per square foot by the total square footage of the walkway utilized in calculating TWC in (f)1i above. "Equalized assessed land value" means the assessed value of a property divided by the current average ratio of assessed to true value for the municipality in which the property is situated, as determined in accordance with N.J.S.A. 54:1-35 et seq.

iii. For example, the total contribution for a 10,000 square foot property with a perpendicular access length of 50 feet, a total length of the waterfront portion of the property of 100 feet and an equalized assessed land value of \$ 300,000 would be calculated as follows:

Total Walkway Cost:

Length of perpendicular access 50 ft.

Length of waterfront portion of property + 100 ft.

Total linear feet 150 ft.

Minimum walkway width (feet) x 10 ft.

Total square feet of walkway 1,500 sq. ft.

Total walkway cost (1,500 sq. ft. x \$ 7.00) \$ 10,500

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Land Acquisition Cost

Equalized assessed land value of property \$ 300,000

Lot size / 10,000 sq. ft.

Cost per sq. ft. \$ 30.00/sq. ft.

Land acquisition (\$ 30.00/sq. ft. x 1,500 sq. ft. total \$ 45,000

walkway)

Total Contribution = \$ 10,500 + \$ 45,000 = \$ 55,500

2. For linear projects, other than projects of the New Jersey Department of Transportation which shall provide public access in accordance with (o) below, the amount of contribution shall be based upon a determination of the costs that would be incurred if land was purchased for creating access and the access was provided in the form of a walkway, using the following formula:

Total Contribution = TWC + LLAC where:

TWC = total walkway cost

LLAC = linear land acquisition cost

i. The TWC is calculated by first adding the length of the perpendicular access, as measured in feet along the right-of-way from the first non-waterward public road to the waterward portion of the property as measured in feet or one-quarter mile, whichever is less, to the width of the right-of-way along the waterfront. This total access way length is multiplied by 10 feet, the minimum walkway width (subsection (w) below), to give the total square feet of walkway. The TWC is

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determined by multiplying the total square feet of walkway by \$ 7.00 (approximate average cost per square foot for walkway construction).

ii. The LLAC is calculated by dividing the equalized assessed land value, as defined at (f)1ii above, of all waterfront lots located within one-half mile upstream and downstream from the right-of-way centerline at the location where the linear project crosses the water body by the total square footage of all waterfront lots located within one-half mile upstream and downstream from the right-of-way centerline at the location where the linear project crosses the water body and multiplying the resulting value by the total square footage of the walkway utilized in calculating TWC in (f)2i above.]

[(g)] **(f) [A Municipal Public Access Plan shall not require:] A municipality may, pursuant to the general police powers at N.J.S.A. 40:48-1 et seq., the power of municipalities bordering on the Atlantic Ocean, tidal water bays or rivers to exercise exclusive control over municipal beaches and other facilities at N.J.S.A. 40:61-22.20, or pursuant to the powers in the “Municipal Land Use Law” at N.J.S.A. 40:55D-1 et seq., include requirements in its Municipal Public Access that exceed the requirements for certain types of development set forth at (f)1 through 8 below. The Department may approve a Municipal Public Access Plan that includes any additional requirements imposed by a municipality on these types of development under the municipality’s independent authority. However, should an applicant propose to the Department a public access project that satisfies the standards listed in (f)1 through 8 below in a municipality which has adopted a Municipal Public**

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Access Plan with requirements in addition to this chapter, the Department shall not deny a permit based upon the public access not satisfying the additional requirements specified in the Municipal Public Access Plan.

