



**Comments on
New Jersey Department of Environmental Protection's
Proposed Beach Access Rules**

Proposed Lands and Waters Subject to the Public Trust Rights Rule, N.J.A.C. 7:7E-3.50, Public Trust Rights Rule, N.J.A.C. 7:7E-8.11 and related amendments to the Coastal Permit Program Rules and Coastal Zone Management Rules; DEP Docket Number 19-06-09/482; Proposal Number PRN 2006-352

Prepared and submitted by

American Littoral Society

Citizens Right to Access Beaches (C.R.A.B.)

Cohansey Area River Preservation

Divers Anonymous Dive Club of Clifton, New Jersey

Hackensack Riverkeeper

New Jersey Environmental Lobby

New York/New Jersey Baykeeper

Raritan Riverkeeper

Sierra Club, New Jersey Chapter

Surfers' Environmental Alliance (SEA)

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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
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Via Hand Delivery

Re: Proposed Lands and Waters Subject to the Public Trust Rights Rule, N.J.A.C. 7:7E-3.50, Public Trust Rights Rule, N.J.A.C. 7:7E-8.11 and related amendments to the Coastal Permit Program Rules and Coastal Zone Management Rules; DEP Docket Number 19-06-09/482; Proposal Number PRN 2006-352

Dear Mr. Brower,

Please accept these comments on behalf of the **American Littoral Society, Citizens Right to Access Beaches (C.R.A.B.), Cohansey Area River Preservation, Divers Anonymous Dive Club of Clifton, New Jersey, Hackensack Riverkeeper, New Jersey Environmental Lobby, NewYork/New Jersey Baykeeper, Raritan Riverkeeper, Sierra Club New Jersey Chapter and the Surfers' Environmental Alliance (SEA)** in support of 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 (collectively, the "Public Access Rules" or "the Rules") proposed by the Department of Environmental Protection ("the Department") as published in the New Jersey Register dated November 6, 2006. Collectively, we have worked for more than 30 years to promote the recognition, acceptance and enforcement of the public's right to access lands and waters subject to the Public Trust Doctrine. Over the past decade, several important decisions of the New Jersey State Courts, some of which were the result of litigation either brought by our organizations or in which our organizations participated, have both substantiated and clarified the public's rights under the Public Trust Doctrine. The Public Access Rules proposed by the Department appropriately respond to these decisions by, among other things, ensuring that the public will be afforded meaningful access to Public Trust lands and waters.

We view the Public Access Rules as a major step forward for our State and for anyone who likes to swim, surf, fish, scuba dive, run, walk or just sit and enjoy our beaches and other tidal lands and waters. Notably, the Public Access Rules:

- Reaffirm important Public Trust Doctrine principles, including the inalienable rights of the public to access and enjoy public trust lands and waters, and acknowledge that it is the duty of the State, as the Trustee, to protect those rights;
- Strengthen existing regulatory standards so that they are consistent with important State Court decisions clarifying the public's rights under the Public Trust Doctrine;
- Ensure that the hundreds of millions of public dollars spent on shore protection and beach nourishment projects are for the benefit, use and enjoyment of all of us, and not just a select few private residents or municipalities;
- Provide consistent guidance for municipalities, homeowners and other entities located along these lands and waters regarding their responsibility to allow or provide public access, reducing the need for litigation;
- Guarantee that public access is meaningful by requiring appropriate signs, parking, accessways and public restroom facilities as well as the abolishment of existing signs, barriers or practices that hinder public access;
- Allow fees municipalities charge for the use of recreational facilities and safeguards at publicly owned beaches or waterfronts to include the costs associated with public access essentials, such as restroom facilities, showers and parking;
- Recognize the import of, and provide access for, those who fish at night and throughout the entire calendar year;
- Facilitate an increase in visitors to towns that provide meaningful public access, which translates into more customers for local stores, restaurants, gas stations, hotels and the summer rental market, in support of a strong Shore economy; and
- Through the conservation easement and public access instrument provisions, ensure that this public access is not a temporary "privilege" that can be revoked and, instead recognize that public access is a right that has been in existence long before we got here, and that it will be recognized and enjoyed by generations to come long after we are gone.

For all of these reasons, we support the proposed Public Access Rules and urge their formal adoption.

Based on our collective experience in issues related to and affecting public access, we also believe that certain provisions of the proposed Rules can be clarified or enhanced to ensure that the important goals that the Department seeks to achieve through these Rules are met. The remainder of this document sets forth the specific clarifications to the proposed Public Access Rules that we recommend to ensure that the public access they promote is consistent, meaningful and achievable and that it is actually provided as part of a development project, rather than as a result of post-development litigation.

Our comments address nine different issues and, as such, are presented in nine parts: (1) the jurisdictional triggers of the new Public Access Rules, i.e., the circumstances under which the Department can apply and enforce the Rules; (2) additional public projects to which the Rules should apply; (3) the specific uses for which the public has access to riparian lands and waters as recognized in the Rules; (4) the timing of the public access requirements for development projects; (5) some of the limits placed on public access by the exceptions provided by the Rules; (6) the lack of public access requirements for New Jersey's bay shores and tidal rivers; (7) whether codification of the common law Public Trust Doctrine undermines its protections in any way; (8) our response to some of the criticism voiced against the Rules; and (9) a summary of the specific provisions for which we suggest that clarifications be made.

