

NEW JERSEY'S PROPOSED PUBLIC ACCESS REGULATIONS AND THE PUBLIC TRUST DOCTRINE: BALANCING PUBLIC RIGHTS OF ACCESS & USE WITH PRIVATE WATERFRONT DEVELOPMENT

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In November of 2006, encouraged by recent judicial expansion of the Public Trust Doctrine, the New Jersey Department of Environmental Protection proposed significant amendments to the public access regulations promulgated under the State's Coastal Zone Management Act. The Public Trust Doctrine is a common law principle that recognizes that the public has particular inalienable rights to certain natural resources. As reiterated in the recent State Supreme Court decision of Raleigh Avenue v. Atlantis, 185 N.J. 40 (2005), New Jersey's courts have acknowledged the deep roots of the Public Trust Doctrine as one of the rights of a free citizenry that the American people inherited after gaining independence from English rule. These public trust resources include but are not limited to tidal waterways, the underlying submerged lands and the shore seaward of the mean high water line, whether owned by a public, quasi-public or private entity. The public use thereof extends to traditional activities such as navigation and fishing, but also to recreational uses such as swimming, walking, sunbathing, bird watching, kayaking, and surfing.

The current Public Access to the Waterfront Rule, N.J.A.C. 7:7E-8.11, requires that coastal development adjacent to coastal waters provide permanent perpendicular and linear access to the waterfront "to the maximum extent practical," and "discourages" development that limits public access and the diversity of the waterfront experiences. In light of the constant development pressures threatening to reduce the public's access to the waters and shores protected by the Public Trust Doctrine, the proposed amendments attempt to ensure that the public's rights continue to be protected and that improvements are accomplished, such as assuring that parking and restroom facilities are available, to provide families and others a realistic and meaningful opportunity to enjoy the public's resources.

Under the Department's proposal, the existing Public Access to the Waterfront Rule is being repealed, and replaced with a new regulation, N.J.A.C. 7:7E-8.11, the Public Trust Rights Rule. The new rule strengthens the Department's existing public access requirements and sets forth specific conditions for certain tidal waterways. Additionally, because these lands and waters are so naturally valuable and important for human use, the Department proposed a new special area rule, N.J.A.C. 7:7E-3.50, Lands and Waters Subject to Public Trust Rights, that would protect tidal waterways and their shores and ensure that public access to these lands is provided. Moreover, the Department proposed a new subchapter, N.J.A.C. 7:E-8A, Information Required to Demonstrate Compliance with the Public Trust Rights Rule: Conservation Restrictions and Public Access Instruments, which outlines the information that permit applicants must submit to demonstrate compliance with the strengthened standards of the rule.

According to the proposed Public Trust Rights Rule, public trust rights include perpendicular and linear public access, which is the ability of the public to pass physically and visually to, from and along lands and waters subject to public trust rights, and to use these lands and waters for a variety of activities as outlined above. The rule requires that these accessways shall be permanently dedicated for public use through the recording of a Department-approved conservation restriction. Reasonable, convenient and safe accessway conditions are necessary for the public to reach and use tidal waterways and their shores. Therefore, in certain circumstances, particularly where public funds are invested in acquisition, shore protection projects or water quality monitoring, the new rules require informative public access signage, adequate restroom facilities, sufficient public parking and barrier free access ramps to assure that the taxpaying public has the right to use these protected resources.

Under the proposed amendments, coastal general permits for the construction of support facilities at legally existing and operating marinas, N.J.A.C. 7:7-7.13, subject to the development standards of the Resort and Recreational Use Rule, N.J.A.C. 7:7E-7.3(d), must comply with the proposed new Public Trust Rights Rule and the Lands and Waters Subject to Public Trust Rights special area rule. To demonstrate compliance with these rules, the proposal requires an applicant to identify on the site plan all existing and proposed public access areas and public accessways to tidal waterways and their shores on the site. While these public accessway requirements do not contain all of the specific language of the existing Hudson Waterfront Rule, N.J.A.C. 7:7E-3.48, the proposed rules do include even stricter, more definite standards for waters in densely developed urban waterfronts, such as the Delaware, Passaic and Raritan Rivers, including a 16' wide public accessway from the landward edge to the water's edge on all developed non-industrial piers and docks.

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

In New Jersey, proposed rule amendments are subject to a 60-day public comment period. The public comment period expired on January 6, 2007, at which time the Department had received nearly six hundred letters on behalf of thousands of citizens, both supporters and opponents alike. The Marine Trades Association ("MTA") of New Jersey, a non-profit organization comprised of over 300 marine-related businesses dedicated to promoting and protecting the marine industry, submitted opposition to several of the proposed public access provisions. The MTA contends that the proposed regulations undermine the marinas' ability to reasonably control and manage their properties, and constitutes a regulatory taking of property from small businesses, as public perpendicular and linear access to the waterfront creates a new entitlement to the detriment of the rights of marina owners, operators and customers. Moreover, the MTA is concerned with security and liability; it claims that the universal approach of the proposed rules does not take into account the unique characteristics of many marinas, and will

require many to reduce their available land for public parking and other uses in order to obtain necessary permits for dredging and repair activities.

The Department is reviewing these and all other public comments and intends to adopt some form of the proposed rules in the fall of 2007. Balancing the rights of working waterfront operators with the public right to access and use the shores of all tidal waterways under the Public Trust Doctrine is a tall but necessary task to properly protect New Jersey's premier public assets.