1. Public access along the Hudson River in the Hudson River Waterfront Area as defined at N.J.A.C. 7:7-9.46(a)2 **shall be consistent** [inconsistent] with N.J.A.C. 7:7-9.46(e). Public access elsewhere in the Hudson River Waterfront Area shall be governed by this section;

2. Public access at marinas, as defined at N.J.A.C. 7:7-15.3(d)1[. Public access requirements at marinas] shall be governed by [(p)] **(m)** below;

3. Public access at piers[. Public access requirements at piers] shall be governed by [(q)] **(n)** below;

4. Public access at existing commercial development that is not classified as "new commercial development" pursuant to [(n)] **(k)**1ii below[. Public access requirements at existing commercial development] shall be governed by [(n)] **(k)**1i below;

5. Public access at existing residential development or new residential development where the development consists solely of the construction of one single family home or duplex not in conjunction with a previous development[. Public access requirements at existing residential development] shall be governed by [(n)] **(k)**2i below. Public access at new residential

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development, consisting solely of the construction of one single family home or duplex not in conjunction with a previous development, shall be governed by [(n)] (k)2ii below;

6. Public access at existing industrial or public development[. Public access requirements at existing industrial or public development] shall be governed by [(n)] (k)3i below;

7. Public access at existing homeland security facilities[. Public access requirements at existing homeland security facilities] shall be governed by [(n)] (k)4i below; or

8. Public access at existing or new ports[. Public access requirements at ports] shall be governed by [(n)] (k)5 below.

[(h) A municipality filing an application for approval of a Municipal Public Access Plan pursuant to (e) above shall provide a full copy of the submittal to the county planning board for the county within which the municipality is located as well as to any regional planning entities with jurisdiction over any portion of the municipality affected by the Municipal Public Access Plan. If the municipality filing an application for approval of a Municipal Public Access Plan has proposed, as a component of the plan, any joint projects with one or more neighboring municipalities, a full copy of the submittal shall also be provided to the neighboring municipality(s) and the county planning board for the county within which the neighboring municipality(s) are located should the municipality(s) be located in a different county.]

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[(i)] (g) (No change.)

[(j)] (h) A municipality which has received approval of a Municipal Public Access Plan shall as a condition of the approval:

1. Initiate action necessary to incorporate the Department-approved Municipal Public Access Plan into the municipality's Master Plan;
2. Notify the Department two weeks in advance of the dates and times of any scheduled public meetings on the Department-approved Municipal Public Access Plan. The Department shall post the meeting information on its website and notify by e-mail individuals who have requested notice of applications for approval of Municipal Public Access Plans;
3. Upon adoption of the Municipal Public Access Plan into the municipal Master Plan, provide the Department with a copy of an approved resolution incorporating the Department-approved Municipal Public Access Plan into the Master Plan; [and
4. Five years after the date of adoption of the Municipal Public Access Plan into the municipal Master Plan, and every five years thereafter, submit to the Department a report detailing:

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- i. The status of all projects that have been undertaken in accordance with the Municipal Public Access Plan;
- ii. All monies received into the municipality's dedicated Public Access Fund and an accounting of all expenditures of those monies; and
- iii. Any problems encountered in pursuit of the plan's objectives and goals and proposed remedies to assure the objectives and goals of the plan are met.]

4. Every five years after adoption of the Municipal Public Access Plan, provide the Department with an update on the status of all projects that have been undertaken in accordance with the Municipal Public Access Plan; and

5. Within 90 days notify and submit to the Department for approval any changes to a Department approved Municipal Public Access Plan that impact the location or type of public access provided. Failure to submit any changes under this paragraph may constitute good cause to revoke approval of a Municipal Public Access Plan.

[(k)] (i) (No change.)

[(l) Department review and approval is required before a municipality may make changes to an approved Municipal Public Access Plan that impact the location or type of access to be provided,

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or that institute or amend the terms of a contribution in lieu of an onsite public access requirement pursuant to (f) above. In support of a request to amend the approved plan under this subsection, the municipality shall submit to the Department the approved plan with the information specified in (e) above updated to reflect the proposed change. This submission shall detail how the proposed change affects the approved plan. The Department shall review and make a determination on the Municipal Public Access Plan amendment request in accordance with (i) above. Upon Department approval of the amended Municipal Public Access Plan, the municipality shall comply with (j) above.]

[(m)] (j) The Department shall revoke its approval of a Municipal Public Access Plan for good cause. Good cause includes failure to implement the Municipal Public Access Plan and/or noncompliance with the Municipal Public Access Plan such as, but not limited to, [inappropriate expenditure of dedicated Public Access Fund monies for purposes other than public access,] conversion of public access sites to other uses, and failure to maintain existing public access and signage.