1. The Jurisdictional Triggers of the Public Access Rule

The requirements of the proposed Public Access Rules, and thus the opportunity for the Department to enforce them, are triggered in three distinct circumstances: (i) when a development permit is sought under either the Coastal Permit Program Rules or the Coastal Zone Management Rules¹, N.J.A.C. 7:7-1.3, et seq., and N.J.A.C. 7:7E-1.8, et seq.; (ii) when a municipality participates in Shore Protection Funding through a State Aid Agreement, N.J.A.C. 7:7E-8.11(p); and (iii) when a municipality, county or nonprofit organization seeks to be eligible for Green Acres Funding, N.J.A.C. 7:7E08.11(q). More specifically, prior to obtaining a development permit, applicants must demonstrate through the submission of site plans and/or a Compliance Statement, how the proposed development meets the public access requirements of both the new Lands and Waters Subject to the Public Trust rule and the Public Trust Rights rule. See, e.g., N.J.A.C. 7:7-5(b)(1)(ii) and N.J.A.C. 7:7-7.7(c)(4).

¹ The Coastal Permit Program Rules are the procedural rules that DEP applies to review permit decisions under the Coastal Area Facility Review Act, N.J.S.A. 13:19-1, et seq., the Waterfront Development Law, N.J.S.A. 12:5-3 and the Wetlands Act of 1970, N.J.S.A. 13:19A-1. The Coastal Zone Management Rules are the substantive rules applied by the DEP to decisions regarding the use and development of coastal resources and are used primarily by the DEP Land Use Regulation Program for the review of permit applications under CAFRA, N.J.S.A. 13:19-1, et seq., the Waterfront Development Law, N.J.S.A. 12:5-3, the Wetlands Act of 1970, N.J.S.A. 13:19A-1, Water Quality Certification (401 of the Federal Clean Water Act) and Federal Consistency Determinations (307 of the Federal Coastal Zone Management Act). In addition to an application for a permit, an applicant must also submit a Compliance Statement demonstrating how the proposed development complies with, among other things, the new Public Access requirements, and should include supplemental documents as appropriate, such as maps or surveys.

A municipality participating in Shore Protection Funding through a State Aid Agreement must submit a draft public access plan, a draft ordinance adopting the public access plan and a draft public access instrument to the Department for approval prior to the issuance of a coastal permit. N.J.A.C. 7:7E-8.11(p)(1). Prior to the commencement of a beach nourishment project or other shore protection construction, the municipality must actually provide the required public access, adopt the public access plan ordinance and record the public access instrument. N.J.A.C. 7:7E-8.11(p)(3).

Similarly, in order to be eligible for Green Acres Funding, a municipality must submit to the Department before even applying for Green Acres funding, a public access plan, a draft ordinance adopting the public access plan, a draft public access instrument and must actually provide public access to all tidal waterways and their shores on or adjacent to lands it holds. N.J.A.C. 7:7E-8.11(q)(1), (3) and (5). Before Green Acres funding can be disbursed, the ordinance must be adopted and the public access instrument recorded.² N.J.A.C. 7:7E-8.11(q)(5)(ii) and (iii).

While these jurisdictional provisions are somewhat straightforward, we would like to address one specific area where the new Rules are not completely clear as to the Department's jurisdiction. This is where, in accordance with a State Aid Agreement, one or more phases of a beach nourishment project has commenced or been completed but, under the same Agreement, additional phases have yet to occur.

By way of example, a sizable beach nourishment project in Monmouth County has commenced, but has yet to be completed. Sponsored by a combination of Federal, State and local funding, and pursuant to State Aid Agreements between the state and each benefiting municipality executed in and around 1993, the project is designed to provide a beach that is 100 feet wide from Sea Bright to the Manasquan Inlet. The project consists of an initial nourishment phase, which is complete with the exception of Elberon, Deal, Allenhurst and Loch Arbour, where real estate easements are still being negotiated. Additional periodic maintenance re-nourishment is scheduled for eight-year cycles as required over the next 50 years.

We interpret the proposed Rules, and, particularly, those requirements set forth in N.J.A.C. 7:7E-8.11(p) and its related provisions, as being applicable to the Monmouth County beach nourishment project, and all other similar projects that have commenced but are not yet completed. We have been advised by members of the Department that our interpretation is correct because each additional maintenance or renourishment portion of these ongoing projects requires a new agreement between the State and the municipality and that the State intends to incorporate the new public access requirements into each such agreement.

In addition, such an interpretation of the proposed Rules is entirely consistent with the position the Department is asserting in its pending litigation against the Borough of Sea

² These requirements vary slightly for nonprofit organizations and counties. For example, these entities do not have to submit and adopt an ordinance.

Bright. See, State of New Jersey, Department of Environmental Protection v. Borough of Sea Bright, et als., Complaint filed in the Superior Court of New Jersey, Chancery Division, Monmouth County, New Jersey, September 22, 2006, hereafter “DEP Complaint.” In that litigation, the Department refers throughout its Complaint to this same beach nourishment project and the State Aid Agreements executed in 1993. The Department argues that the Public Trust Doctrine is a common law doctrine of ancient origin, that it was one of the State laws that existed at the time the Agreements were entered into and, that it therefore forms a part of the Agreements as if it was expressly referred to or incorporated into their terms. See, DEP Complaint, par. 51, 61. The Department further notes that, since the Agreements were executed, Court decisions have clarified the rights of the public under the Public Trust Doctrine – rights that have existed since ancient times - and argues that the original Agreements must be interpreted and enforced consistent with what the Courts have now clarified as being the governing State law at the time the parties entered into the Agreements. DEP Complaint, par. 46-48; 64, *citing Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005); *National Association of Homebuilders v. DEP*, 64 F.Supp. 2d 354 (D.N.J. 1999); and *Liu v. City of Long Branch*, 363 N.J. Super. 411 (Law Div. 2003). The Department concludes that enforcement of the terms of the original Agreements without taking into account these clarifications of the public’s rights “would be contrary to the law and public policy of this State.” DEP Complaint, par. 66.

