

**CHAPTER 7E**  
**COASTAL ZONE MANAGEMENT**

**Authority**

N.J.S.A. 12:5-3, 13:1D-9, 13:1D-29 et seq.,  
13:9A-1 et seq., and 13:19-1 et seq.

**Source and Effective Date**

R.2003 d.60, effective January 7, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

**Chapter Expiration Date**

In accordance with N.J.S.A. 52:14B-5.1b, Chapter 7E, Coastal Zone Management, expires on July 7, 2013. See: 43 N.J.R. 1203(a).

**Chapter Historical Note**

Chapter 7E, Coastal Zone Management, was adopted as R.1978 d.292, effective September 28, 1978. See: 10 N.J.R. 184(a), 10 N.J.R. 384(a).

Public Notice: Federal ruling on N.J.A.C. 7:7E. See: 14 N.J.R. 1467(b).

Pursuant to Executive Order No. 66(1978), Chapter 7E, Coastal Zone Management, was readopted as R.1985 d.422, effective July 24, 1985. See: 17 N.J.R. 1465(a), 17 N.J.R. 1797(c), 17 N.J.R. 2021(a).

Pursuant to Executive Order No. 66(1978), Chapter 7E, Coastal Zone Management, was readopted as R.1990 d.413, effective July 24, 1990. See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Public Notice: Notice of Routine Program Implementation. See: 25 N.J.R. 1010(a).

Subchapter 3A, Standards for Beach and Dune Activities, Subchapter 3B, Information Required in Wetland Mitigation Proposals, and Subchapter 3C, Assessing Impacts to Endangered and Threatened Wildlife Species in Environmental Impact Assessments, were adopted as New Rules by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994). See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Appendix to Chapter 7E: Figures 1 through 16 were adopted as a part of R.1994 d.380 and form the Appendix to N.J.A.C. 7:7E. The Figures are not reproduced in this chapter, but can be reviewed by contacting the Office of Administrative Law, Rules and Publications, PO Box 301, Trenton, NJ 08625-0301, or the Department of Environmental Protection.

Pursuant to Executive Order No. 66(1978), Chapter 7E, Coastal Zone Management, was readopted as R.1995 d.405, effective June 23, 1995. See: 27 N.J.R. 417(a), 27 N.J.R. 2738(a).

Notice of Routine Program Change. See: 30 N.J.R. 2087(a), 30 N.J.R. 2780(b), 30 N.J.R. 4284(a).

Subchapter 5A, Impervious Cover Limits and Vegetative Cover Percentages in the Upland Waterfront Development Area; Subchapter 5B, Impervious Cover Limits and Vegetative Cover Percentages in the CAFRA Area, were adopted as R.2000 d.45, effective February 7, 2000. See: 31 N.J.R. 2042(a), 32 N.J.R. 503(a).

The expiration date of Chapter 7E, Coastal Zone Management, was extended by gubernatorial directive from June 23, 2000 to March 31, 2001. See: 32 N.J.R. 2591(c).

The expiration date of Chapter 7E, Coastal Zone Management, was extended by gubernatorial directive from March 31, 2001 to March 31, 2002. See: 33 N.J.R. 1370(a).

The expiration date of Chapter 7E, Coastal Zone Management, was extended by gubernatorial directive from September 27, 2002 to January 7, 2003. See: 34 N.J.R. 3641(a).

Chapter 7E, Coastal Zone Management, was readopted as R.2003 d.60, effective January 7, 2003. As part of R.2003 d.60, Subchapter 2, Location, Use and Resource Rules, is repealed, effective February 3, 2003. See: Source and Effective Date. See, also, section annotations.

Public Notice: Routine Program Change for Coastal Management Program. See: 35 N.J.R. 4917(a).

Public Notice: Routine Program Change for Coastal Management Program. See: 36 N.J.R. 3304(b).

Public Notice: Coastal Management Office: determination on routine program change to the Coastal Management Program. See: 38 N.J.R. 1587(a).

Subchapter 8A, Information Required to Demonstrate Compliance with the Public Trust Rights Rule, N.J.A.C. 7:7E-8.11; Conservation Restrictions and Public Access Instruments, was adopted as new rules by R.2007 d.374, effective December 17, 2007. See: 38 N.J.R. 4570(a), 39 N.J.R. 5222(a).

Public Notice: Coastal Management Office: notice of routine program change to the Coastal Management Program. See: 41 N.J.R. 1272(b).

In accordance with N.J.S.A. 52:14B-5.1d, the expiration date of Chapter 7E, Coastal Zone Management, was extended by gubernatorial directive from January 7, 2008 to July 7, 2009. See: 40 N.J.R. 781(b).

In accordance with N.J.S.A. 52:14B-5.1d, the expiration date of Chapter 7E, Coastal Zone Management, was extended by gubernatorial directive from July 7, 2009 to July 7, 2010. See: 41 N.J.R. 2894(a).

In accordance with N.J.S.A. 52:14B-5.1d, the expiration date of Chapter 7E, Coastal Zone Management, was extended by gubernatorial directive from July 7, 2010 to July 7, 2011. See: 42 N.J.R. 468(a).

Public Notice: Plan Endorsement. See: 42 N.J.R. 523(a).

Petition for Rulemaking. See: 42 N.J.R. 2277(a), 2332(a), 2992(a), 2992(b).

Public Notice: Routine Program Changes for Coastal Management Program. See: 42 N.J.R. 2638(a).

Petition for Rulemaking. See: 43 N.J.R. 451(a).

Public Notice: Determination on Routine Program Changes for Coastal Management Program. See: 43 N.J.R. 681(a).

Subchapter 8A, Information Required to Demonstrate Compliance with the Public Trust Rights Rule, N.J.A.C. 7:7E-8.11; Conservation Restrictions and Public Access Instruments, was repealed by R.2012 d.182, effective November 5, 2012. See: 43 N.J.R. 772(a), 44 N.J.R. 614(a), 44 N.J.R. 2559(a).

**Case Notes**

Department of Environmental Protection (DEP) must make findings under the standards in the statute governing the issuance of permits for development in coastal zones, even if DEP finds that a Coastal Area Facility Review Act (CAFRA) permit application complies with its specific regulations. In the Matter of the Protest of Coastal Permit Program Rules, 807 A.2d 198, 354 N.J.Super. 293.

Department of Environmental Protection (DEP) was required to amend its implementing rules with respect to Coastal Area Facility Review Act (CAFRA) to set forth requirement that it make findings under standards set forth in CAFRA prior to issuing permit for development thereunder. In the Matter of the Protest of Coastal Permit Program Rules, 807 A.2d 198, 354 N.J.Super. 293.

Department of Environmental Protection (DEP) did not invalidate Coastal Zone management (CZM) rules by giving regulatory effect to state development and redevelopment plan by presuming that boundaries established by state planning commission would function as boundaries pursuant to Coastal Area Facility Review Act (CAFRA), and then by using those boundaries to establish impervious cover limits in CZM rules.

In the Matter of the Protest of Coastal Permit Program Rules, 807 A.2d 198, 354 N.J.Super. 293.

Coastal zone management rules preempted township ordinance governing placement and length of docks. *Tumino v. Long Beach Township*, 319 N.J.Super. 514, 725 A.2d 1173 (N.J.Super.A.D. 1999).

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Public Notice: Coastal Management Office: determination on routine program change to the Coastal Management Program.  
See: 41 N.J.R. 2343(c).

#### Case Notes

Definition of "impervious cover" established by Department of Environmental Protection (DEP) in connection with subchapters of Coastal Zone Management (CZM) rules pertaining to development intensity was not arbitrary or otherwise impermissible, despite its inclusion in "impervious cover" of types of cover described in earlier rules as "permeable cover," where intervening rules removed distinction between impervious and permeable cover, establishing single permissible development intensity regardless of which form of cover was utilized, and where change in definition was supported by DEP's experience with permeable paving. In the Matter of the Protest of Coastal Permit Program Rules, 807 A.2d 198, 354 N.J.Super. 293.

Board's recognition of impact of zoning variance on upland property eliminated the need for reconsideration. *Anfuso v. Seeley*, 243 N.J.Super. 349, 579 A.2d 817 (A.D.1990).

Nonaggrieved third parties lack statutory right to administrative hearing to challenge coastal development. N.J.S.A. 12:5-1 et seq., 13:19-1 et seq. *Spalt v. New Jersey Dept. of Environmental Protection*, 237 N.J.Super. 206, 567 A.2d 264 (A.D.1989) certification denied 122 N.J. 140, 584 A.2d 213.

Fears of damage to generalized property rights were insufficient to entitle residents to adjudicatory hearing regarding coastal development. N.J.S.A. 12:5-1 et seq., 13:19-1 et seq., 52:14B-2(b), 52:14B-9. *Spalt v. New Jersey Dept. of Environmental Protection*, 237 N.J.Super. 206, 567 A.2d 264 (A.D.1989) certification denied 122 N.J. 140, 584 A.2d 213.

State's interest in waterfront development was rational basis for depriving fisherman of the right to work at that particular site. N.J.S.A. 12:5-1 et seq., 13:19-1 et seq., 52:14B-2(b), 52:14B-9. *Spalt v. New Jersey Dept. of Environmental Protection*, 237 N.J.Super. 206, 567 A.2d 264 (A.D.1989) certification denied 122 N.J. 140, 584 A.2d 213.

Conditional approval of construction permit for large scale development, permitting no construction until statutory standards satisfied, improper as not authorized by enabling legislation and as being a decision deficient in essential findings (citing former N.J.A.C. 7:7D-2.3). *Crema v. Dept. of Environmental Protection*, 182 N.J.Super. 445, 442 A.2d 630 (App.Div.1982), affirmed as modified 94 N.J. 286, 463 A.2d 910 (1983).

Record established that landowner was entitled to waterfront development permit to bulkhead 100 foot lot and relocate drainage pipe. *Baron v. New Jersey Department of Environmental Protection*, 92 N.J.A.R.2d (EPE) 18.

#### 7:7E-1.6 Mitigation

(a) Mitigation shall be selectively considered on a case-by-case basis as compensation for the loss or degradation of a particular natural resource. In general, mitigation should be similar in type and location to the resource disturbed or destroyed, that is, replacement in kind within the same watershed. The Department will, however, consider proposals for mitigation that differ in type and/or location from the disturbed or destroyed resource provided the mitigation would provide a major contribution to meeting the coastal goals and supplemental policies at N.J.A.C. 7:7E-1.1(c). Requirements for mitigation of a particular resource are addressed more specifically in each applicable Special Area Rules (N.J.A.C. 7:7E-3.1 through 3.49).

(b) Rationale: This rule is intended to conserve those physical and biological values described under applicable Special Area rules, while allowing development consistent with acceptability criteria. Use of this mitigation rule will result in real gain, or no net loss of habitat productivity or resource value.

New Rule by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Amended by R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Text at (a) and (b) deleted; provisions moved to 3.27 and 3.15.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

In (a), substituted "Department" for "Program" in the second sentence and substituted "3.9" for "3.48" in the third sentence.

Amended by R.2004 d.43, effective January 20, 2004.

See: 35 N.J.R. 2801(a), 36 N.J.R. 442(a).

In (a), amended N.J.A.C. references.

Amended by R.2008 d.82, effective April 7, 2008.

See: 39 N.J.R. 725(a), 40 N.J.R. 1836(a).

In (a), substituted "coastal goals and supplemental policies at N.J.A.C. 7:7E-1.1(c)" for "basic coastal policies (N.J.A.C. 7:7E-1.5(a)1)".

Public Notice: Coastal Management Office: determination on routine program change to the Coastal Management Program.

See: 41 N.J.R. 2343(c).

#### 7:7E-1.7 Correspondence with the Department

Correspondence related to this chapter may be submitted to the Department at the following address:

Land Use Regulation Program  
New Jersey Department of Environmental  
Protection  
501 E. State Street  
PO Box 439  
Trenton, New Jersey 08625-0439

New Rule, R.2000 d.45, effective February 7, 2000.

See: 31 N.J.R. 2042(a), 32 N.J.R. 503(a).

#### 7:7E-1.8 Definitions

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

"Acceptable" means that a proposed use of coastal resources is likely to be approved.

"Action," "activity," "project," "proposal" or "use" are used interchangeably to describe the proposed use of coastal resources that is under scrutiny using the Coastal Zone Management rules.

"Amusement pier" means an elevated, pile-supported structure located on a beach and/or tidal water, seaward of a bulkhead or boardwalk, and perpendicular to the mean high water line, on which amusements are located. For purposes of this definition, "amusements" includes rides, games of skill or chance for prizes other than cash payoffs, vendors of toys

and/or other merchandise. "Amusements" also means bar and restaurant establishments and entertainment venues such as stage and band shells and associated seating areas. "Amusements" do not include games for cash payoffs.

"Area": See definition for "site" below.

"Bulkhead" means a vertical shore protection structure installed to withstand the forces of waves and currents. A bulkhead is not a "revetment" or a "gabion" as defined elsewhere in this section.

"CAFRA area" means the "coastal area" defined in the Coastal Area Facility Review Act at N.J.S.A. 13:19-4.

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

"Commercial development" means a development designed, constructed or intended to accommodate commercial, retail or office uses. "Commercial development" shall include, but need not be limited to, any establishment used for the wholesale or retail sale of food or other merchandise, or any establishment used for providing professional, financial or other commercial services.

"Conditionally acceptable" means that a proposed use of coastal resources is likely to be acceptable, provided that conditions specified in the rules are satisfied.

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

1. Construction or placing of buildings, roads, signs, billboards or other advertising, or other structures on or above the ground;
2. Dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste or unsightly or offensive materials;
3. Removal or destruction of trees, shrubs or other vegetation;
4. Excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance;

5. Surface use except for the purposes permitting the land or water area to remain predominantly in its natural condition;

6. Activities detrimental to drainage, flood control, water conservation, erosion control or soil conservation, or fish and wildlife habitat preservation; and

7. Other acts or uses detrimental to the retention of land or water areas according to the purposes of this chapter.

"Critical infrastructure" means the same as "homeland security facility."

"Development" means any activity for which a Wetlands Act of 1970 Permit, Waterfront Development Permit, or Federal consistency determination is required, including site preparation and clearing. Development, for an application under the CAFRA, means the construction, relocation, or enlargement of any building or structure and all site preparation therefor, the grading, excavation or filling on beaches and dunes, and shall include residential development, commercial development, industrial development and public development. Development under CAFRA and the Waterfront Development Law does not include repairs or maintenance such as replacing siding, windows or roofs, unless such repairs or maintenance are associated with enlargements which are not exempt under CAFRA pursuant to N.J.A.C. 7:7-2.1(c)4 or the Waterfront Development Law pursuant to N.J.A.C. 7:7-2.3(d). Development under CAFRA does not include debris removal or cleanup provided such activities do not involve excavation, grading, or filling on beaches and dunes.

"Discouraged" means that a proposed use of coastal resources is likely to be rejected or denied as the Department has determined that such uses of coastal resources should be deterred. In cases where the Department considers the proposed use to be in the public interest despite its discouraged status, the Department may permit the use provided that mitigating or compensating measures can be taken so that there is a net gain in quality and quantity of the coastal resource of concern.

"Dwelling unit" means a house, townhouse, apartment, cooperative, condominium, cabana, hotel or motel room, a patient/client room in a hospital, nursing home or other residential institution, mobile home, campsite for a tent or recreational vehicle, floating home, or any other habitable structure of similar size and potential environmental impact, except that dwelling unit shall not mean a vessel as defined in section 2 of P.L. 1962, c.73 (N.J.S.A. 12:7-34.37).

"11-digit hydrologic unit code area" means an area within which water drains to a particular receiving surface water body, which area is identified by an 11-digit hydrologic unit boundary designation, as shown on the map included in the United States Geological Survey, Water Resources Investigations Report 95-4134, 1995, entitled "Development of a 14-digit Hydrologic Coding Scheme and Boundary Data Set for New Jersey." The HUC codes of New Jersey can be down-

loaded from *www.njgeodata.state.nj.us*. The HUC 11 data is entitled "subwatersheds." Software designed for use with Geographic Information Systems (GIS) will be required to view that downloaded data.

"Encouraged" means that a proposed use of coastal resources is acceptable and is a use, by its purpose, location, design, and effect, that the Department has determined should be fostered and supported in the coastal zone.

"Footprint of development" means the vertical projection of the horizontal plane of the exterior of all exterior walls of a structure.

"Gabion" means a shore protection structure that is comprised of wire mesh basket(s) or mattress(es) filled with rock and used in multiples as a structural unit installed to withstand the forces of waves and currents. A gabion is not a "bulkhead" or a "revetment" as defined elsewhere in this section.

"Habitable structure" means a structure that is able to receive a certificate of occupancy from the municipal construction code official, or can be demonstrated to have been legally occupied as a dwelling unit for the most recent five years.

"Homeland security facility" means any facility deemed by the Department in consultation with the New Jersey Office of Homeland Security and Preparedness or the United States Department of Homeland Security to be either critical in nature or a key resource. These facilities may include, but are not limited to, airports and military facilities, certain transportation infrastructure, and certain chemical or energy facilities and utilities, marine terminal or transfer facilities, and freight or passenger rail lines.

"Impervious cover" means any structure, surface, or improvement that reduces and/or prevents absorption of stormwater into land. Porous paving, paver blocks, gravel, crushed stone, crushed shell, elevated structures (including boardwalks), and other similar structures, surfaces, or improvements are considered impervious cover. Grass, lawns, or any other vegetation are not considered impervious cover.

"Industrial development" means a development that involves a manufacturing or industrial process, and shall include, but is not limited to, electric power production, food and food by-product processing, paper production, agricultural production, chemical processes, storage facilities, metallurgical processes, mining and excavation processes, and processes using mineral products.

"Linear development" means a development with the basic function of connecting two points, such as a road, drive, public walkway, railroad, sewerage pipe, stormwater management pipe, gas pipeline, water pipeline, or electric, telephone or other transmission line.

"Location": See definition for "site" below.

"Major commercial development" means a commercial development with a cumulative building area of greater than 100,000 square feet.

"Mean high water" (MHW) is a tidal datum that is the arithmetic mean of the high water heights observed over a specific 19-year Metonic cycle (the National Tidal Datum Epoch). For the New Jersey coast, the two high waters of each tidal day are included in the mean. This datum is available from the Department, Bureau of Tidelands Management.

"Mean high water line" (MHWL) is the intersection of the land with the water surface at the elevation of mean high water. The elevation of mean high water varies along the oceanfront and the tidal bays and streams in the coastal zone.

1. For practical purposes, the mean high water line is often referred to as the "ordinary" high water line, which is typically identified as the limit of wet sand or debris line on a beach, or by a stain line on a bulkhead or piling. However, for the purpose of establishing regulatory jurisdiction pursuant to the Coastal Area Facility Review Act (CAFRA) and the Waterfront Development Law, the surveyed mean high water elevation will be used.

"Minor commercial development" means a commercial development with a cumulative building area of 100,000 square feet or less.

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

"Navigable" means deep enough and wide enough to afford passage to watercraft, including canoes, at high tide. Navigability will also apply to areas upstream of obstructions (for example, culverts), provided that the water course is still tidally influenced in the upstream area.

"Parcel" means the totality of all contiguous lots under common ownership on April 4, 2011.

"Program" means the Department of Environmental Protection's Land Use Regulation Program.

"Prohibited" means that a proposed use of coastal resources is unacceptable and that the Department will use its legal authority to reject or deny the proposal.

"Public development" means a solid waste facility, including incinerators and landfills, wastewater treatment plant, public highway, airport including single or multi-air strips, an above or underground pipeline designed to transport petroleum, natural gas, or sanitary sewage, and a public facility, and shall not mean a seasonal or temporary structure related to the tourism industry, an educational facility or

power lines. "Public development" does not have to be publicly funded or operated.

"Reconstruction" means the repair or replacement of a building, structure or other parts of a development, provided that such repair or replacement does not increase or change the location of the footprint of the preexisting development, does not increase the area covered by buildings and/or asphalt or concrete pavement and does not result in a change in the use of the development. Reconstruction of docks and piers means repair or replacement in the same location and size of the preexisting structure. Reconstruction does not include repairs or maintenance, such as replacing siding, windows or roofs, unless such repairs or maintenance are associated with enlargements which are not exempt pursuant to N.J.A.C. 7:7-2.1(c)4.

"Redevelopment" means the development of a previously developed site that has been inactive, underutilized, or abandoned for five years or less.

"Residential development" means a development that provides one or more dwelling units.

"Revetment" means a sloped shore protection structure consisting of a facing made of stone, placed on a bank, bluff, or shoreline to withstand the forces of waves and currents. A revetment is not a "gabion" or "bulkhead" as defined elsewhere in this section.

"Site" means the lot or lots upon which a proposed development is to be constructed.

"Spring high water line" is the intersection of the land with the water surface at the elevation of spring high tide.

"Spring tide" means a tide that occurs at or near the time of new and full moon and which rises highest (spring high tide) and falls lowest (spring low tide) from the mean level.

"Water dependent" means development that cannot physically function without direct access to the body of water along which it is proposed. Uses, or portions of uses, that can function on sites not adjacent to the water are not considered water dependent regardless of the economic advantages that may be gained from a waterfront location. Maritime activity, commercial fishing, public waterfront recreation and marinas are examples of water dependent uses, but only the portion of the development requiring direct access to the water is water dependent. The test for water dependency shall assess both the need of the proposed use for access to the water and the capacity of the proposed water body to satisfy the requirements and absorb the impacts of the proposed use. A proposed use will not be considered water dependent if either the use can function away from the water or if the water body proposed is unsuitable for the use. For example, in a maritime operation, a dock or quay and associated unloading area would be water dependent, but an associated warehouse would not be water dependent.

1. Examples of water dependent uses include: docks, piers, marina activities requiring access to the water, such as commissioning and decommissioning new and used boats, boat repairs and short term parking for boaters, storage for boats which are too large to be feasibly transported by car trailer (generally greater than 24 feet), rack systems for boat storage, industries such as fish processing plants and other commercial fishing operations, port activities requiring the loading and unloading of vessels, and water-oriented recreation.

2. Water dependent uses exclude, for example: housing, hotels, motels, restaurants, warehouses, manufacturing facilities (except for those which receive and quickly process raw materials by ship), dry boat storage for boats that can be transported by car trailer, long-term parking, parking for persons not participating in a water-dependent activity, boat sales, automobile junk yards, and non-water oriented recreation such as roller rinks and racquetball courts.

"Water oriented" means development that serves the general public and derives economic benefit from direct access to the water body along which it is proposed. (Industrial uses need not serve the general public.) A hotel or restaurant, since it serves the public, could be water-oriented if it takes full advantage of a waterfront location. An assembly plant could be water oriented if overland transportation is possible but water-borne receipt of raw materials and shipment of finished products is economically advantageous. Housing is not water-oriented despite the economic premium placed on waterfront housing, because it only benefits those who can afford to buy or rent the housing units.

"Watershed management area" means an aggregation of the 11-digit hydrologic unit codes designated by the Department as a watershed management area and shown on the map entitled "New Jersey's Watersheds, Watershed Management Areas, and Water Regions," dated April 2000, as amended and supplemented. The map of watershed management areas may be obtained from the Department's Division of Watershed Management at (609) 984-0058, or may be viewed on the internet at [www.state.nj.us/dep/gis](http://www.state.nj.us/dep/gis).

New Rule, R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

Amended by R.2007 d.374, effective December 17, 2007.

See: 38 N.J.R. 4570(a), 39 N.J.R. 5222(a).

Rewrote definition "Coastal Permit"; and in the introductory paragraph of definition "Conservation restriction"; inserted "or for public access to tidal waterways and their shores".

Amended by R.2008 d.82, effective April 7, 2008.

See: 39 N.J.R. 725(a), 40 N.J.R. 1836(a).

Rewrote (a); and added definition "Footprint of development".

Public Notice: Coastal Management Office: determination on routine program change to the Coastal Management Program.

See: 41 N.J.R. 2343(c).

Petition for Rulemaking.

See: 42 N.J.R. 2332(a), 2992(a).

Petition for Rulemaking.

See: 43 N.J.R. 680(b).

Amended by R.2012 d.182, effective November 5, 2012.

See: 43 N.J.R. 772(a), 44 N.J.R. 614(a), 44 N.J.R. 2559(a).

Deleted designation (a); added definitions "Amusement pier", "Critical infrastructure", "Homeland security facility", "Industrial development", "Natural area", "Parcel", "Public development", "Redevelopment" and "Residential development"; and in definition "Dwelling unit", inserted a comma following "floating home" and inserted "other" preceding "habitable".

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SUBCHAPTER 2. (RESERVED)  
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SUBCHAPTER 3. SPECIAL AREAS

OFFICE OF ADMINISTRATIVE LAW NOTE: Rationale statements were filed as a part of these rules, but have not been reproduced in this subchapter. The rationale statements can be reviewed at the following office:

**7:7E-3.1 Purpose and scope**

(a) Special Areas are areas that are so naturally valuable, important for human use, hazardous, sensitive to impact, or particular in their planning requirements, as to merit focused attention and special management rules. This subchapter divides Special Areas into four categories:

1. Special Water Areas, N.J.A.C. 7:7E-3.2 through 3.15, extend landward to the spring high water line or the level of normal flow in non-tidal waters;

2. Special Water's Edge Areas, N.J.A.C. 7:7E-3.16 through 3.32, are divided into three subcategories depending on their location. Special Water's Edge Areas in (a)2i and ii below are found only next to tidal waters, while Coastwide Special Water's Edge Areas are found adjacent to tidal as well as non-tidal waters;

- i. Oceanfront, and Raritan and Delaware Bayfronts, N.J.A.C. 7:7E-3.16 through 3.19;
- ii. Barrier and Bay Islands, N.J.A.C. 7:7E-3.20 and 7:7E-3.21; and
- iii. Coastwide Special Water's Edge Areas, N.J.A.C. 7:7E-3.22 through 3.32;

3. Special Land Areas, N.J.A.C. 7:7E-3.33 through 3.35, generally are landward of the Special Water's Edge Areas; and

4. Coastwide Special Areas, N.J.A.C. 7:7E-3.36 through 3.49, may include Special Water Areas, Special Water's Edge Areas or Special Land Areas.

(b) All land or water areas, except certain Special Water's Edge Areas, are subject to either the General Land Area rules at N.J.A.C. 7:7E-5 and either N.J.A.C. 7:7E-5A or 5B or the General Water Area rules at N.J.A.C. 7:7E-4. In addition, certain land or water areas are subject to one or more Special Area rules. All Special Water's Edge Areas are subject to one or more Special Area rules. In some cases, a portion of a site is subject to both General Area rules and Special Area rules. Where the applicable General Area rules and Special Area rules conflict, the Special Area rules shall govern.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(a), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Coastal areas changed from 44 types to 45 types.  
Amended by R.1990 d.413, effective August 20, 1990.  
See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Coastal High Hazard Areas and Bay Islands added; water's edge areas regrouped geographically; References to Figley 1988 and 1989 fishing guides added.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2000 d.45, effective February 7, 2000.

See: 31 N.J.R. 2042(a), 32 N.J.R. 503(a).

Rewrote (b).

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

Rewrote (a).

### 7:7E-3.2 Shellfish habitat

(a) Shellfish habitat is defined as an estuarine bay or river bottom which has a history of production for hard clams (*Mercenaria mercenaria*), soft clams (*Mya arenaria*), eastern oysters (*Crassostrea virginica*), bay scallops (*Argopecten irradians*), or blue mussels (*Mytilus edulis*), or otherwise listed below in this section. A shellfish habitat area is defined as an area which meets one or more of the following criteria:

1. The area has a current shellfish density equal to or greater than 0.20 shellfish per square foot;

2. The area has a history of natural shellfish production according to data available to the New Jersey Bureau of Shellfisheries, or is depicted as having high or moderate commercial value in the Distribution of Shellfish Resources in Relation to the New Jersey Intracoastal Waterway (U.S. Department of the Interior, 1963), "Inventory of New Jersey's Estuarine Shellfish Resources" (Division of Fish, Game and Wildlife, Bureau of Shellfisheries, 1983-present); and/or the "Inventory of Delaware Bays Estuarine Shellfish Resources" (Division of Fish, Game and Wildlife, Bureau of Shellfisheries, 1993);

3. The area is designated by the State of New Jersey as a shellfish culture area as authorized by N.J.S.A. 50:1 et seq. Shellfish culture areas include estuarine areas presently leased by the State for shellfish aquaculture activities or hard clam relay, transplant and transfer as well as those areas suitable for future shellfish aquaculture development; or

4. The area is designated as productive at N.J.A.C. 7:25-24, Leasing of Atlantic and Delaware Bay Bottom for Aquaculture.

(b) Any area determined by the Department to be contaminated by toxins is excluded from this definition. The Final Short List, prepared by the Department pursuant to the Federal Clean Water Act 33 U.S.C.A. § 1313(c)(1), identifies these known contaminated areas. Also excluded from this definition are those sites for which the Department is presented with clear and convincing evidence that the sites lack the physical features necessary for the support of a shellfish population, excluding those waterways listed at N.J.A.C. 7:7E-7.3(d)10 and (j) below.

(c) The water located under any boat mooring facility (including docks and associated structures) is automatically condemned and reduced to "prohibited" status pursuant to N.J.A.C. 7:12-2.1(a)1ii. Development which would result in the destruction, condemnation (downgrading of the shellfish growing water classification) or contamination of shellfish habitat is prohibited, unless the proposed development is a dock, pier, or boat mooring constructed in accordance with (d)3 below.

1. The term "destruction" includes actions of filling to create fast land, overboard dumping or disposal of solids or spoils which would smother shellfish populations, or create unsuitable conditions for shellfish colonization or the creation of bottom depressions with anoxic conditions.