1. – 2. (No change.)

3. If a hearing under [(m)] (j)2 above is not requested within 10 business days of receipt of said notice, the Municipal Public Access Plan shall be revoked.

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[(n)] **(k)** In municipalities that do not have an approved Municipal Public Access Plan, for sites which are located on or adjacent to tidal waterways and their shores, public access along and use of the beach and the shores shall be provided as specified in this subsection and, as applicable, in [(p)] **(m)** below for marinas and [(q)] **(n)** below for piers. Public access may include any one or a combination of the options listed at (b)3 above. When determining whether proposed public access is appropriate and/or sufficient, the Department shall consider factors such as type of public access available, the compatibility of the proposed public access with the applicant's proposed use of the site, square footage of access area, and environmental impact or benefit. The Department shall not approve public access that is contrary to any requirement contained in this chapter (for example, access that encroaches upon threatened or endangered species habitat or is in violation of the dunes rules):

1. Commercial development shall provide both visual and physical access as follows:

i. For existing commercial development, except for existing commercial development classified as "new commercial development" pursuant to [(n)] **(k)**1ii below, where the proposed activity consists of maintenance, rehabilitation, renovation, redevelopment, or expansion that remains entirely within the parcel containing the existing development, no public access is required if there is no existing public access onsite. Any existing public access shall be maintained or equivalent public access shall be provided onsite. Equivalent public access shall include access that provides for opportunities to participate in the same activities, such as fishing, swimming and passive recreation, in the same manner and by the same number of people as in the existing public access area;

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ii. Except as provided in [(n)] (k)1ii(1) below, for new commercial development, access shall be provided onsite, at a minimum during normal operating hours. For the purposes of this subparagraph, "new commercial development" also includes the conversion of any existing non-commercial use to a commercial use and any change in an existing development that would result in either greater than a cumulative 50 percent increase in the area covered by buildings, asphalt, or concrete paving; or development outside the parcel containing the existing development;

(1) (No change.)

2. Residential development shall provide both visual and physical access as follows:

i. – ii. (No change.)

iii. Except as provided in [(n)] (k)2iii(3) below, for new residential development consisting of more than one single-family home or duplex, or the conversion of any existing non-residential use to a residential use consisting of more than one single-family home or duplex, that has a total frontage of 500 linear feet or less on areas subject to N.J.A.C. 7:7-9.48, public access shall be provided onsite.

(1) (No change.)

(2) If the applicant demonstrates that offsite public access within the same municipality is not feasible because there are no sites available upon which to provide public access in accordance with [(n)] (k)2iii(1) above, equivalent offsite public access shall be provided on the same waterway within a neighboring municipality where the access is consistent with the neighboring

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municipality's Municipal Public Access Plan or, if there is no Municipal Public Access Plan, the access is located and designed to be consistent with (b) above. The Department shall consider factors such as type of public access available (for example, if swimming access is available onsite, then swimming access should be available at the offsite location), square footage of access area, and environmental impact/benefit when determining whether the proposed offsite public access is equivalent to that which would have been required onsite;

(3) (No change.)

iv. Except as provided in [(n)] (k)2iv(1) below, for new residential development consisting of more than one single-family home or duplex or the conversion of any existing non-residential use to a residential use consisting of more than one single-family home or duplex, where the development has a total frontage of more than 500 linear feet on areas subject to N.J.A.C. 7:7-9.48, public access shall be provided onsite.

(1) (No change.)

3. Except as provided at [(n)] (k)4 and 5 below, industrial development and public development, except for public highways, shall provide both visual and physical access in accordance with [(n)] (k)3i through iv below. Public highways shall meet the requirements at [(o)] (l) below.

i. For existing industrial or public development, except as provided at [(n)] (k)3ii below, where the proposed activity consists of the maintenance, rehabilitation, renovation, redevelopment, or expansion that remains entirely within the parcel containing the existing development, no public access is required if there is no existing public access onsite. Any existing public access shall be maintained or equivalent onsite public access shall be provided. Equivalent public access shall