Clearly, our interpretation of the Rules is consistent with the posture of the Department in the above litigation and legal precedent recognizing the State as a Trustee of the “historic legal rights retained by the public.” Specifically, the Department’s arguments lead to the conclusion that the proposed Rules apply to all beach nourishment and shore protection projects, whether they have commenced or not and regardless of when the State Aid Agreements were executed. N.J.A.C. 7:7E-3.50(e); Proposed Rule Summary, p. 6. To find otherwise would be contrary to the law and public policy of this state.

Accordingly, the Department should clarify the language of N.J.A.C. 7:7E-8.11(p) to expressly ensure that its public access requirements are applicable to ongoing beach nourishment projects and that all parties are certain of this intent.

2. Public Access for Other Publicly Funded Projects

As described above, the Public Access Rules impose certain public access requirements upon municipalities that participate in Shore Protection Program funding. N.J.A.C. 7:7E-8.11(p). In addition to the historic rights retained by the public to tidal lands and waters, the Department cites to the many state and federal dollars invested in these types of public projects as providing another basis for the public’s right to use these resources. For these same reasons, we believe that N.J.A.C. 7:7E-8.11(p) should include and apply to other projects constructed adjacent to public trust lands and waters that rely on public funding, including, but not limited to, the construction of the various commuter ferry terminals throughout the state, the construction and reconstruction of bridges, roads and other Department of Transportation projects, and publicly funded brownfields remediation projects. Under the proposed Public Access Rules as currently written, such

projects would fall under the category of “all other development”, meaning development other than shore protection/beach nourishment projects or a Green Acres project. As such, they would only be required to provide parking to accommodate residents seeking public access to the waterfront if construction of the project will reduce existing on-street or off-street parking that is already used by the public for access to the waterfront. N.J.A.C. 7:7E-8.11(j). In addition, there are no restroom requirements for such development projects and, as discussed in detail in section 4 of this document, unlike with the shore protection/beach nourishment projects, there is no requirement that the public access areas and public accessways be provided prior to the commencement of or even immediately upon completion of construction. *Compare* N.J.A.C. 7:7E-8.11(j) *with* N.J.A.C. 7:7E-8.11(p)(3) and (p)(7). Accordingly, the proposed Public Access Rules should be amended to include other publicly funded projects in subsection 8.11(p), subjecting such projects to the same public access requirements as shore protection and beach nourishment projects.

3. Recreational Uses for which the Public has Access

The Public Access Rules acknowledge that the public's right to use public trust lands and waters extends beyond what are considered to be the traditional uses of navigation and fishing to “recreational uses, such as swimming, sunbathing, fishing, surfing, walking and boating.” N.J.A.C. 7:7-1.3 (Definition of Public Trust Doctrine). *See*, also N.J.A.C. 7:7E-3.50, recognizing “swimming, sunbathing, fishing, surfing, walking and boating along the various tidal waterways and their shores” and N.J.A.C. 7:7E-8.11(a) recognizing “fishing, swimming, sunbathing, bird watching, walking and boating.” In addition to those that partake in these uses, there is another constituency that has played a significant and pioneering role in the effort to gain meaningful public access to our Public Trust lands and waters – scuba divers. We note that it was a group of divers that founded the American Littoral Society in 1961, that comprise an important part of the Society's current membership and that were among the members on whose behalf the Society participated in public access litigation that helped to shape the proposed Rules. We request that the proposed Rules incorporate scuba diving as one of the recognized uses for which the public has access to public trust lands and waters and that their needs be considered when the public access requirements are implemented.

4. Timing of Public Access Requirements for Development

As proposed, the Public Trust Rights rule provides three different sets of public access requirements - one for development, another for shore protection and beach nourishment projects and a third for Green Acres projects. With respect to the shore protection and beach nourishment projects, the Public Trust Rights rule requires that public access to all tidal waterways and their shores on or adjacent to lands held by the municipality be provided “prior to the commencement of construction”. N.J.A.C. 7:7E-8.11(p)(3). In addition, “immediately upon completion of construction” the municipality must provide public accessways to the project and to all beaches within the municipality along the

waterway on which the project occurs. N.J.A.C. 7:7E-8.11(p)(7)(ii). Similarly, for Green Acres projects, immediately upon disbursement of Green Acres funding, the recipient must provide public access along the tidal shore waterway and its entire shore at the Green Acres project site. N.J.A.C. 7:7E-8.11(q)(7). At this same time, the recipient must also provide at least one accessway to the tidal waterway, its shore and the project site across land held by the recipient, with additional accessways to be provided as necessary given the size, locations and proposed use of the site. N.J.A.C. 7:7E-8.11(q)(8). However, for development projects, meaning all projects to which this rule would apply other than shore protection/beach nourishment or Green Acres projects, the proposed rule is silent as to when the access and accessways must be provided. For example, the proposed rule states that “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 physical and visual access. N.J.A.C. 7:7E-8.11(d). The proposed rule further states that the public accessways must include perpendicular access and a linear area along the tidal waterway and its entire shore. Neither of these provisions makes any mention of when this requirement must be met.

The proposed changes to the Coastal Permit Program Rules and Coastal Zone Management Rules that reference the proposed Public Access Rules provide no further clarity on this issue. Although those proposed changes require a permit applicant to identify on its site plan and/or in a compliance statement all existing and proposed public access areas and public accessways to demonstrate how the applicant intends to comply with both the Lands and Waters Subject to Public Trust Rights and the Public Trust Rights Rules, again, there is no mention of when the applicant must actually provide the public access areas and accessways identified in the plans.