(d) Construction of a dock, pier or boat moorings in shellfish habitat is prohibited, except for the following:

1. Public fishing piers owned and controlled by a public agency for the sole purpose of providing access for fishing;

2. In waters which have been classified as prohibited for the purpose of harvesting shellfish; and

3. A single noncommercial dock, pier, or boat mooring associated with a single family dwelling provided the proposed dock, pier, or boat mooring meets the requirements at (d)3i through v below. If a lot has frontage on both a natural waterway and a man-made lagoon, as defined at N.J.A.C. 7:7-1.3, the dock, pier, or boat mooring shall be located within the lagoon, unless locating the dock, pier or boat mooring on the lagoon would not otherwise comply with the recreational docks and piers rule at N.J.A.C. 7:7E-4.5 or any other provisions of this chapter.

i. The proposed dock, pier, or boat mooring is:

(1) Constructed of non-polluting or other inert material, such as natural lumber or other untreated wood, concrete, plastic or vinyl; and

(2) Designed and constructed in a manner that reduces the size of the structure to limit the area of shellfish habitat condemned and reduces adverse impacts to the marine ecosystem to the extent practicable. Reduction of the area of shellfish habitat condemned and adverse impacts to the marine ecosystem may include, for example, adjustment of the dimensions and location of the proposed dock, pier, or boat mooring to reduce the total area covered by the structure while ensuring that the requirements of this chapter are met.

ii. Unless the Department determines that a different length dock or pier is appropriate in order to ensure that the requirements of this chapter are met, the dock or pier shall not extend beyond, and a boat mooring shall not be located beyond, a straight line drawn between the outermost end of decking of the nearest adjacent existing legal dock or pier to each side of the dock, pier or boat mooring, except:

(1) If the dock, pier, or boat mooring is associated with a lot that has frontage on both a man-made lagoon and a natural waterway and the dock, pier, or boat mooring is to be located on the natural waterway as required under (d)3 above, the dock or pier shall not extend beyond, or the boat mooring shall not be located beyond, the outermost end of decking of the nearest adjacent dock or pier on the natural waterway; or

(2) To meet the requirements of the submerged vegetation habitat rule at N.J.A.C. 7:7E-3.6, a dock or pier shall be extended to the minimum length necessary, or the boat mooring shall be located where necessary to ensure that at mean low water a minimum water depth of four feet is present in the designated slips of the dock, pier, or boat mooring;

iii. The dock, pier, or boat mooring shall have no more than two designated slips. Boats shall not be moored at any area other than the two boat slips designated in the Department permit and/or the plan approved under that permit;

iv. Only one dock, pier or boat mooring shall be constructed per buildable lot pursuant to this subsection. Where two or more lots have been assembled for the purpose of building a single family dwelling, only one dock, pier or boat mooring shall be constructed pursuant to this subsection;

v. No dredging shall be performed in conjunction with the construction or use of the dock, pier, or boat mooring; and

vi. Mitigation shall be performed in accordance with the following:

(1) A conservation restriction shall be placed on the subject property governing the construction or reconstruction of a shoreline protection structure, as follows:

(A) If the dock, pier or boat mooring is associated with an unbulkheaded shoreline, the conservation restriction shall prohibit the construction of a shoreline protection structure other than stone rip-rap or other similar sloped revetment; or

(B) If the dock, pier or boat mooring is associated with a previously bulkheaded shoreline, the conservation restriction shall prohibit replacement, reconstruction or rehabilitation of the bulkhead with anything other than non-polluting or other inert material; and

(2) A monetary contribution shall be provided to the Department's dedicated account for Shellfish Habitat Mitigation. The amount of each monetary contribution provided under this section shall be based upon the area of shellfish habitat condemned due to coverage by the structure and boat moorings, the documented shellfish density on the property, and the commercial value of the shellfish resource.

(e) New dredging (defined at N.J.A.C. 7:7E-4.7) within shellfish habitat is prohibited, except when it is necessary to maintain the use of public launching facilities (ramps) with 25 or more trailer parking spaces or marina facilities with 25 or more dockage units, consisting of either dry dock storage or wet slips. New dredging for existing marinas or for the expansion of such facilities is conditionally acceptable provided that:

1. The expanded portion of the marina, other than the access channel, will not be located within the shellfish habitat;

2. The marina provides on site restrooms, a marine sanitation disposal device and pumpout station; and

3. The width, depth and length of the to-be-dredged channel and boat basin are limited to the minimum dimensions needed to service the existing or expanded facilities.

(f) Maintenance dredging (defined at N.J.A.C. 7:7E4.6) within shellfish habitat is conditionally acceptable, provided the disturbance to shellfish habitat is minimized to the greatest extent possible.

(g) New dredging adjacent to shellfish habitat is discouraged in general, but may be conditionally acceptable if it can be demonstrated that the proposed dredging activities will not adversely affect shellfish habitat, population or harvest. If the Department determines dredging to be acceptable, dredging shall be managed pursuant to N.J.A.C. 7:7E-4.7 so as not to cause significant mortality of the shellfish due to increased turbidity and sedimentation, resuspension of toxic chemicals, or any other occurrence which will interfere with the natural functioning of the shellfish habitat.

(h) For the purpose of this rule all docks and piers, except public fishing piers defined in (d)1 above, are considered boat mooring facilities.

(i) Development required for national security for which there exists no other prudent and feasible alternative site is acceptable under this rule, provided that the shellfish resource is salvaged and mitigated pursuant to a plan approved in writing by the Department. The applicant is responsible for all the expenses of resource salvaging and mitigation. All such programs shall be coordinated with the appropriate shellfish management agency.

(j) N.J.A.C. 7:7E-7.3(d)10 shall also apply to development of boat mooring facilities of five or more slips on the Navesink, Shrewsbury, and Manasquan Rivers and St. George's Thorofare.

(k) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.

See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Substantially amended.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).  
Petition for Rulemaking.

See: 26 N.J.R. 4450(a), 27 N.J.R. 244(d), 27 N.J.R. 2629(b).

Public Notice: Petition for Rulemaking.

See: 27 N.J.R. 3634(c).

Public Notice: Shellfish habitat proposed interim policy; additional public meeting and extension of comment period.

See: 27 N.J.R. 4011(b).

Petition for Rulemaking.

See: 31 N.J.R. 4341(a), 32 N.J.R. 604(a).

Amended by R.2000 d.154, effective April 17, 2000.

See: 31 N.J.R. 749(a), 32 N.J.R. 1382(a).

In (c), added “, unless the proposed development is a dock, pier, or boat mooring constructed in accordance with (d)3 below” at the end of the introductory paragraph; and in (d), inserted a reference to piers in the introductory paragraph, and added 3.

Amended by R.2001 d.153, effective May 21, 2001.

See: 32 N.J.R. 1274(a), 33 N.J.R. 1581(a).

Rewrote (d).

Amended by R.2002 d.32, effective January 22, 2002.

See: 33 N.J.R. 1524(a), 34 N.J.R. 535(a).

In (d)3, rewrote i(1) and (2), inserted “in order to ensure that the requirements of this chapter are met” following “appropriate” in the introductory paragraph of ii, and added vi.

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

In (d)3, substituted “recreational docks and piers rule at N.J.A.C. 7:7E-4.5” for “standards relevant to recreational docks at N.J.A.C. 7:7E-4.2(e)”; in (e), (f) and (g), amended the N.J.A.C. references.

### Law Review and Journal Commentaries

Court Says Riparian Rules Don't Warrant Compensation. Matt Ackermann, 151 N.J.L.J. 792 (1998).

### Case Notes

Riparian grant from state to original owners of upland property did not create absolute and perpetual right to construct dock, free from all regulatory intervention, and thus subsequent owners did not have reasonable, investment-backed expectation that was destroyed by denial of permit to build dock, sufficient to effect regulatory taking. Karam v. State Dept. of Environmental Protection, 705 A.2d 1221, 308 N.J.Super. 225 (A.D. 1998).

Office of Administrative Law lacked jurisdiction over property owners' constitutional challenge to denial of waterfront development permit on grounds that proposed construction would conflict with shellfish habitat regulation. Rivkin v. Department of Environmental Protection, 96 N.J.A.R.2d (EPE) 353.

Waterfront development permit to construct dock was properly denied where proposed construction was to be located in shellfish habitat. Hedrick v. Department of Environmental Protection, 96 N.J.A.R.2d (EPE) 329.

Department of Environmental Protection must complete toxin study before permit for new waterfront development on Manasquan River may be issued. Nordell v. Department of Environmental Protection, 96 N.J.A.R.2d (EPE) 296.

Boat dock development in area where there existed no presently productive shellfish beds would be allowed. Carozza v. DEPE, 96 N.J.A.R.2d (EPE) 109.

Denial of application to construct dock and boat anchorages on shellfish habitat was not improper. Fahey v. Department of Environmental Protection, 95 N.J.A.R.2d (EPE) 148.

Application for permit to construct dock was properly denied given adverse impact on shallow aquatic environment. Mangel v. NJDEPE/LUR, 95 N.J.A.R.2d (EPE) 133.

Waterfront development permits were not issuable due to shellfish habitat regulations. Addiego v. Department of Environmental Energy and Protection, 95 N.J.A.R.2d (EPE) 112.

Construction of dock was not violative of regulations as amounting to a condemnation of currently productive shellfish beds. McCullough v. NJDEPE/LUR, 95 N.J.A.R.2d (EPE) 101.

Denial of petitioners' application for a waterfront development permit for the construction of a fixed pier and floating platform was appropriate. Caruso v. Department of Environmental Protection, 94 N.J.A.R.2d (EPE) 204.

Destruction of oyster beds precluded issuance of permit to rebuild dock on river. Brennenstuhl v. Department of Environmental Protection, 93 N.J.A.R.2d (EPE) 125.

### 7:7E-3.3 Surf clam areas

(a) Surf clam areas are coastal waters which can be demonstrated to support significant commercially harvestable quantities of surf clams (*Spisula solidissima*), or areas important for recruitment of surf clam stocks. This includes areas where fishing is prohibited for research sanctuary or conservation purposes by N.J.A.C. 7:2512.1(d)4. Surf clams are a marine fish and therefore are also subject to the marine fish and fisheries rule, N.J.A.C. 7:7E-8.2.

(b) Development which would result in the destruction, condemnation, or contamination of surf clam areas is prohibited except for the following:

1. Development that is of national interest provided:
  - i. There are no prudent and feasible alternative sites; and
  - ii. Impacts to the surf clam area are minimized.
2. Sand and gravel mining to obtain material for beach nourishment provided:
  - i. The beach nourishment project is in the public interest;
  - ii. There are no prudent and feasible alternative offshore borrow site that would result in less impact to marine fish and fisheries;
  - iii. The impacts to surf clam areas are minimized through the following:
    - (1) The beach nourishment project is designed to minimize the volume of sand borrowed from the surf clam area;
    - (2) The borrow cut is designed to minimize the area disturbed, for example, by designing a deeper cut;
    - (3) The borrow site is located to avoid those more productive surf clam areas; and
    - (4) When appropriate, notice shall be provided to clambers in advance of the mining operation to allow for surf clam harvest; and
  - iv. The sand mining is not located within a surf clam conservation area as defined at N.J.A.C. 7:25-12.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).  
Rewrote the section.

#### 7:7E-3.4 Prime fishing areas

(a) Prime fishing areas include tidal water areas and water's edge areas which have a demonstrable history of supporting a significant local intensity of recreational or commercial fishing activity. These areas include all coastal jetties, groins, public fishing piers or docks, and artificial reefs. Prime fishing areas also include features such as rock outcroppings, sand ridges or lumps, rough bottoms, aggregates such as cobblestones, coral, shell and tubeworms, slough areas and offshore canyons. Prime fishing areas also include areas identified in "New Jersey's Recreational and Commercial Fishing Grounds of Raritan Bay, Sandy Hook Bay and Delaware Bay and The Shellfish Resources of Raritan Bay and Sandy Hook Bay" Figley and McCloy (1988) and those areas identified on the map titled, "New Jersey's Specific Sport Ocean Fishing Grounds." This map is available through the Coastal Management Program's website at [www.state.nj.us/dep/cmp](http://www.state.nj.us/dep/cmp).

(b) Standards relevant to prime fishing areas are as follows:

1. Permissible uses of prime fishing areas include recreational and commercial finfishing and shellfishing, as presently regulated by the Department's Division of Fish and Wildlife, scuba diving and other water related recreational activities.

2. Prohibited uses include sand or gravel submarine mining which would alter existing bathymetry to a significant degree so as to reduce the high fishery productivity of these areas. Disposal of domestic or industrial wastes must meet applicable State and Federal effluent limitations and water quality standards.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Subsection (a) substantially amended by incorporating (a)1 and (a)2 in (a) and adding text "or as indicated ... Long and Figley (1984)".  
Amended by R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Added source material for Raritan Bay.

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

In (a), inserted "and artificial reefs" following "piers or docks" and substituted "coastal waters" for "State of New Jersey's three-mile territorial sea"; in (b), rewrote the introductory paragraph and substituted "the Department's Division of Fish and Wildlife" for "NJDEP Division of Fish, Game, and Wildlife".

Amended by R.2008 d.82, effective April 7, 2008.

See: 39 N.J.R. 725(a), 40 N.J.R. 1836(a).

Rewrote (a) and the Rationale statement referenced in (c).

Public Notice: Coastal Management Office: determination on routine program change to the Coastal Management Program.

See: 41 N.J.R. 2343(c).

#### 7:7E-3.5 Finfish migratory pathways

(a) Finfish migratory pathways are waterways (rivers, streams, creeks, bays and inlets) which can be determined to serve as passageways for diadromous fish to or from seasonal spawning areas, including juvenile anadromous fish which migrate in autumn and those listed by H.E. Zich (1977) "New Jersey Anadromous Fish Inventory" NJDEP Miscellaneous Report No. 41, and including those portions of the Hudson and Delaware Rivers within the coastal zone boundary.

1. Species of concern include: alewife or river herring (*Alosa pseudoharengus*), blueback herring (*Alosa sapidissima*), American shad (*Alosa aspidissima*), striped bass (*Monroe saxatilis*), Atlantic sturgeon (*Acipenser oxyrinchus*), Shortnose sturgeon (*Acipenser brevirostrum*) and American eel (*Anguilla rostrata*).

(b) Development, such as dams, dikes, spillways, channelization, tide gates and intake pipes, which creates a physical barrier to the movement of fish along finfish migratory pathways is prohibited, unless acceptable mitigating measures such as fish ladders, erosion control, or oxygenation are used.

(c) Development which lowers water quality to such an extent as to interfere with the movement of fish along finfish migratory pathways or to violate State and Delaware River Basin Commission water quality standards is prohibited.

1. Mitigating measures are required for any development which would result in: lowering dissolved oxygen levels, releasing toxic chemicals, raising ambient water temperature, impinging or suffocating fish, entrainment of fish eggs, larvae or juveniles, causing siltation, or raising turbidity levels during migration periods.

(d) Water's edge development which incorporates migration access structures, such as functioning fish ladders, will be conditionally acceptable, provided that the Department's Division of Fish and Wildlife approves the design of the access structure. As of January, 1994, the Department's Division of Fish and Wildlife is evaluating anadromous fish spawning areas for potential enhancement work. This may include building of fish ladders, removal of obstructions, stocking, and other means. A development proposal shall be consistent with these Department efforts.

(e) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

(a)I added text "Atlantic sturgeon (*Acipenser oxyrinchus*), Shortnose sturgeon (*Acipenser brevirostrum*)" and (*Anguilla rostrata*)."; deleted (b) and recodified rest of section.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

In (d), substituted "the Department's Division of Fish and Wildlife" for "the NJDEP Division of Fish, Game and Wildlife" throughout and deleted "currently" preceding "evaluating".

### 7:7E-3.6 Submerged vegetation habitat

(a) A submerged vegetation special area consists of water areas supporting or documented as previously supporting rooted, submerged vascular plants such as widgeon grass (*Ruppia maritima*), sago pondweed (*Potamogeton pectinatus*), horned pondweed (*Zannichellia palustris*) and eelgrass (*Zostera marina*). In New Jersey, submerged vegetation is most prevalent in the shallow portions of the Navesink, Shrewsbury, Manasquan and Metedeconk Rivers, and in Barnegat, Manahawkin and Little Egg Harbor Bays. Other submerged vegetation species in lesser quantities include, but are not limited to, the following: water weed (*Elodea nuttalli*), *Eriocaulon parkeri*, *Liaeopsis chinesis*, *Naja flexilis*, *Nuphar variegatum*, *Potamogeton crispus*, *Potamogeton epihydrus*, *Potamogeton perfoliatus*, *Potamogeton pusillus*, *Scirpus subterminalis* and *Vallisneria americana*. Detailed maps of the distribution of the above species for New Jersey, and a method for delineation, are available from Department in the New Jersey Submerged Aquatic Vegetation Distribution Atlas (Final Report), February, 1980, conducted by Earth Satellite Corporation and also on "Eelgrass Inventory" maps prepared by the Division of Fish and Wildlife, Bureau of Shellfisheries, 1983. If the Department is presented with clear and convincing evidence that a part of its mapped habitat lacks the physical characteristics necessary for supporting or

continuing to support the documented submerged vegetation species, such a site would be excluded from the habitat definition.

(b) Development in submerged vegetation habitat is prohibited except for the following:

1. Trenching for utility pipelines and submarine cables in the public interest, provided there is no practicable or feasible alternative alignment, the impact area is minimized and that, following pipeline or cable installation, the disturbed area is restored to its preconstruction contours and conditions. This may include subsequent monitoring and replanting of the disturbed area if these species have not recolonized the disturbed area within three years. The use of directional drilling techniques for utility installations is strongly encouraged, rather than the use of trenching;

2. New dredging of navigation channels maintained by the State or Federal government provided that there is no practicable or feasible alternative to avoid the vegetation; and that impacts to the habitat area (for example, dredging width, length and depth) are minimized to the maximum extent practicable. Mitigation will be required for destruction of one acre or more which possess submerged aquatic vegetation;

3. Maintenance dredging, as defined at N.J.A.C. 7:7E-4.6, of previously authorized, existing navigation channels maintained by the State or Federal government and associated disposal areas provided that there is no practicable or feasible alternative to avoid the vegetation and that impacts to the habitat area are minimized to the maximum extent practicable;

4. New and maintenance dredging, as defined at N.J.A.C. 7:7E-4.6 and 4.7, of previously authorized operating marinas and any necessary access channels to the expanded portion of such marinas (this exception does not include the boat basin of the expanded portion of the marina) and existing launching facilities with 25 or more dockage, storage or trailer parking units and their associated access channels, provided the proposed areas to be dredged (such as channel length, depths and widths) are minimized to the maximum extent practicable;

5. Maintenance dredging, as defined at N.J.A.C. 7:7E-4.6, to regain access to existing private docks, piers, boat ramps and mooring piles not associated with marinas that were previously dredged to an authorized channel and/or mooring depth, width and length, provided there is no practicable or feasible alternative on site that would avoid dredging in submerged vegetation habitat;

6. Construction of a single noncommercial dock or pier provided that:

i. There are no practicable or feasible alternatives to avoid impacts to submerged vegetation habitat at the site;

ii. The width of the structure will not exceed four feet, except for that portion of the structure adjacent to the mooring area, where the width and length may not exceed six and 20 feet, respectively;

iii. The pier shall have no more than two designated slips. No boats may be moored at a non-designated pier/dock area;

iv. No more than one pier shall be placed for every building lot and each building lot shall have a forty foot or greater frontage on the water. Where more than one lot has been assembled for the purpose of building, only one pier will be allowed;

v. No dredging shall be performed in conjunction with the use of the dock or pier;

vi. A minimum water depth of four feet at mean low water must be present in the area where the boats will be moored; and

vii. There is no alternative mooring area at the site that would have less impact on the submerged aquatic vegetation; and

7. The extension of existing piers or floating docks through submerged vegetation habitat to water at least four feet deep at mean low water, for the purpose of eliminating dredging or boating through submerged vegetation habitat, provided the width of the extended portion of the pier does not exceed four feet (except for the portion of the pier adjacent to the mooring area where the width shall not exceed six feet), there will be no increase in the number of boat moorings, and no dredging will be performed in conjunction with the use of the structure.

(c) Development in upland or water areas adjacent to submerged vegetation habitat or in submerged vegetation habitat which results in erosion or turbidity increases in the waters supporting submerged vegetation or prop or hull scour through use of the development is prohibited unless mitigating measures are provided.

(d) Compensation for unavoidable, permanent significant impacts to submerged vegetation habitats, when required, shall consist of the establishment of self-sustaining habitat for the appropriate species in accordance with scientifically-documented transplanting methods. Monitoring and replanting shall be carried out biannually to demonstrate persistence of the compensatory habitat for a minimum of three years. The following must be documented for any area proposed for seagrass habitat restoration: that the area previously supported seagrass but no longer does; the specific cause(s) of seagrass elimination; and that the specific condition(s) or action(s) responsible for elimination of seagrass has since ceased. Priority will be given to in-kind restoration of seagrass habitat in as close proximity as possible to the impacted site. No compensation credit will be given for attempts to plant seagrass within unvegetated interpatch areas of existing seagrass habitat or for attempts to increase bottom coverage

within existing seagrass beds (defined as an area where seagrass rhizomes overlap, or where seagrass shoots intermingle within less than one square meter).

(e) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1990 d.413, effective August 20, 1990.  
See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Green algae added to (a).

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

In (a), substituted "Department" for "DEP"; in (b), substituted "Development" for "Regulated activities" in the introductory paragraph, substituted "navigation channels maintained by the State or Federal government" for "State and Federal navigation channels" and amended the N.J.A.C. references throughout; in (c), substituted "Development" for "Regulated activities" and "or prop or hull scour through use of the development is" for "are" following "submerged vegetation".

#### Case Notes

Petitioner's application for a Waterfront Development Permit to construct a 4' by 100' dock was properly denied as prohibited by the submerged vegetation habitat rule because the petitioner failed to meet his burden of proving by clear and convincing evidence that the property should have been excluded from the habitat definition; the evidence demonstrated that, whatever the current situation was regarding the actual presence of eelgrass, it was undisputed that eelgrass was historically mapped to exist at the site (adopting 2008 N.J. AGEN LEXIS 1271). *Shedaker v. N.J. Dep't of Env'tl. Prot., Land Use Regulation*, OAL Dkt. No. ELU 10281-07S, 2008 N.J. AGEN LEXIS 1416, Final Decision (December 8, 2008).

Initial Decision (2007 N.J. AGEN LEXIS 126) adopted, which concluded that petitioners' application for a Waterfront Development Permit to construct a 4' by 170' dock with a boatlift and three mooring pilings at their residential site fronting on Barnegat Bay was properly denied as prohibited by the submerged vegetation habitat rule, N.J.A.C. 7:7E-3.6, because the project area was documented on 1979 Point Pleasant Submerged Vegetation maps as containing the submerged vascular plants *Ruppia maritima*, *Zannichellia palustris*, and *Zostera marina*. *Cocuzzo v. N.J. Dep't of Env'tl. Prot., Land Use Regulation*, OAL Dkt. No. ESA 2414-04, 2007 N.J. AGEN LEXIS 534, Final Decision (April 18, 2007).

#### 7:7E-3.7 Navigation channels

(a) Navigation channels are tidal water areas including the Atlantic Ocean, inlets, bays, rivers and tidal guts with sufficient depth to provide safe navigation. Navigation channels include all areas between the top of the channel slopes on either side. These navigation channels are often marked with buoys or stakes. Major navigation channels are shown on NOAA/National Ocean Service Charts.

(b) Standards relevant to navigation channels are as follows:

1. Development which would cause terrestrial soil and shoreline erosion and siltation in navigation channels shall utilize appropriate mitigation measures.
2. Development which would result in loss of navigability is prohibited.

3. Any construction which would extend into a navigation channel is prohibited.

4. The placement of structures within 50 feet of any authorized navigation channel is discouraged, unless it can be demonstrated that the proposed structure will not hinder navigation.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).  
See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

Rewrote (a); in (b), deleted former 1 and recodified former 2 through 5 as 1 through 4.

**7:7E-3.8 Canals**

(a) Canals are navigation channels for boat traffic through land areas which are created by cutting and dredging or other human construction technique sometimes enlarging existing natural surface water channels. The Cape May, Point Pleasant, and Delaware and Raritan Canals are the principal examples in the New Jersey Coastal zone.

(b) In canals presently used for navigation, any use that would interfere with existing or proposed canal boat traffic is prohibited.

(c) In the Delaware and Raritan Canal, and in the surrounding Review Zone established by the Delaware and Raritan Canal Commission, development must be consistent with the rules and regulations of the Review Zone of the Delaware and Raritan Canal State Park (N.J.A.C. 7:45).

(d) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

In (a), substituted "Point Pleasant" for "Bay Head-Manasquan"; rewrote (b), recodified former (b)2 as (c) and amended the N.J.A.C. reference; recodified former (c) as (d).

### 7:7E-3.9 Inlets

(a) Inlets are natural channels through barrier islands allowing movement of fresh and salt water between the ocean and the back bay system. Inlets naturally have delta fans of sediment seaward and landward, deposited by the ebb and flow of the tide.

1. The seaward limit of an inlet is defined as the seaward extent of the ebb delta fan. The landward limit is defined as the inland extent of the flood delta fan.

2. If there is doubt about the extent of these fans, the applicant shall submit up-to-date bathymetric surveys and Department staff will determine the boundary on a case-by-case basis.

(b) Development in inlets shall comply with the following:

1. Filling is prohibited; and
2. Submerged infrastructure is discouraged.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

In (a)2, substituted "Department" for "DEP"; in (b), rewrote the introductory paragraph.

### 7:7E-3.10 Marina moorings

(a) Marina moorings are areas of water that provide mooring, docking and boat maneuvering room as well as access to land and navigational channels for five or more recreational boats.

(b) Non-water dependent development in a marina mooring area is prohibited.

(c) Any use that would detract from existing or proposed recreational boating use in marina mooring areas is discouraged.

(d) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.

See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Substantially amended (b); recodified (b)1 and 2 to (c) and (d); (c) recodified to (e).

Amended by R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Dredging conditionally acceptable.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

Deleted former (d); recodified former (e) as (d).

### Case Notes

Board's recognition of impact of zoning variance on upland property eliminated the need for reconsideration. *Anfuso v. Seeley*, 243 N.J.Super. 349, 579 A.2d 817 (A.D.1990).

### 7:7E-3.11 Ports

(a) Ports are water areas having, or lying immediately adjacent to, concentrations of shoreside marine terminals and transfer facilities for the movement of waterborne cargo (including fluids), and including facilities for loading, unloading and temporary storage.

1. Port locations in New Jersey include, among others, Newark, Elizabeth, Bayonne, Jersey City, Weehawken, Hoboken, Woodbridge, Perth Amboy, Camden, Gloucester City, Paulsboro and Salem.

2. Standards for a docking facility or concentration of docks for a single industrial or manufacturing facility are found at N.J.A.C. 7:7E-4.4, Docks and piers for cargo and commercial fisheries.

(b) Any use which would preempt or interfere with port uses of this water area is prohibited.

(c) Aquaculture and dumping of solid waste or semi-solid waste is prohibited.

(d) Boat ramps for recreational boating are conditionally acceptable provided the ramp complies with all Special Areas Rules (N.J.A.C. 7:7E-3) and provided it does not interfere with the port use.

(e) Docks and piers for cargo movements are encouraged.

(f) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.

See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

(b) deleted; (b)1-4 recodified to (b)-(e); (c) recodified to (f).

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).  
Rewrote (a)2.

#### Law Review and Journal Commentaries

Environmental Law—Waterfront Development. P.R. Chenoweth, 137 N.J.L.J. No. 10, 66 (1994).

#### Case Notes

"Port Use Rule" satisfies legislative objective of the Waterfront Development Act. *Distributec, Inc. v. New Jersey Dept. of Environmental Protection and Energy, Div. of Coastal Resources*, 274 N.J. Super. 1, 643 A.2d 11 (A.D.1994), certification granted 138 N.J. 266, 649 A.2d 1286, affirmed 139 N.J. 431, 655 A.2d 437.

"Ports Rule" is not inconsistent with legislative purpose of Waterfront Development Act. *Distributec, Inc. v. New Jersey Dept. of Environmental Protection and Energy, Div. of Coastal Resources*, 274 N.J. Super. 1, 643 A.2d 11 (A.D.1994), certification granted 138 N.J. 266, 649 A.2d 1286, affirmed 139 N.J. 431, 655 A.2d 437.

Proposed facility for container-cargo vessels was "port" under the Waterfront Development Act. *Distributec, Inc. v. New Jersey Dept. of Environmental Protection and Energy, Div. of Coastal Resources*, 274 N.J. Super. 1, 643 A.2d 11 (A.D.1994), certification granted 138 N.J. 266, 649 A.2d 1286, affirmed 139 N.J. 431, 655 A.2d 437.

#### 7:7E-3.12 Submerged infrastructure routes

(a) A submerged infrastructure route is the corridor in which a pipe or cable runs on or below a submerged land surface.

(b) Any activity which would increase the likelihood of infrastructure damage or breakage, or interfere with maintenance operations is prohibited.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).  
"Policy;" deleted from (b).  
Amended by R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

#### 7:7E-3.13 Shipwreck and artificial reef habitats

(a) The shipwreck and artificial reef habitats special area includes all permanently submerged or abandoned remains of vessels, and other structures including, but not limited to, artificial reefs, anchors, quarry rocks or lost cargo, which serve as a special marine habitat or are fragile historic and cultural resources. An artificial reef is a man-made imitation of a natural reef created by placing hard structures on the sea floor for the purpose of enhancing fish habitat and fish stock. In time, an artificial reef will attain many of the biological and ecological attributes of a natural reef. Artificial reefs do not include shore protection structures, pipelines and other structures not constructed for the sole purpose of fish habitat.

1. Known sites include those shown either on National Ocean Survey (N.O.S.) Charts listed at N.J.A.C. 7:7E-3.7(a), the navigation channel rule, or listed in the following publications: W. Krotee and R. Krotee, *Shipwrecks Off the New Jersey Coast* (1966), B.L. Freeman and L.A. Walford, *Angler's Guide to the United States Atlantic Coast Fish, Fishing Grounds, and Fishing Facilities* (1974); and B. Preim, J. Carlson, B. Figley, *A Guide to Fishing and Diving New Jersey Reefs*, (2000). In addition to known sites, unidentified remains of vessels may exist within tidal waters. Shipwrecks may also be considered historic or archaeological resources pursuant to N.J.A.C. 7:7E-3.36.

2. Shipwreck and artificial reef habitats may be subject to the marine fish and fisheries rule, N.J.A.C. 7:7E-8.2.

(b) Acceptable uses of shipwreck and artificial reef habitats include finfishing, shellfishing, and scuba diving.

(c) Any use, except archeological research, which would significantly adversely affect the usefulness of this special area as a fish habitat is prohibited. Persons conducting archeological research which significantly affects the usefulness of a shipwreck for fisheries purpose shall compensate for this loss by creation of an artificial reef of equal habitat value.

(d) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).  
Substantially amended.  
Amended by R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).  
Rewrote the section.

#### 7:7E-3.14 Wet borrow pits

(a) Wet borrow pits are scattered artificially created lakes that are the results of surface mining for coastal minerals extending below groundwater level to create a permanently flooded depression. This includes, but is not limited to, flooded sand, gravel and clay pits, and stone quarries. Where a wet borrow pit is also a wetland and/or wetlands buffer, the wetlands rule, N.J.A.C. 7:7E-3.27, and/or wetlands buffer rule, N.J.A.C. 7:7E-3.28, shall apply.

(b) All proposed dredging and filling activities shall comply with any applicable Freshwater Wetlands Protection Act Rules (N.J.A.C. 7:7A). In addition, such activities must receive a Water Quality Certificate pursuant to N.J.S.A. 58:10A et seq. and Section 401 of the Federal Clean Water Act if a Federal permit is required for the activities.

(c) Proposed uses which would promote the wildlife habitat and scenic amenity values of wet borrow pits are encouraged.

(d) Surface mining is conditionally acceptable provided condition (b) above and the mining rule, N.J.A.C. 7:7E-7.8, are met.

(e) Recreational use of wet borrow pits is acceptable provided that wildlife habitat disturbance is minimized.

(f) Disposal of dredged material is discouraged, but may be acceptable in limited cases, provided condition (b) above is met and that:

1. The dredged material is clean and non-toxic, an appropriate particle size for the site, and will not disturb groundwater flow or quality;

2. At least half of the water area in existence at the time of the first coastal permit application for filling of the pit remains as surface water in a pattern designed to maximize wildlife habitat value and create wetland areas, except that the entire lake may be filled if necessary to prevent the lake from acting as a channel for salt water intrusion into aquifers.

