

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, destroyed, that is, replacement in kind within the same watershed. The Program 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 Basic Location Policies (N.J.A.C. 7:7E-1.5(b)1). 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 3.48).

(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).

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).

SUBCHAPTER 2. LOCATION, USE AND RESOURCE RULES

7:7E-2.1 Introduction

The coastal land and water areas of New Jersey are diverse. The same development placed in different locations will have different impacts on the coastal ecosystem and built environment as well as different social and economic implications. Different rules are therefore required for different locations. This subchapter and subsequent subchapters defines the Location, Use and Resource Rules of the Coastal Program. This presentation of the rules is lengthy and detailed because the coast is large, varied, and complex. The method of applying the rules is, however, relatively simple.

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-2.2 Classification of land and water types

(a) The Location rules classify all land and water locations into General Land Areas and General Water Areas and some into one or more Special Areas.

1. Special Areas are so naturally valuable, or so important for human use, or so hazardous, or so sensitive to impact, or so particular in their planning requirements, as to merit focused attention. Special Areas are defined and given special rules in N.J.A.C. 7:7E-3. Special Areas are grouped under four broad classifications: Special Water Areas; Special Water's Edge Areas; Special Land Areas; and Special Coast Wide Areas.

2. General Areas are general types of locations which classify the whole coastal zone with the exception of certain Special Water's Edge areas, which are entirely Special Areas. Parts of General Areas may also be classified as one or more Special Areas. General Areas are defined and given general rules in N.J.A.C. 7:7E-4 and 5. General Areas are grouped under two broad classifications: General Water Areas (N.J.A.C. 7:7E-4) and General Land Areas (N.J.A.C. 7:7E-5, 5A, and 5B).

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), changed N.J.A.C. references and substituted references to classifications for references to headings throughout, substituted a reference to General Land Areas and General Water Areas for a reference to General Areas in the introductory paragraph, substituted a

reference to Special Areas for a reference to Special Area types in 1, and substituted a reference to certain Special Water's Edge areas for a reference to the Special Water's Edge and substituted a reference to General Areas for a reference to General Area types in 2.

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

Office of Administrative Law

Quakerbridge Plaza

Bldg. No. 9

PO Box 301

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 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).

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 mooring 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 in the lagoon would not otherwise comply with the standards relevant to recreational docks and piers at N.J.A.C. 7:7E-4.2(e) or any other provisions of this chapter.

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

(1) Between two existing, legal docks or piers and the distance between those two existing docks or piers does not exceed 300 linear feet. The 300 linear foot distance shall be measured parallel to the shoreline and from the edge of decking of the dock or pier

on one side to the edge of decking of the dock or pier on the other side;

(2) Between an existing, legal dock or pier on one side and a man-made lagoon on the other side, and the distance between the existing dock or pier and the lagoon does not exceed 300 linear feet, measured parallel to the shoreline; or

(3) Between two existing, legal docks or piers, or between an existing, legal dock or pier and a man-made lagoon, where the distance between the existing docks or piers or between the dock or pier and a man-made lagoon exceeds 300 linear feet measured parallel to the shoreline, provided the dock, pier, or boat mooring is constructed of nonpolluting material, mitigation is provided, and the structure is 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 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 assuring that the requirements of this chapter are met. Mitigation shall include a conservation restriction on the subject property to prohibit the construction of a shoreline protection structure other than stone rip-rap and other sloped revetments along an unbulk-headed shoreline. If the Department determines that the conservation restriction is not sufficient to compensate for the area of shellfish habitat condemned and for adverse impacts to the marine ecosystem, additional mitigation shall be required, including, for example, on and/or off-site shellfish habitat restoration, enhancement and/or related research projects, funded through a monetary contribution provided to the Department's account for Shellfish Habitat Mitigation, or other similar project designed in accordance with a watershed management plan approved by the Department under the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., and implementing rules at N.J.A.C. 7:15. Any contribution provided to the account for Shellfish Habitat Mitigation 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.

ii. Unless the Department determines under (d)3i(3) above that a different length dock or pier is appropriate, 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; and

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

(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).

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).

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.