Based on past experience with this very situation, we believe that it is extremely important for the Department to require coastal permit applicants to provide the public access areas and accessways prior to the commencement of project construction. Over the past several decades, numerous development projects along the Atlantic Ocean and the Hudson River Waterfront Area were permitted based on the promise of public access. Although these projects have been constructed and occupied, the public access components have never materialized. Instead, it has been left to citizens and public interest groups to utilize their own limited resources in attempts to enforce these project requirements through litigation on a case-by-case basis. It is acknowledged that the proposed Public Access Rules require a development permit applicant to record a public access instrument detailing the public access areas and accessways on a project site and to submit proof of the proper recording of the instrument to the Department “prior to commencement of site preparation or construction, or permit effectiveness.” N.J.A.C. 7:7E-8A.4. However, while this provides a stronger mechanism for parties to attempt to enforce the public access aspects of a project in the event the permittee does not comply, this does not ensure that the public access will actually be constructed without resorting to litigation, the very circumstance the proposed Public Access Rules should expressly avoid. Accordingly, we urge that the language of proposed N.J.A.C. 7:7E-8.11(d) should be amended to include a new subparagraph 3 that states:

Subsection (p) below contains additional public accessway and public access area requirements for municipalities that participate in Shore Protection Program funding. Subsection (q) below contains additional public accessway and public access area requirements for municipalities, counties and nonprofits that receive Green Acres funding. All other development shall provide the public accessways and public access areas prior to the commencement of project construction.

5. Limits Imposed by Exceptions to Public Access Requirements

There are seven (7) exceptions to the requirements of the proposed Public Trust Rights rule, all of which are set forth in N.J.A.C. 7:7E-8.11(f). Of particular concern to the undersigned are the “public safety” exception set forth at N.J.A.C. 7:7E-8.11(f)(1) and the “industrial use” exception set forth at N.J.A.C. 7:7E-8.11(f)(3).

a. The Public Safety Exception

The “public safety” exception to the public access requirements states the following:

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

The proposed rule further states that this exception does not apply to the Hudson River Waterfront Area, or to the following waterways: the Arthur Kill, the 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 the Maurice River in Millville City.

The only explanation for the proposed rule’s distinction between public trust lands in the southern portion of the state and those in the northern part of the state is found in the “Summary”, which states that in the areas excepted from the public safety provision, the “rule contemplates continuous public waterfront walkways with prescribed design that will function akin to a sidewalk that is always open to the public.” See, Summary, p. 29. This explanation is not satisfactory for several reasons. First, while the rule may “contemplate” such a continuous walkway along these northern waterfront areas, the fact is, such a continuous walkway simply does not exist at this time, and it is unknown when it will be completed. Second, this walkway distinction in no way accounts for the broad conclusion that unique circumstances that threaten public safety are more likely to occur in the southern portion of the state, but will never occur in the specified northern areas.

We can only surmise that this distinction is actually in response to requests by developers, public officials and private land owners in the southern portion of the state

who want an opportunity to keep the public out during the overnight hours (we note that the American Littoral Society recently opposed such an effort in Cape May). Regardless of the reasons behind this exception, because it will negate important public trust rights, any attempt to invoke this exception should undergo serious scrutiny. Accordingly, the Department should amend the proposed rule to require that any time a party seeks to have public access limited under this provision, a public hearing is held before a decision is made. The amended rule should also require that, prior to the public hearing, the public has had access to and an opportunity to review the documentation of the alleged unique circumstances that threaten public safety and warrant such closure that the party attempting to invoke this exception is required to submit to the Department.

b. The Energy Facility, Industrial Use, Port Use, Airport, Railroad or Military Facility Exception

The Public Access Rules contemplate another exception to the public access requirements for the following facilities under the following circumstances:

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 is not practicable.

N.J.A.C. 7:7E-8.11(f)(3). As with the “public safety” exception, because this exception will negate important public trust rights, consideration of its application to a project or facility should undergo serious scrutiny. Accordingly, the Department should amend the proposed rule to require that, any time it determines that this exception is or may be applicable to one of the proposed uses or facilities, a public hearing is held before a final decision is made. The amended rule should also require that, prior to the public hearing, the public has had access to and an opportunity to review a written summary stating the basis for the determination that public access is not practicable based on the risk of injury from existing or proposed hazardous operations, or substantial existing and permanent obstructions, as well as the basis for the determination that no measures can be taken to avert these risks. The summary should also detail the proposed equivalent public access on site or, if applicable, the basis for the determination that equivalent on-site public access is not practicable and a description of the proposed equivalent off-site public access.

Issues that we have with some of the other exceptions to the Public Access requirements, particularly as they relate to development projects on sites that are adjacent to bays and tidal rivers, are discussed in detail below.

6. The Proposed Rules do not Address Public Access to the State's Bays and Rivers

Although the Public Access Rules clearly state that the Public Trust Doctrine ensures “the public’s right of access to and use of tidal waterways and their shores, including the oceans, bays and rivers”, N.J.A.C. 7:7E-3.50(e), for the most part, the substantive provisions of the proposed rules apply to ocean beaches. Left out of the Public Access Rules are the means for the public to gain, and the state to enforce access to, certain New Jersey bay and tidal river shores. For example, the proposed Public Trust Rights rule specifically states that public access is not required where a single family home, duplex, associated accessory development or shore protection structure is proposed that does not include beach or dune maintenance activities and is on a site does that does not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and their shores. N.J.A.C. 7:7E-8.11(f)(6).³ Thus, with the exception of Sandy Hook Bay and Raritan Bay, the proposed Public Trust Rights rule provides an exception for any small-scale development that occurs on the remaining bay shores and tidal rivers.

Similarly, the proposed rule allows “equivalent public access”, which includes access at a nearby offsite location, where a two-unit (excluding duplexes) or three-unit residential development, associated accessory development or shore protection structure is proposed that does not include beach or dune maintenance activities and is not on a site with a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and their shores. N.J.A.C. 7:7E-8.11(f)(7).⁴ Again, with the exception of Sandy Hook Bay and Raritan Bay, this proposed rule would provide an exception for small-scale development that occurs on the rest of the bay shores and tidal rivers.