(g) Filling of wet borrow pits for construction is conditionally acceptable provided that:

1. The fill is clean and will not degrade groundwater quality;

2. At least half of the water area in existence at the time of the first coastal permit application for filling of the pit is left as open water;

3. Land-water edges are maximized and vegetated to promote native wildlife;

4. A water quality buffer zone of at least 50 feet is designated in accordance with (j) below around remaining water areas;

5. A program for water quality monitoring and maintenance is included with the application; and

6. Recreational uses in water and water quality buffer areas minimize wildlife disturbance.

(h) Discharge of liquid or solid waste, other than clean dredge fill of acceptable particle size, is prohibited.

(i) All proposed uses directly adjacent to wet borrow pits shall grade all banks at the immediate water's edge, except those in acceptable water access areas, to a slope not greater than 33 percent, and shall stabilize the surface and initiate succession of native vegetation adapted to water's edge conditions.

(j) A water quality buffer area is required around the perimeter of wet borrow pits. The minimum width of this buffer area will be 100 feet where soils are coarse (sands and gravels) and 50 feet elsewhere. Recreational use of the water quality buffer is acceptable provided that the disturbance is limited in extent and wildlife habitat disturbance is minimized. The remainder of the buffer area shall be al-

lowed to succeed naturally to water's edge. Structures and paving, except at limited water access points for recreational use, are prohibited in the water quality buffer.

(k) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.

Sec: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Section was originally "Estuarine or marine sanctuary"; Section was totally recodified.

Amended by R.1990 d.413, effective August 20, 1990.

Sec: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Amended to conform to Freshwater Wetlands Protection Act, which includes wet borrow pits: dredging and filling acceptable, if criteria met.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

Sec: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2003 d.60, effective February 3, 2003.

Sec: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

In (a), rewrote the third sentence and deleted the fourth sentence; rewrote (d); in (f)2, substituted "surface water in a pattern designed to maximize" for "surface water in pattern design to maximize"; in (g), rewrote 4 and deleted 7; deleted former (j), recodified former (k) as (j) and added the last three sentences; recodified former (l) as (k).

#### Case Notes

Project encroachment upon historic site. In re North Jersey Dist. Water Supply Comm., 175 N.J.Super. 167, 417 A.2d 1095 (App.Div. 1980), certif. den. 85 N.J. 460, 427 A.2d 559 (1980).

#### 7:7E-3.15 Intertidal and subtidal shallows

(a) Intertidal and subtidal shallows means all permanently or temporarily submerged areas from the spring high water line to a depth of four feet below mean low water.

(b) Development, filling, new dredging or other disturbance is discouraged but may be permitted in accordance with (c), (d), (e) and (f) below and with N.J.A.C. 7:7E-4.2 through 4.22.

(c) Maintenance dredging of intertidal and subtidal shallows is acceptable to maintain adequate water depths in accordance with N.J.A.C. 7:7E-4.6.

(d) New dredging in intertidal and subtidal shallows is discouraged, unless it complies with the following conditions:

1. There is a need for the proposed facility that requires the dredging that cannot be met by other similar facilities in reasonable proximity taking into account scope and purpose of the proposed facility;

2. There is no feasible alternative location for the proposed facility that requires the dredging, which would eliminate or reduce the amount of disturbance to intertidal and subtidal shallows without increasing impacts on other Special Areas; and

3. The proposed dredging and the facility that requires the dredging have been designed to minimize impacts to intertidal and subtidal shallows.

(e) The installation of submerged infrastructure within intertidal and subtidal shallows is conditionally acceptable, provided:

1. Directional drilling is used unless it can be demonstrated that the use of directional drilling is not feasible;
2. Where directional drilling is not feasible, there is no feasible alternative route that would not disturb intertidal and subtidal shallows;
3. The infrastructure is located deeply enough to avoid exposure or hazard; and
4. All trenches are backfilled to the preconstruction depth with naturally occurring sediment.

(f) The filling of intertidal and subtidal shallows for beach nourishment is conditionally acceptable provided it meets the requirements of the filling rule at N.J.A.C. 7:7E-4.10(f) and the coastal engineering rule at N.J.A.C. 7:7E-7.11(d).

(g) Mitigation shall be required for the destruction of intertidal and subtidal shallows in accordance with (h) below. Mitigation proposals shall comply with the standards of N.J.A.C. 7:7E-3B. Mitigation shall not be required for the following:

1. Filling in accordance with N.J.A.C. 7:7E-4.10(c) and (e)1, 2 and 3;
2. Maintenance dredging in accordance with N.J.A.C. 7:7E-4.6;
3. Beach nourishment in accordance with N.J.A.C. 7:7E-7.11(d);
4. New dredging in accordance with N.J.A.C. 7:7E-4.7 to a depth not to exceed four feet below mean low water; and
5. Construction of a replacement bulkhead in accordance with N.J.A.C. 7:7E-7.11(e)2i or ii.

(h) Mitigation shall be required for the destruction of intertidal and subtidal shallows at a creation to loss ratio of 1:1 through the creation of intertidal and subtidal shallows on the site of the destruction. For the purposes of this section, creation means excavating upland to establish the characteristics, habitat and functions of an intertidal and subtidal shallow. Where on-site creation is not feasible, mitigation shall be accomplished as follows:

1. At a single family home or duplex property that is not part of a larger development, mitigation shall be in the form of a monetary contribution to the Wetlands Mitigation Fund. The monetary contribution shall be in the amount of the value of the land filled and the cost of creation of intertidal subtidal shallows of equal ecological value to those which are being lost; or

2. At a property other than a single family home or duplex property, mitigation shall be performed in accordance with the following hierarchy:

i. If on site creation of intertidal and subtidal shallows is not feasible, then mitigation shall be required at a creation to loss ratio of 1:1 through the creation of intertidal and subtidal shallows within the same 11-digit hydrologic unit code area, as defined at N.J.A.C. 7:7E-1.8, as the destruction;

ii. If on site creation of intertidal and subtidal shallows is not feasible in accordance with (h)2i above, then mitigation shall be required at a creation to loss ratio of 1:1 through the creation of intertidal and subtidal shallows within an adjacent 11-digit hydrologic unit code area within the same watershed management area, as defined at N.J.A.C. 7:7E-1.8, as the destruction. An adjacent 11-digit hydrologic unit code area is one which shares a common boundary at any point on the perimeter of the 11-digit hydrologic unit code area where the destruction is located;

iii. If the creation of intertidal and subtidal shallows required in (h)2ii is not feasible, then mitigation shall be required at an enhancement to loss ratio of 2:1 through the enhancement of a wetland system which was previously more ecologically valuable but has become degraded due to factors such as siltation, impaired tidal circulation, or contamination with hazardous substances (degraded wetland system) on the site of the destruction. For the purposes of this section, enhancement means actions performed to improve the characteristics, habitat and functions of an existing degraded wetland;

iv. If the enhancement of degraded wetlands required in (h)2iii above is not feasible, then mitigation shall be required at an enhancement to loss ratio of 2:1 through the enhancement of a degraded wetland system within the same 11-digit hydrologic unit code area as the destruction;

v. If the enhancement of degraded wetlands required in (h)2iv above is not feasible, then mitigation shall be required at an enhancement to loss ratio of 2:1 through the enhancement of a degraded wetland system within an adjacent 11-digit hydrologic unit code area within the same watershed management area as the destruction. An adjacent 11-digit hydrologic unit code area is one which shares a common boundary at any point on the perimeter of the 11-digit hydrologic unit code where the destruction is located;

vi. If the enhancement of degraded wetlands required in (h)2v above is not feasible, then mitigation shall be required in accordance with either of the following:

- (1) Creation of intertidal and subtidal shallows at a creation to loss ratio of 1:1 within the same watershed management area; or

(2) Enhancement of degraded wetlands at an enhancement to loss ratio of 2:1 within the same watershed management area.

(i) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

(a) deleted old text and inserted new; old (b) deleted; (b)1 now (b) and text "but may be ... N.J.A.C. 7:7E-4.4(i)" added; rest of section recodified.

Amended by R.1990 d.413, effective August 20, 1990.  
See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Mitigation ratio, sites and exemptions specified at (b)1.  
Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).  
Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).  
Rewrote the section.

Amended by R.2004 d.43, effective January 20, 2004.

See: 35 N.J.R. 2801(a), 36 N.J.R. 442(a).

In (b), amended N.J.A.C. references.

#### Case Notes

Property owners who sought permission to construct a bulkhead on property adjacent to bay failed to establish that water dependent use existed which would justify the inevitable destruction of the intertidal shallows. *Muir v. NJ Dept. of Env Protection*, 1999 N.J. AGEN LEXIS 557.

Application for permit to construct dock was properly denied given adverse impact on shallow aquatic environment. *Mangel v. NJDEPE/LUR*, 95 N.J.A.R.2d (EPE) 133.

Bulkhead constructed in violation of regulations; removal ordered. *Walker v. New Jersey Department of Environmental Protection*, 93 N.J.A.R.2d (EPE) 69.

#### 7:7E-3.16 Dunes

(a) A dune is a wind or wave deposited or man-made formation of sand (mound or ridge), that lies generally parallel to, and landward of, the beach and the foot of the most inland dune slope. "Dune" includes the foredune, secondary or tertiary dune ridges and mounds, and all landward dune ridges and mounds, as well as man-made dunes, where they exist (see Appendix, Figure 1, incorporated herein by reference).

1. Formation of sand immediately adjacent to beaches that are stabilized by retaining structures, and/or snow fences, planted vegetation, and other measures are considered to be dunes regardless of the degree of modification of the dune by wind or wave action or disturbance by development.

2. A small mound of loose, windblown sand found in a street or on a part of a structure as a result of storm activity is not considered to be a "dune."

(b) Development is prohibited on dunes, except for development that has no practicable or feasible alternative in an area other than a dune, and that will not cause significant adverse longterm impacts on the natural functioning of the

beach and dune system, either individually or in combination with other existing or proposed structures, land disturbances or activities. In addition, the removal of vegetation from any dune, and the excavation, bulldozing or alteration of dunes is prohibited, unless these activities are a component of a Department approved beach and dune management plan. Examples of acceptable activities are:

1. Demolition and removal of paving and structures;

2. Limited, designated access ways for pedestrian and authorized motor vehicles between public streets and the beach that provide for minimum feasible interference with the beach and dune system and are oriented so as to provide the minimum feasible threat of breaching or overtopping as a result of a storm surge or wave runup (see N.J.A.C. 7:7E-3A);

3. Limited stairs, walkways, pathways and boardwalks to permit access across dunes to beaches, in accordance with N.J.A.C. 7:7E-3A, provided they cause minimum feasible interference with the beach and dune system;

4. The planting of native vegetation to stabilize dunes in accordance with N.J.A.C. 7:7E-3A;

5. Sand fencing, either a brush type barricade or picket type, to accumulate sand and aid in dune formation in accordance with N.J.A.C. 7:7E-3A;

6. Shore protection structures which meet the coastal engineering rule at N.J.A.C. 7:7E7.11(e); and

7. Linear development which meets the Rule on Location of Linear Development (N.J.A.C. 7:7E-6.1).

(c) The creation of dunes for the purpose of shore protection is strongly encouraged. According to the National Flood Insurance Program (NFIP) Regulations established by the Federal Emergency Management Agency (FEMA), primary frontal dunes will not be considered as effective barriers to base flood storm surges and associated wave action where the cross-sectional area of the primary frontal dune, as measured perpendicular to the shoreline and above the 100-year still-water flood elevation and seaward of the dune crest, is equal to or less than 1,100 square feet. This standard represents the minimal dune volume to be considered effective in providing protection from the 100-year storm surge and associated wave action, and should represent a "design dune" goal.

(d) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

(b) deleted; new (b)-(f) added; (c) recodified to (h).  
Repeal and New Rule, R.1990 d.413, effective August 20, 1990.  
See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Text on filled water's edge deleted.  
Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2000 d.428, effective October 16, 2000.

See: 32 N.J.R. 864(a), 32 N.J.R. 3784(b).

In (a), inserted "and mounds," following "tertiary dune ridges" in the introductory paragraph; and in (c), substituted "1,100" for "540" preceding "square feet" in the second sentence.

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

In (a), inserted "and all landward dune ridges and mounds," preceding "as well as man-made dunes," in the introductory paragraph; in (b)6, substituted "coastal engineering rule at" for "use conditions of" preceding the N.J.A.C. reference.

#### Case Notes

In interpreting the regulatory definitions of a dune under N.J.A.C. 7:7E-3.16(a) and a primary frontal dune under N.J.A.C. 7:7-7.8(d)1ii, the waterward and landward slopes of a primary frontal dune must abruptly incline and decline respectively compared with the rest of the subject property or with the other properties in the area immediately adjacent to the subject property. *Seigel v. N.J. Dep't of Env'tl. Prot.*, 395 N.J. Super. 604, 930 A.2d 461, 2007 N.J. Super. LEXIS 291 (App.Div. 2007).

Reviewing court interpreting the regulatory definitions of a dune under N.J.A.C. 7:7E-3.16(a) and a primary frontal dune under N.J.A.C. 7:7-7.8(d)1ii held that the Department of Environmental Protection (DEP) improperly denied a landowner's application to build an oceanfront home as the subject property was not a dune; the DEP's interpretation of the regulatory language also resulted in a fundamental unfairness to petitioner, whose surrounding neighbors had constructed similar homes on their adjacent properties. *Seigel v. N.J. Dep't of Env'tl. Prot.*, 395 N.J. Super. 604, 930 A.2d 461, 2007 N.J. Super. LEXIS 291 (App.Div. 2007).

Initial Decision (2007 N.J. AGEN 782) adopted, which concluded that notwithstanding that a proposed development site was not oceanfront or Raritan or Delaware bayfront, the dune rule at N.J.A.C. 7:7E-3.16 applied to the site; the site was located within the coastal area boundary as designated by N.J.S.A. 13:19-4, and the Coastal Area Facilities Review Act General Permit for development of a single-family home, duplex, and accessory development requires such development to comply with the dune rule. *North Bayview, LLC v. N.J. Dep't of Env'tl. Prot., Land Use Regulation*, OAL Dkt. No. ESA 2072-06, 2008 N.J. AGEN LEXIS 144, Final Decision (January 17, 2008).

Notwithstanding the argument that a proposed development site did not contain a primary dune because the dune was isolated and was not a "continuous or nearly continuous mound or ridge of sand," nor was it "subject to erosion and overtopping from high tides and waves during major coastal storms," a dune existed on the site and it was subject to the dune rule; the definition in N.J.A.C. 7:7E-7.8(d)1ii is limited to that subparagraph, and the definition in N.J.A.C. 7:7E-3.16(a) applied. *North Bayview, LLC v. N.J. Dep't of Env'tl. Prot., Land Use Regulation*, OAL Dkt. No. ESA 2072-06, 2008 N.J. AGEN LEXIS 144, Final Decision (January 17, 2008).

Where a municipality applied for a permit to reduce the height of certain dunes within its municipal jurisdiction to 15 feet so that it could comply with easements it entered into with several beach front property owners in connection with a 1989 beach replenishment and dunes restoration program, whereby it agreed to maintain the dunes at an elevation not to exceed three feet above bulkhead height, the municipality's application to reduce the dune height was not permitted under N.J.A.C. 7:7E-3.16, which prohibits "the excavation, bulldozing or alteration of dunes," nor did the application fall within the limited exception permitting the alteration of dunes for an approved beach and dune management plan, which could only include activities such as the demolition and removal of paved structures or the installation of limited access ways or other types of certain linear development (adopting Initial Decision as modified). *Ocean City v. N.J. Dep't of Env'tl. Prot., Land Use Regulation Program*, OAL Dkt. No. ESA 10103-05, 2007 N.J. AGEN LEXIS 498, Final Decision (April 27, 2007).

Initial Decision (2006 N.J. AGEN 177) adopted, which concluded that contract purchaser's construction of a single-family dwelling on lot was prohibited pursuant to N.J.A.C. 7:7E-3.16 because: (1) the purchaser had not presented facts to establish that the proposed development had no practicable or feasible alternative in an area other than a dune and that it would not cause significant adverse long-term impacts on the natural functioning of the beach and dune system; (2) the proposed development would necessitate removal of dune vegetation and would require dune excavation, and such activities were not a component of an approved beach and dune management plan; and (3) the subject lot was located entirely on the landward slope of a primary rather than secondary dune and thus did not meet the exception in N.J.A.C. 7:7-7.8(d)1. *Grauso v. N.J. Dep't of Env'tl. Prot., Land Use Regulation Program*, OAL Dkt. No. ESA 11080-04, 2006 N.J. AGEN LEXIS 672, Final Decision (April 17, 2006).

#### 7:7E-3.17 Overwash areas

(a) An overwash area is an area subject to accumulation of sediment, usually sand, that is deposited landward of the beach or dune by the rush of water over the crest of the beach berm, a dune or a structure. An overwash area may, through stabilization and vegetation, become a dune (see Appendix, Figure 1).

1. The seaward limit of the overwash area is the seaward toe of the former dune, or the landward limit of the beach, in the absence of a dune.

2. The landward limit of the overwash area is the inland limit of sediment transport.

3. Verifiable aerial photography and other appropriate sources may be used to identify the extent of overwash.

(b) Development is prohibited on overwash areas, except for development that has no prudent or feasible alternative in an area other than an overwash area, and that will not cause significant adverse long-term impacts on the natural functioning of the beach and dune system, either individually or in combination with other existing or proposed structures, land disturbances or activities. Examples of acceptable activities are:

1. Creation of dunes or expansion of existing dunes in accordance with N.J.A.C. 7:7E-3A;

2. Demolition and removal of paving and structures;

3. Limited, designated access ways for pedestrians and authorized motor vehicles between public streets and the beach that provide for the minimum feasible interference with the beach and dune system and are so oriented as to provide the minimum feasible threat of breaching or overtopping as a result of storm surge or wave runoff;

4. Shore protection structures which meet the coastal engineering rule at N.J.A.C. 7:7E-7.11(e);

5. Linear development which meets the Rule on Location of Linear Development (N.J.A.C. 7:7E-6.1);

6. Removal of newly deposited overwash fans from public roads and or developed lots; and

7. Construction of street-end beach accessways along the oceanfront, provided they are oriented at an angle against the predominant northeast storm approach, are limited in width to no more than ten feet, and are defined/stabilized with sand fencing. These standards should be included in all beach and dune management plans for oceanfront locations.

(c) A development may be permitted if, by creating a dune with buffer zone or expanding an existing dune landward, the classification of the site is changed so as to significantly diminish the possibility of future overwash. In determining overwash potential, the protective capacity of newly created dunes will be evaluated in terms of the "design dune" goal discussed in N.J.A.C. 7:7E-3.16(c).

(d) A single story, beach/tourism oriented commercial development located within a commercial boardwalk area existing on July 19, 1993 is conditionally acceptable provided that it meets the following conditions:

1. The site is located within an area currently used and zoned for beach related commercial use, and is landward of the boardwalk;

2. The height of the building does not exceed 15 feet measured from either the elevation of the existing ground or the boardwalk (depending on the specific site conditions) to the top of a flat roof or the mid-point of a sloped roof;

3. The facility is open to the general public and supports beach/tourism related activities, that is, retail, amusement and food services. Lodging facilities are excluded; and

4. The facility meets all the requirements of the Flood Hazard Area Rule, N.J.A.C. 7:7E-3.25.

(e) Any development determined to be acceptable at (b) through (d) above shall comply with the requirements for impervious cover and vegetative cover that apply to the site under N.J.A.C. 7:7E-5 and 5B.

(f) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Public Notice: Coastal Management Office: determination on routine program change to the Coastal Management Program.

See: 41 N.J.R. 2343(c).

Amended by R.2010 d.045, effective June 7, 2010.

See: 41 N.J.R. 356(a), 42 N.J.R. 1039(a).

In (a)2, under the heading "ATLANTIC COUNTY", inserted "Bader Field, Atlantic City".

#### Case Notes

Department of Environmental Protection did not abuse its discretion in considering only modifications in its review of developer's application for major-modification permit, and thus, appeal from grant of application did not revive appellant's expired right to challenge Department's prior waiver of island corridor preservation policy; modified project generally fit within "footprint" of original proposal. In re CAFRA Permit No. 87-0959-5 Issued to Gateway Associates, 704 A.2d 1261, 152 N.J. 287 (N.J. 1997).

Regulation authorizing relaxation of application of rules when necessary and in public interest allowed only waiver of procedural rules for Coastal Area Facility Review Act development permits and did not authorize Department of Environmental Protection to waive bay island corridor preservation policy incorporated into separate chapter. In re CAFRA Permit No. 87-0959-5 Issued to Gateway Associates, 290 N.J.Super. 498, 676 A.2d 161 (A.D.1996).

Requirements of Coastal Area Facilities Review Act for coastal area development; waiver. SMB Associates (Anchoring Point) v. New Jersey Dept. of Environmental Protection, 137 N.J. 58, 644 A.2d 558 (1994).

Public interest group; standing to challenge coastal area review board's decision to grant permit. SMB Associates (Anchoring Point) v. New Jersey Dept. of Environmental Protection, 137 N.J. 58, 644 A.2d 558 (1994).

Absent regulations authorizing them to grant waivers, the Commissioner of Department of Environmental Protection and the Coastal Area Review Board had no authority to grant a waiver from compliance with regulations. SMB Associates v. New Jersey Dept. of Environmental Protection, 246 N.J.Super. 38, 624 A.2d 14 (A.D.1993) certification granted 134 N.J. 562, 636 A.2d 520, affirmed 137 N.J. 58, 644 A.2d 558.

Where petitioner sought to demolish the buildings at an existing marina on a bay island, redevelop the marina on a smaller scale, and use the remaining land to construct 10 new single-family homes, the proposed project did not meet the clear provisions of the bay island rule, and any additional exemptions to the rule had to be sought by rulemaking rather than by a contested case; the Department does not have authority to waive its own regulations, and its application of the rule was reasonable and not arbitrary or capricious, notwithstanding that there were no wetlands, forested areas, or threatened or endangered species or habitat on site and that the redevelopment would have yielded some environmental benefits. Landview Property Group v. N.J. Dep't of Envtl. Prot., Land Use Regulation, OAL Dkt. No. ESA 4063-04, 2006 N.J. AGEN LEXIS 581, Final Decision (July 12, 2006).

Property between two barrier islands was subject to classification and more restrictive regulation as a bay island. Estate of Sims v. Department of Environmental Protection, 95 N.J.A.R.2d (EPE) 6.

Bay island was dependent upon location coupled with geological characteristics. Sims v. DEPE, 95 N.J.A.R.2d (EPE) 6.

#### 7:7E-3.22 Beaches

(a) Beaches are gently sloping areas of sand or other unconsolidated material, found on all tidal shorelines, including ocean, bay and river shorelines (see Appendix, Figure 1), that extend landward from the mean high water line to either:

1. A man-made feature generally parallel to the ocean, inlet, or bay waters such as a retaining structure, seawall, bulkhead, road or boardwalk, except the sandy areas that extend fully under and landward of an elevated boardwalk are considered beach areas; or

2. The seaward or bayward foot of dunes, whichever is closest to the bay, inlet or ocean waters.

(b) Development is prohibited on beaches, except for development that has no prudent or feasible alternative in an area other than a beach, and that will not cause significant adverse long-term impacts to the natural functioning of the beach and dune system, either individually or in combination with other existing or proposed structures, land disturbances or activities. Examples of acceptable activities are:

1. Demolition and removal of paving and structures;

2. Dune creation and related sand fencing and planting of vegetation for dune stabilization, in accordance with N.J.A.C. 7:7E-3A;

3. The reconstruction of existing amusement and fishing piers and boardwalks;

4. Temporary recreation structures for public safety such as first aid and lifeguard stations;

5. Shore protection structures which meet the use conditions of N.J.A.C. 7:7E-7.11(e);

6. Linear development which meets the Rule on Location of Linear Development (N.J.A.C. 7:7E-6.1);

7. Beach maintenance activities which do not adversely affect the natural functioning of the beach and dune system, and which do not preclude the development of a stable dune along the back beach area. These activities include routine cleaning, debris removal, mechanical sifting, maintenance of access ways and Department approved dune creation and maintenance activities;

8. Post-storm beach restoration activities involving the placement of clean fill material on beaches, and the mechanical redistribution of sand along the beach profile from the lower to the upper beach. These post-storm activities, which are different than routine beach maintenance activities, must be carried out in accordance with the standards found at N.J.A.C. 7:7E-3A; and

9. The following development in Atlantic City provided it meets the standards of N.J.A.C. 7:7E-3.49:

i. Development on or over existing ocean piers;

ii. Pilings necessary to support development proposed on or over existing ocean piers; and

iii. Development on or over the Boardwalk.

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

(d) Rationale: See the OAL Note at the beginning of this subchapter.

(Agency Note: N.J.A.C. 7:7E-3.16 through 3.32 are Special Water's Edge Areas. Within these sections, N.J.A.C. 7:7E-3.16 through 3.19 belong to the Oceanfront, and Raritan and Delaware Bayfronts subcategory.)

Amended by R.1985 d.715, effective February 3, 1986.

See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Repeal and New Rule, R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Text on overwash fans deleted.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2000 d.45, effective February 7, 2000.

See: 31 N.J.R. 2042(a), 32 N.J.R. 503(a).

Inserted (b)9.

Amended by R.2007 d.374, effective December 17, 2007.

See: 38 N.J.R. 4570(a), 39 N.J.R. 5222(a).

Rewrote (c).

Amended by R.2012 d.182, effective November 5, 2012.

See: 43 N.J.R. 772(a), 44 N.J.R. 614(a), 44 N.J.R. 2559(a).

In (c), substituted "access" for the second occurrence of "trust rights".

#### Case Notes

Sand areas adjacent to bay were "beaches," albeit only minimal ones, that were subject to coastal permit program rules governing beaches, for purposes of property owners' application for permit to construct bulkhead. *Muir v. NJ Dept. of Env Protection*, 1999 WL 728289, N.J. Adm., Aug 26, 1999, (No. ESA 02956-98S).

Public Trust Doctrine requires that once a municipality permits swimming in an area of public beach, it cannot restrict the right of all who wish to swim from doing so; municipal ban on swimming in water adjoining beach owned by religious order whose members were permitted to swim is a violation of the equal protection and due process clauses. *Capano v. Boro. of Stone Harbor*, 530 F.Supp. 1254 (D.N.J. 1982).

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

(a) Filled water's edge areas are existing filled areas lying between wetlands or water areas, and either the upland limit of fill, or the first paved public road or railroad landward of the adjacent water area, whichever is closer to the water. Some existing or former dredged material disposal sites and excavation fill areas are filled water's edge (see Appendix, Figure 4, incorporated herein by reference).

(b) The "waterfront portion" is defined as a contiguous area at least equal in size to the area within 100 feet of navigable water, measured from the Mean High Water Line (MHWL). This contiguous area must be accessible to a public road and occupy at least 30 percent of its perimeter along the navigable water's edge.

(c) On filled water's edge sites with direct water access (that is, those sites without extensive inter-tidal shallows or wetlands between the upland and navigable water), development shall comply with the following:

1. The waterfront portion of the site shall be:
  - i. Developed with a water dependent use, as defined at N.J.A.C. 7:7E-1.8;
  - ii. Developed with an at-grade deck provided:
    - (1) The deck is open to the general public;
    - (2) The use of the deck is water oriented;
    - (3) The deck is not enclosed; and
    - (4) A public walkway is provided around the deck landward of the mean high water line at the water's edge; or
  - iii. Left undeveloped for future water dependent uses;

2. On the remaining non-waterfront portion of the site, provision of additional area devoted to water dependent or water-oriented uses may be required as a special case at locations which offer a particularly appropriate combination of natural features and opportunity for waterborne commerce and recreational boating; and

3. On large filled water's edge sites, of about 10 acres or more upland acres, where water-dependent and water-oriented uses can co-exist with other types of development, a greater mix of land uses may be acceptable or even desirable. In these cases, a reduced waterfront portion, that is, less than that provided by a 100 foot setback, may be acceptable provided that non-water related uses do not adversely affect either access to or use of the waterfront portion of the site.

(d) On filled water's edge sites without direct access to navigable water, the area to be devoted to water related uses will be determined on a case-by-case basis.

(e) On filled water's edge sites with an existing or pre-existing water dependent use, that is, one existing at any time since July of 1977, development must comply with the following additional conditions:

1. For sites with an existing or pre-existing marina, development that would reduce the area currently or recently devoted to the marina is acceptable if:

i. For every two housing units proposed on the filled water's edge the existing number of boat slips in the marina mooring area (N.J.A.C. 7:7E-3.10) is increased by one and at least 75 percent of the total number of slips (existing and new) remain open to the general public. Removal of upland to create slips is acceptable;

ii. Marina services are expanded in capacity and upgraded (that is, modernized) to the maximum extent practicable; and

iii. In-water or off site boat storage capability is demonstrated or upland storage is provided to accommodate at least 75 percent of the marina's boats, as determined by maximum slip capacity, 26 feet in length

and longer, and 25 percent of the marina's boats less than 26 feet in length.

2. For sites with an existing or pre-existing water dependent use other than a marina, development that would reduce or adversely affect the area currently or recently devoted to the water dependent use is discouraged.

(f) In waterfront areas located outside of the CAFRA zone the water dependent use may be a public walkway, provided the upland walkway right-of-way is at least 30 feet wide, unless there are existing onsite physical constraints which cannot be removed or altered to meet this requirement.

(g) In the area known as Bader Field, a filled water's edge area located in the City of Atlantic City and described on the 2008 Atlantic City tax duplicate as Block 794, Lot 1, the water dependent use shall be provided in accordance with (c) above or an upland public walkway along the water's edge, no less than 20 feet wide, with a 40-foot-wide right-of-way shall be provided.

(h) The development shall comply with the requirements for impervious cover and vegetative cover that apply to the site under N.J.A.C. 7:7E-5 and either N.J.A.C. 7:7E-5A or 5B.

(i) Along the Hudson River and in other portions of the Northern Waterfront and Delaware River Region, where water dependent uses are deemed infeasible, some part of the waterfront portion of the site may be acceptable for non-water dependent development under the following conditions:

1. The development proposal addresses, as a minimum, past use of the site as well as potential for future water dependent, commercial, transportation, recreation, and compatible maritime support services uses;
2. The developed land uses closest to the water's edge are water oriented;
3. Currently active maritime port and industrial land uses are preserved;
4. Adverse impacts on local residents and neighborhoods are mitigated to the maximum extent practicable; and
5. All other coastal rules are met.

(j) On all filled water's edge sites, development must comply with the lands and waters subject to public trust rights rule, N.J.A.C. 7:7E-3.50, and the public access rule, N.J.A.C. 7:7E-8.11.

(k) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

(a)2 text deleted "if no shore . . . erosion hazard area." (b) deleted; (b)1i.-ii. recodified to (b)1.-2.; (b)2 deleted.

Repeal and New Rule, R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Text on erosion hazard areas deleted.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2000 d.45, effective February 7, 2000.

See: 31 N.J.R. 2042(a), 32 N.J.R. 503(a).

Rewrote (g).

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

In (c), substituted "development shall comply with the following:" for "development must comply with the following conditions:" in the introductory paragraph and rewrote 1.

Amended by R.2007 d.374, effective December 17, 2007.

See: 38 N.J.R. 4570(a), 39 N.J.R. 5222(a).

Rewrote (i).

Amended by R.2010 d.045, effective June 7, 2010.