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include access that provides for opportunities to participate in the same activities (such as fishing, swimming, or passive recreation), in the same manner and by the same number of people as in the existing public access area;

ii. Except as provided in [(n)] (k)3ii(1) below, for new industrial or public development, including the conversion of any existing use to an industrial or public use, public access shall be provided onsite during normal operating hours, unless it can be demonstrated that continued public access is not practicable based on the risk of injury from proposed hazardous operations, or substantial permanent obstructions, or upon documentation of a threat to public safety due to unique circumstances concerning the subject property, and no measures can be taken to avert these risks. In cases where the Department concurs that the risk is too great for onsite public access, access shall be provided in accordance with [(n)] (k)3iii below. For the purposes of this paragraph, "new industrial or public development" includes development of areas not within the parcel containing the existing development.

(1) (No change.)

iii. (No change.)

iv. If the applicant demonstrates that offsite public access within the same municipality is not feasible because there are no sites available upon which to provide public access in accordance with [(n)] (k)3ii above, equivalent offsite public access shall be provided on the same waterway within a neighboring municipality where the access is consistent with the neighboring municipality's Municipal Public Access Plan or, if there is no Municipal Public Access Plan, the access is located and designed to be consistent with (b) above.

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4. Homeland security facilities shall provide both visual and physical access as follows:

i. For existing homeland security facilities, except as provided at [(n)] (k)4ii below, where the proposed activity consists of maintenance, rehabilitation, renovation, redevelopment, or expansion that remains entirely within the parcel containing the existing development, no public access is required if there is no existing public access onsite. Any existing public access shall be maintained onsite or equivalent public access shall be provided either onsite or offsite on the same waterway and within the same municipality as the development. Equivalent public access shall include access that provides for opportunities to participate in the same activities such as fishing, swimming, or passive recreation, in the same manner and by the same number of people as in the existing public access area;

ii. Except as provided in [(n)] (k)4i(1) below, for new homeland security facilities, including the conversion of a non-homeland security facility to a homeland security facility, or the expansion of an existing homeland security facility onto areas not within the parcel containing the existing development, the applicant may provide either onsite public access or equivalent offsite public access on the same waterway and within the same municipality as the development. The Department shall consider factors such as type of public access available (for example, if swimming access is available onsite, then swimming access should be available at the offsite location), square footage of access area, and environmental impact/benefit when determining whether proposed offsite public access is equivalent to that which would have been required onsite;

(1) (No change.)

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5. Ports, as defined at N.J.A.C. 7:7-9.11, shall provide both visual and physical access as follows:

i. For existing ports, public access shall be provided as follows:

(1) (No change.)

(2) If the applicant demonstrates that offsite public access within the same municipality is not feasible because there are no sites available upon which to provide public access in accordance with [(n)] **(k)**5i(1) above, equivalent offsite public access shall be provided on the same waterway within a neighboring municipality where the access is consistent with the neighboring municipality's Municipal Public Access Plan or, if there is no Municipal Public Access Plan, the access is located and designed to be consistent with (b) above.

ii. (No change.)

[o] **(l)** Public highways, including superhighways, shall provide both visual and physical access as follows. For purposes of this subsection, an example of visual and physical access is a sidewalk on or adjacent to a bridge. Public transportation agencies and counties are encouraged to submit to the Department an application for approval of a Transportation Public Access Plan in accordance with [(o)] **(l)**3 below:

1. Superhighways, specifically, the Garden State Parkway, New Jersey Turnpike, Atlantic City Expressway, and Interstates 76, 78, 80, 95, 276, 278, 195, 295, and 676, shall provide access as follows:

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i. – ii. (No change.)

iii. If the applicant demonstrates that offsite public access in the same municipality is not feasible because there are no sites available upon which to provide public access in accordance with [(o)] (1)1i and ii above, equivalent offsite public access shall be provided on the same waterway(s) within a neighboring municipality where the access is consistent with the neighboring municipality's Municipal Public Access Plan or, if there is no Municipal Public Access Plan, the access is located and designed to be consistent with (b) above.