The Public Access Rules do require that public access be provided in the form of both perpendicular and linear walkways for developments located along the Arthur Kill, the 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 the Maurice River in Millville City. N.J.A.C. 7:7E-(d). However, as described above, these requirements do not apply when the development consists of a single family home or duplex. Further, these Rules are relaxed when the development consists of only a two-unit (excluding duplexes) or three-unit residential development, or associated accessory development or shore protection structure. In such a case, the walkway requirements are lessened, such that the width of the linear walkway can be 10 feet wide instead of 16 feet. N.J.A.C. 7:7E-(f)(5). In addition, the width of the conservation restrictions intended to

³ The project must also 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).

⁴ The project must also 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).

permanently protect a linear and perpendicular accessway to these sites is reduced from 30 feet to 20 feet for the linear accessway and from 20 to 10 feet for the perpendicular accessway. Compare N.J.A.C. 7:7E-8.11(e)(1) and (2) to N.J.A.C. 7:7E-8.11(f)(5)(i) and (ii).

The exceptions to the public access requirements should not be based upon which bay or river is adjacent to the development site and it is unclear why these exceptions exist. Specifically, the exception to the public access requirements provided for single family homes or duplexes, which is not available to developments that are adjacent to the Sandy Hook Bay and the Raritan Bay, should not be available to developments that are adjacent to any bay or tidal river. Further, the exceptions for two or three unit developments that are not available for developments adjacent to the Arthur Kill, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, and select portions of the Kill Van Kull, Delaware River, Cohansey River and Maurice River, should not be available to developments adjacent to any bay or tidal river.

7. Defining the Common Law Public Trust Doctrine in Administrative Rules

We reiterate our full support for the proposed Public Access Rules and our appreciation for the thought and detail that has gone into their drafting. Nevertheless, we are concerned that an attempt to define the Public Trust Doctrine and its parameters by administrative rule might result in an inadvertent limitation of its authority.

The proposed Rules describe the Public Trust Doctrine in detail in four (4) separate provisions: (i) a comprehensive definition of the “Public Trust Doctrine” is added to the “Definitions” section of the Coastal Permit Program Rules, N.J.A.C. 7:7-1.3; (ii) a concise definition of public trust lands and waters is included in the new Lands and Waters Subject to the Public Trust Rights rule, N.J.A.C. 7:7E-3.50(a); (iii) another in-depth explanation of the Public Trust Doctrine is set forth in the “Rationale” section of the new Lands and Waters Subject to the Public Trust Rights rule; and (iv) a similar lengthy comprehensive explanation of the Public Trust Doctrine is set forth in the “Rationale” section of the new Public Trust Rights rule.

These provisions seem to capture the way in which our collective understanding of the Public Trust Doctrine has evolved over the years, including a summary of the Court decisions that have shaped this understanding, and account for the fact that the Doctrine will continue to change. For example, the definition of the term Public Trust Doctrine proposed for the Coastal Permit Program Rules recognizes that the Public Trust Doctrine bestows certain “inalienable” rights upon the public and states that “the specific rights recognized under the Public Trust Doctrine, a common law principle, continue to develop through individual court decisions.” N.J.A.C. 7:7-1.3. The new Lands and Waters Subject to the Public Trust Rights rule contains the following in its “Rationale” section:

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.

N.J.A.C. 7:7E-3.50(e). The Rationale section of the new Public Trust Rights rule contains similar language. See, N.J.A.C. 7:7E-8.11(r), par. 1, 6 and 7.

While we find the language of these sections and their descriptions of the history, purpose and authority of the Public Trust Doctrine to be sufficient, we are more concerned with what these provisions do not say, i.e., that through the adoption of these Rules, the Department has neither the intention nor the authority to limit the rights under the Public Trust Doctrine in any way. We note that the proposed Public Trust Rights rule contains the following disclaimer: “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.” N.J.A.C. 7:7E-8.11(o). In addition, the proposed amendments to the Coastal Permit Program Rules incorporate the following statement: “Authorization of construction shall not constitute a relinquishment of public rights to access and use tidal waterways and their shores.” N.J.A.C. 7:7-1.5(b)(19). A similar relevant disclaimer should be added to each of the four (4) aforementioned sections in which the Public Trust Doctrine is defined or explained. Specifically, the following statement could be incorporated:

“The Department recognizes that the rights of the public under the Public Trust Doctrine are inalienable and that the incorporation of these common-law principles into the Coastal Permit Program Rules and the Coastal Zone Management Rules in no way diminishes or relinquishes any of those rights.”

8. Response to Public Criticism of the Proposed Rules

Since the proposed Public Access Rules were published on November 6, 2006, numerous articles have appeared in newspapers throughout the state presenting both public support and opposition to the Rules. Many of these issues were also raised at the public hearings held in Jersey City, Trenton and Pamona, New Jersey. We would like to take this opportunity to address some of the arguments behind the opposition that have been expressed publicly to date.

(a) The Public Access Requirements and the Takings Argument

One argument articulated against the proposed Rules is that granting the public such access amounts to a taking of private property without just compensation. See, e.g., “A Plan to Make Private New Jersey Beaches Friendly to the Public”, New York Times, Sunday, November 12, 2006, Metro Section, p. 38. This is an issue that has been fully contemplated and resolved by our courts and it has been definitively held that granting the public access to land and waters under the Public Trust Doctrine is not a taking.