See: 41 N.J.R. 356(a), 42 N.J.R. 1039(a).

Added new (g); and recodified former (g) through (j) as (h) through (k).

Amended by R.2012 d.182, effective November 5, 2012.

See: 43 N.J.R. 772(a), 44 N.J.R. 614(a), 44 N.J.R. 2559(a).

In (j), substituted "access" for the second occurrence of "trust rights".

#### Case Notes

Project promoting public access and water dependent uses of waterfront property complied with Waterfront Development Act. Matter of Waterfront Development Permit No. 87-1235-1 by Dept. of Environmental Protection to Union County Utilities Authority, 257 N.J.Super. 524, 608 A.2d 973 (A.D.1992).

#### 7:7E-3.24 Existing lagoon edges

(a) Existing lagoon edges are defined as existing manmade land areas resulting from the dredging and filling of wetlands, bay bottom and other estuarine water areas for the purpose of creating waterfront lots along lagoons for residential and commercial development.

1. Existing Lagoon Edges extend upland to the limit of fill, or the first paved public road or railroad generally parallel to the water area, whichever is less.

(b) Development of existing lagoon edges is acceptable provided:

1. The proposed development is compatible with existing adjacent land and water uses;
2. Existing retaining structures are adequate to protect the proposed development;
3. New or reconstructed retaining structures are consistent with the filling rule at N.J.A.C. 7:7E-4.10 and structural shore protection rule N.J.A.C. 7:7E-7.11(e); and

4. The development complies with the requirements for impervious cover and vegetative cover that apply to the site under N.J.A.C. 7:7E-5 and either N.J.A.C. 7:7E-5A or 5B.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Substantially amended.

Repeal and New Rule, R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Text on island corridor deleted.

Amended by R.2000 d.45, effective February 7, 2000.

See: 31 N.J.R. 2042(a), 32 N.J.R. 503(a).

Rewrote (b)4.

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

In (b), deleted "that" following "provided" in the introductory paragraph and rewrote 3.

#### Law Review and Journal Commentaries

Administrative Procedure—CAFRA—Environmental Protection.  
P.R. Chenoweth, 134 N.J.L.J. No. 10, 64 (1993).

Administrative Procedure—Environmental Law. Steven P. Bann, 137 N.J.L.J. No. 1, 67 (1994).

#### 7:7E-3.25 Flood hazard areas

(a) Flood hazard areas are areas subject to flooding from the flood hazard area design flood, as defined by the Department under the Flood Hazard Area Control Act rules at N.J.A.C. 7:13. Flood hazard areas include those areas mapped as such by the Department, areas defined or delineated as an A or a V zone by the Federal Emergency Management Agency (FEMA), and any unmapped areas subject to flooding by the flood hazard area design flood. Flood hazard areas are subject to either tidal or fluvial flooding and the extent of flood hazard areas shall be determined or calculated in accordance with the procedures at N.J.A.C. 7:13-3.

(b) In a tidal flood hazard area below the mean high water line, this section shall apply only to the following activities:

1. Development of habitable buildings; and
2. Construction of railroads, roadways, bridges and/or culverts.

(c) Dedication of flood hazard areas for purposes of public open space is encouraged.

(d) In an undeveloped portion of a flood hazard area that is within 100 feet of a navigable water body, development is prohibited unless the development is for water dependent use. "Navigable" and "water dependent" are defined at N.J.A.C. 7:7E-1.8. For the purposes of this subsection and (d) below, an "undeveloped" area is an area that has no impervious cover.

(e) In a portion of an undeveloped flood hazard area that is 100 feet or farther from a navigable waterway, development is conditionally acceptable provided the development would

not prevent potential water-dependent use in any portion of the flood hazard area within 100 feet of a navigable water body.

(f) Development in flood hazard areas shall conform with the applicable design and construction standards of the following:

1. The Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., and implementing rules at N.J.A.C. 7:13, except in lands regulated under the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq., pursuant to N.J.S.A. 58:16A-60;

2. The Uniform Construction Code, N.J.A.C. 5:23; and

3. The Federal flood reduction standards, 44 C.F.R. Part 60.

(g) Development in a flood hazard area shall comply with the requirements for impervious cover and vegetative cover under N.J.A.C. 7:7E-5 and either N.J.A.C. 7:7E-5A or 5B, as applicable.

(h) If endangered and/or threatened wildlife or species habitat is present in the flood hazard area such that the area is also an endangered or threatened wildlife or plant species habitat special area in accordance with N.J.A.C. 7:7E-3.38, then the requirements of N.J.A.C. 7:7E-3.38, Endangered or threatened wildlife or plant species habitats, shall apply.

(i) For the purposes of this section, if a term is defined in this chapter and in the Flood Hazard Area Control Act rules at N.J.A.C. 7:13, the definition in N.J.A.C. 7:13 shall govern. For any term used in this section that is not defined or otherwise described in this chapter but that is defined or described in the Flood Hazard Area Control Act rules at N.J.A.C. 7:13, the definition or description in N.J.A.C. 7:13 shall apply.

(j) Rationale: See the OAL Note at the beginning of this subchapter.

New Rule, R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Text on wetlands recodified to 3.27.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2000 d.45, effective February 7, 2000.

See: 31 N.J.R. 2042(a), 32 N.J.R. 503(a).

In (a), rewrote the first sentence of the introductory paragraph; in (b), substituted a reference to flood hazard areas for a reference to undeveloped flood hazard areas, and deleted a former second sentence; and rewrote (c), (d) and (g).

Amended by R.20032 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

In (a), substituted "the Department" for "DEP" throughout the introductory paragraph and deleted "Alluvial Flood Margins," and substituted "rules" for "policies" in 3; rewrote (b); in (c), amended the N.J.A.C. reference; in (e), substituted "stormwater management" for "Stormwater Runoff".

Amended by R.2007 d.340, effective November 5, 2007.

See: 38 N.J.R. 3950(a), 39 N.J.R. 4573(a).

Rewrote the section.

**7:7E-3.26 Riparian zones**

(a) A riparian zone exists along every regulated water, except there is no riparian zone along the Atlantic Ocean nor along any manmade lagoon, stormwater management basin, or oceanfront barrier island, spit or peninsula. Regulated waters are defined in the Flood Hazard Area Control Act rules at N.J.A.C. 7:13-2.2.

(b) The riparian zone includes the land and vegetation within each regulated water described in (a) above, as well as the land and vegetation within a certain distance of each regulated water as described in (c) below. The portion of the riparian zone that lies outside of a regulated water is measured landward from the top of bank. If a discernible bank is not present along a regulated water, the portion of the riparian zone outside the regulated water is measured landward as follows:

1. Along a linear fluvial or tidal water, such as a stream, the riparian zone is measured landward of the feature's centerline;
2. Along a non-linear fluvial water, such as a lake or pond, the riparian zone is measured landward of the normal water surface limit;
3. Along a non-linear tidal water, such as a bay or inlet, the riparian zone is measured landward of the mean high water; and
4. Along an amorphously-shaped feature, such as a wetland complex, through which a regulated water flows but which lacks a discernible channel, the riparian zone is measured landward of the feature's centerline.

(c) The width of the riparian zone along each regulated water described in (a) above is as follows:

1. The riparian zone is 300 feet wide along both sides of any Category One water, and all upstream tributaries situated within the same HUC-14 watershed;
2. The riparian zone is 150 feet wide along both sides of the following waters not identified in (c)1 above:
  - i. Any trout production water and all upstream waters (including tributaries);
  - ii. Any trout maintenance water and all upstream waters (including tributaries) within one linear mile as measured along the length of the regulated water;
  - iii. Any segment of a water flowing through an area that contains documented habitat for a threatened or endangered species of plant or animal, which is critically dependent on the regulated water for survival, and all upstream waters (including tributaries) within one linear

mile as measured along the length of the regulated water; and

iv. Any segment of a water flowing through an area that contains acid producing soils; and

3. The riparian zone is 50 feet wide along both sides of all waters not identified in (c)1 or (c)2 above.

(d) The riparian zones established by this chapter are separate from and in addition to any other similar zones or buffers established to protect surface waters. For example, the Stormwater Management rules at N.J.A.C. 7:8 establish 300-foot Special Water Resource Protection Areas along certain waters. Furthermore, the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A establish 50-foot and 150-foot transition areas along freshwater wetlands and other features that are also regulated under this chapter. Compliance with the riparian zone requirements of this chapter does not constitute compliance with the requirements imposed under any other Federal, State or local statute, regulation or ordinance.

(e) Development in riparian zones shall conform with the requirements for a flood hazard area individual permit under the Flood Hazard Area Control Act rules at N.J.A.C. 7:13-9, 10 and 11 or, in the alternative as applicable, a flood hazard area permit-by-rule at N.J.A.C. 7:13-7 or a flood hazard area general permit at N.J.A.C. 7:13-8.

(f) If endangered and/or threatened wildlife or species habitat is present in the riparian zone such that the area is also an endangered or threatened wildlife or plant species habitat special area in accordance with N.J.A.C. 7:7E-3.38, then the requirements of N.J.A.C. 7:7E-3.38, Endangered or threatened wildlife or plant species habitats, shall apply.

(g) For the purposes of this section, if a term is defined in this chapter and in the Flood Hazard Area Control Act rules at N.J.A.C. 7:13, the definition in N.J.A.C. 7:13 shall govern. For any term used in this section that is not defined or otherwise described in this chapter but that is defined or described in the Flood Hazard Area Control Act rules at N.J.A.C. 7:13, the definition or description in N.J.A.C. 7:13 shall apply.

(h) Rationale: See the OAL note at the beginning of this subchapter..

New Rule, R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Text on wetlands buffers recodified to 3.28 and amended to conform to Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A. Repealed by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Section was "Alluvial Flood Margins".

New Rule, R.2007 d.340, effective November 5, 2007.

See: 38 N.J.R. 3950(a), 39 N.J.R. 4573(a).

Section was "Reserved".

**7:7E-3.27 Wetlands**

(a) Wetlands or wetland means an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation.

1. Wetlands areas are identified and mapped on the following:

- i. National Wetlands Inventory Maps produced by the U.S. Fish and Wildlife Service at a scale of 1:24,000 (generalized locations only);
- ii. Coastal wetland maps, pursuant to the Wetlands Act of 1970 (N.J.S.A. 13:9A-1 et seq.) prepared by the DEP at a scale of 1:2,400; and
- iii. Freshwater wetland maps prepared by DEP at a scale of 1:12,000 (generalized locations only).

Note: Maps referenced in (a)ii and iii above are available from the DEP Map and Publications sales office (609) 777-1038.

2. Generalized locations of some wetland types can be found in county soil surveys prepared by the U.S. Department of Agriculture, Soil Conservation Service.

3. The maps referenced under (a)li, iii, and 2 above shall be useful as an indicator to assist in the preliminary determination of the presence or absence of wetlands only. They have been determined to be unreliable for the purposes of locating the actual wetlands boundary on a specific site.

4. All tidal and inland wetlands, excluding the delineated tidal wetlands defined pursuant to N.J.A.C. 7:7-2.2, shall be identified and delineated in accordance with the USEPA three-parameter approach (that is, hydrology, soils and vegetation) specified under N.J.A.C. 7:7A-1.4 of the Freshwater Wetlands Protection Act Rules.

(b) Development in wetlands defined under the Freshwater Wetlands Protection Act is prohibited unless the development is found to be acceptable under the Freshwater Wetlands Protection Act Rules (N.J.A.C. 7:7A), except as provided at (b)1 below. Pursuant to the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-6, coastal activities under the jurisdiction of the New Jersey Meadowlands Commission shall not require a Freshwater Wetlands permit, or be subject to transition area requirements of the Freshwater Wetlands Protection Act, except that discharge of dredged or fill materials may require a permit issued under the provisions of Section 404 of the Federal Water Pollution Control Act of 1972 as amended by the Federal Clean Water Act of 1977, or under an individual or general permit program administered by the State under the provisions of the Federal Act and applicable State laws. Accordingly, under this rule the Department does not exert jurisdiction under the Freshwater Wetlands Protection

Act, N.J.S.A. 13:9B-1 et seq., in the Hackensack Meadowlands District. However, the Department shall, in accordance with N.J.S.A. 13:9B-6 and applicable law, review any such coastal activity or development as follows:

1. For the purposes of reviewing a coastal activity or development that proposes the placement of dredged or fill materials in wetlands located below the mean high water line in the Hackensack Meadowlands District under the Waterfront Development Law, N.J.S.A. 12:5-3, Federal Consistency provisions of the Federal Coastal Zone Management Act, 16 U.S.C. §§1451 et seq., or water quality certification under Section 401 of the Federal Clean Water Act, 33 U.S.C. §§1251 et seq., the Department shall use the conditions, limits, and requirements governing activities or developments in wetlands set forth in N.J.A.C. 7:7A-4, 5 and 7. For the purposes of reviewing a coastal activity or development that proposes the placement of dredged or fill materials in wetlands above the mean high water line that does not require a zoning certificate, resolution or statement of consistency from the New Jersey Meadowlands Commission pursuant to N.J.A.C. 7:7E-3.45(c) in the Hackensack Meadowlands District under the Federal Consistency provisions of the Federal Coastal Zone Management Act, 16 U.S.C. §§1451 et seq., or water quality certification under Section 401 of the Federal Clean Water Act, 33 U.S.C. §§1251 et seq., the Department shall use the conditions, limits, and requirements governing activities or developments in wetlands set forth in N.J.A.C. 7:7A-4, 5 and 7.

i. The mitigation requirements at (h) below shall apply to any coastal activity or development reviewed under this subsection, unless, where the coastal activity or development is reviewed under the conditions, limits, and requirements at N.J.A.C. 7:7A-4 and 5, those conditions, limits, and requirements do not require mitigation.

(c) Development of all kinds in all other wetlands not defined in (b) above is prohibited unless the Department can find that the proposed development meets the following four conditions:

1. Requires water access or is water oriented as a central purpose of the basic function of the activity (this rule applies only to development proposed on or adjacent to waterways). This means that the use must be water dependent as defined in N.J.A.C. 7:7E-1.8;

2. Has no prudent or feasible alternative on a non-wetland site;

3. Will result in minimum feasible alteration or impairment of natural tidal circulation (or natural circulation in the case of non-tidal wetlands); and

4. Will result in minimum feasible alteration or impairment of natural contour or the natural vegetation of the wetlands.

(d) In particular, dumping solid or liquid wastes and applying or storing certain pesticides on wetlands are prohibited.

(e) No action by the Commissioner shall prohibit, restrict or impair the exercise or performance of the powers and duties conferred or imposed by law on the Department of Environmental Protection, the Natural Resource Council and the State Mosquito Control Commission in said Department, the Department of Health, or any mosquito control or other project or activity operating under or authorized by the provisions of chapter 9 of Title 26 of Revised Statutes. This rule does not supersede the authority of the State Mosquito Commission to undertake mosquito control projects authorized by chapter 9 of Title 26 of the Revised Statutes.

(f) Development that adversely affects white cedar stands such as water table drawdown, surface and groundwater quality changes and the introduction of non-native plant species is prohibited.

(g) For projects which require a Waterfront Development permit, the reuse of former dredged material disposal sites for continued dredged material disposal is conditionally acceptable provided the following criteria are met:

1. The site has been used for dredged material disposal within the past 10 years;
2. The site has existing dikes or berms in sound condition, and/or has sufficient area of previously disposed material within the previously disturbed disposal area to allow the construction of structurally sound dikes and berms;
3. There are no anticipated adverse effects on threatened or endangered species;
4. There are no colonial nesting birds present on site which would be adversely affected (seasonal restrictions may be required);
5. No wetlands regulated pursuant to the Wetlands Act of 1970 would be adversely affected;

6. The former dredged material disposal area is not subject to daily tidal inundation, and the vegetation community is limited primarily to scrub/shrub or phragmites; and

7. The required Waterfront Development permit and Water Quality Certification are obtained.

(h) If an application to disturb or destroy wetlands meets the standards for permit approval, the Department will require the applicant to mitigate for the loss or degradation of the wetlands in accordance with the following:

1. Mitigation for the loss of wetlands subject to the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., shall meet the standards of N.J.A.C. 7:7A.

2. When a permit allows the disturbance or loss of wetlands by filling or other means, this disturbance or loss shall be compensated for as specified under (h)9 below unless the applicant can prove through the use of productivity models or other similar studies, that by restoring or creating a lesser area, there will be replacement of wetlands of equal ecological value. In order to demonstrate equal ecological value, the applicant shall survey and provide written documentation regarding, at a minimum, existing soil, vegetation, water quality functions, flood storage capacity, soil erosion and sediment control functions, and wildlife habitat conditions and detail how the proposed mitigation plan will replace the ecological values of the wetland to be lost or disturbed.

3. Mitigation shall be performed prior to or concurrent with activities that will permanently disturb wetlands and immediately after activities that will temporarily disturb these habitats. A letter of credit or other financial assurance is required prior to approval of the mitigation proposal by the Department, except if the mitigator is a government agency or entity that is exempt from this requirement under Federal law. The financial assurance requirements are found at N.J.A.C. 7:7E-3B.3.

4. Where the Department permits a mitigation surface area of less than 2:1, monitoring by the permittee at a frequency determined by the Department to be appropriate on a case-by-case basis shall be required. In such cases, additional mitigation or further remedial action shall be required at a level and within the forms determined to be appropriate on a case-by-case basis by the Department when the Department determines that a net loss of equal ecological value occurs. Under no circumstances shall the mitigation area be smaller than the disturbed area. Creation of wetlands from existing natural resources protected under the applicable Special Area Rules (N.J.A.C. 7:7E-3) is not an acceptable form of mitigation, nor is transfer of title of existing wetlands or intertidal or subtidal shallows to a government agency or conservation organization.

5. The Department will not consider a mitigation proposal in determining whether a project should be

awarded a permit, but will require mitigation as a condition of any permit found to be acceptable under the criteria listed in N.J.A.C. 7:7A-3 and/or N.J.A.C. 7:7E-3.15 and 3.27.

6. As a condition of every creation or enhancement plan authorized under this subsection, an applicant shall sign a Department approved conservation restriction and register this restriction on the deed for the subject parcel. This conservation restriction will provide that no regulated activities will occur in the created or enhanced wetland area. This conservation restriction shall be approved by the Department and shall run with the land and be binding upon the applicant and the applicant's successors in interest in the premises or any part thereof. The permit will not become effective until the conservation restriction is recorded with the county clerk or Registrar of Deeds and Mortgages, if applicable. Any regulated activities undertaken on the site before a copy of the recorded conservation restriction is submitted to the Department will be considered in violation of these rules.

i. No future development will be permitted on the mitigation site unless the Department finds that the regulated activity has no practicable alternative which would:

(1) Not involve a wetland site;

(2) Involve a wetland but would have a less adverse impact on the aquatic ecosystem;

(3) Not have other significant adverse environmental consequences, that is, it shall not merely substitute other significant environmental consequences, for those attendant on the original proposal; and

(4) There is a compelling public need for the activity greater than the need to protect the mitigation site.

ii. To satisfy (h)6 above, the applicant shall provide a copy of the recorded document or a receipt showing that the conservation restriction has been recorded at the county clerk's office.

7. Except for publicly funded projects, as described at (h)7i below, any mitigation carried out off-site shall be on private property.

i. Mitigation for publicly funded projects may be carried out on public lands provided that these lands were private lands purchased by a public agency expressly for the purpose of performing mitigation.

8. Future development of the mitigation site is prohibited and as a condition of any permit which includes creation of the mitigation site, the owner shall be required to record a conservation restriction governing that site.

9. The Department distinguishes between four types of mitigation: restoration, creation, enhancement, and

contribution. Depending on the circumstances under which wetlands are lost or disturbed, different types of mitigation may be required by the Department. The types of mitigation are explained below, in decreasing order of their desirability:

i. Restoration refers to actions performed on the site of a regulated activity, within six months of the commencement of the regulated activity, in order to reverse or remedy the effects of the activity on the wetland and to restore the site to preactivity condition.

(1) Restoration shall be required at a ratio of one acre created to one acre lost or disturbed. If restoration actions are performed more than six months after the commencement of the regulated activity which disturbed the wetland, these actions will no longer be considered restoration, but will be considered creation, and will be governed by the provisions of (h)9ii(3) below.

(2) If restoration actions are performed on degraded wetlands offsite, these actions will be considered enhancement and will be governed by the provisions of (h)9iii below.

ii. Creation refers to actions performed to establish wetland characteristics, habitat and functions on:

(1) A non-wetlands site; or

(2) A former wetlands site which has been filled or otherwise disturbed such that it no longer retains wetland characteristics. If the site retains wetland characteristics such that it meets the definition of a degraded wetland pursuant to N.J.A.C. 7:7A-1.4, it is not eligible for use in creation. Rather, it is only eligible for enhancement activities pursuant to (h)9iii below. If the disturbance to a formerly wetlands site is the result of a violation of the Freshwater Wetlands Protection Act and/or the Wetlands Act of 1970, the Department may, at its discretion, condition an approval of a mitigation proposal, or a permit, or both, on the resolution of the violation.

(3) Creation will be required at a ratio of two acres created to one acre lost or disturbed. Under no circumstances shall the mitigation area be smaller than the disturbed area.

(4) Creation shall not be permitted on a site that retains wetlands characteristics.

iii. Enhancement refers to actions performed to improve the characteristics, habitat and functions of an existing, degraded wetland such that the enhanced wetland will have resource values and functions similar to an undisturbed wetland. The enhancement requirement will be determined on a case-by-case basis.

iv. Contribution refers to the donation of money or land. The Department will permit the donation of land only after determining that all alternatives to the donation are not practicable or feasible, or that the permanent protection of the land will provide ecological benefits equal to or greater than those resulting from the creation of wetlands. This determination will be made in consultation with the United States Environmental Protection Agency (USEPA) for freshwater wetlands. Monies donated shall be used for the purchase of land to provide areas for wetland losses, to provide areas for restoration of degraded wetlands, and to provide areas to preserve wetlands and transition areas determined to be of critical importance, and the transfer of funds for research to enhance the practice of mitigation. If money is donated, the Department will require an amount equivalent to the lesser of the following costs:

(1) Purchasing and enhancing existing degraded wetlands, resulting in preservation of wetlands of equal ecological value to those which are being lost; or

(2) Purchase of property and the cost of creation of wetlands of equal ecological value to those which are being lost.

v. If the Department determines that land may be donated as part or all of a contribution to mitigate for the destruction of freshwater wetlands, the Wetlands Mitigation Council must first determine that the donated land has the potential to be a valuable component of the wetlands ecosystem.

10. All mitigation projects shall be carried out on-site to the maximum extent practicable. Mitigation of wetlands, on-site or off-site, from other existing climax habitats is not practicable and is discouraged.

i. If on-site mitigation is found to be impracticable, off-site mitigation shall be considered and implemented within the same watershed or estuary if feasible.

11. All mitigation proposals submitted to the Department shall be prepared in accordance with N.J.A.C. 7:7E-3B.

(i) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Substantially amended.

Amended by R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Text on cranberry bogs recodified to 3.29; text on wetlands recodified from 3.25 and amended to conform to Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2000 d.428, effective October 16, 2000.

See: 32 N.J.R. 864(a), 32 N.J.R. 3784(b).

In (h)6, substituted "approved by the Department" for "memorialized in a deed restriction meeting the Department's requirements" in the third sentence; and in (h)6 and (h)8, inserted references to conservation restrictions for references to conservation easements and substituted "recorded" for "registered" throughout.

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

In (c)1, amended the N.J.A.C. reference; rewrote (h)3.

Amended by R.2008 d.82, effective April 7, 2008.

See: 39 N.J.R. 725(a), 40 N.J.R. 1836(a).

Rewrote (b).

Public Notice: Routine Program Change for Coastal Management Program.

See: 41 N.J.R. 3324(b), 4325(b).

#### Case Notes

Federal court finding that land was wetland under federal definition required applicant for permit to concede that activity conflicted with state's coastal zone management program. Matter of Stoeco Development, Ltd., 262 N.J.Super. 326, 621 A.2d 29 (A.D.1993).

Project's exemption from permit requirements does not prevent state from finding proposed activity inconsistent with state's coastal zone management program. Matter of Stoeco Development, Ltd., 262 N.J.Super. 326, 621 A.2d 29 (A.D.1993).

Permit to fill wetlands granted by Army Corps of Engineers was not subject to state regulation. Matter of Waterfront Development Permit No. 87-1235-1 by Dept. of Environmental Protection to Union County Utilities Authority, 257 N.J.Super. 524, 608 A.2d 973 (A.D.1992).

Exclusive state regulation of isolated wetlands was provided by Freshwater Wetland Protection Act. Matter of Waterfront Development Permit No. 87-1235-1 by Dept. of Environmental Protection to Union County Utilities Authority, 257 N.J.Super. 524, 608 A.2d 973 (A.D.1992).

State regulation of upland development which had no direct effect on navigable waterways was not authorized by Waterfront Development Act. Matter of Waterfront Development Permit No. 87-1235-1 by Dept. of Environmental Protection to Union County Utilities Authority, 257 N.J.Super. 524, 608 A.2d 973 (A.D.1992).

Department of Environmental Protection was not required, in contested permit proceeding, to give notice that condition of mitigation might be imposed. *Baron v. New Jersey Department of Environmental Protection*, 93 N.J.A.R.2d (EPE) 75.

#### 7:7E-3.28 Wetlands buffers

(a) Wetlands buffer or transition area means an area of land adjacent to a wetland which minimizes adverse impacts on the wetlands or serves as an integral component of the wetlands ecosystem (see Appendix, Figure 7). Wider buffers than those noted below may be required to establish conformance with other Coastal Rules, including, but not limited to, 7:7E-3.38 and 3.39.

1. A wetlands buffer or transition area of up to 150 feet in width shall be established adjacent to all wetlands defined and regulated under the Freshwater Wetlands Protection Act. (Refer to the Freshwater Wetland Protection Act Rules, N.J.A.C. 7:7A, for further guidance).

2. For all other wetlands, including wetlands regulated under the Coastal Wetlands Act of 1970, a wetlands buffer of up to 300 feet shall be established.

(b) Subject to (a) above, all wetlands buffers (that is, transition area) associated with wetlands subject to the

Freshwater Wetlands Protection Act shall be regulated in accordance with the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A.

(c) Development is prohibited in a wetlands buffer around all other wetlands, unless it can be demonstrated that the proposed development will not have a significant adverse impact and will cause minimum feasible adverse impact, through the use of mitigation where appropriate on the wetlands, and on the natural ecotone between the wetlands and surrounding upland. The precise geographic extent of the actual wetlands buffer required on a specific site shall be determined on a case-by-case basis using these standards.

(d) In areas of the coastal zone which are within the Hackensack Meadowlands District, the appropriate buffer width shall be determined in accordance with the requirements set forth in the Hackensack Meadowlands District Zoning Regulations.

(e) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.

See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

"Policy:" deleted from (b).

Amended by R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Text on wet borrow pit margins recodified to 3.30 and amended to conform to Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A and N.J.A.C. 7:50-6.14.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Administrative correction.

See: 37 N.J.R. 1516(a).

#### 7:7E-3.29 (Reserved)

Amended by R.1985 d.715, effective February 3, 1986.

See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

(b) deleted; (b)1.-3. recodified as (b)-(d); (c) recodified as (e).

Amended by R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Text on coastal bluffs recodified to 3.31.

Repealed by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Section was "Cranberry Bogs".

#### 7:7E-3.30 (Reserved)

Amended by R.1985 d.715, effective February 3, 1986.

See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Subsection (b) deleted; (b)1.-6. recodified to (b)-(g); (c) recodified to (h).

Amended by R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Text on intermittent stream corridors recodified to 3.32; text on wet borrow pit margins recodified and amended to conform to Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A; wet borrow pits are considered State open waters.

Repealed by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Section was "Wet Borrow Pit Margins".

**7:7E-3.31 Coastal bluffs**

(a) A coastal bluff is a steep slope (greater than 15 percent) of consolidated (rock) or unconsolidated (sand, gravel) sediment which is adjacent to the shoreline or which is demonstrably associated with shoreline processes.

1. The waterward limit of a coastal bluff is a point 25 feet waterward of the toe of the bluff face, or the mean high water line, whichever is nearest the toe of the bluff.

2. The landward limit of a coastal bluff is the landward limit of the area likely to be eroded within 50 years, or a point 25 feet landward of the crest of the bluff, whichever is farthest inland (see Appendix, Figures 7 and 8, incorporated herein by reference).

3. Steep slopes (N.J.A.C. 7:7E-3.34) are isolated inland areas with slopes greater than 15 percent. All steep slopes associated with shoreline processes or adjacent to the shoreline and associated wetlands, or contributing sediment to the system, will be considered coastal bluffs.

(b) Development is prohibited on coastal bluffs, except for linear development which meets the rule on the Location of Linear Development (N.J.A.C. 7:7E-6.1), shore protection activities which meet the appropriate Coastal Engineering Use rules (N.J.A.C. 7:7E-7.11), and single family homes and duplexes which are not located along the shorelines of the Atlantic Ocean, Delaware Bay, Raritan Bay or Sandy Hook Bay and comply with N.J.A.C. 7:7E-7.2(e) or (f).

(c) The stabilization of coastal bluffs with vegetation is encouraged.

(d) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

(b) and (b)2 deleted; section recodified to reflect deletions.

Amended by R.1990 d.413, effective August 20, 1990.  
See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Text on farmland conservation areas recodified to 3.33 and amended to reflect and support the State and local Farmlands Preservation and Agricultural Development and Retention Programs; text on coastal bluffs recodified from 3.29.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Public Notice: Petition for Rulemaking; Coastal Permit Program Rules.

See: 28 N.J.R. 3674(a).

Public Notice: Action on petition for rulemaking.

See: 28 N.J.R. 3833(a).

Amended by R.2000 d.428, effective October 16, 2000.

See: 32 N.J.R. 864(a), 32 N.J.R. 3784(b).

Rewrote (b).

**7:7E-3.32 Intermittent stream corridors**

(a) Intermittent stream corridors are areas including and surrounding surface water drainage channels in which there is not a permanent flow of water and which contain an area or

areas with a seasonal high water table equal to or less than one foot. The inland extent of these corridors is either the inland limit of soils with a seasonal high water table depth equal to, or less than one foot, or a disturbance of 25 feet measured from the top of the channel banks, whichever is greater (see Appendix, Figures 7 and 9, incorporated herein by reference).

1. Where an intermittent stream corridor is also a wetland, the Wetlands rule (N.J.A.C. 7:7E-3.27) shall apply.

(b) Uses that promote undisturbed growth of native vegetation and wildlife habitat value are encouraged.

(c) Cutting, filling, damming, detention basins for runoff recharge, paving, structures or any other activities that would directly degrade the function of intermittent stream corridors, except for linear infrastructure for which there is no feasible alternate route, is prohibited.

(d) Intermittent streams not subject to the ebb and flow of the tide shall also comply with the Freshwater Wetlands Protection Act Rules (N.J.A.C. 7:7A).

(e) Rationale: See the OAL Note at the beginning of this subchapter.

(Agency note: N.J.A.C. 7:7E-3.33 through 3.35 are Special Land Areas)

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

(b) deleted; section recodified.

