

**7:7E-2.3 (Reserved)**

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

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

CLAM steps 7 and 8 described.

Repealed by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).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 "Mapping and acceptability determination".

**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:

Rules and Publications

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Quakerbridge Plaza

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Trenton, New Jersey 08625-0301

**7:7E-3.1 Introduction**

(a) Special Areas are those 48 types of coastal areas which merit focused attention and special management rules. This subchapter divides Special Areas into Special Water Areas (See N.J.A.C. 7:7E-3.2 through 3.15), Special Water's Edge Areas (See N.J.A.C. 7:7E-3.16 through 3.32), Special Land Areas (See N.J.A.C. 7:7E-3.33 through 3.35), and Coastwide Special Areas (See N.J.A.C. 7:7E-3.36 through 3.48).

1. Special Water Areas extend landward to the spring high water line or the level of normal flow in non-tidal waters.

2. The Special Water's Edge Areas can be found at N.J.A.C. 7:7E-3.16 through 3.32 and are divided into three subcategories, depending on their locations:

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 Water's Edge Areas in (a)2i and ii above are found only next to the ocean, major open bays and backbay waters, while Coastwide Special Water's Edge Areas are found adjacent to tidal as well as non-tidal waters.

4. Special Land Areas are landward of the Water's Edge.

5. Coastwide Special Areas may include Water, Water's Edge or Land Areas.

(b) All land or water locations, except Special Water's Edge Areas, are subject to either the Land Area or Water

Area General rules. In addition, certain locations are subject to one or more Special Area rules. All Special Water's Edge Areas are subject to one or more Special Area rules. Where the applicable General and Special Area rules differ, the Special Area rules shall be applied.

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).

**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)iii. Development which would result in the destruction, condemnation (downgrading of the shellfish growing water classification) or contamination of shellfish habitat is prohibited.

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 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; and

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

(e) New dredging (defined at N.J.A.C. 7:7E-4.11(g)) 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. 7:7E-4.11(f)) 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-4.11(g) 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).

#### 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 waters within the territorial sea of the State of New Jersey 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. 7:25-12.1(d)4.

(b) Policy relevant to surf clam areas is as follows:

1. Development which would result in the destruction, condemnation, or contamination of surf clam areas is prohibited.
2. Development within surf clam areas is conditionally acceptable only if the development is of national interest and no prudent and feasible alternative sites exist.

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

### 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 quantity of recreational or commercial fishing activity. The area includes all coastal jetties and groins and public fishing piers or docks. Prime fishing areas also include all red line delineated features within the State of New Jersey's three-mile territorial sea illustrated in: B.L. Freeman and L.A. Walford (1974) *Angler's Guide to the United States Atlantic Coast Fish; Fishing Grounds and Fishing Facilities*, Section III and IV or as indicated on New Jersey's Specific Sport and Commercial Fishing Grounds Chart (page 14) contained in "New Jersey's Recreational and Commercial Ocean Fishing Grounds." Long and Figley (1984); recently developed artificial reefs off the New Jersey coast as identified in

Figley (1989) "A Guide to Fishing and Diving New Jersey's Artificial Reefs", and The Fishing Grounds of Raritan, Sandy Hook and Delaware Bays as determined in Figley and McCloy (1988) "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". While this information source applies only to the Delaware and Raritan Bay and Atlantic Ocean shorefronts, Prime Fishing Areas do occur throughout the coastal zone.

(b) Policy relevant to prime fishing areas is as follows:

1. Permissible uses of prime fishing areas include recreational and commercial finfishing and shellfishing, as presently regulated by NJDEP Division of Fish, Game, 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.

### 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 NJDEP, Division of Fish, Game and Wildlife approves the design of the access structure. As of January, 1994, the NJDEP Division of Fish, Game and Wildlife is currently 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)1 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).

### 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*, *Liaecopsis chinesis*, *Najas flexilis*, *Nuphar variegatum*, *Potamogeton crispus*, *Potamogeton epiphydrus*, *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 DEP 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, Game 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) Regulated activities in submerged vegetation habitat are 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 State and Federal navigation channels 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-4.2(f) of previously authorized, existing State and Federal navigation channels 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-4.2(f), 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-4.2(f) 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;