In 1988, the U.S. Supreme Court reaffirmed the long-held precedents that the States, upon entry into the Union, received ownership of all lands and waters subject to the tides and that the authority to define the limits of the lands held in public trust rests entirely with the individual States. Phillips Petroleum v. Mississippi, 484 U.S. 469 (1988). The Phillips Court further held that the fact that a private party has long been the record title holder to the property or has paid taxes on the lands in question cannot divest a State of its claim to ownership. Id. In New Jersey, our courts have continually defined the lands that are held in public trust through a series of decisions, all of which are discussed in the proposed Rules, including Matthews v. Bayhead Improvement Association, 95 N.J. 306 (1984), National Association of Home Builders v. N.J.DEF, 64 F.Supp 2d 354 (D.N.J. 1999) and Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc., 185 N.J. 40 (2005). Collectively, these and other cases have defined the public trust rights to mean that 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; that, as the Trustee, it is the obligation of the State to protect the public’s right to use and enjoy these lands and waters for a variety of uses, including swimming, sunbathing, fishing, surfing, walking and boating; 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; and that various portions 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 ensure their ability to fully use and enjoy the lands subject to the Public Trust Doctrine. The New Jersey Supreme Court has even set forth specific factors for determining the amount of dry sand available for public use in a given area to ensure that a taking does not occur. Matthews v. Bayhead Improvement Association, 95 N.J. 306, 326 (1984).

It is the holdings of these cases that govern takings claims in New Jersey, and efforts to provide and enforce the public’s rights that are in accordance with these decisions are not takings under the law. See, e.g., National Association of Home Builders v. N.J.DEF, 64 F.Supp 2d. 354, 359 (D.N.J. 1999), citing Matthews v. Bayhead Improvement Association, 95 N.J. at 355. The proposed Public Access Rules are based upon and were developed in response to the holdings of each and every one of these and other New Jersey Public Trust Doctrine cases. See, e.g., N.J.A.C. 7:7E-3.50(e) and N.J.A.C. 7:7E-8.11(r). Accordingly, their adoption, implementation and enforcement do not constitute a “taking” under the law of this State.

It is also important to emphasize that these Court decisions have simply clarified the rights of the public under the Public Trust Doctrine – rights that have existed since

ancient times - and that the decisions, and the proposed Rules, merely reflect our current understanding of rights that have always existed. The lands and waters subject to the Public Trust Doctrine have always belonged to the people, and not to any one private owner. Simply put, the State cannot take from a property owner something that the property owner never had.

(b) The Public Access Requirements as they Apply to Towns Receiving Beach Nourishment

Some municipal officials are claiming that the Public Access requirements are too onerous. For example, the Mayor of Long Beach Township has argued that the proposed regulations, particularly the requirements for access points and restrooms, are excessive and do not allow for compromise. See, “No Access, No Aid for Beaches”, New Jersey Star Ledger, Monday, November 13, 2006. Specifically, the Mayor stated “When you’re accepting public money, you have to go by their rules, but I think it’s totally unreasonable. This beach replenishment project is something we need desperately. I feel they’re holding us hostage.” *Id.* Opposition to the public access requirements was also voiced by many residents of Long Beach Island, who feel the requirements place an unfair burden on their towns.

These arguments are seriously flawed for several reasons. First, the beach nourishment municipalities continuously fail to acknowledge that the overwhelming majority of the cost of beach nourishment projects – projects that these same municipalities say they need desperately - is paid for by state and federal taxpayers that do not live there. For example, it has been estimated that the Long Beach Island beach nourishment project will cost as much as \$75 million dollars. The funding for such projects, including that proposed for Long Beach Township, is allocated as follows: The federal government contributes 65% of the project cost, while the remaining 35% is divided into a cost-share between the state and local government, with the state contributing 75% and the local government contributing 25%.⁵ Based on this cost-share allocation, for a total cost of \$75 million, the federal contribution will be \$48.75 million, the state contribution will be \$19.69 million and the local contribution will be \$6.56 million. Thus, \$68.44 million of the cost to protect mostly private residential properties in Long Beach Island is being borne by taxpayers who do not live there. The cost of public access amenities, which can be defrayed as described below, is a small price to pay for the monies and protections each town receives. As was aptly stated in the New York Times in response to the Department’s proposed rules and the vehement opposition to them expressed by the residents of Long Beach Island: “Bravo. There is something infuriating about a town that gets beach restoration money from federal or state taxpayers, and then proceeds to keep these very same taxpayers from going to the beach.” See “New Jersey – Broadening Beach Access”, New York Times, Sunday, December 11, 2006 (New Jersey Section).

Second, the State of New Jersey has recently committed to provide municipalities, including Long Beach Township for its upcoming beach nourishment project, 5% of the

⁵ See, www.state.nj.us/dep/shoreprotection/nourishment.htm

total cost of the project to help local governments pay for public access. See “State OK With Plan to Extend Pumping”, Asbury Park Press, Saturday, December 16, 2006. This 5% is in addition to the share of the project cost that the state already contributes. This means that, for a project that cost \$75 million dollars, the state will provide an additional \$3.75 million dollars to the municipality to put towards public access. Although this funding responds directly to the most vehement argument against the public access requirements raised by the municipal officials and the residents of Long Beach Island, these same officials continually fail to acknowledge the State’s offer publicly and, most significantly, have failed to apprise their own residents of this funding.

Third, municipalities can, and do, charge fees for the use of bathing and recreational facilities and safeguards. The proposed Rules specify that these fees can include the costs of providing restroom facilities and parking at publicly owned beach or waterfront areas. N.J.A.C. 7:7E-8.11(m).

Finally, it is anticipated that more public access will bring more visitors to an area. An increase in visitors means an increase in consumers, which translates into more customers for a town’s convenience stores, restaurants, gas stations, hotels and summer rental market – all in support of a strong local shore economy.