Amended by R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Text on steep slopes recodified to 3.34; text on intermittent stream corridors recodified from 3.30; intermittent stream corridors are considered State open waters.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

**7:7E-3.33 Farmland conservation areas**

(a) Farmland conservation areas are defined as any contiguous area of 20 acres or more (in single or multiple tracts of single or multiple ownership) with soils in the Capability Classes I, II and III or special soils for blueberries and cranberries as mapped by the United States Department of Agriculture, Soil Conservation Service, in National Cooperative Soil Surveys, which are actively farmed, or suitable for farming, unless it can be demonstrated by the applicant that new or continued use of the site for farming or farm dependent purposes is not economically feasible. Farming or farm-dependent purposes include nurseries, orchards, vegetable and fruit farming, raising grains and seed crops, silviculture (such as Christmas tree farming), floriculture (including greenhouses), dairying, grazing, livestock raising, and wholesale and retail marketing of crops, plants, animals and other related commodities.

(b) Farmland conservation areas shall be maintained and protected for open space or farming purposes. Farming or farm-dependent uses are permitted uses in farmland conservation areas. Housing is permitted only if it is an accessory use

to farming. Mining is permitted only in accordance with a reclamation plan which meets the requirements of the Mining Use rule (N.J.A.C. 7:7E-7.8).

those developments listed in (i) above, in accordance with the following:

1. The amount to be paid in mitigation shall be calculated as follows:

i. For development within a street right-of-way at grade, or below a height of 14 feet six inches above grade, the amount of mitigation is five times the property tax on the assessed value of the right-of-way area to be developed. The assessed value is an average of the value of the land on both sides of the area to be developed; and

ii. For development within a street right-of-way at a height of 14 feet six inches or greater above grade, the amount of mitigation is three times the Atlantic City tax on the assessed value of the right-of-way area to be covered by development. The assessed value is an average of the value of the land on both sides of the right-of-way area to be covered by development;

2. Mitigation monies shall be paid in full to the Casino Reinvestment and Development Authority prior to the commencement of construction; and

3. Mitigation monies paid to the Casino Reinvestment and Development Authority in accordance with (j)1 and 2 above, shall be designated only for acquisition and/or improvement of lands for public access and public parks along the oceanfront and inlet. If the money is used for these improvements within a street-end, the money shall be used only in a street-end listed in (f) above.

(k) Standards relevant to intercept parking are as follows:

1. Each hotel-casino facility located in Atlantic City shall provide one of every five non-Absecon Island and non-Brigantine Island resident hotel-casino employees commuting during the daily peak hour with an intercept space. Absecon Island residents are residents of Atlantic City, Margate, Ventnor and Longport. Brigantine Island residents are residents of the City of Brigantine. Nobsecon Island and non-Brigantine Island resident employees commuting during the daily peak hour is the sum of the number of non-Absecon Island and non-Brigantine Island resident employees of the shift with the largest number of employees plus the number of non-Absecon Island and non-Brigantine Island resident employees of the next largest adjoining shift. This intercept parking space shall be located off Absecon and Brigantine Islands, specifically outside of the municipal boundary of the five municipalities identified above. If off-island sites are not available, temporary use of other sites is conditionally acceptable if an applicant can demonstrate that it will be moved to an off-island site within one year.

2. Alternatives that would reduce vehicle miles traveled and peak hour employee travel demand may be substituted for the employee intercept parking space requirements for casino facilities. The Department will review proposed alternatives in consultation with the De-

partment of Transportation. The Department will approve alternatives, which it determines will reduce vehicle miles traveled and peak-hour employee travel by at least as much as would result from furnishing intercept parking as described above. Acceptable alternatives include, but are not limited to, employee subsidies for bus, rail transit, van pools, and/or bicycle programs.

3. Alternative scheme proposals must include documentation indicating the existing travel pattern and mode of travel characteristics of non-Absecon and non-Brigantine Island resident employees. This information shall be provided to the Department along with the necessary data used to establish the vehicle miles traveled and peak hour employee travel demand with and without the proposed peak hour traffic reduction program. All proposals shall include a monitoring program to be submitted to the Department to verify the success of the proposed traffic reduction program, update the employee travel characteristics pattern, and serve as a basis for future adjustments if necessary.

(l) Development in Atlantic City shall be constructed in conformance with this section and with all other applicable provisions in this chapter.

New Rule, R.2000 d.45, effective February 7, 2000.

See: 31 N.J.R. 2042(a), 32 N.J.R. 503(a).

Amended by R.2010 d.045, effective June 7, 2010.

See: 41 N.J.R. 356(a), 42 N.J.R. 1039(a).

Rewrote (f) and (g).

Amended by R.2010 d.193, effective September 7, 2010.

See: 41 N.J.R. 3168(a), 41 N.J.R. 4168(a), 42 N.J.R. 642(a), 42 N.J.R. 2066(b).

Rewrote (c)5.

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

(a) Lands and waters subject to public trust rights are tidal waterways and their shores, including both lands now or formerly below the mean high water line, and shores above the mean high water line. Tidal waterways and their shores are subject to the Public Trust Doctrine and are held in trust by the State for the benefit of all the people, allowing the public to fully enjoy these lands and waters for a variety of public uses. Public trust rights include public access which is the ability of the public to pass physically and visually to, from and along the ocean shore and other waterfronts subject to public trust rights and to use these lands and waters for activities such as navigation, fishing and recreational activities including, but not limited to, swimming, sunbathing, surfing, sport diving, bird watching, walking, and boating. Public trust rights also include the right to perpendicular and linear access.

(b) Public access to lands and waters subject to public trust rights shall be provided in accordance with the public access rule, N.J.A.C. 7:7E-8.11. Development that does not comply with N.J.A.C. 7:7E-8.11, Public access, is discouraged in lands and waters subject to public trust rights.

(c) **Rationale:** See the OAL Note at the beginning of this subchapter.

New Rule, R.2007 d.374, effective December 17, 2007.

See: 38 N.J.R. 4570(a), 39 N.J.R. 5222(a).

Amended by R.2009 d.34, effective January 20, 2009.

See: 39 N.J.R. 5145(a), 41 N.J.R. 546(a).

Added (c).

Amended by R.2012 d.182, effective November 5, 2012.

See: 43 N.J.R. 772(a), 44 N.J.R. 614(a), 44 N.J.R. 2559(a).

Rewrote the section.

## SUBCHAPTER 3A. STANDARDS FOR BEACH AND DUNE ACTIVITIES

### 7:7E-3A.1 Purpose and scope

(a) This subchapter sets forth the standards applicable to routine beach maintenance, emergency post-storm restoration, dune creation and maintenance, and construction of boardwalks. These standards are referenced at N.J.A.C. 7:7E-3.16, Dunes; N.J.A.C. 7:7E-3.17, Overwash areas; N.J.A.C. 7:7E-3.19, Erosion hazard areas; N.J.A.C. 7:7E-3.22, Beaches; and N.J.A.C. 7:7E-7.11, Coastal engineering. In addition, N.J.A.C. 7:7E-3A.2, 3A.3 and 3A.4 are the standards for the coastal general permit for beach and dune maintenance activities, N.J.A.C. 7:7-7.6.

1. The standards applicable to routine beach maintenance, including debris removal and clean-up; mechanical sifting and raking; maintenance of access ways; removal of sand from street ends; boardwalk promenades and residential properties; repairs or reconstruction of existing gazebos and dune walkover structures, and limited sand transfers from the lower beach to the upper beach or alongshore are found at N.J.A.C. 7:7E-3A.2;

2. The standards that apply to the restoration of all beaches that are impacted by coastal storms with a recurrence interval to or exceeding a five-year storm event are found at N.J.A.C. 7:7E-3A.3;

3. The standards for dune creation and maintenance including the placement and/or repair of sand fencing, the planting and fertilization of appropriate dune vegetation, the maintenance and clearing of beach access pathways less than eight feet in width; and the construction or repair of approved dune walkover structures are found at N.J.A.C. 7:7E-3A.4; and

4. The standards for construction of boardwalks along tidal shorelines are found at N.J.A.C. 7:7E-3A.5.

New Rule, R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

Former N.J.A.C. 7:7E-3A.1, Standards applicable to routine beach maintenance, recodified to N.J.A.C. 7:7E-3A.2.

#### Case Notes

New Jersey Department of Environmental Protection's broad scope of authority under the New Jersey Coastal Area Facility Review Act

(CAFRA), N.J.S.A. 13:19-1 through 13:19-21, included jurisdiction to review fees proposed by a private beach club for the public's use of its beach. *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40, 879 A.2d 112, 2005 N.J. LEXIS 932 (2005).

### 7:7E-3A.2 Standards applicable to routine beach maintenance

(a) Routine beach maintenance includes debris removal and clean-up; mechanical sifting and raking; maintenance of accessways; removal of sand from street ends, boardwalks/promenades and residential properties; the repair or reconstruction of existing boardwalks, gazebos and dune walkover structures; and limited sand transfers from the lower beach to the upper beach or alongshore (shore parallel). Sand transfers from the lower beach profile to the upper beach profile are specifically designed to restore berm width and elevation, to establish/enhance dunes and to repair dune scarps. Activities which preclude the development of a stable dune along the back beach are not considered to be routine beach maintenance activities, pursuant to this section. Specifically, the bulldozing of sand from the upper beach (berm) to the lower beach (beach face), for the purpose of increasing the berm width or flattening the beach profile, is not considered to be routine maintenance.

1. If the activities in (a) above are proposed to be conducted by a municipal or county agency on property owned by that governing body, then the municipal or county engineer must certify that the activities will be conducted in accordance with these standards. The appropriate municipal or county engineer is responsible for ensuring compliance with these requirements. If these activities are proposed to be conducted on privately owned property, then the property owner is responsible for ensuring that the activities will be conducted in accordance with these standards. If these activities are proposed to be conducted on State owned properties, then the DEP, Bureau of Construction and Engineering must certify that the activities will be conducted in accordance with these standards.

2. All guidelines and specifications of this section must be incorporated into any contract documents or work orders related to proposed beach and dune activities, as described in this section. The Land Use Regulation Program is available to assist in the development of specific maintenance plans for oceanfront locations, upon request.

3. In areas documented by the Department as habitat for threatened or endangered beach nesting shorebirds such as Piping Plovers (*Charadrius melodus*) and Least Terns (*Sterna albifrons*), no beach raking or other mechanical manipulation of the beach shall take place between April 1 and August 15.

i. The Department's Division of Fish and Wildlife shall develop a list of specific areas where this restriction shall apply, based on documented habitat during the most recent nesting season. The list of restricted areas shall be updated annually by the Division of Fish and Wildlife, at the end of each nesting season and be

available upon request from the Department's Land Use Regulation Program at PO Box 439, Trenton, New Jersey 08625-0439 (609) 292-0060. The updated list shall be provided by the Department to each permittee prior to April 1 of each year.

ii. If a particular beach area is identified on the updated list as described in (a)3i above as habitat for threatened or endangered beach nesting shorebirds, regardless of the habitat classification of the previous nesting season, no beach raking or other mechanical

manipulation of the beach shall take place between April 1 and August 15 in those areas.

iii. If a particular beach area is not identified on the updated list as described in (a)3i above, but is subsequently found to contain a nest of a threatened or endangered beach nesting shorebird, the Department shall notify the permittee and no beach raking or mechanical manipulation of the beach shall take place between April 1 and August 15 in those areas.

iv. The restrictions contained in (a)3 above may be waived if the Department's Division of Fish and Wildlife determines that the identified areas do not represent suitable threatened or endangered beach nesting shorebird habitat, due to beach erosion or other causes. Requests for such a waiver shall be made in writing to the Land Use Regulation Program, PO Box 439, Trenton, New Jersey, 08625-0439; and

4. Mechanical sifting and beach raking shall be limited to recreational beach areas only. For the purposes of this subsection, "recreational beach area" means all areas within 100 yards of a staffed lifeguard stand.

(b) Projects involving the mechanical redistribution of sand from the lower beach profile to the upper beach profile, or alongshore, are acceptable, in accordance with the following standards:

1. The amount of sand transferred at any one time shall be limited to one foot scraping depth at the borrow zone. This borrow zone may not be rescraped until the sand volume from the previous scraping activities has been fully restored.

2. The borrow zone shall be limited to the area between the low water line and the inland limit of the berm. It is strongly recommended that a program of beach profiling be utilized to monitor the condition of the beaches and to ensure compliance with the standards of this section.

3. If the purpose of the sand transfers is to repair eroded dunes (dune scarps), all filled areas shall be stabilized with sand fencing and planted with beach grass in accordance with DEP and/or SCS standards. Fencing shall be in place within 30 days of the transfer operation, while the vegetative plantings may be installed during the appropriate seasonal planting period (October 15 through March 31, anytime the sand is not frozen).

4. There shall be no disturbance to existing dune areas.

5. In areas of documented habitat for threatened or endangered beach nesting shorebirds such as Piping Plovers (*Charadrius melodus*) and Least Terns (*Sterna albifrons*), no sand transfers shall take place between April 1 and August 15.

i. The Department's Division of Fish and Wildlife shall develop a list of specific areas where this restriction shall apply, based on documented habitat during the

most recent nesting season. The list of restricted areas shall be updated annually by the Division of Fish and Wildlife, at the end of each nesting season and be available upon request from the Department's Land Use Regulation Program at PO Box 439, Trenton, New Jersey 08625-0439 (609) 292-0060. The updated list shall be provided by the Department to each permittee prior to April 1 of each year.

ii. If a particular beach area is identified on the updated list as described in (b)5i above as habitat for threatened or endangered beach nesting shorebirds, regardless of the habitat classification of the previous nesting season, no sand transfers shall take place between April 1 and August 15 in those areas.

iii. If a particular beach area is not identified on the updated list as described in (b)5i above, but is subsequently found to contain a nest of a threatened or endangered beach nesting shorebird, the Department shall notify the permittee and no sand transfers shall take place between April 1 and August 15 in those areas.

iv. The restrictions contained in (b)5 above may be waived if the Department's Division of Fish and Wildlife determines that the identified areas do not represent suitable threatened or endangered beach nesting shorebird habitat, due to beach erosion or other causes. Requests for such a waiver shall be made in writing to the Land Use Regulation Program, PO Box 439, Trenton, New Jersey, 08625-0439; and

6. Sand transfers to or from wetland areas that may exist on a beach are not authorized by this permit.

7. Records of all sand transfer activities shall be maintained by the property owner, beach association, governmental agency or other authority conducting the activities, and shall be available for inspection by the Department, upon request. These records shall include, but not be limited to, dates of transfer, borrow area limits, fill area limits, estimates of the amount of sand transferred, the name of the person(s) supervising the transfer activities, and the engineering certification required (if appropriate) for all sand transfer activities.

Amended by R.2000 d.428, effective October 16, 2000.

See: 32 N.J.R. 864(a), 32 N.J.R. 3784(b).

Rewrote the section.

Recodified from N.J.A.C. 7:7E-3A.1 by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

Former N.J.A.C. 7:7E-3A.2, Standards applicable to emergency post-storm beach restoration, recodified to N.J.A.C. 7:7E-3A.3.

### 7:7E-3A.3 Standards applicable to emergency post-storm beach restoration

(a) This section on emergency post-storm beach restoration will apply to all beaches which are impacted by coastal storms with a recurrence interval equal to or exceeding a five-year storm event. Emergency post-storm beach restoration

projects not specifically identified in this section may be authorized by the Department through an Emergency Permit authorization pursuant to N.J.A.C. 7:7-1.7 if the Department determines that there is an imminent threat to lives or property.

(b) Beach restoration activities, as part of an emergency post-storm recovery, include: the placement of clean fill material with grain size compatible with (or larger than) the existing beach material; the bulldozing of sand from the lower beach profile to the upper beach profile; the alongshore transfer of sand on a beach; the placement of concrete or rubble; and the placement of sand filled geotextile bags or tubes. The placement of sand filled geotextile bags or tubes is preferred to the placement of concrete, rubble or other material.

(c) The emergency post-storm beach restoration activities in (b) above should be designed and implemented as a means to restore the beaches to the pre-storm condition, or to restore the beaches to a level sufficient to provide protection from a storm event with a minimum recurrence interval of five years (five-year storm protection). For the purpose of this section, five-year storm protection equates to a minimum 30-foot wide berm at elevation +8 Mean Sea Level (NAD, 1983). Restoration beyond the pre-storm beach condition is encouraged by the Department, but will not be considered "emergency post-storm beach restoration," pursuant to this section.

(d) The bulldozing of sand from the lower beach profile to the upper beach profile, as part of an emergency post-storm beach restoration plan, is acceptable, in accordance with the following standards:

1. Bulldozing is limited to the beach area landward of the low water line. Removal of material from below the low water line is considered dredging, and is not authorized pursuant to this section; and
2. The beach face cannot be graded to a slope steeper than 1:3.

(e) The longshore transfer of sand from one beach area to another, as part of an emergency post-storm beach restoration plan, is acceptable, in accordance with the following standards:

1. No disturbance to existing dune areas is permitted;
2. Sand borrow areas shall not be bulldozed to a depth which exceeds one foot;
3. The borrow areas may not be rescarped until full sand volume recovery has occurred; and
4. An adequate supply of sand is available at the borrow area site, so that the relocation of this material will not decrease the level of protection adjacent to the borrow area.

(f) The placement of sand filled geotextile bags or geotubes, as part of an emergency post-storm beach restoration

plan, is acceptable, in accordance with the following standards:

1. In areas where dunes are present, the geotextile bags or geotubes shall be placed along the toe of any scarped dune, or seaward of the dune toe, and not on the dune itself;
2. In areas where dunes are not present, the geotextile bags or geotubes shall be placed at the landward limit of the beach and in no case be placed below the mean high water line;
3. The geotextile bags or geotubes shall be tapered at the end of the project area, to minimize the impact to adjacent areas which are not protected by the geotextile bags or geotubes;
4. The crest and seaward side of the geotubes shall be buried to achieve a gradual, uniform slope from the upper beach to the crest of the geotextile bag or geotube;
5. The length of shoreline along which the geotextile bags or geotubes are installed shall not exceed a cumulative length of 500 feet;
6. Fill material for the geotextile bags or geotubes shall be from an upland source, excluding the beach and dune; and
7. The geotextile bag or geotube shall be installed parallel to the shoreline.

(g) The placement of sand, gravel, rubble, concrete, or other inert material, as part of an emergency post-storm beach restoration plan, is acceptable, in accordance with the following standards:

1. All material shall be non-toxic sand, gravel, concrete, rubble, or other inert material;
2. The placement of concrete or rubble shall be temporary in nature, and is not to be used as permanent protection, unless it is part of a DEP approved, engineered design for permanent shore protection;
3. All concrete and rubble placed on the beach shall be removed within 90 days, unless the placement is part of a Department approved, engineered design for permanent shore protection; and
4. The use of automobiles, tires, wood debris, asphalt, appliances or other solid waste is prohibited.

Amended by R.2000 d.428, effective October 16, 2000.

See: 32 N.J.R. 864(a), 32 N.J.R. 3784(b).

Rewrote (a) and (f).

Recodified from N.J.A.C. 7:7E-3.2 and amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

In (g)3, substituted "Department" for "DEPE". Former N.J.A.C. 7:7E-3.3, Standards applicable to dune creation and maintenance, recodified to N.J.A.C. 7:7E-3.4.

**Case Notes**

In an action involving the interpretation of a restrictive covenant in a beach-front community, because the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 et seq., and a local zoning ordinance did not: (1) govern the same field; and, (2) have the same purpose or cover the same subject matter, the statute did not preempt the ordinance; moreover, the appeals court did not believe that the New Jersey Legislature intended landowners to circumvent local zoning ordinances that regulated fences by invoking CAFRA, especially when the so-called dune at issue between a landowner and her neighbor did not protect the beach from erosion as dunes generally should. *Bubis v. Kassin*, 184 N.J. 612, 878 A.2d 815, 2005 N.J. LEXIS 949 (2005).

**7:7E-3A.4 Standards applicable to dune creation and maintenance**

(a) Dune creation and maintenance includes the placement and/or repair of sand fencing (including wooden support posts), the planting and fertilization of appropriate dune vegetation, the maintenance and clearing of beach access pathways less than eight feet in width, and the construction or repair of approved dune walkover structures. Bulldozing, excavation, grading, vegetation removal or clearing, and relocation of existing dunes are not authorized pursuant to this section.

(b) All dune creation and maintenance activities should be conducted in accordance with the specifications found in Guidelines and Recommendations for Coastal Dune Restoration and Creation Projects (DEP, 1985), and/or Restoration of Sand Dunes Along the Mid-Atlantic Coast (Soil Conservation Service, 1992). The Department will provide site specific technical assistance for dune creation and maintenance projects, upon request.

(c) All proposed dune vegetation should be limited to the following coastal species: American Beachgrass (*Ammophila breviligulata*), Coastal Panicgrass (*Panicum amarulum*), Bayberry (*Myrica pennsylvanica*), Beach Plum (*Prunus maritima*), and Shore Juniper (*Juniperus conferta*). Although they may not be currently available from commercial nurseries at this time, the following plant species are also well suited to the dune environment: Seaside Goldenrod (*Solidago sempervirens*), Beach Pea (*Lathyrus japonicus*), Sea Oats (*Uniola paniculata*), Bitter Panicgrass (*Panicum amarum*), and even Saltmeadow Cordgrass (*Spartina patens*).

1. American beachgrass is the preferred species for the stabilization of newly established dunes, and for stabilization of the primary frontal dune. Woody plant species are suitable for back dune and secondary dune environments. Herbaceous plant species are preferred as supplemental plantings for all dune areas.

2. Dune vegetation should be diversified as much as possible, in an effort to provide continuous stabilization in the event that pathogens reduce or eliminate the effectiveness of one species. A complex of associated grasses, herbaceous species and woody species is preferred to the planting of one species.

(d) The construction of elevated timber dune walkover structures shall be in accordance with the standards and specifications (or similar specifications) described in Beach Dune Walkover Structures (Florida Sea Grant, 1981). The construction of elevated dune walkover structures, particularly at municipal street-ends and other heavily used beach access points, is preferred to the construction of pathways or walkways through the dunes.

1. Copies of the DEP and Florida Sea Grant reports are available from the DEP, Land Use Regulation Program, PO Box 439, Trenton, NJ 08625-0439. Copies of the Soil Conservation Service report are available directly from the Soil Conservation Service, Plant Materials Center, 1536 Route 9 North, Cape May Court House, NJ 08210.

(e) The construction of at-grade dune walkovers is acceptable only at single family and duplex residential dwellings, subject to the following conditions:

1. Only one walkover per residential building is allowed;
2. The width of the walkover must not exceed four feet;
3. The walkover shall be fenced on both sides through the use of sand fencing;
4. The use of unrolled sand fencing as a base for the walkover is preferred to the use of planks and boards. Sand fence based walkovers allow for easier seasonal removal and placement, and allow for greater growth of beachgrass, while still providing an adequate base for pedestrian traffic; and
5. Solid boardwalk type walkovers shall be elevated at least one foot above the dune, to allow for movement of sand and vegetative growth under the boardwalk structure.

(f) The controlled use of discarded natural Christmas trees for the purpose of dune stabilization is generally discouraged, but may be acceptable, in accordance with the standards set forth below. Discarded Christmas trees serve the same function as sand fencing, by trapping wind blown sand and facilitating sand deposition and dune formation.

However, uncontrolled or inappropriate placement of trees will hinder the development of dunes and may present a fire hazard.

1. Only natural, coniferous trees are suitable for use in dune stabilization. The use of tree limbs, clippings, artificial trees, and other dead vegetation is prohibited;
2. Trees should be placed at least 100 feet landward of the high water line, in areas which are generally not subject to spring tidal inundation and wave swash action;
3. The placement of trees should be oriented against the prevailing winds, in either a straight line or zig-zag formation;
4. The trees should be installed by overlapping the stump end of one tree with the pointed end of another, and then anchoring the connection point with a sufficient amount of sand to hold the trees in place;
5. Newly placed trees should be monitored to ensure that the trees remain anchored and do not become dislodged. Additional quantities of sand or wooden anchor stakes may be used to hold the trees in place until they become stabilized; and
6. All newly deposited sand should be stabilized through the planting of beachgrass, during the appropriate planting season.

Amended by R.2000 d.428, effective October 16, 2000.

See: 32 N.J.R. 864(a), 32 N.J.R. 3784(b).

In (c), deleted "Japanese Sedge (*Carex kobomugi*)", "Rugosa Rose (*Rosa rugosa*)", "Japanese Black Pine (*Pinus thunbergii*)" and "Dusty Miller (*Artemisia stelleriana*)" in the introductory paragraph. Recodified from N.J.A.C. 7:7E-3A.3 and amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

Former N.J.A.C. 7:7E-3A.4, Standards applicable to the construction of boardwalks, recodified to N.J.A.C. 7:7E-3A.5.

#### **7:7E-3A.5 Standards applicable to the construction of boardwalks**

(a) The construction of oceanfront or bayfront boardwalks should address a number of engineering concerns related to structural support, resistance to vertical and horizontal water and wind loads, and scouring. The construction of boardwalks along tidal shoreline is acceptable, in accordance with the following standards:

1. All timber support piles shall be a minimum of eight inches in diameter;
2. Support piles should be driven to a depth of at least -10 feet (mean sea level), for all V-zone locations. In A-zones, the depth of penetration should be at least -five feet (mean sea level);
3. The method for insertion of piles should be a pile driver or drop hammer;
4. All support joists and timber connections should be anchored through the use of hurricane clips or metal plates; and

5. All metal fasteners, including but not limited to bolts, screws, plates, clips, anchors and connectors, shall be hot dipped galvanized.

Recodified from N.J.A.C. 7:7E-3A.4 by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

### SUBCHAPTER 3B. INFORMATION REQUIRED IN TIDAL WETLAND AND INTERTIDAL AND SUBTIDAL SHALLOWS MITIGATION PROPOSALS

#### 7:7E-3B.1 Purpose and scope

(a) This subchapter sets forth the standards for mitigation proposals pursuant to N.J.A.C. 7:7E-3.15 and 3.27.

1. Mitigation for the loss of tidal wetlands and intertidal and subtidal shallows shall comply with the Coastal Permit Program rules, N.J.A.C. 7:7, and the Coastal Zone Management rules, N.J.A.C. 7:7E, and include an appropriate buffer area; and

2. Mitigation for the loss of freshwater wetlands shall comply with the Freshwater Wetlands Protection Act rules, N.J.A.C. 7:7A, Coastal Permit Program rules, N.J.A.C. 7:7, and the Coastal Zone Management rules, N.J.A.C. 7:7E.

New Rule, R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

Former N.J.A.C. 7:7E-3B.1, Mitigation proposal requirements, recodified to N.J.A.C. 7:7E-3B.2.

#### 7:7E-3B.2 Tidal wetland and intertidal and subtidal shallows mitigation proposal requirements

(a) All tidal wetland and intertidal and subtidal shallows mitigation proposals submitted to the Land Use Regulation Program shall include, but not be limited to:

1. An introduction describing the wetland or intertidal and subtidal shallows mitigation proposal. The introduction shall include the following:

i. The amount, in acres, of:

(1) Wetlands to be created, enhanced, or restored, in accordance with N.J.A.C. 7:7E-3.27 and the associated wetlands buffer area required by N.J.A.C. 7:7E-3.28; or

(2) The amount of intertidal and subtidal shallows to be created as required by N.J.A.C. 7:7E-3.15;

ii. The goals of the mitigation project in terms of either (a)1ii(1) or (2) below:

(1) For creation, restoration or enhancement of wetlands, the wetlands types, values, and functions, and a discussion of how the mitigation proposal will satisfy those goals. For example, the goal of the wetlands mitigation project is to establish a low marsh wetland complex dominated by *Spartina alterniflora* that is flowed twice daily by the tide; or

(2) For intertidal and subtidal shallows creation, the area, depth, and duration of tidal inundation;

iii. The reasons why the mitigation site is an appropriate site for meeting the goals in (a)1ii above, and the aspects of the site that will ensure the success of the mitigation project;

iv. A copy of the USGS quad map(s) showing the location of the permitted activity and showing the mitigation site with the state plane coordinates of the mitigation site. The accuracy of these coordinates shall be within 50 feet of the actual center point of the site. For linear mitigation projects 2,000 feet in length and longer, additional coordinates shall be provided at each 1,000 foot interval; and

v. The New Jersey Wetlands/Tidelands Map number(s) for the development and for the mitigation site, if the mitigation site is at a different location;

2. A description (such as size, type, vegetation, hydrology, and wildlife use) of the wetlands or intertidal and subtidal shallows that are being destroyed or disturbed by the permitted activity;

3. Photographs of the proposed mitigation site showing topography, vegetation, tidal streams and wetland features;

4. The names and addresses of all current and proposed owner(s) of the mitigation site;

5. The lot, block, municipality and county of the proposed mitigation site. This information shall also be visible on the front page of the proposal and on the site plan;

6. A description of the existing ecosystem of the mitigation site, including a discussion of the vegetation, soils, and hydrology, wildlife and adjacent land use;

7. A projected water budget for the proposed mitigation site. The water budget should detail the sources of water for the mitigation project as well as the water losses. The projected water budget should document that an ample supply of water is available to create, enhance, or restore wetland conditions, as applicable. The water budget must contain sufficient data to show that the mitigation project will indefinitely in the future have sustained wetland hydrology, or for intertidal and subtidal shallows, that the mitigation project will have sustained tidal inundation. The water budget shall include the following regional information for the proposed and existing site conditions:

### 7:7E-3C.3 Standards for conducting Endangered or Threatened Wildlife Species Habitat Evaluations

(a) These standards shall be used by applicants who dispute the Department designation of the site as endangered or threatened wildlife species habitat, or dispute the boundary of that habitat. Applicants who dispute the Department's determination shall provide information that demonstrates that the habitat is not suitable for each of the endangered or threatened wildlife species that resulted in that identification of the site, a portion of the site, or an area abutting the site, as endangered or threatened wildlife species habitat in accordance with N.J.A.C. 7:7E-3.38(a) and/or (d).

(b) Habitat evaluations for endangered or threatened wildlife species pursuant to N.J.A.C. 7:7E-3.38(c) shall be conducted for each wildlife species described in (a) above. This habitat evaluation shall:

1. Use scientific methodology appropriate for each species or species group;
2. Examine specific attributes and characteristics of the site that limit or eliminate its suitability as habitat, including, but not limited to, an examination of vegetative cover, soils, hydrology, existing land use and any other factors that are used to determine suitability of a site for the species. The site's vegetative analysis shall include an on-site investigation and evaluation; and
3. Include an examination of the area surrounding the site using aerial photographs and/or appropriate cover maps.

(c) A survey for the endangered or threatened wildlife species that resulted in identification of the site, a portion of the site, or an area abutting the site, as endangered or threatened wildlife species habitat in accordance with N.J.A.C. 7:7E-3.38(a) and/or (d), will only be considered in the context of supplementing information on habitat suitability. If such a survey is conducted, it shall be conducted consistent with techniques established in the scientific literature.