2. Public highways, other than superhighways, shall provide both physical and visual access as follows:

i. For existing public highways, except as provided at [(o)] (1)2ii below, where the proposed activity consists of the maintenance, reconstruction, rehabilitation, or expansion that remains entirely within the right-of-way existing as of November 5, 2012, no public access is required if there is no existing public access onsite. Any existing public access shall be maintained or equivalent onsite public access shall be provided. Equivalent public access shall include access that provides for opportunities to participate in the same activities, in the same manner and by the same number of people as in the existing public access area.

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ii. For new public highways, or expansion of existing public highways outside the right-of-way existing as of November 5, 2012 where the new public highway or expansion crosses or proposes fill in a tidal waterway, public access shall be provided in accordance with a Department approved Transportation Public Access Plan if one exists or onsite unless it can be demonstrated that public access is not practicable based on the risk of injury from proposed hazardous operations, or substantial permanent obstructions, or upon documentation of a threat to public safety due to unique circumstances concerning the subject property, and no measures can be taken to avert these risks. In cases where the Department concurs that the risk is too great for onsite public access, access shall be provided in accordance with [(o)] (I)2iii below;

iii. (No change.)

iv. If the applicant demonstrates that offsite public access in the same municipality is not feasible because there are no sites available upon which to provide public access in accordance with [(o)] (I)2ii and iii above, equivalent offsite public access shall be provided on the same waterway(s) within a neighboring municipality where the access is consistent with the neighboring municipality's Municipal Public Access Plan or, if there is no Municipal Public Access Plan, the access is located and designed to be consistent with (b) above.

3. Transportation Public Access Plans shall satisfy the goals specified at N.J.A.C. 7:7-1.1(c) and the public access goals at (b) above. Transportation Public Access Plans shall additionally meet the requirements at [(o)] (I)3i through iii below:

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i. – iii. (No change.)

4. (No change.)

5. The Department shall review an application for approval of a Transportation Public Access Plan to determine whether the plan is consistent with the broad coastal goals described at N.J.A.C. 7:7-1.1(c), and the goals for public access at (b) above as follows:

i. Upon receipt of an application for approval of a Transportation Public Access Plan that meets the requirements of [(o)] (1)4 above, the Department shall seek public comment on the application by:

(1) -- (3) (No change.)

ii. – v. (No change.)

vi. The Department shall provide notice of its determination under [(o)] (1)5iv or v above by:

(1) – (3) (No change.)

6. (No change.)

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7. Department review and approval is required before a public transportation agency or county may make changes to an approved Transportation Public Access Plan. In support of a request to amend the approved plan under this subsection, the applicant shall submit to the Department the approved plan with the information specified in [(o)] (I)4 above updated to reflect the proposed change. This submission shall detail how the proposed change affects the approved plan. The Department shall review and make a determination on the Transportation Public Access Plan amendment request in accordance with [(o)] (I)5 above.

[(p)] (m) Marinas, as defined at N.J.A.C. 7:7-15.3(d)1, shall provide both visual and physical public access in accordance with this subsection. Public access may include any one or a combination of the options listed at (b)3 above. When determining whether proposed public access is appropriate and/or sufficient, the Department shall consider factors such as type of public access available, the compatibility of the proposed public access with the applicant's proposed use of the site, square footage of access area, and environmental impact or benefit.

1. – 2. (No change.)

3. If the marina development includes a beach area, public access along and use of the beach shall be provided and activities that have the effect of discouraging or preventing the exercise of public trust rights, as described at N.J.A.C. 7:7-9.48, are prohibited in accordance with [(v)] (s) below;

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4. Applicants for new marinas, as described at [(p)] **(m)**2 above, shall provide to the Department at the time of application, for its review and approval, a public access plan for the marina development which shall include the following:

i. – ii. (No change.)

5. (No change.)

Recodify existing (q) - (w) as **(n) - (t)** (No change in text.)

[(x)] **(u)** If a public accessway is chosen to satisfy the public access requirement in [(n)] **(k)** and [(p)] **(m)** above, the accessway shall provide a minimum width of 10 feet free of obstructions to public access. Amenities such as public benches, litter or recycling receptacles, and lighting fixtures are provided to enhance public access and shall not be considered obstructions.