(c) The Public Access Rules and Their Application to Marinas

Through amendments to certain Coastal Permit Program and Coastal Zone Management Rules, the proposed public access requirements will be applicable to all marinas. Specifically, the Coastal General Permit for the Construction of Support Facilities at Legally Existing and Operating Commercial Marinas, N.J.A.C. 7:7-7.13, will be amended such that new marina facilities and expansions and renovations of existing marinas shall provide public access in accordance with the Lands and Waters Subject to the Public Trust Rights rule and the Public Trust Rights rule. Accordingly, when a marina constructs or upgrades any existing boat rack systems or support buildings, restroom facilities, pumpout facilities, fences, water lines or sewer lines, gasoline pumps and associated pipes and tanks and boat handling facilities, such as winches, hoists and ramps, the marina will be subjected to the public access requirements. Similar amendments to the Resorts/Recreational Use rule, N.J.A.C. 7:7E-7.3, render new marinas or existing marinas that engage in expansion or renovation, including dredging, bulkhead construction and reconstruction and relocation of docks, subject to the public access requirements.

It is important to note that, under the existing Construction of Support Facilities Rule and Resorts/Recreational Use rule, the very same activities listed above require that public access be provided in accordance with the existing Public Access to the Waterfront Rule. This means that, when engaged in the above-listed activities today, marinas, like any other development subject to the public access requirements, “shall provide permanent perpendicular and linear access to the waterfront” but only “to the maximum extent practicable.” This last phrase would seem to indicate that, under certain conditions not

articulated, under the existing rule, a marina would be exempt from the public access requirements. However, we do not know to what extent, if any, the Department has utilized the “maximum extent practicable” language to determine under the existing rule that marinas could not or did not have to provide public access. In addition, under the existing rule, as with any other development subject to the public access requirements, such development at marinas that limits public access to the waterfront is “discouraged.” Under the proposed Rules, there is no exemption from the public access requirements and development that limits public access to the waterfront is “prohibited.” The proposed Rules also do away with the provision in the old rule that allows municipalities to set a fee schedule that charges up to twice as much for non-residents for use of marinas and boat launching facilities for which local funds provided 50 percent or more of the costs.

With regard to how the public access requirements must be met, under the existing rule, other than the reference to perpendicular access and “a linear waterfront strip accessible to the public”, and with the exception of marinas built in the Hudson River Waterfront Area, the existing rule provides no specific requirements or guidance for how such access must be constructed. Similarly, the proposed Rules do not provide details, specific requirements or guidance as to how such public access will be provided, other than the general requirement that it “must include perpendicular access and a linear area along the tidal waterway and its entire shore”, N.J.A.C. 7:7E-8.11(d)(1) and that it “shall incorporate fishing access and associated amenities to the maximum extent practicable within the area provided for public access.” N.J.A.C. 7:7E-8.11(l). The parking requirements are the same under the proposed Rules as in the old one, and are triggered only when the development reduces existing parking that is currently used by the public for access to the waterfront, requiring mitigation for this parking at a 1:1 creation to loss ratio. Compare existing N.J.A.C. 7:7E-8.11(b)(14) to proposed N.J.A.C. 7:7E-8.11(j). Again, it should be noted that these requirements do not apply solely to marinas, but to any “development” along public trust lands and waters.

At the public hearings held on the proposed Rules, numerous marina owners and operators testified against the Rules alleging they would cause a serious hardship to their businesses. After subsequent conversations with marina owners and operators as well as residents that house their boats at marinas, it appears that many of their concerns are based on the manner in which the Department has been requiring compliance with the existing rule, and the uncertainty regarding the manner in which the Department will require compliance with the proposed Rules. As discussed above, the proposed Rules do not contain any specific standards or guidance on how the access requirements are to be met. We believe the language of the proposed Rules allow for some measure of flexibility in the way they are applied and give the Department the opportunity to apply the Rule in a manner that strikes an appropriate balance between marinas and private boat owners and the public’s right to access the lands and waters they occupy. The Department should rely on that flexibility to apply the Rules in a manner that provides the public with the greatest access to and enjoyment of Public Trust resources while taking into account the unique property features, size, location and configuration of the marinas.

(d) Many of the Public's Complaints are based on Misinterpretations of the Rules

Collectively, we attended all three of the public hearings held by the Department, during which the public repeatedly raised many of the same objections to the Rules. It is important to note that many of the objections were based upon misinterpretations of the specific requirements of the Rules. Examples are as follows:

- **Objection** – How can private homeowners or lot owners who want to expand their existing homes or build on their lots be expected to pay for restroom facilities and parking spaces? (Trenton, December 1, 2006)
Response – There is no parking requirement unless the expansion or construction will reduce existing on-street or off-street parking that is already used by the public for access to the waterfront. N.J.A.C. 7:7E-8.11(j). There are no restroom facility requirements for such development.
- **Objection** – The public access requirements will result in the “big boxing” or “Walmarting” of our beaches by imposing rigid, cookie-cutter requirements across the State without taking into account the differences in each community. (Trenton, December 1, 2006; Stockton State College, December 4, 2006)
Response – The Rules are not as rigid or cookie-cutter as has been implied. Specifically, they do not impose a requisite number of parking spaces, such as a set number of spaces for every square mile of beach. Instead, they require that the municipality 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.” N.J.A.C. 7:7E-8.11(p)(7)(v). This same provision allows for alternative means of providing adequate parking, such as remote/offsite parking with shuttle service, and, when all possibilities have been exhausted, a reduction in the number of spaces. Similarly, the distances between each restroom and their distance from each municipal boundary can be increased in proportion to a decrease in the distance that the restrooms are located from the landward edge of the beach. N.J.A.C. 7:7E-8A.2(c).
- **Objection** – The minimum of ¼ mile between each restroom is excessive and unnecessary. (Trenton, December 1, 2006; Stockton State College, December 4, 2006)
Response – The Rules do not require that a restroom be located every ¼ mile. Instead, they require that there is at least one restroom facility every ½ mile within the municipality. N.J.A.C. 7:7E-8A.2(c). They also require that a restroom facility shall be located within ¼ mile of each municipal boundary and that each restroom facility shall be located within ¼ mile of the landward edge of the beach. The ½ mile distance between each restroom and the ¼ mile distance from each municipal boundary can be increased in proportion to a decrease in the distance the restrooms are located from the landward edge of the beach, provided

the average interval between restrooms is ½ mile and that, in no case is the interval between restrooms greater than 5/8 of a mile.