New Rule, R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

### 7:7E-3C.4 Standards for reporting the results of impact assessments and habitat evaluations

(a) All habitat evaluations and impact assessments submitted to the Department shall include:

1. An introduction describing the goals of the habitat evaluation and/or impact assessment;
2. A copy of the USGS quad map(s) showing the location of the site, with the State plane coordinates of the site. The accuracy of these coordinates shall be within 50 feet of the actual center point of the site. For linear

sites, 2,000 feet in length and longer, additional coordinates shall be provided at each 1,000 foot interval;

3. The lot, block, municipality and county in which the site is located;

4. For wildlife habitat evaluations and impacts assessments only, a map identifying the site, and the areas mapped as endangered or threatened wildlife species habitat on the Landscape Maps onsite and abutting the site, along with a list of the endangered or threatened species that resulted in the mapping of endangered or threatened species habitat;

5. For impact assessments for plant species only, a map identifying the location of the species habitat on the site or abutting the site along with a list of the potential plant species from the Department's Natural Heritage Database;

6. A description of the habitat requirements for each of these species identified at (a)4 and/or 5 above, including appropriate literature citations; and

7. The names and qualifications of all investigators who performed habitat evaluations, species surveys, and/or impact assessments.

(b) For wildlife habitat evaluations only, a narrative, including supporting documentation, including maps, photographs and field logs, which contains the following:

1. A description, for each species, of the findings of the habitat evaluation performed in accordance with N.J.A.C. 7:7E-3C.3;

2. If a survey was conducted in accordance with N.J.A.C. 7:7E-3C.3(b), literature citations for the methodology used and a description of how the methodology was applied to the survey, giving the following information: surveyor's name(s), dates and times surveys were performed, number of samples, and number of replications. This information shall be provided for each species surveyed; and

3. A comparison of the findings of the habitat evaluation with the known habitat requirements for each species, as provided at (a)6 above, and a description of the specific attributes and characteristics of the site that limit or eliminate the site's suitability as habitat.

(c) For impact assessments only, a narrative, including supporting documentation, such as maps and photographs, which contains the following:

1. A description for each species, of how the proposed development will alter habitat, including vegetation, soils, hydrology, human disturbance, and effects on competitor, parasite, or predator species. The impact assessment shall describe the likely affects of the proposed development on the local populations of the particular species on or abutting the site and why the development would not

directly or through secondary impacts adversely affect each endangered or threatened species habitat; and

2. Literature citations used to reach the conclusions in (c)1 above.

New Rule, R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

## SUBCHAPTER 4. GENERAL WATER AREAS

**OFFICE OF ADMINISTRATIVE LAW NOTE:** Rationale statements were filed as a part of these rules, but have not been reproduced in this subchapter. The rationale statements can be reviewed at the following office:

Office of Administrative Law  
Quakerbridge Plaza  
Bldg. No. 9  
PO Box 049  
Trenton, New Jersey 08625-0049

### 7:7E-4.1 Purpose and scope

(a) General Water Areas are all water areas which are located below either the spring high water line or the normal water level of non-tidal water that are subject to this subchapter and to Special Area rules.

(b) General Water Areas are divided by volume and flushing rate into eight categories as described below:

1. "Atlantic Ocean" includes the area of the Atlantic Ocean that extends out to the three geographical mile limit of the New Jersey territorial sea and is bounded by the boundaries of New York and Delaware (see Appendix, Figure 13c).

2. "Lakes, ponds and reservoirs" are relatively small water bodies with no tidal influence or salinity. Many are groundwater fed, while others serve as surface aquifer recharge areas. Lakes that are the result of former mining operations are not included in this definition, but are defined at N.J.A.C. 7:7E-3.14, Wet borrow pits.

3. "Large rivers" are waterways with watersheds greater than 1,000 square miles. Large Rivers are limited to the Delaware, Hudson and Raritan Rivers.

i. The Delaware River is a tidal river from the Bridge Street Bridge in Trenton to its mouth at Delaware Bay, defined as a line between Alder Cover, Lower Alloways Creek Township and the Delaware River Basin Commission River and Bay Memorial at Liston Point, Delaware.

ii. The Hudson River is a tidal river from the New York State Line to its mouth at Upper New York Bay at the Morris Canal, Jersey City.

iii. The Raritan River is a tidal river from a point approximately 1.1 miles upstream from the Landing Lane Bridge between Piscataway and Franklin Townships to its mouth at Raritan Bay and the Arthur Kill.

4. "Man-made harbors" are semi-enclosed or protected water areas which have been developed for boat mooring or docking.

5. "Medium rivers, creeks and streams" are rivers, streams and creeks with a watershed of less than 1,000 square miles. This definition includes waterways such as the Hackensack, Passaic, Oldmans, Big Timber, Pennsauken, Navesink, Manasquan, Toms, Wading, Mullica, Great Egg, Maurice, Cohansey, Salem, and Rancocas (see Appendix, Figures 13c-e, incorporated herein by reference).

6. "Open bays" are large, semi-confined estuaries with a wide unrestricted inlet to the ocean and with a major river mouth discharging directly into the upper portion. Open bays are limited to the Delaware Bay, Raritan Bay, Sandy Hook Bay and Upper New York Bay (see Appendix, Figure 13b, incorporated herein by reference).

7. "Semi-enclosed and back bays" are a partially confined estuary with direct inlet connection and some inflow of freshwater. Semi-enclosed bays differ from back bays in depth, degree of restriction of inlet and level of freshwater flow.

8. "Tidal guts" are the waterway connections between two estuarine bodies of water. Also known as thorofares or canals, tidal guts control the mix of salt and freshwater. Examples include the Arthur Kill and Kill Van Kull (see Appendix, Figures 13a-e, incorporated herein by reference).

(c) N.J.A.C. 7:7E-4.2 through 4.20 set forth the requirements for specific types of development within General Water Areas as defined at (a) above. In many cases an area already identified as a Special Area will also fall within the definition of a General Area. In these cases, both General and Special Area rules apply. In case of conflict between General and Special Area rules, the more specific Special Area rules shall apply.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

Rewrote the section.

Amended by R.2004 d.43, effective January 20, 2004.

See: 35 N.J.R. 2801(a), 36 N.J.R. 442(a).

### 7:7E-4.2 Aquaculture

(a) Aquaculture is the use of permanently inundated water areas, whether saline or fresh, for the purposes of growing and harvesting plants or animals in a way to promote more rapid growth, reduce predation, and increase harvest rate. Oyster farming in Delaware Bay is a form of aquaculture.

(b) Aquaculture is encouraged in all General Water Areas as defined at N.J.A.C. 7:7E-4.1, provided:

1. It does not unreasonably conflict with resort or recreation uses;
2. It does not cause significant adverse off-site environmental impacts; and
3. It does not present a hazard to navigation. A hazard to navigation includes all potential impediments to navigation, including access to adjacent moorings, water areas and docks and piers.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Section substantially amended.

Amended by R.1990 d.413, effective August 20, 1990.  
See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Dock, pile and breakwater dimensions and dredging requirements added.

Recodified from 7:7E-4.11 and amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Prior text at 7:7E-4.2, Water Area Policy Summary Table, repealed.  
Amended by R.2000 d.428, effective October 16, 2000.

See: 32 N.J.R. 864(a), 32 N.J.R. 3784(b).

Rewrote (e).

Repeat and New Rule, R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

Section was "Acceptability conditions for uses".

#### Case Notes

Waterfront pier built without permit; no unusual circumstances warranting grant of application to legalize structure. *Rotelle v. Division of Coastal Resources*. 92 N.J.A.R.2d (EPE) 107.

#### 7:7E-4.3 Boat ramps

(a) Boat ramps are inclined planes, extending from the land into a water body for the purpose of launching a boat into the water until the water depth is sufficient to allow the boat to float. Boat ramps are most frequently constructed of asphalt, concrete or crushed shell.

(b) Boat ramps are conditionally acceptable provided:

1. There is a demonstrated need that cannot be met by existing facilities;
2. They cause minimal practicable disturbance to intertidal flats or subaqueous vegetation;
3. Boat ramps shall be constructed of environmentally acceptable material, such as concrete or oyster shells; and
4. Garbage cans are provided near the boat ramp.

(c) Public use ramps shall have priority over restricted use and private ramps.

(d) Rationale: See the OAL Note at the beginning of this subchapter.

Repealed by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Section was "Ocean".

New Rule, R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

#### 7:7E-4.4 Docks and piers for cargo and commercial fisheries

(a) Docks and piers for cargo and passenger movement and commercial fisheries are structures supported on pilings driven into the bottom substrate or floating on the water surface, used for loading and unloading passengers or cargo, including fluids, connected to or associated with, a single industrial or manufacturing facility or to commercial fishing facilities.

(b) Docks and piers for cargo and passenger movement and commercial fisheries are conditionally acceptable provided:

1. The width and length of the dock or pier is limited to only what is necessary for the proposed use;
2. The dock or pier will not pose a hazard to navigation. A hazard to navigation includes all potential impediments to navigation, including access to adjacent moorings, water areas and docks and piers; and
3. The associated use of the adjacent land meets all applicable Coastal Zone Management rules.

(c) The standards for port uses are found at N.J.A.C. 7:7E-7.9. The standards for the construction of a dock or pier composed of fill and retaining structures are found at N.J.A.C. 7:7E-4.10.

(d) Rationale: See the OAL Note at the beginning of this subchapter.

Repealed by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Section was "Open bay".

New Rule, R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

#### 7:7E-4.5 Recreational docks and piers

(a) Recreational and fishing docks and piers are structures supported on pilings driven into the bottom substrate, or floating on the water surface or cantilevered over the water, which are used for recreational fishing or for the mooring of boats or jet skis used for recreation or fishing, except for commercial fishing, and house boats.

(b) Recreational docks and piers, including jet ski ramps and mooring piles, are conditionally acceptable provided:

1. There is a demonstrated need that cannot be satisfied by existing facilities;
2. The construction minimizes adverse environmental impact to the maximum extent feasible;

3. The docks and piers and their associated mooring piles are located so as to not conflict with overhead transmission lines;

4. There is minimum feasible interruption of natural water flow patterns;

5. Space between horizontal planking is maximized and width of horizontal planking is minimized to the maximum extent practicable. Under normal circumstances, a minimum of  $\frac{3}{8}$  inch,  $\frac{1}{2}$  inch,  $\frac{3}{4}$  inch, or one inch space is to be provided for four inch, six inch, eight to 10 inch, or 12 inch plus wide planks, respectively;

6. The width of the structure shall not exceed twice the clearance between the structure and the surface of the ground below or the water surface at mean high tide (measured from the bottom of the stringers), except for floating docks whose width shall not exceed eight feet. Under typical circumstances the maximum width of the structure shall be eight feet over water and six feet over wetlands and intertidal flats, except as noted at (b)6iii below. For the purposes of this section, an intertidal flat is a low lying strip of land along a shoreline located between spring high and spring low tides. The height of the structure over wetlands shall be a minimum of four feet regardless of width;

i. A minimum of eight feet of open water shall be provided between any docks if the combined width of the docks over the water exceeds eight feet;

ii. Construction and placement of the dock shall be a minimum of four feet from all property lines, for docks which are perpendicular to the adjacent bulkhead or shoreline; and

iii. In man-made lagoons only, the maximum width of the structure shall be eight feet over water and six feet over wetlands; The height of the structure over wetlands shall be a minimum of four feet;

7. In man-made lagoons only, the structure extends no more than 20 percent of the width of the lagoon from bank to bank; and

8. The proposed structure and associated mooring piles do not hinder navigation or access to adjacent water areas. A hazard to navigation will apply to all potential impediments to navigation, including access to adjacent moorings, water areas and docks and piers.

(c) The construction of recreational docks and piers within areas designated by the Department as shellfish habitat must comply with the standards specified under the shellfish habitat rule, N.J.A.C. 7:7E-3.2.

(d) The construction of recreational docks and piers within submerged vegetation areas must comply the standards specified under the submerged vegetation rule, N.J.A.C. 7:7E-3.6.

(e) For sites which have existing dock or pier structures exceeding eight feet in width over water areas and/or wetlands, which were constructed prior to September 1978 and for which the applicant proposes to increase the coverage over the water area or wetland by relocating or increasing the number or size of docks or piers, the existing oversized structures must be reduced to a maximum of eight feet in width over water areas and six feet in width over wetlands and intertidal flats. All structures proposed as part of an expansion must comply with all of the applicable Coastal Zone Management rules.

(f) The construction of covered or enclosed structures such as gazebos or sheds located on or above the decking of recreational docks and piers is prohibited except on public piers owned and controlled by a public agency.

(g) Rationale: See the OAL Note at the beginning of this subchapter.

Repealed by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Section was "Semi-enclosed and back bay".

New Rule, R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

Amended by R.2004 d.43, effective January 20, 2004.

See: 35 N.J.R. 2801(a), 36 N.J.R. 442(a).

#### 7:7E-4.6 Maintenance dredging

(a) Maintenance dredging is the removal of accumulated sediment from previously authorized and legally dredged navigation and access channels, marinas, lagoons, canals or boat moorings for the purpose of maintaining a previously authorized water depth and width for safe navigation.

1. To be considered maintenance dredging:

i. The proposed dredge area must be limited to the same depth, length and width as the previous dredging operation; and

ii. For natural water areas, the area must have been either:

(1) Currently used for navigation or mooring of vessels requiring the proposed water depth; or

(2) Dredged within the last 10 years.

(b) Maintenance dredging is conditionally acceptable to the authorized depth, length and width within all General Water Areas to ensure that adequate water depth is available for safe navigation, provided:

1. An acceptable dredged material placement site, with sufficient capacity will be used. (see N.J.A.C. 7:7E-4.8, Dredged material disposal in water areas, and N.J.A.C. 7:7E-7.12, Dredged material placement on land);

2. Pre-dredging chemical and physical analysis of the dredged material and/or its elutriate may be required where the Department suspects contamination of sediments. Additional testing, such as bioaccumulation and bioassay testing of sediments, may also be required as needed to determine the acceptability of the proposed placement site for the dredged material. The results of these tests will be used to determine if contaminants may be resuspended at the dredging site and what methods may be needed to control their escape. The results will also be used to determine acceptability of the proposed dredged material placement method and site;

3. Turbidity concentrations (that is, suspended sediments) and other water quality parameters at, downstream, and upstream of the dredging site, and slurry or decant water overflows shall meet applicable State Surface Water Quality Standards at N.J.A.C. 7:9B. The Department may require the permittee to conduct biological, physical and chemical water quality monitoring before, during, and after dredging and disposal operations to ensure that water quality standards are not exceeded;

4. If predicted water quality parameters are likely to exceed State Surface Water Quality Standards, or if pre-dredging chemical analysis of dredged material or elutriate reveals significant contamination, the Department will work cooperatively with the applicant to fashion acceptable control measures and will impose seasonal restrictions under specific circumstances identified at (b)7 below;

5. For mechanical dredges such as clamshell bucket, dragline, grab, or ladders, deploying silt curtains at the dredging site may be required, if feasible based on site conditions. Where the use of silt curtains is infeasible, dredging using closed watertight buckets or lateral digging buckets may be required. The Department may decide not to allow mechanical dredging of highly contaminated sites even if turbidity control measures were planned;

6. For hydraulic dredges specific operational procedures designed to minimize water quality impacts, such as removal of cutter head, flushing of pipeline sections prior to disconnection, or limitations on depth of successive cuts may be required;

7. The Department may authorize dredging on a seasonally restricted basis only, in waterways characterized by the following:

i. Known spawning, wintering or nursery areas of shortnose sturgeon, winter flounder, Atlantic sturgeon,

alewife, blueback herring, striped bass, white perch or blue crab;

ii. Water bodies downstream of known anadromous fish spawning sites under N.J.A.C. 7:7E-3.5, Finfish migratory pathways, where the predicted turbidity plume will encompass the entire cross-sectional area of the water body, thus forming a potential blockage to upstream migration;

iii. Areas of contaminated sediments with high levels of fecal coliform and/or streptococcus bacteria, and/or hazardous substances adjacent to (upstream or downstream) State approved shellfishing waters and public or private bathing beaches; or

iv. Areas within 1,000 meters or less of oyster beds as defined in N.J.A.C. 7:7E-3.2; and

8. Maintenance dredging side slopes shall not be steeper than 3:1 adjacent to wetlands to prevent undermining and/or sloughing of the wetlands.

(c) Reprofiling, which is the movement of material from one area of a berth or channel to an adjacent, deeper location, is discouraged in all water areas except the New York New Jersey Harbor Area as provided at (c)1 below.

1. Reprofiling is conditionally acceptable in the New York New Jersey Harbor Area north of Sandy Hook, excluding the Raritan Bay and its tributaries east of the Cheesecake Creek, provided:

i. The applicant has demonstrated that there is no other available dredged material management alternative;

ii. The project involves the movement of less than 5,000 cubic yards of material;

iii. The depth of the material to be removed is limited to three feet;

iv. There exists a suitable adjacent deep water area with sufficient capacity to accommodate the relocated material within which the material will be stable and located so as not to interfere with adjacent navigation channels or berths; and

v. The reprofiling is performed by dragging a steel beam or pipe across the berth and/or channel bottom, thereby leveling accumulated sediment to a uniform, specified depth. Alternative procedures will be considered only under special instances where the use of a drag bar is impractical due to limited space in the project area.

(d) Propwash dredging, which is the movement of sediment by resuspending accumulated material by scouring the bottom with boat propellers or specially designed equipment with propellers, is prohibited.

(e) The Department has prepared a dredging technical manual, titled "The Management and Regulation of Dredging Activities and Dredged Material Disposal in New Jersey's Tidal Waters," October 1997, which provides guidance

on dredged material sampling, testing, transporting, processing, management, and placement. The manual is available from the Department's Office of Maps and Publications, PO Box 420, Trenton, New Jersey 08625-0420, (609) 777-1038.

(f) Rationale: See the OAL Note at the beginning of this subchapter.

Repealed by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Section was "Tidal guts".

New Rule, R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

#### 7:7E-4.7 New dredging

(a) New dredging is the removal of sediment that does not meet the definition of maintenance dredging at N.J.A.C. 7:7E-4.6.

(b) New dredging is conditionally acceptable in all General Water Areas for boat moorings, navigation channels or anchorages, provided:

1. There is a demonstrated need that cannot be satisfied by existing facilities;
2. The facilities served by the new dredging satisfy the location requirements for Special Water's Edge Areas;
3. The adjacent water areas are currently used for recreational boating, commercial fishing or marine commerce;
4. The dredge area causes no significant disturbance to Special Water or Water's Edge Areas;
5. The adverse environmental impacts are minimized to the maximum extent feasible;
6. The dredge area is reduced to the minimum practical;
7. The maximum depth of the newly dredged area shall not exceed that of the connecting access or navigation channel necessary for vessel passage to the bay or ocean;
8. Dredging will have no adverse impacts on ground-water resources;
9. No dredging shall occur within 10 feet of any wetlands. The proposed slope from this 10 foot buffer to the nearest edge of the dredged area shall not exceed three vertical to one horizontal; and
10. Dredging shall be accomplished consistent with all of the following conditions, as appropriate to the dredging method:
  - i. An acceptable dredged material placement site with sufficient capacity will be used. (See N.J.A.C. 7:7E-4.8, Dredged material disposal in water areas, and N.J.A.C. 7:7E-7.12, Dredged material placement on land);

ii. Pre-dredging chemical and physical analysis of the dredged material and/or its elutriate may be required where the Department suspects contamination of sediments. Additional testing, such as bioaccumulation and bioassay testing of sediments, may also be required as needed to determine the acceptability of the proposed placement site for the dredged material. The results of these tests will be used to determine if contaminants may be resuspended at the dredging site and what methods may be needed to control their escape. The results will also be used to determine acceptability of the proposed dredged material placement method and site;

iii. Turbidity concentrations (that is, suspended sediments) and other water quality parameters at, downstream, and upstream of the dredging site, and slurry water overflows shall meet applicable State Surface Water Quality Standards at N.J.A.C. 7:9B. The Department may require the permittee to conduct biological, physical and chemical water quality monitoring before, during, and after dredging and disposal operations to ensure that water quality standards are not exceeded;

iv. If predicted water quality parameters are likely to exceed State Surface Water Quality Standards, or if pre-dredging chemical analysis of dredged material or elutriate reveals significant contamination, then the Department will work cooperatively with the applicant to fashion acceptable control measures and will impose seasonal restrictions under the specific circumstances identified at (b)11vii below;

v. For new dredging using mechanical dredges such as clamshell bucket, dragline, grab, or ladders, deploying silt curtains at the dredging site may be required, if feasible based on site conditions. Where the use of silt curtains is infeasible, dredging using closed watertight buckets or lateral digging buckets may be required. The Department may decide not to allow mechanical dredging of highly contaminated sites even if turbidity control measures were planned;

vi. For hydraulic dredges, specific operational procedures designed to minimize water quality impacts, such as removal of cutter head, flushing of pipeline sections prior to disconnection, or limitations on depth of successive cuts, may be required;

vii. The Department may authorize dredging on a seasonally restricted basis only, in waterways characterized by the following:

- (1) Known spawning, wintering or nursery areas of shortnose sturgeon, winter flounder, Atlantic sturgeon, alewife, blueback herring, striped bass or blue crab;

(2) Water bodies downstream of known anadromous fish spawning sites under N.J.A.C. 7:7E-3.5, Finfish migratory pathways, where the predicted turbidity plume will encompass the entire cross-sectional area of the water body, thus forming a potential blockage to upstream migration;

(3) Areas of contaminated sediments with high levels of fecal coliform and/or streptococcus bacteria, and/or hazardous substances adjacent to (upstream or downstream) State approved shellfishing waters and public or private bathing beaches; or

(4) Areas within 1,000 meters or less of oyster beds as defined in N.J.A.C. 7:7E-3.2; and

viii. Side slopes shall not be steeper than 3:1 adjacent to wetlands to prevent undermining and/or sloughing of the wetlands.

(c) Propwash dredging, which is the movement of sediment by resuspending accumulated material by scouring the bottom with boat propellers or specially designed equipment with propellers, is prohibited.

(d) New dredging or excavation to create new lagoons for residential development is prohibited in wetlands, N.J.A.C. 7:7E-3.27, wetlands buffer, N.J.A.C. 7:7E-3.28, endangered or threatened wildlife or plant species habitats, N.J.A.C. 7:7E-3.38, and discouraged elsewhere.

(e) New dredging is conditionally acceptable to control siltation in lakes, ponds and reservoirs, provided that an acceptable sedimentation control plan is developed to address re-sedimentation of these water bodies.

(f) The Department has prepared a dredging technical manual, titled "The Management and Regulation of Dredging Activities and Dredged Material Disposal in New Jersey's Tidal Waters," October 1997, which provides guidance on dredged material sampling, testing, transporting, processing, management, and placement. The manual is available from the Department's Office of Maps and Publications, PO Box 420, Trenton, New Jersey 08625-0420, (609) 777-1038.

(g) With the exception of N.J.A.C. 7:7E-4.7(b), (c), (d) and (e) above, new dredging is discouraged.

(h) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.

See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Added text in (a)3 "a point approximately . . . Landing Lane Bridge" and deleted "Interstate Route 287 Bridge".

Repealed by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Section was "Large rivers".

New Rule. R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

#### 7:7E-4.8 Dredged material disposal

(a) Dredged material disposal is the discharge of sediments removed during dredging operations.

(b) The standards relevant to dredged material disposal in water areas are as follows:

1. Dredged material disposal is prohibited in tidal guts, man-made harbors, medium rivers, creeks and streams, and lakes, ponds and reservoirs. Dredged material disposal is discouraged in open bays, semi-enclosed and backbays where the water depth is less than six feet;

2. Disposal of dredged materials in the ocean and bays deeper than six feet is conditionally acceptable provided that there is no feasible beneficial use or upland placement site available and it is in conformance with the USEPA and US Army Corps of Engineers Guidelines (40 C.F.R. parts 220-228 and 230-232 and 33 CFR, parts 320-330 and 335-338) established under Section 404(b) of the Clean Water Act and the Evaluation of Dredged Material Proposed for Ocean Disposal Testing Manual, EPA-503/8-91/001, February 1991, and Evaluation of Dredged Material Proposed for Discharge in Inland and Near Coastal Waters Testing Manual, EPA-000/0-93/000, May 1993, as appropriate to the proposed disposal site;

3. Dredged material disposal in water areas shall conform with applicable State Surface Water Quality Standards at N.J.A.C. 7:9B;

4. Overboard disposal (also known as aquatic, open water, side casting, subaqueous, or wet) of uncontaminated sediments into unconfined disposal sites in existing anoxic dredge holes, shall comply with the following:

i. Data on water quality, benthic productivity and seasonal finfish use demonstrate that the unconfined disposal site has limited biological value;

ii. All subaqueous dredged material disposal shall utilize best management techniques such as submerged elbows or underwater diffusers and may be limited to a particular tidal cycle to further minimize impacts; and

iii. The hole shall not be filled higher than the depth of the surrounding waters.

5. Overboard disposal of sediments consisting of less than 90 percent sand shall be conditionally acceptable in unconfined disposal sites when shallow waters preclude removal to an upland or confined site. Such disposal shall comply with the following:

i. Shellfish habitats (as defined in N.J.A.C. 7:7E-3.2) are not within 1,000 meters;

ii. Disposal will not smother or cause condemnation or contamination of harvestable shellfish resources (as in N.J.A.C. 7:7E-3.2); and

iii. Sediment characteristics of the dredged material and disposal site are similar; and

6. Uncontaminated dredged sediments with 75 percent sand or greater are generally encouraged for beach nourishment.

(c) The standards for dredged material placement on land are found at N.J.A.C. 7:7E-7.12.

(d) The Department has prepared a dredging technical manual, titled "The Management and Regulation of Dredging Activities and Dredged Material Disposal in New Jersey's Tidal Waters," October 1997, which provides guidance on dredged material sampling, testing, transporting, processing, management, and placement. The manual is available from the Department's Office of Maps and Publications, PO Box 420, Trenton, New Jersey 08625-0420, (609) 777-1038.

(e) Rationale: See the OAL Note at the beginning of this subchapter.

Repealed by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Section was "Medium rivers, streams and creeks".

New Rule. R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

#### 7:7E-4.9 Solid waste or sludge dumping

(a) The dumping of solid waste or sludge is the discharge of solid or semi-solid waste material from industrial or domestic sources or sewage treatment operations into a water area.

(b) The dumping of solid or semi-solid waste of any type in any General Water Area is prohibited.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Reference to Freshwater Wetlands Protection Rules added at (b).

Repealed by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Section was "Lakes, Ponds and Reservoirs".

New Rule. R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

#### 7:7E-4.10 Filling

(a) Filling is the deposition of material including, but not limited to, sand, soil, earth, and dredged material, into water areas for the purpose of raising water bottom elevations to create land areas.

(b) Filling is prohibited in lakes, ponds, reservoirs and open bay areas at greater than 18 feet as defined at N.J.A.C. 7:7E-4.1, unless the filling is consistent with the Freshwater Wetlands Protection Act (N.J.S.A. 13:9B-1 et seq.) and Freshwater Wetlands Protection Act rules, N.J.A.C. 7:7A.

(c) Filling in a man-made lagoon, as defined at N.J.A.C. 7:7E-1.8, is discouraged unless:

1. The filling complies with (d) below; or

2. In those areas where two existing lawful bulkheads are not more than 75 feet apart and no limit of fill line has been promulgated by the Department, the connecting bulkhead may not extend seaward of a straight line connecting the ends of the existing bulkheads. Compliance with the mitigation rule at N.J.A.C. 7:7E-1.6 shall not be required in such cases.

(d) Except as provided in (b) and (c) above, filling is discouraged in all other water areas. In cases where there is no alternative to filling, filling is conditionally acceptable provided:

1. The use that requires the fill is water dependent;

2. There is a demonstrated need that cannot be satisfied by existing facilities;

3. There is no feasible or practical alternative site on an existing Water's Edge;

4. The minimum practicable area is filled;

5. The adverse environmental impacts are minimized, for example, by compensating for the loss of aquatic habitat by creation of an area of equivalent or greater environmental value elsewhere in the same estuary;

6. Minimal feasible interference is caused to Special Areas; and

7. Pilings and columnar support or floating structures are unsuitable for engineering or environmental reasons.

(e) Mitigation shall be required for the filling of tidal water areas at a ratio of one acre created to one acre lost in the same estuary. The mitigation standards for filling of intertidal and subtidal shallows are found at N.J.A.C. 7:7E-3.15(g) and (h). Mitigation shall not be required for the following:

1. Filling in accordance with N.J.A.C. 7:7E-4.10(c);

2. Beach nourishment in accordance with N.J.A.C. 7:7E-7.11(d); and

3. Construction of a replacement bulkhead in accordance with N.J.A.C. 7:7E-7.11(e)2i or ii.

(f) Filling of wetlands must comply with the wetlands rule, N.J.A.C. 7:7E-3.27.

(g) Filling using clean sediment of suitable particle size and composition is acceptable for beach nourishment projects provided it meets the standards of the coastal engineering rule, N.J.A.C. 7:7E-7.11(d).

(h) Standards for the removal of unauthorized fill are as follows:

1. For filling which took place prior to September 26, 1980 (the effective date of the Coastal Zone Management rules Statewide, or prior to September 28, 1978 for areas within the coastal area as defined by CAFRA (N.J.S.A. 13:19-4)), removal shall be required only if the fill has resulted in ongoing significant adverse environmental impacts, such as the blocking of an otherwise viable tidal wetland or water body, and its removal will alleviate the adverse impacts.

2. For filling which took place subsequent to September 26, 1980 (or subsequent to September 28, 1978 for areas within the coastal area defined as defined by CAFRA (N.J.S.A. 13:19-4)), removal shall be required if the fill does not comply with the standards of (b), (c) or (d) above.

(i) Rationale: See the OAL Note at the beginning of this subchapter.

Repealed by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Section was "Man-made harbor".

New Rule, R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

#### 7:7E-4.11 Mooring

(a) A boat mooring is a temporary or permanently fixed or floating anchored facility in a water body for the purpose of attaching a boat.

(b) Temporary or permanent boat mooring areas are conditionally acceptable provided:

1. There is a demonstrated need that cannot be satisfied by existing facilities;
2. Adverse environmental impacts are minimized to the maximum extent practicable; and
3. The mooring area is adequately marked and is located so as not to hinder navigation. A hazard to navigation will apply to all potential impediments to navigation, including access to adjacent moorings, water areas, docks and piers.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

New Rule, R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

#### 7:7E-4.12 Sand and gravel mining

(a) Sand and gravel mining is the removal of sand or gravel from the water bottom substrate, usually by suction dredge, for the purpose of using the sand or gravel at another location.

(b) Sand and gravel mining is discouraged in all water body types except as provided at (b)1 below.

1. Sand and gravel mining is prohibited in lakes, ponds and reservoirs, man-made harbors and tidal guts as defined at N.J.A.C. 7:7E-4.1, unless the water body was created by the mining process, in which case the use is conditionally acceptable provided:

- i. Direct and indirect impacts to Special areas are minimized;
- ii. Turbidity and resuspension of toxic materials is controlled throughout the mining operation consistent with the State's Surface Water Quality Standards (N.J.A.C. 7:9B-4);
- iii. There is an acceptable disposal site for the waste from washing operations;
- iv. In rivers, creeks, and streams, the depth of water at the mining site is at least six feet below mean low water;
- v. The mining will not increase shoreline erosion; and
- vi. The mining will not create anoxic water conditions.

(c) Sand and gravel mining for the purposes of beach nourishment is conditionally acceptable provided:

1. Direct and indirect impacts to special areas and marine fish and fisheries are minimized;
2. In rivers, creeks, and streams, the depth of water at the mining site is at least six feet below mean low water;
3. The mining will not increase shoreline erosion;
4. The mining will not create anoxic water conditions; and
5. The beach nourishment project complies with the coastal engineering rule, N.J.A.C. 7:7E-7.11(d).

(d) Rationale: See the OAL Note at the beginning of this subchapter.

New Rule, R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

#### 7:7E-4.13 Bridges

(a) A bridge is any continuous structure spanning a water body, except for an overhead transmission line.

(b) Bridges are conditionally acceptable provided:

1. There is a demonstrated need that cannot be satisfied by existing facilities;
2. Pedestrian and bicycle use is provided for unless it is demonstrated to be inappropriate; and
3. Fishing catwalks and platforms are provided to the maximum extent practicable. This shall be taken into

consideration during the design phase of all proposed bridge projects.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

New Rule, R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

#### 7:7E-4.14 Submerged pipelines

(a) Submerged pipelines (pipelines) are underwater pipelines which transmit liquids or gas, including crude oil, natural gas, water petroleum products or sewerage.

(b) Submerged pipelines are conditionally acceptable provided:

1. The pipelines are not sited within Special Areas, unless no prudent and feasible alternate route exists;
2. Directional drilling is used unless it is demonstrated that the use of directional drilling is not feasible;
3. The pipeline is buried to a sufficient depth to avoid exposure or hazard;
4. All trenches are backfilled to preconstruction depth with naturally occurring sediment; and
5. The proposed development has been designed to minimize impacts to the water area.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

New Rule, R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

#### 7:7E-4.15 Overhead transmission lines

(a) Overhead transmission lines are wires hung between supporting pylons for transmission from the site of origin to the site of consumption. Overhead transmission lines include electrical, telecommunication and cable television lines.

(b) Overhead transmission lines are prohibited over open bays, semi-enclosed and back bays, lakes, ponds and reservoirs as defined at N.J.A.C. 7:7E-4.1. Overhead transmission lines are discouraged over large rivers as defined at N.J.A.C. 7:7E-4.1.

(c) Overhead transmission lines are conditionally acceptable over rivers, streams, creeks, and tidal guts as defined at N.J.A.C. 7:7E-4.1, provided:

1. There is a demonstrated need that cannot be satisfied by existing facilities;
2. There is no feasible alternative route that avoids crossing water bodies;
3. The transmission line provides adequate vertical clearance for masts; and

4. Visual impacts are minimized to the maximum extent practicable.

(d) Rationale: See the OAL Note at the beginning of this subchapter.

New Rule, R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

#### 7:7E-4.16 Dams and impoundments

(a) Dams and impoundments are structures that obstruct natural water flow patterns for the purpose of forming a contained volume of water. Impoundments include dikes with sluice gates and other structures to control the flow of water.

(b) Except for medium rivers, creeks and stream as defined at N.J.A.C. 7:7E-4.1, the construction of dams and impoundments is prohibited. The construction of these structures is conditionally acceptable in medium rivers, creeks and streams as defined at N.J.A.C. 7:7E-4.1, provided:

1. The structures are essential for water supply purposes or for the creation of special wildlife habitats;
2. Adverse impacts are minimized; and
3. The structures will not adversely affect navigation routes.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

New Rule, R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

#### 7:7E-4.17 Outfalls and intakes

(a) Outfalls and intakes are pipe openings that are located in water areas for the purpose of intake of water or discharge of effluent including sewage, stormwater and industrial effluents.

(b) Outfalls and intakes are conditionally acceptable provided that the use associated with the intake or outfall meets applicable Coastal Zone Management rules.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

New Rule, R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

#### 7:7E-4.18 Realignment of water areas

(a) Realignment of water areas means the physical alteration or relocation of the surface configuration of any water area. This does not include the rebulkheading of a previously bulkheaded water area or the bulkheading at or above the spring high water line.

(b) Realignment of naturally occurring water areas is discouraged. Discouraged uses can only be approved if it can be demonstrated that the proposed development is in the public interest and mitigation for the impact is provided.

(c) Realignment of previously realigned water areas is conditionally acceptable, provided:

1. It is demonstrated that no adverse environmental impacts (that is, water quality, flood hazard, species diversity reduction/alteration) will result; and
2. A net recreational/ecological benefit will demonstrably accrue.

(d) Rationale: See the OAL Note at the beginning of this subchapter.

New Rule, R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

#### 7:7E-4.19 Breakwaters

(a) Breakwaters, including, but not limited to, those constructed of concrete, rubble mound and timber, are structures designed to protect shoreline areas or boat moorings by intercepting waves and reducing the wave energy which would normally impact the adjacent shoreline areas or boat mooring areas. Typically, timber breakwaters are designed and utilized to protect boat moorings. In most cases concrete or rubble mound breakwaters are designed and utilized to protect shoreline areas which are subject to storm waves and associated erosion.

(b) Construction of breakwaters is conditionally acceptable provided:

1. Timber, vinyl or plastic breakwaters shall be at least 18 inches above the bottom of the waterway and shall provide a minimum of three inch spacing between planks except as provided at (b)3 below. The individual plank width shall not exceed six inches;
2. For detached breakwaters which are not fixed directly to a dock or pier structure, marking with photocell lights and/or reflectors is required; and
3. The construction of breakwater structures other than those which comply with (b)1 above shall be consistent with the acceptability conditions for filling, N.J.A.C. 7:7E-4.10 and structural shore protection, N.J.A.C. 7:7E-7.11.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

New Rule, R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

#### 7:7E-4.20 Submerged cables

(a) Submerged cables (cables) are underwater telecommunication cables, and shall include all associated structures in the water such as repeaters.

(b) Submerged cables, or portions thereof, which are not located in the Atlantic Ocean shall meet the following conditions:

1. The cable shall not be sited within Special Areas, unless no prudent and feasible alternate route exists;
2. Directional drilling for the installation of cables is encouraged over the use of trenching;
3. The cable route minimizes areas where anchors are likely to foul the cable; and
4. The alignment of the cable route is marked at the landfall. This provision does not apply to cables that are directionally drilled.

(c) Submerged cables, or portions thereof, which are sited in the Atlantic Ocean shall meet the following conditions:

1. Siting a cable in the Atlantic Ocean is discouraged unless the cable complies with the following:
  - i. If the cable is either sited within surf clam areas, N.J.A.C. 7:7E-3.3, or sited within areas where marine fish, as defined at N.J.A.C. 7:7E-8.2, are commercially harvested using mobile bottom-tending gear, no prudent and feasible land-based alternate route exists and the cable follows the shortest route to waters beyond the surf clam areas and areas where marine fish are commercially harvested using mobile bottom-tending gear; and
  - ii. If the cable is sited within prime fishing areas, N.J.A.C. 7:7E-3.4, shipwreck and artificial reef habitats, N.J.A.C. 7:7E-3.13, or historic and archaeological resources, N.J.A.C. 7:7E-3.36, no prudent and feasible alternate route exists outside of these special areas and the cable follows the route with the least disturbance to these special areas;
2. The submerged cable, shall be buried to a depth of at least 1.2 meters both in surf clam areas, N.J.A.C. 7:7E-3.3, and in areas where marine fish, as defined at N.J.A.C. 7:7E-8.2, are commercially harvested using mobile bottom-tending gear except where it is demonstrated that it is not practicable to bury the cable to 1.2 meters due to geologic or topographic features or crossing of existing in-service cables. Where it is demonstrated that achieving the depth of 1.2 meters is not practicable, the cable shall be buried as close as practicable to the above standard;
3. Where a submerged cable will cross an existing in-service cable either within surf clam areas, N.J.A.C. 7:7E-3.3, or within areas where marine fish, as defined at N.J.A.C. 7:7E-8.2, are commercially harvested using mobile bottom-tending gear, the cable company shall minimize the impact of cable crossings on commercial fishing and minimize the risks to the proposed and existing cables, as follows:

i. The cable shall be buried to the depth of the existing cable or as close thereto as practicable at the crossing;

ii. The number of cable crossings shall be minimized;

iii. The location of the cable route shall be adjusted after consultation with the fishing interest groups identified in N.J.A.C. 7:7-4.2(a)3 in order to reduce the impact of cable crossings on commercial fishing, to the maximum extent practicable; and

iv. The permittee shall, to the maximum extent practicable, share information and otherwise cooperate with those responsible for any cables being crossed and with installers of subsequent cables crossing the subject cable so as to reduce the impacts of cable crossings on commercial fishing.

4. Where a submerged cable will cross an existing out-of-service cable either within surf clam areas, N.J.A.C. 7:7E-3.3, or within areas where marine fish, as defined at N.J.A.C. 7:7E-8.2, are commercially harvested using mobile bottom-tending gear, the cable company shall minimize the impact of cable crossings on commercial fishing and minimize the risks to the proposed and existing cables, as follows:

i. Where the out-of-service cable is buried less than 0.6 meter, the out-of-service cable shall be cut, and recovered for proper disposal for a distance of at least 500 meters on each side of the selected cable crossing. For surface laid out-of-service cables, the ends of the remaining out-of-service cable shall be re-laid flat on the seabed to minimize problems for other seabed users. For buried out-of-service cables, the ends of the remaining out-of-service cable shall be re-buried to the original depth;

ii. Where the out-of-service cable is buried between 0.6 and 1.2 meters, the out-of-service cable shall, if practicable, be cut and recovered for proper disposal for a distance of at least 500 meters on each side of the selected cable crossing. The ends of the remaining out-of-service cable shall be re-buried as close as practicable to the original depth, and in no case to a depth of less than 0.6 meters. If the out-of-service cable cannot be cut and recovered, the cable crossing shall comply with (c)3 above; and

iii. Where the out-of-service cable is buried more than 1.2 meters, the cable shall be laid over the out-of-service cable at the depth prescribed in (c)2 above;

5. Directional drilling for the submerged cable landing is encouraged over the use of trenching to minimize impacts to beaches, dunes, and shallow water areas;

6. The submerged cable route minimizes areas where anchors are likely to foul the submerged cable;

7. Prior to installation of the cable, the permittee shall obtain a financial assurance from a lender or insurer regulated and authorized by the New Jersey Department of Banking and Insurance to transact business in New Jersey. The financial assurance shall be in an amount sufficient for the Department to hire an independent contractor to remove the inactive cable should the permittee fail to do so. Letters of credit, surety bonds and insurance assuring that the Department could hire an independent contractor to remove an inactive cable shall be acceptable to satisfy the financial assurance requirement. The financial assurance shall be released upon the permittee's removal of the cable or upon the Department's determination that the cable may remain in place in accordance with (c)11 below;

8. After the submerged cable has been installed, a long-term inspection and maintenance plan, approved by the Department, shall be implemented both within surf clam areas, N.J.A.C. 7:7E-3.3, and within areas where marine fish, as defined at N.J.A.C. 7:7E-8.2, are commercially harvested using mobile bottom tending gear, to insure that the cable remains at the authorized depth and location. The plan shall provide for the following:

i. An inspection immediately following cable installation;

ii. An inspection two years after cable installation;

iii. An inspection every five years after the inspection required at (c)8ii above;

iv. An investigation within six months after the Department reports to the permittee that it has received information suggesting that the cable has been uncovered. If appropriate, such investigation shall include an inspection of the cable. The Department may require an inspection after reviewing the report submitted pursuant to (c)9 below; and

v. Reburial of the cable within 90 days, if practicable, and in no case later than six months after the permittee discovers that the cable has been uncovered. Reburial shall be to the depth prescribed in (c)2 above to the maximum extent practicable;

9. A report containing the results of the initial inspection required in (c)8i above shall be submitted by the permittee to the Department within six months following the inspection. The report shall identify all areas where inactive cable has been cut and all areas where the cable is not buried to a depth of 1.2 meters, and indicate the actual depth in those areas. The report shall also provide the installed route of the cable. All locations shall be reported using latitude and longitude coordinate pairs, in the WGS 84 (World Geodetic System 1984) datum, that were arrived at using the global positioning system (GPS). To reduce the impacts of fishing on cables by notifying the commercial fishing industry of the locations of areas where the cable is buried less than 1.2 meters deep, a copy of the report shall be submitted to the fishing interest groups identified in N.J.A.C. 7:7-4.2(a)3;

10. A report containing the results of inspection and maintenance of the submerged cable required in (c)8 above, if applicable in the reporting year, a discussion of storm events which could have affected the cable, and reported hits of the cable for the previous year shall be submitted by the permittee to the Department in January of each year. The report shall also indicate if and when the cable becomes out-of-service;

11. Within two years of taking the cable out of service pursuant to Federal Communications Commission regulations, the submerged cable shall be removed both from surf clam areas, N.J.A.C. 7:7E-3.3, and from areas where marine fish, as defined at N.J.A.C. 7:7E-8.2, are commercially harvested using mobile bottom-tending gear. The Department may allow all or portions of the cable to remain in place if leaving the cable in place would not result in a long term adverse impact to the ocean and/or ocean resources, and the cable would not unreasonably interfere with fishing or other uses of the seabed. A permittee who seeks to leave an inactive cable in place shall submit a request, including the reasons and justification for leaving the cable in place. The Department shall solicit public input on the request, including input from the fishing interest groups identified in N.J.A.C. 7:7-4.2(a)3; and

12. If portions of the cable located either within surf clam areas, N.J.A.C. 7:7E-3.3, or within areas where marine fish, as defined at N.J.A.C. 7:7E-8.2, are commercially harvested using mobile bottom-tending gear, are not buried to a depth of 0.6 meters, the permittee shall provide a one-time monetary contribution to the Department's dedicated account for shellfish habitat mitigation. The amount of each mitigation contribution provided under this section shall be based on the length of cable that is not buried to a depth of 0.6 meters, based on the inspection required in (c)8i above. The contribution will be calculated at the rate of \$100.00 per meter of cable which is buried to a depth of less than 0.6 meters. Moneys in the Shellfish Habitat Mitigation account are to be administered by the Department's Bureau of Shellfisheries and utilized for shellfish habitat restoration, enhancement and related research projects.

(d) Rationale: See the OAL Note at the beginning of this subchapter.

New Rule, R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

#### 7:7E-4.21 Artificial reefs

(a) Artificial reefs are man-made structures intended to simulate the characteristics and functions of natural reefs created by placing hard structures on the sea-floor for the purpose of enhancing fish habitat and/or fisheries. In time, an artificial reef will attain many of the biological and ecological attributes of a natural reef. Artificial reefs do not include shore protection structures, pipelines, fish aggregat-

ing devices, and other structures not constructed for the sole purpose of fish habitat.

(b) New reefs shall be sited in accordance with the following:

1. The reef site shall not be located in the following special areas: surf clam areas (N.J.A.C. 7:7E 3.3), prime fishing areas (N.J.A.C. 7:7E-3.4), navigation channels (N.J.A.C. 7:7E-3.7), inlets (N.J.A.C. 7:7E-3.9), and submerged infrastructure routes (N.J.A.C. 7:7E-3.12) and historic and archaeological resources (N.J.A.C. 7:7E-3.36);

2. The reef site shall be located in the Atlantic Ocean;

3. The reef site shall be located in a manner that minimizes impacts on commercial fishing operations;

4. The reef site shall not be located within shipping lanes, and/or anchorages;

5. The natural seafloor at the reef site shall have a firm substrate to minimize sinking of reef materials;

6. The reef site shall not be located within an area environmentally influenced by dredge disposal sites, sewage outfalls, or other areas known to experience hypoxic events, contaminated waters or sediment that may impair the quality of fish habitat; and

7. The reef site shall not be located in an area with currents that have the potential to cause material instability, scouring, or sanding over.

(c) Construction of new or expanded artificial reefs is conditionally acceptable provided that at the time of deployment, and at all times after creation, the following conditions are met:

1. The reef materials are of sufficient density so that it will not move outside of the approved reef boundary;

2. The reef materials shall not float;

3. The reef materials shall not pose a hazard to navigation;

4. The reef materials shall not pose a threat to the marine environment;

5. The reef materials shall not be toxic;

6. The reef materials shall not be hazardous;

7. The reef materials shall not be explosive;

8. The reef materials shall not be radioactive;

9. The following reef materials are acceptable for deployment, provided that (c)1 through 8 above are met:

- i. Ships;

- ii. Armored military vehicles;

- iii. Manufactured reef habitats;

- iv. Dredge rock;
- v. Concrete and steel rubble;
- vi. Demolition material free of floating debris;
- vii. Obsolete submarine telephone cable; and
- viii. Miscellaneous reef materials that meet the conditions in (c)1 through 8 above;

10. The reef material shall be deployed in the following manner:

i. No materials shall be deposited until notification has been provided to the Department at least 72 hours in advance;

ii. Inspection by the Department prior to deployment, to ensure materials are not harmful to the marine environment, and will not pose a threat to human safety, and comply with the reef material conditions (c)1 through 8 above;

iii. Department personnel shall directly observe and oversee the deployment of any reef materials;

iv. To the extent practicable, deployment of reef materials shall not adversely impact the marine environment; and

v. The locations of artificial reef sites shall be recorded using a Global Positioning Satellite (GPS) system.

(d) An Artificial Reef Management Plan shall be submitted for each individual reef permit application and shall include the following:

1. A description of the proposed site;
2. A mechanism for recording materials used in constructing the reef; and
3. A monitoring schedule to measure the stability, durability and biological attributes of reef materials and impacts to the marine environment. The schedule shall include submission of monitoring reports, including a listing of materials deployed in the previous year, to the Department every year during reef construction, and every five years thereafter.

(e) It shall be the responsibility of the reef-builder to provide the location of the artificial reef to the US Department of Commerce, NOAA, National Ocean Survey, 1315 East West Highway, Silver Spring, MD 20910-3282, for inclusion on nautical charts.

(f) Rationale: See the OAL Note at the beginning of this subchapter.

New Rule, R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

#### 7:7E-4.22 Miscellaneous uses

(a) Miscellaneous uses are uses of Water Areas not specifically defined in this section or addressed in the use rules, N.J.A.C. 7:7E-7.

(b) Water dependent uses of Water Areas not identified in the use rules will be analyzed on a case-by-case basis to ensure that adverse impacts are minimized. Non-water dependent uses are discouraged in all Water Areas.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

New Rule, R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

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### SUBCHAPTER 5. REQUIREMENTS FOR IMPERVIOUS COVER AND VEGETATIVE COVER FOR GENERAL LAND AREAS AND CERTAIN SPECIAL AREAS

#### Authority

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

#### Source and Effective Date

R.2000 d.45, effective February 7, 2000.  
See: 31 N.J.R. 2042(a), 32 N.J.R. 503(a).

#### Subchapter Historical Note

Subchapter 5, General Land Areas, was repealed and Subchapter 5, Requirement for Impervious Cover and Vegetative Cover for General Land Areas and Certain Special Areas, was adopted as new rules by R.2000 d.45, effective February 7, 2000. See: Source and Effective Date.

#### 7:7E-5.1 Purpose and scope

(a) This subchapter sets forth requirements for impervious cover and vegetative cover on sites in the upland waterfront development area, as defined at N.J.A.C. 7:7E-5.2, and in the CAFRA area, as defined at N.J.A.C. 7:7E-5.2. In addition:

1. For a site in the upland waterfront development area, the applicable impervious cover limits and vegetative cover percentages are determined under N.J.A.C. 7:7E-5A, based on the site's growth rating, development potential, and environmental sensitivity; and
2. For a site in the CAFRA area, the applicable impervious cover limits and vegetative cover percentages are determined under N.J.A.C. 7:7E-5B, based on the site's location in a coastal center; in a Coastal Planning Area; in a CAFRA center, CAFRA core, or CAFRA node; or on a military installation.

public"; deleted (e)5i and (f)5i; and in the introductory paragraph of (f)5, substituted "Public" for "Except as provided in (f)5i below, public".

#### Case Notes

Reviewing court interpreting the regulatory definitions of a dune under N.J.A.C. 7:7E-3.16(a) and a primary frontal dune under N.J.A.C. 7:7-7.8(d)l<sup>ii</sup> held that the Department of Environmental Protection (DEP) improperly denied a landowner's application to build an ocean-front home as the subject property was not a dune; the DEP's interpretation of the regulatory language also resulted in a fundamental unfairness to petitioner, whose surrounding neighbors had constructed similar homes on their adjacent properties. *Seigel v. N.J. Dep't of Env'tl. Prot.*, 395 N.J. Super. 604, 930 A.2d 461, 2007 N.J. Super. LEXIS 291 (App.Div. 2007).

Construction permits issued without sufficient findings of fact were invalid. *Crema v. Dept. of Environmental Protection*, 192 N.J. Super. 505, 471 A.2d 422 (App.Div.1984) certiorari denied 96 N.J. 306, 307, 475 A.2d 597 (1984).

Regulation noted as being responsive to both CAFRA directions and to the fair share housing constitutional mandate of the Mount Laurel I decision. *Southern Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp.*, 92 N.J. 158, 456 A.2d 390, on remand 207 N.J. Super. 169, 504 A.2d 66 (1983).

Department of Environmental Protection to impose "fair share" housing conditions to provide for low and moderate income housing (citing former N.J.A.C. 7:7E-8.6 and 7:7E-8.11). In re *Egg Harbor Associates*, 185 N.J. Super. 507, 449 A.2d 1324 (App.Div.1982) affirmed 94 N.J. 358, 465 A.2d 1115 (1983).

Former rules for large scale residential development do not support conditional approval of construction permit for large scale development because of serious deficiencies in essential findings (citing former regulations and former N.J.A.C. 7:7E-8.11). *Crema v. Dept. of Environmental Protection*, 182 N.J. Super. 445, 442 A.2d 630 (App.Div.1982), affirmed as modified 94 N.J. 286, 463 A.2d 910 (1983).

Where a Settlement Agreement and Letter of Authorization (LOA) following alternative dispute resolution authorized the reconstruction and expansion of the footprint of an existing single-family dwelling located on the property adjacent and easterly to that owned by the petitioners but there were no houses or commercial buildings within 100 feet of the property on either the northerly or southerly sides, the LOA was not a "waiver" of the third prong of the infill development rule of N.J.A.C. 7:7E-7.2(f)4 but rather a settlement based on the totality of the facts of a case in litigation. The Department of Environmental Protection has the ability to enter into reasonable settlements on a case-by-case basis that are in the best interest of the environment and that are consistent with the purpose of Coastal Area Facility Review Act, and in this case, the settlement mitigated the litigation risk and required the homeowner to enhance the dune area with plantings, to file a deed restriction prohibiting any future development seaward of the proposed reconstructed home, and to come into compliance with FEMA requirements governing flooding and storm damage prevention. *Dragon v. N.J. Dep't of Env'tl. Prot., Land Use Regulation Program*, OAL Dkt. No. ESA 2988-06, 2007 N.J. AGEN LEXIS 919, Final Decision (June 25, 2007).

Activity fit within the "repair, replacement or renovation" exemption from requirement for Waterfront Development Permit. N.J.S.A. 12:5-3. *Ward v. Department of Environmental Protection*, 91 N.J.A.R.2d 1 (EPE).

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

(a) Resort/recreation uses include the wide range of small and large developments attracted to and often dependent upon locations along the coast. These uses include hotels, motels, marinas, boating facilities, campgrounds, amusement piers, parks and recreational structures such as bathhouses, natural

areas, open space for active and passive recreation, and linear paths for bicycling and jogging.

(b) Standards relevant to recreation priority are as follows:

1. Each waterfront municipality should contain at least one waterfront park on each body of water within the municipality. Municipalities that do not currently provide, or have active plans to provide, access to the water will not be eligible for Green Acres or Shore Protection Bond Funding.

2. Resort/recreation uses and commercial fisheries uses shall have priority over all other uses in Monmouth, Ocean, Atlantic, and Cape May counties with highest priority reserved for those uses that serve a greater rather than a lesser number of people, and those uses that provide facilities for people of all ages and for people with physical handicaps.

3. Rationale: See the OAL Note at the beginning of this subchapter.

(c) Standards relevant to recreation areas within developments are as follows:

1. "Recreation areas" include a variety of types and sizes of open space adequate to accommodate appropriate recreational activities or facilities.

2. Appropriate recreation areas shall be incorporated in the design of all residential, industrial and commercial development to the maximum extent practicable, as necessary to ensure that needed on-site recreation opportunities will not be precluded by a lack of suitable open space. The "maximum extent practicable" will be determined based on guidelines of the Green Acres Program (N.J.S.A. 13:8A-1 et seq.) which consider the recreation resource supply and demand, the natural characteristics of the site, and the ability to identify a public agency or other organization willing to manage, maintain and develop the open space as a recreational resource. What is necessary will be determined by consideration of recreation resource supply and demand and municipal and county open space and recreation master plans.

3. Rationale: See the OAL Note at the beginning of this subchapter.

(d) Standards relevant to marinas are as follows:

1. Marina means any dock, pier, bulkhead, mooring or similar structure or a collection of adjacent structures under singular or related ownership providing permanent or semi-permanent dockage to five or more vessels.

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

- i. The marina includes the development of an appropriate mix of dry storage areas, public launching facilities, berthing spaces, repair and maintenance facilities, and boating and hardware supply facilities, depending upon site conditions.
  - ii. The marina posts prominent signs indicating discharges shall not be allowed within the basin and provides restrooms and marine septic disposal facilities for wastewater disposal from boats. For marinas with dockage for 25 or more vessels or any on vessel with live-aboard arrangement, adequate and conveniently located pumpout stations shall be provided.
  - iii. Restrooms and at least one portable toilet emptying receptacle shall be provided at a marina. The portable toilet emptying receptacle requirement may be satisfied either by the installation of a receptacle device or by the designation of either a pumpout or restroom facility for this use; and
    - (1) Discharge to a municipal or regional treatment plant where practicable;
    - (2) Discharge to a subsurface sewerage disposal system constructed in accordance with N.J.A.C. 7:9-2 and N.J.A.C. 7:7E-8.21; or
    - (3) Discharge to a holding tank with waste being removed by a licensed septage hauler. A marina employing this method shall maintain a record of waste removal; and
  - iv. New marina facilities and expansions and renovation of existing marinas shall provide public access in accordance with the lands and waters subject to the public trust rights rule, N.J.A.C. 7:7E-3.50, and the public access rule, N.J.A.C. 7:7E-8.11.
3. New marinas or boat launching facilities that provide primarily for sail, oar or rental boating are encouraged.
  4. Expansions of existing marinas shall be encouraged by limiting non-water dependent land uses that preclude support facilities for boating.
  5. Publicly funded marinas shall be designed to be part of multiple use parks, to the maximum extent practicable.
  6. Recreational boating facilities are acceptable provided that they are designed and located in order to cause minimum feasible interference with the commercial boating industry.
  7. New marinas are encouraged to locate on filled water's edge sites, where minimal dredging is required.
  8. Construction of new marinas within areas designated by the Department as shellfish habitat is prohibited. Expansions of existing marinas within shellfish habitat areas shall comply with the standards of the Shellfish Habitat rule (N.J.A.C. 7:7E-3.2) and Submerged Vegetation rule (N.J.A.C. 7:7E-3.6).

9. Marinas shall comply with the design standards set forth in N.J.A.C. 7:7E-7.3A to the maximum extent practicable.

10. In addition to complying with all other applicable portions of these rules, all new, expanded and renovated boat mooring facilities with five or more slips which are located on any portion of the Navesink River, Shrewsbury River or Manasquan River (upstream of the Route 35 Bridge) or the St. George's Thorofare shall meet the conditions in (d)10i through iii below. Renovation shall include complete or partial alteration of any portion of a structure, including construction, reconstruction of or relocation of existing docks, piers, moorings and bulkheads and dredging. The conditions are:

- i. A pumpout facility shall be constructed and maintained at those facilities at which boats over 24 feet in length or those with on-board septic facilities (heads) shall be docked. All other facilities shall construct and maintain on site marine septic disposal facilities;

- ii. No pressure treated lumber or other lumber treated with any other substance shall be used in any portion of the project. This restriction applies only to bulkhead sheathing and planking, and dock planking, and does not apply to pilings. In addition, this restriction does not apply to any construction upland of the mean high water line; and

- iii. The applicant and/or property owner shall finance monthly sampling and testing of fecal coliform levels per milliliter of water at five locations selected by the Department in the water in which the project is located. Testing shall be performed by a State-certified laboratory and shall be conducted beginning in the first month following the mooring of vessels and monthly thereafter for two full seasons of operation (that is, May 1 through October 31). The monitoring shall occur on the day of the month selected by the Department and no advance notice of the sampling day shall be given to the property-owner. Results of the monitoring shall be provided to the Department and the property-owner in writing by the laboratory within 10 calendar days after the date of sampling.

- (1) The State-certified laboratory shall determine the pre-construction median level of fecal coliform in the water at each of the Department selected test sites at the applicant's expense, and advise the Department and the applicant in writing of these results within 10 calendar days after the date of sampling. If any post-construction test at any single site yields fecal coliform levels which exceed the pre-construction reading at that site by 100 percent, the property owner shall allow Department personnel access to the property during day-light hours to assess whether the operation of the project is causing or contributing to the elevated reading.

(2) In the event the Department determines in writing that the elevated readings of fecal coliform are caused, in whole or in part, by the operation of the project, the property owner shall, as a condition of the permit, cease such uses and practices as described in writing by the Department and shall implement such practices as determined by the Department in writing to be minimally necessary to reduce the levels of fecal coliform emanating from the project.

(3) In the event the Department determines that the laboratory has twice or more failed to sample in the correct location, failed to comply with commonly accepted sampling techniques and laboratory methods or has divulged the date of sampling to the applicant and/or property-owner in advance of sampling, the property owner shall immediately discontinue use of such laboratory upon receipt of written notice to this effect from the Department and shall arrange for all future sampling to be conducted by another State-certified laboratory. For every month in which sampling does not occur as a result of a change in laboratory, an extra month of sampling shall be required from the property owner during the next season of operation.

(4) If the property owner fails to arrange for water sampling as required herein without first securing the express written permission of the Department to omit sampling for that month, the property owner shall be in violation of the terms of the permit issued under these rules and the Department shall notify the property owner in writing of its intention to revoke the permit and prohibit use of the project pending final revocation of the permit in accordance with N.J.A.C. 7:7-4.11(b).

11. Rationale: See the OAL Note at the beginning of this subchapter.

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

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

i. The amusement pier, park, or boardwalk does not reasonably conflict with aesthetic values, ocean views, or other beach uses and wildlife functions;

ii. The proposed pier expansion will not eliminate or affect the existing direct public access to the beach, unless another access point is provided immediately adjacent to the expanded pier, for each access point eliminated;

iii. The surrounding community can adequately handle the activity and uses to be generated by the proposed development;

iv. The pier expansion is constructed on pilings at the same elevation as the existing pier;

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

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

2. The expansion of a pier qualifying for a General Permit under N.J.A.C. 7:7-7 is acceptable.

3. Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.

See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Section substantially amended and recodified.

Amended by R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Marina redefined; pump out requirements specified further.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2000 d.45, effective February 7, 2000.

See: 31 N.J.R. 2042(a), 32 N.J.R. 503(a).

In (a), deleted N.J.A.C. reference; and in (e), inserted a new 1, and recodified former 1 through 3 as 2 through 4.

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

In (d)2iii(2), amended the N.J.A.C. reference.

Amended by R.2007 d.374, effective December 17, 2007.

See: 38 N.J.R. 4570(a), 39 N.J.R. 5222(a).