- **Objection** – The Rules do not take into account the fact that our town already provides public accessways, parking and restrooms. (Trenton, December 1, 2006; Stockton State College, December 4, 2006)

Response – This assertion is also incorrect. The Rules require that each municipality prepare and submit to the Department a draft Public Access Plan demonstrating the manner in which the public access requirements will be met. N.J.A.C. 7:7E-(p)(1). The Rules specifically require that, as part of this demonstration, each municipality identify in its Public Access Plan all existing public accessways, public restrooms and parking. N.J.A.C. 7:7E-8A.2(b)(1)(ii), -8A.2(c)(2)(i) and -8A.2(d)(3).

- **Objection** – The Rules prohibit towns from including the cost of the public access requirements in their beach fees. (Stockton State College, December 4, 2006).

Response – To the contrary, the Rules state that a fee may be charged for the use of bathing and recreational facilities and safeguards, including toilets and parking, at publicly or privately owned beach or waterfront areas. N.J.A.C. 7:7E-8.11(m).

9. Specific Clarifications of the Proposed Public Access Rules

In summary, based upon the comments set forth above, we request that the following clarifications to the proposed Public Access Rules be made. To the extent that the Department determines that any of the following suggestions go beyond the realm of clarifications and could therefore not be implemented without re-noticing the proposed Rules, we request that the Department instead consider any such suggestions outside of the proposed Rules as a request for a separate rule-making procedure.

- Clarify the Public Trust Rights rule at N.J.A.C. 7:7E-8.11(p) to state the Department's intent that the public access requirements apply to beach nourishment projects that have already commenced.
- Amend the Public Trust Rights rule to include other publicly funded projects in subsection 8.11(q), subjecting such projects to the same public access requirements as shore protection and beach nourishment projects.
- Incorporate scuba diving in the recognized recreational uses for public trust lands set forth in N.J.A.C. 7:7-1.3, N.J.A.C. 7:7E-3.50 and N.J.A.C. 7:7E-8.11(a).
- Amend the Public Trust Rights rule at N.J.A.C. 7:7E-8.11(d) to include a new subparagraph 3 that states:

Subsection (p) below contains additional public accessway and public access area requirements for municipalities that participate in Shore Protection Program funding. Subsection (q) below contains additional public accessway and public access area requirements for municipalities, counties and nonprofits that receive Green Acres funding. All other development shall provide the public accessways and public access areas prior to the commencement of project construction.

- Amend the Public Trust Rights rule at N.J.A.C. 7:7E-8.11(f)(1) to add language requiring that a public hearing is held each time a request is made to limit public access under this provision and to require that, prior to the public hearing, the public has had access to and an opportunity to review the documentation of the alleged unique circumstances that threaten public safety and warrant such closure.
- Amend the Public Trust Rights rule at N.J.A.C. 7:7E-8.11(f)(3) to add language requiring that a public hearing is held each time a request is made to limit public access under this provision and to require that, prior to the public hearing, the public has had access to and an opportunity to review the basis for the determination that public access is not practicable, the proposed equivalent public access on site or, if applicable, the basis for the determination that equivalent on-site public access is not practicable and a description of the proposed equivalent off-site public access.
- Amend the Public Trust Rights rule at N.J.A.C. 7:7E-8.11 (f)(6) to remove the exception stating public access is not required for the development of a single family home, duplex, associated accessory development or shore protection structure on sites adjacent to bays or tidal rivers other than the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and their shores.
- Amend the Public Trust Rights rule at N.J.A.C. 7:7E-8.11(f)(7) and N.J.A.C. (f)(5) to remove the exceptions stating public access can be modified (lessened) for the development of a two or three unit residential unit, associated accessory development or shore protection structure on bays and tidal rivers other than the Atlantic Ocean, Sandy Hook Bay, Raritan Bay, the Arthur Kill, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, and select portions of the Kill Van Kull, the Delaware River, the Cohansey River and the Maurice River.
- Amend the Coastal Permit Program Rules “Definitions”, N.J.A.C. 7:7-1.3; the New Lands Subject to the Public Trust Rights rule at N.J.A.C. 7:7E-3.50(a) and 7:7E-3.50(e); and the Public Trust Rights rule at N.J.A.C. 7:7E-8.11(r) to include the following statement:

- “The Department recognizes that the rights of the public under the Public Trust Doctrine are inalienable and that the incorporation of these common-law principles into the Coastal Permit Program Rules and the Coastal Zone Management Rules in no way diminishes or relinquishes any of those rights.”

Respectfully submitted,

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Policy Advocate
American Littoral Society

For:

American Littoral Society

Citizens Right to Access Beaches (C.R.A.B.)

Cohansey Area River Preservation

Divers Anonymous Dive Club of Clifton, New Jersey

Hackensack Riverkeeper

New Jersey Environmental Lobby

New York/New Jersey Baykeeper

Raritan Riverkeeper

Sierra Club, New Jersey Chapter

Surfers' Environmental Alliance (SEA)