In (d)2iv, substituted "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" for "Public Access to the Waterfront Rule (N.J.A.C. 7:7E-8.11)"; in (e)2iv; deleted "and" from the end; in (e)2v, inserted "; and" at the end; and added (e)2vi.

Amended by R.2012 d.182, effective November 5, 2012.

See: 43 N.J.R. 772(a), 44 N.J.R. 614(a), 44 N.J.R. 2559(a).

In (d)2iv, substituted "access" for the second occurrence of "trust rights"; deleted former (e)1; recodified former (e)2 through (e)4 as (e)1 through (e)3; and in (e)1vi, deleted ", and the public trust rights rule, N.J.A.C. 7:7E-8.11" from the end.

#### Case Notes

CAFRA definition of "facilities" includes cabanas. State, Dept. of Environmental Protection v. Stavola, 206 N.J.Super. 213, 502 A.2d 63 (App.Div.1985) reversed 103 N.J. 425, 511 A.2d 622 (1986).

Resort-recreation uses have priority over all other uses with highest priority reserved for those uses that serve a greater rather than a lesser number of people; rationale (citing former N.J.A.C. 7:7E-8.13). Lusardi v. Curtis Point Property Owners Assn., 86 N.J. 217, 430 A.2d 881 (1981).

Permit to install septic systems by filling in area back of bay was not issuable absent satisfaction of waterfront development criteria. Myles v. Department of Environmental Protection, 95 N.J.A.R.2d (EPE) 232.

#### 7:7E-7.3A Marina development

(a) The following pertains to marina project design:

1. The following should be followed to promote water quality in the marina basin:

- i. Basin depths must never exceed the depths of access channels nor the open water to which the basin is connected.
  - ii. Deep-draft slips shall be constructed in naturally deep portions of the site in order to minimize the need for dredging.
  - iii. Floating breakwaters are preferred in low-energy areas (where wavelengths are less than twice the width of the breakwater).
  - iv. Sharp angles are to be avoided; corners should be gently rounded, never square.
  - v. Basin depths should uniformly deepen toward the exit and waterway outside the basin.
  - vi. Entrance channels should not be located on corners.
  - vii. Where possible, entrance channels should be oriented in the direction of the prevailing winds to promote wind-driven circulation.
  - viii. Enclosed basins should include openings at opposite ends to promote circulation.
  - ix. Slips should be oriented parallel to currents, never broadside; this promotes circulation and reduces the load on the pier structure.
  - x. Fuel pumps shall include back pressure cut-off valves. Main cut-off valves shall be available both at the dock and in the upland area of the marina.
  - xi. Fuel docks should be sturdy using a floating design wherever possible in order to withstand significant storm affected tidal ranges.
  - xii. To control stormwater runoff, upland portions of the site should include water quality features such as detention basins and limit pollutants from entering the waterway.
2. Sloping rip-rap bulkheads are preferred over solid vertical structures; they better dissipate wave energy and provide a more diverse habitat for marine organisms.
3. To avoid standing waves, bulkheads should never be parallel to one another.
4. To minimize the impact on the photic zone, dock and pier widths should be minimized. In addition, the structures should stand as high above mean high water as possible and should be oriented north-south to the maximum extent practicable.
5. The distance from a parked car to a slip should never exceed 180 meters.

6. Septic systems shall be installed with a minimum setback of 100 feet and in soils with a minimum depth to the seasonal high water table of four feet or more.

7. For safety, the usable width of the entrance channel should be at least four times the beam of the widest expected vessel, or a minimum of 19 meters.

8. The marina shall provide pumpout station(s) (fixed or portable). Marinas which allow occupation of berthed vessels for a period of 72 hours or more shall provide slipside pumpout facilities.

9. The marina shall provide abundant trash receptacles along with adequate fish cleaning areas, including separate and well-marked dispensers for organic refuse.

10. Ample parking facilities shall be provided, with a minimum of 0.6 spaces per slip (the number will range from 0.6 to 2.5 spaces per slip, depending on the nature of the marina).

11. The design should include an aesthetically pleasing landscape design.

12. Maintenance areas shall be screened by proper landscaping and shall include techniques which will prevent materials from entering the water.

13. The fueling facility shall be designed to accommodate four of the largest expected vessels.

14. For safety, the turning area of the basin should be at least 2.25 times the length of the longest expected vessel.

15. Marinas shall provide restroom facilities according to the following schedule:

i. For a small marina (up to 40 boats):

(1) Men: One toilet stall, one urinal, and one washbasin.

(2) Women: Two toilet stalls and one washbasin.

ii. For a small "quality" or medium marina (40 to 80 boats):

(1) Men: One urinal, one toilet stall, one shower stall, and one washbasin.

(2) Women: Two toilet stalls, one washbasin, and one shower stall.

iii. For a large marina (over 80 boats):

(1) Add:

(A) One urinal per 30 boats (men);

(B) One toilet stall per 60 boats (men);

(C) One toilet stall per 30 boats (women);

(D) One washbasin per 30 boats (men and women);

**Law Review and Journal Commentaries**

Environmental Law—Waterfront Development. P.R. Chenoweth, 137 N.J.L.J. No. 10, 66 (1994).

**Case Notes**

Compatibility test is consistent with Waterfront Development Act. *Distributec, Inc. v. New Jersey Dept. of Environmental Protection and Energy, Div. of Coastal Resources*, 274 N.J.Super. 1, 643 A.2d 11 (A.D.1994), certification granted 138 N.J. 266, 649 A.2d 1286, affirmed 139 N.J. 431, 655 A.2d 437.

Developer failed to demonstrate need for new port facility. *Distributec, Inc. v. New Jersey Dept. of Environmental Protection and Energy, Div. of Coastal Resources*, 274 N.J.Super. 1, 643 A.2d 11 (A.D.1994), certification granted 138 N.J. 266, 649 A.2d 1286, affirmed 139 N.J. 431, 655 A.2d 437.

Evidence supported denial of port development application. *Distributec, Inc. v. New Jersey Dept. of Environmental Protection and Energy, Div. of Coastal Resources*, 274 N.J.Super. 1, 643 A.2d 11 (A.D.1994), certification granted 138 N.J. 266, 649 A.2d 1286, affirmed 139 N.J. 431, 655 A.2d 437.

Record established that it was proper to deny permits to allow construction of new bulk materials handling port, particularly in view of availability of suitable land and water area at least one existing port. In *Matter of Bridgeton Bulk Materials Handling Facility*. 93 N.J.A.R.2d (EPE) 203.

Waterfront development permit sought for containerized freight facility; failure to satisfy requirements for "new port". *Distributec Inc. v. New Jersey Department of Environmental Protection*, 92 N.J.A.R.2d (EPE) 198.

**7:7E-7.10 Commercial facility use rule**

(a) Standards relevant to hotels and motels are as follows:

1. Hotels and motels are commercial establishments, known to the public as hotels, motor-hotels, motels, or tourist courts, primarily engaged in providing lodging, or lodging and meals, for the general public. Also included are hotels and motels operated by membership organizations, whether open to the general public or not.

2. New, expanded or improved hotels and motels are conditionally acceptable provided that the development complies with all Location and Resource rules and with the rule for high-rise structures and is compatible in scale, site design, and architecture with surrounding development.

3. Hotels, motels or restaurants may be water oriented if they take full advantage of a waterfront location.

4. In special urban areas, new hotel, motel, or restaurant development is acceptable in the filled water's edge and over large rivers on structurally sound pilings, provided it is consistent with rules on Filled Water's Edge (N.J.A.C. 7:7E-3.23) and Special Urban Areas (N.J.A.C. 7:7E-3.43), and the existing total area of water coverage is not expanded except where it can be demonstrated that extensions are functionally necessary for water dependent uses.

5. Rationale: See the OAL Note at the beginning of this subchapter.

(b) Standards relevant to retail trade and services are as follows:

1. Retail and trade service is a broad category including, but not limited to, establishments selling merchandise for personal and household consumption, such as food stores and clothing stores; offices; service establishments such as banks and insurance agencies; establishments such as restaurants and night clubs; and establishments for participant sports such as bowling alleys and indoor tennis courts.

2. In special urban areas, new or expanded retail trade and service establishments are conditionally acceptable in filled water's edge areas and over large rivers on structurally sound existing pilings as part of mixed use developments, provided that the development is consistent with the rule on Filled Water's Edge (N.J.A.C. 7:7E-3.23) and Special Urban Areas (N.J.A.C. 7:7E-3.43), and the existing total area of water coverage is not expanded except where it can be demonstrated that extensions are functionally necessary for water dependent uses.

3. Elsewhere in the coastal zone, new or expanded retail trade and service establishments are conditionally acceptable provided that the development:

- i. Complies with all applicable Location and Resource rules;
- ii. Is compatible in scale, site design, and architecture with surrounding development; and
- iii. Where appropriate, utilizes the water area as the central focus of the development.

4. Rationale: See the OAL Note at the beginning of this subchapter.

(c) Standards relevant to convention centers and arenas are as follows:

1. "Convention centers" are facilities designed primarily for holding conventions. "Arenas" are commercial facilities designed primarily for spectator sporting events. Arenas do not include indoor tennis courts, bowling alleys and other facilities primarily designed for participant sports, nor arenas affiliated with schools and colleges.

2. New convention centers and arenas are encouraged in special urban areas, and conditionally acceptable in Development regions, provided that the development is compatible in scale, site design, and architecture with surrounding development, and is accessible by public transportation. New convention centers and arenas are discouraged in Barrier Island, Extension and Limited Growth regions.

3. Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Substantially amended and recodified.

Amended by R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

References specified in (b)2iii.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2000 d.45, effective February 7, 2000.

See: 31 N.J.R. 2042(a), 32 N.J.R. 503(a).

Deleted a former (b); and recodified former (c) and (d) as (b) and (c).

### 7:7E-7.11 Coastal engineering

(a) Coastal engineering includes a variety of structural and nonstructural measures to manage water areas and the shoreline for natural effects of erosion, storms, and sediment and sand movement. Beach nourishment, sand fences, pedestrian control on dunes, stabilization of dunes, dune restoration projects, dredged material disposal and the construction of retaining structures such as bulkheads, gabions, revetments and seawalls are all examples of coastal engineering.

1. The standards relevant to shore protection priorities in (b) below do not apply to water dependent uses within existing ports.

(b) Standards relevant to shore protection priorities are as follows:

1. Non-structural solutions to shoreline erosion problems are preferred over structural solutions. Vegetative shore protection measures have been proven effective, and are preferred at shoreline sites in which they are feasible. Feasibility is dependent on the following factors: shoreline geometry; shoreline slope; sediment type; boat traffic; and wind and extent of exposed land/water surface (fetch). The infeasibility and impracticability of a non-structural solution must be demonstrated before structural solutions may be deemed acceptable.

2. Rationale: See the OAL Note at the beginning of this subchapter.

(c) Standards relevant to dune management are as follows:

1. Dune restoration, creation and maintenance projects as nonstructural shore protection measures, including sand fencing, revegetation, additions of nontoxic appropriately sized material, control of pedestrian and vehicular traffic, are encouraged. These projects shall comply with N.J.A.C. 7:7E-3A, Standards for Beach and Dune Activities.

2. Rationale: See the OAL Note at the beginning of this subchapter.

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

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

i. The particle size and type of the fill material is compatible with the existing beach material to ensure that the new material will not be removed to a greater extent than the existing material would be by normal tidal fluctuations;

ii. The elevation, width, slope and form of the proposed beach nourishment projects are compatible with the characteristics of the existing beach;

iii. The sediment deposition will not cause unacceptable shoaling in downdrift inlets and navigation channels; and

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

2. Rationale: See the OAL Note at the beginning of this subchapter.

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

1. The construction of new shore protection structures or expansion or fortification of existing shore protection structures, including, but not limited to, jetties, groins, seawalls, bulkheads, gabions and other retaining structures to retard longshore transport and/or to prevent tidal waters from reaching erodible material is acceptable only if it meets all of the following five conditions:

i. The structure is essential to protect water dependent uses or heavily used public recreation beach areas in danger from tidal waters or erosion, or the structure is essential to protect existing structures and infrastructure in developed shorefront areas in danger from erosion, or the structure is essential to mitigate, through, for example, the construction of a retained earthen berm, the projected erosion in an erosion hazard area along a headland and provide erosion protection for a development that is otherwise acceptable under the Coastal Zone Management rules;

ii. The structure will not cause significant adverse impacts on local shoreline sand supply;

iii. The structure will not create net adverse shoreline sand movement downdrift, including erosion or shoaling;

iv. The structure will cause minimum feasible adverse impact to living marine and estuarine resources;

v. The structure is consistent with the State's Shore Protection Master Plan;

vi. If the proposed project requires filling of a water area it must be consistent with the General Water Area rule for filling (N.J.A.C. 7:7E-4.10) and all other relevant coastal rules.

2. Maintenance or construction of an existing bulkhead is conditionally acceptable provided that it meets (e)2i, ii or iii below. All measurements shall be made from the waterward face of the original bulkhead alignment of the existing bulkhead to the waterward face of the replacement bulkhead.

i. The replacement bulkhead is located within 18 inches outshore of the existing bulkhead, except in accordance with (e)2ii or iii below;

ii. The replacement bulkhead is located no more than 24 inches outshore of the existing bulkhead when the replacement bulkhead is constructed of a corrugated material, and the replacement bulkhead is located as close as possible to the face of the existing bulkhead; or

iii. Maintenance or reconstruction of an existing bulkhead which does not meet (e)2i or ii above shall be considered new construction, unless it can be demonstrated that the existing bulkhead cannot physically accommodate a replacement in accordance with (e)2i or ii above. In such case, the replacement bulkhead shall be as close as physically possible to the original bulkhead alignment.

3. Stone rip-rap and sloped concrete and gabion revetments which allow for growth of vegetation are the preferred form of retaining structures.

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

5. The construction of bulkheads subject to wave runup forces (V-Zones) must be designed and certified by a professional engineer to withstand the forces of wave runup, and must include a splash pad on the landward side. The splash pad must have a minimum width of 10 feet, and may be constructed of concrete, asphalt or other erosion resistant material. If a cobblestone or similar splash pad is utilized, appropriate subbase and filter cloth must be incorporated into the design. A provision for the use of rip-rap along the seaward toe of the bulkhead structure may be required on a case-by-case basis, as a means to limit the scour potential.

6. Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Section substantially amended and recodified.

Amended by R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Expansion or fortification of structures included at (e).

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

Rewrote the section.

Amended by R.2007 d.374, effective December 17, 2007.

See: 38 N.J.R. 4570(a), 39 N.J.R. 5222(a).

Rewrote (d)1iv and (e)4.

Amended by R.2012 d.182, effective November 5, 2012.

See: 43 N.J.R. 772(a), 44 N.J.R. 614(a), 44 N.J.R. 2559(a).

In (d)1iv and (e)4, substituted "access" for the second occurrence of "trust rights".

#### Case Notes

Property owners' application for permit to construct a bulkhead on property adjacent to bay failed to satisfy coastal engineering rule establishing standards applicable to structural shore protection, where there was no evidence that approval of construction of bulkhead was essential to protect existing structures. *Muir v. NJ Dept. of Env Protection*, 1999 WL 728289, N.J. Adm., Aug 26, 1999, (No. ESA 02956-98S).

Permit to install septic systems by filling in area back of bay was not issuable absent satisfaction of waterfront development criteria. *Myles v. Department of Environmental Protection*, 95 N.J.A.R.2d (EPE) 232.

Issuance of waterfront development permit did not endanger navigation to adjoining bulkhead and dock. *Misiak v. Walker*, 95 N.J.A.R.2d (EPE) 14.

Bulkhead and dock permit allowed. *Misiak v. Walker*, 95 N.J.A.R.2d (EPE) 14.

Bulkhead constructed in violation of regulations; removal ordered. *Walker v. New Jersey Department of Environmental Protection*, 93 N.J.A.R.2d (EPE) 69.

Record established that landowner was entitled to waterfront development permit to bulkhead 100 foot lot and relocate drainage pipe. *Baron v. New Jersey Department of Environmental Protection*, 92 N.J.A.R.2d (EPE) 18.

#### 7:7E-7.12 Dredged material placement on land

(a) Dredged material placement is the disposal or beneficial use of sediments removed during dredging operations. Beneficial uses of dredged material include, but are not limited to, fill, topsoil, bricks and lightweight aggregate. This rule applies to the placement of dredged material landward of the spring high water line. The standards for dredged material disposal in Water Areas are found at N.J.A.C. 7:7E-4.8.

(b) Dredged material placement on land is conditionally acceptable provided that the use is protective of human health, groundwater quality, and surface water quality, and manages ecological risks. Testing of the dredged material may be required as needed to determine the acceptability of the placement of the material on a particular site.

(c) Dredged material disposal is prohibited on wetlands unless the disposal satisfies the criteria found at N.J.A.C. 7:7E-3.27.

(d) The use of dredged material of appropriate quality and particle size for purposes such as restoring landscape, enhancing farming areas, capping and remediating landfills and brownfields, beach protection, creating marshes, capping contaminated dredged material disposal areas, and making new wildlife habitats is encouraged.

(e) Effects associated with the transfer of the dredged materials from the dredging site to the disposal site shall be minimized to the maximum extent feasible.

(f) Dredged material disposal in wet and dry borrow pits is conditionally acceptable (see N.J.A.C. 7:7E-3.14, and 3.35).

(g) If pre-dredging sediment analysis indicates contamination, then special precautions shall be imposed including but not necessarily limited to increasing retention time of water in the disposal site or rehandling basin through weir and dike design modifications, use of coagulants, ground water monitoring, or measures to prevent biological uptake by colonizing plants.

(h) All potential releases of water from confined (diked) disposal sites and rehandling basins shall meet existing State Surface Water Quality Standards (N.J.A.C. 7:9B) and State Groundwater Quality Standards (N.J.A.C. 7:9).

(i) The Department has prepared a dredging technical manual, titled "The Management and Regulation of Dredging Activities and Dredged Material Disposal in New Jersey's Tidal Waters," October 1997, which provides guidance on dredged material sampling, testing, transporting, processing, management, and placement. The manual is available from the Department's Office of Maps and Publications, PO Box 420, Trenton, New Jersey, 08625-0420, (609) 777-1038.

(j) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

(a) 6 and 7 added.  
Amended by R.1990 d.413, effective August 20, 1990.  
See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Stylistic changes.  
Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).  
Amended by R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

Rewrote the section.

### 7:7E-7.13 National defense facilities use rule

(a) A national defense facility is any building, group of buildings, marine terminal, or land area owned or operated by a defense agency (Army, Navy, Air Force, Marines, Coast Guard) and used for training, research, material support, or any other defense-related use.

(b) National defense facilities are conditionally acceptable provided the development meets either (b)1 or 2 below:

1. The proposed facility is consistent with all relevant Coastal Zone Management rules; or

2. The proposed facility is coastally dependent, will be constructed and operated with maximum possible consistency with Coastal Zone Management rules, and will result in minimal feasible degradation of the natural environment.

(c) The construction of new facilities or expansion of existing facilities on land not owned by a defense agency is discouraged, unless it can be shown that the facility cannot feasibly be accommodated on an existing base.

(d) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

(b) deleted; (b)1-2 recodified as (b)-(c); (c) recodified to (d).  
Amended by R.1990 d.413, effective August 20, 1990.  
See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Stylistic changes.  
Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).  
Amended by R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

In (b), in main paragraph substituted "provided the development meets either (b)1 or 2 below" for "and will be approved if one of two findings can be made".

### 7:7E-7.14 High-rise structures

(a) High-rise structures are structures which are more than six stories or more than 60 feet in height as measured from existing preconstruction ground level.

(b) The standards for high-rise structures are as follows:

1. High-rise structures are encouraged to locate in an urban area of existing high density, high-rise and/or intense settlements;

2. Highrise structures within the view of coastal waters shall be separated from coastal waters by at least one public road or an equivalent area (at least 50 feet) physically and visually open to the public except as provided by N.J.A.C. 7:7E3.48;

3. The longest lateral dimension of any highrise structure must be oriented perpendicular to the beach or coastal waters, except for a highrise structure that is located in the Redevelopment Zone of the City of Long Branch and authorized pursuant to the Long Branch Redevelopment Zone Permit at N.J.A.C. 7:77.4.

4. The proposed structure must not block the view of dunes, beaches, horizons, skylines, rivers, inlets, bays, or oceans that are currently enjoyed from existing residential structures, public roads or pathways, to the maximum extent practicable;

5. High-rise structures outside of the Hudson River waterfront special area as defined by N.J.A.C. 7:7E3.48 shall not overshadow the dry sand beach between 10:00 A.M. and 4:00 P.M. between June 1 and September 20, and shall not overshadow waterfront parks year round;

6. The proposed structure must be in character with the surrounding transitional heights and residential densities, or be in character with a municipal comprehensive development scheme requiring an increase in height and density which is consistent with all applicable Coastal Zone Management rules;

7. The proposed structure must not have an adverse impact on air quality, traffic, and existing infrastructure; and

8. The proposed structure must be architecturally designed so as to not cause deflation of the beach and dune system or other coastal environmental waterward of the structure.

(c) The high-rise structures rule shall not apply to the following types of development:

1. Development in Atlantic City on existing ocean piers which meets the standards at N.J.A.C. 7:7E-3.49(c) or pedestrian bridges which meet the standards at N.J.A.C. 7:7E-3.49(i)1;

2. Utility structures that have a demonstrated need; or

3. Wind turbines.

(d) Rationale: See the OAL Note at the beginning of this subchapter.

New Rule R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Amended by R.1988 d.338, effective August 15, 1988.  
See: 20 N.J.R. 139(a), 20 N.J.R. 2058(b).

Added text to (a)4 "High-rise structures ... N.J.A.C. 7:7E-3.46 shall"; substituted "shall" for "must".

Administrative Correction to (a)1.

See: 21 N.J.R. 1857(a).

Amended by R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Added text in (a).

Amended by R.1998 d.108, effective February 17, 1998.

See: 29 N.J.R. 3920(a), 30 N.J.R. 645(a).

In (a)2, added exception and N.J.A.C. reference.

Amended by R.2000 d.45, effective February 7, 2000.

See: 31 N.J.R. 2042(a), 32 N.J.R. 503(a).

In (a), rewrote the introductory paragraph; inserted a new (b); and recodified former (b) as (c).

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

Rewrote the section.

Amended by R.2010 d.193, effective September 7, 2010.

See: 41 N.J.R. 3168(a), 41 N.J.R. 4168(a), 42 N.J.R. 642(a), 42 N.J.R. 2066(b).

In (c)1, deleted "or" from the end; in (c)2, substituted "; or" for a period at the end; and added (c)3.

## SUBCHAPTER 8. RESOURCE RULES

OFFICE OF ADMINISTRATIVE LAW NOTE: Rationale statements were filed as a part of the rules, but have not been reproduced in this subchapter. The rationale statements can be reviewed at the following office:

Office of Administrative Law  
Quakerbridge Plaza  
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### 7:7E-8.1 Purpose and scope

In addition to satisfying the location and use rules, a proposed development must satisfy the requirements of this subchapter. This subchapter contains the standards the Department utilizes to analyze the proposed development in terms of its effects on various resources of the built and natural environment of the coastal zone, both at the proposed site as well as in its surrounding region.

Amended by R.1985 d.715, effective February 3, 1986.

See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

(b) added.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

Rewrote (a); deleted (b).

Amended by R.2004 d.43, effective January 20, 2004.

See: 35 N.J.R. 2801(a), 36 N.J.R. 442(a).

Deleted the paragraph identifier.

### Case Notes

CAFRA empowers the Department of Environmental Protection to consider health and safety effects of proposed facility upon prospective residents or occupants; CAFRA is not comparable to the Natural Environmental Policy Act (Commissioner's Final Decision). *A.C. Powell Health Center v. Dept. of Environmental Protection*, 1 N.J.A.R. 454 (1980).

### 7:7E-8.2 Marine fish and fisheries

(a) Marine fish are marine and estuarine animals other than marine mammals and birds. Marine fisheries means:

1. One or more stocks of marine fish which can be treated as a unit for the purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational and economic characteristics; and

2. The catching, taking or harvesting of marine fish.

(b) Any activity that would adversely impact on the natural functioning of marine fish, including the reproductive, spawning and migratory patterns or species abundance or diversity of marine fish, is discouraged. In addition, any activity that would adversely impact any New Jersey based marine fisheries or access thereto is discouraged, unless it complies with (c) below.

(c) The following coastal activities are conditionally acceptable provided that the activity complies with the appropriate general water area rule(s) at N.J.A.C. 7:7E-4;

1. Construction of submerged cables and pipelines;
2. Sand and gravel mining to obtain material for beach nourishment, provided:
  - i. The beach nourishment project is in the public interest;
  - ii. There are no alternative borrow sites that would result in less impact to marine fish and fisheries;
  - iii. Any alteration of existing bathymetry within Prime Fishing areas, as defined at N.J.A.C. 7:7E-3.4, does not reduce the high fishery productivity of these areas; and
  - iv. Measures are implemented to minimize and compensate for impacts to marine fish and fisheries; and
3. The establishment of Aquaculture Development Zones in accordance with N.J.S.A. 4:27-1 et seq. and any rules developed and adopted pursuant thereto.

(d) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Deleted "policy" from (a).

Amended by R.1990 d.413, effective August 20, 1990.  
See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Stylistic changes.

Amended by R.2003 d.60, effective February 3, 2003.  
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

Rewrote section.

### 7:7E-8.3 (Reserved)

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

(b) deleted; recodified (b)1.-3. as (b)-(d); old (c) now (e).

Repealed by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).  
Section was "Shellfisheries".

### 7:7E-8.4 Water Quality

(a) As required by Section 307(f) of the Federal Coastal Zone Management Act (P.L. 92-583), Federal, State and local water quality requirements established under the Clean Water Act (33 U.S.C. §1251) shall be the water resource standards

of the coastal management program. These requirements include not only the minimum requirements imposed under the Clean Water Act but also the additional requirements adopted by states, localities, and interstate agencies pursuant to Section 510 of the Clean Water Act and such statutes as the New Jersey Water Pollution Control Act. In the Delaware River Basin, the requirements include the prevailing "Basin Regulations-Water Quality" adopted by the Delaware River Basin Commission as part of its Comprehensive Plan. In the waters under the jurisdiction of the Interstate Environmental Commission in the New Jersey-New York metropolitan area, the requirements include the Interstate Environmental Commission's Water Quality Regulations. Department rules related to water pollution control and applicable throughout the entire coastal zone include, for example, the Surface Water Quality Standards (N.J.A.C. 7:9-4), the rules concerning Wastewater Discharge Requirements (N.J.A.C. 7:9-5), the Ground-Water Quality Standards (N.J.A.C. 7:9C), and the Regulations Concerning the New Jersey Pollutant Discharge Elimination System (N.J.A.C. 7:14A).

(b) Coastal development which would violate the Federal Clean Water Act, or State laws, rules and regulations enacted or promulgated pursuant thereto, is prohibited. In accordance with N.J.A.C. 7:15 concerning the Water Quality Management Planning and Implementation process, coastal development that is inconsistent with an approved Water Quality Management (208) Plan under the New Jersey Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., is prohibited.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

(a) Deleted text "In the Delaware ... (see N.J.A.C. 7:9-4.5 and 6)." and added "These requirements include ... (system N.J.A.C. 7:14A)."; Old (b) deleted and new (b) substituted.

Amended by R.1990 d.413, effective August 20, 1990.  
See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Stylistic changes.

Administrative change.

See: 34 N.J.R. 1902(a).

Administrative correction.

See: 37 N.J.R. 4245(a).

### 7:7E-8.5 Surface water use

(a) Surface water is water in lakes, ponds, streams, rivers, bogs, wetlands, bays, and ocean that is visible on land.

(b) Coastal development shall demonstrate that the anticipated surface water demand of the facility will not exceed the capacity, including phased planned increases, of the local potable water supply system or reserve capacity, and that construction of the facility will not cause unacceptable surface water disturbances, such as drawdown, bottom scour, or alteration of flow patterns.

1. Coastal development shall conform with all applicable Department and, in the Delaware River Area, Delaware River Basin Commission requirements for surface water diversions.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

"Policy:" deleted from (b).

Amended by R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Stylistic changes.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

### 7:7E-8.6 Groundwater Use

(a) Groundwater is all water within the soil and subsurface strata that is not at the surface of the land. It includes water that is within the earth that supplies wells and springs.

(b) Coastal development shall demonstrate, to the maximum extent practicable, that the anticipated groundwater withdrawal demand of the development, alone and in conjunction with other groundwater diversions proposed or existing in the region, will not cause salinity intrusions into the groundwaters of the zone, will not degrade groundwater quality, will not significantly lower the water table or piezometric surface, or significantly decrease the base flow of adjacent water sources. Groundwater withdrawals shall not exceed the aquifer's safe yield.

1. Coastal development shall conform with all applicable DEP and, in the Delaware River Basin, Delaware River Basin Commission requirements for groundwater withdrawal and water diversion rights.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Added text in (b) "alone and in ... in the region."

Amended by R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Stylistic changes.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

### 7:7E-8.7 Stormwater management

If a project or activity meets the definition of "major development" at N.J.A.C. 7:8-1.2, then the project or activity shall comply with the Stormwater Management rules at N.J.A.C. 7:8.

Amended by R.1985 d.715, effective February 3, 1986.  
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

(c)-(h) added; old (c) now (i).

Amended by R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Text added at (c)1i.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.1996 d.391, effective August 19, 1996.

See: 28 N.J.R. 324(a), 28 N.J.R. 3924(a).

Amended by R.2000 d.45, effective February 7, 2000.

See: 31 N.J.R. 2042(a), 32 N.J.R. 503(a).

Rewrote (d)1iv(3).

Repeal and New Rule, R.2004 d.48, effective February 2, 2004.

See: 35 N.J.R. 119(a), 35 N.J.R. 1328(a), 36 N.J.R. 670(a).

Section was "Stormwater management".

### 7:7E-8.8 Vegetation

(a) Vegetation is the plant life or total plant cover that is found on a specific area, whether indigenous or introduced by humans.

(b) Coastal development shall preserve, to the maximum extent practicable, existing vegetation within a development site. Coastal development shall plant new vegetation, particularly appropriate coastal species, native to New Jersey to the maximum extent practicable.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.

See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Section 8.8 was "Soil erosion and sedimentation". The section was repealed.

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

In (b), substituted "coastal species, native to New Jersey" for "native coastal species".

### 7:7E-8.9 (Reserved)

Amended by R.1985 d.715, effective February 3, 1986.

See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Deleted text in (a) "Definitions and maps ... Cape May County" and inserted "which identify these areas".

Amended by R.1990 d.413, effective August 20, 1990.

See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Stylistic changes.

Repealed by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Section was "Important Wildlife Habitat".

### 7:7E-8.10 Air quality

(a) The protection of air resources refers to the protection from air contaminants that injure human health, welfare or property, and the attainment and maintenance of State and Federal air quality goals and the prevention of degradation of current levels of air quality.

(b) Coastal development shall conform to all applicable State and Federal regulations, standards and guidelines and be consistent with the strategies of New Jersey's State Implementation Plan (SIP). See N.J.A.C. 7:27 and New Jersey SIP for ozone, particulate matter, sulfur dioxide, nitrogen dioxide, carbon monoxide, lead, and visibility.