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BY OVERNIGHT MAIL

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Office of Legal Affairs
New Jersey Department of Environmental Protection
401 East State Street
P.O. Box 402
Trenton, New Jersey 08625-0402

Attn: DEP Docket Number 19-06-09/482

Re: Comments in Support of the Proposed Lands and Waters Subject to the Public Trust Rights Rule, N.J.A.C. 7:7E-3.50, and the Proposed Public Trust Rights Rule, N.J.A.C. 7:7E-8.11

Dear Mr. Brower:

I submit these comments on behalf of Citizens Right to Access Beaches ("C.R.A.B.") to supplement the joint comments that C.R.A.B. is submitting with other groups. Since 1996, C.R.A.B.'s mission has been to protect the rights of the public to use and enjoy beaches for waterfront-related activities throughout New Jersey and in other states.

C.R.A.B. supports the proposed Lands and Waters Subject to the Public Trust Rights Rule, N.J.A.C. 7:7E-3.50, and the proposed Public Trust Rights Rule, N.J.A.C. 7:7E-8.11, (the "Public Access Rules" or "the Rules") proposed by the Department of Environmental Protection ("DEP") that were published in the New Jersey Register on November 6, 2006. The rules are a significant step forward towards fulfilling the state's obligation to protect public trust rights. Instead of standards developed through case-by-case adjudication, the rules will provide clarity, consistency, and predictability to public trust access rights.

We offer these comments in support the rules. However, we suggest several refinements to close loopholes and make the rules more protective of public access.

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*** Admitted in New Jersey Pursuant to 1:21-3(c) + Also admitted in New York # Also admitted in Pennsylvania**

History of Public Access Rights and the Need for Better Rules

Tidal Areas Are An Important Resource That Are In Flux. Any discussion of tidal areas must consider global warming. A recent reported noted that global warming may submerge sections of the New Jersey's highly developed coastline by the end of the century; melting ice caps may cause the Atlantic Ocean to rise by up to 4 feet by the year 2100, moving the coastline 480 feet inland in a worst-case scenario. See Future Sea Level Rise and the New Jersey Coast (co-authored by Michael Oppenheimer, a professor of geosciences and international affairs at Princeton's Woodrow Wilson School of Public and International Affairs). The public access rules do not fully account for this expected change, and should be modified to allow for the expected shift of tidal, public trust areas inland.

Open Beaches are Important to New Jersey's Long-Term Interests. There is a significant need for public access in the state. Ocean beaches define New Jersey. They are the main playground and recreational space for New Jersey citizens and the foundation of the State's multi-billion dollar tourist industry. As noted by the Supreme Court, "New Jersey beaches adjacent to its tidal areas are world famous because of their suitability for bathing, surf fishing and other forms of recreation." *Van Ness v. Deal*, 78 N.J. 174, 178 (1978). Tourism is a $16 billion industry in New Jersey's coastal communities, See New Jersey Department of Environmental Protection, *2003-2007 New Jersey Statewide Comprehensive Outdoor Recreation Plan* 45 (Mar. 2003), available at <http://www.dep.state.nj.us/greenacres/scorp.pdf, meaning that a significant portion of the coastal population makes its living directly or indirectly in the tourism industry. Tourism requires readily accessible beaches that are open to the public, not private reserves closed off to all but the privileged few. The tourism industry was established in New Jersey in no small part because very little waterfront property was developed and the public could reach the water's edge and freely use the beach and the ocean. That public access can increase the economic vitality of localities is shown by the positive experience with the Hudson River walkway rule, which has increased the economic value of properties along the Gold Coast and has increased recreational opportunities for the new residents of those structures and thus the quality of life of those towns.

In fact, until the middle of the 20th century access to and use of New Jersey's beaches was completely free and open to the public. *Secure Heritage, Inc. v. City of Cape May*, 361 N.J. Super. 281, 289 (App. Div. 2003), certif. denied, 178 N.J. 32 (2003) (citing *Neptune City v. Avon-by-the-Sea*, 61 N.J. 296, 300 (1972)). In the Diamond Beach area, free and open public access continued until 1996, as the record in the recent *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005) case showed. Completely open and free beaches are the rule in Florida, Oregon, Texas, and other coastal states through statutes, customs, or public trust doctrine. The need for badges to get on to the beach in New Jersey always puzzles visitors to the State.

Yet New Jersey faces the prospect of permanently losing many of its treasured beaches to a wave of development. The Supreme Court on several occasions has noted the threats to publicly available beaches and the importance of protecting the resource, see *Lusardi v. Curtis Pt. Property Owners Ass'n*, 86 N.J. 217, 227 (1981); *Van Ness v. Deal*, 78 N.J. 174, 180 (1978);

Avon, 61 N.J. at 307, as has the Legislature, see N.J.S.A. 13:19-2 (reciting justifications for the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq. ("CAFRA")). This crucial common resource has remained open to the public only through enforcement of the public trust doctrine through coastal regulation permitting decisions and judicial enforcement. The broader issues of public demand and the uniqueness of title are highly relevant to establishing the scope of public trust rights, and its recognition of the demand for and scarcity of trust resources underlies its reasoning. E.g., *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 323, 331 n.10 (1984), cert. denied, 469 U.S. 821 (1984) (referring to the 1977 Statewide Comprehensive Outdoor Recreation Plan and the 1977 Beach Access Study); see also *Lusardi*, 86 N.J. at 227 (noting high demand for the use of unique and scarce waterfront lands); *Deal*, 78 N.J. at 180 (same); and . *Avon*, 61 N.J. at 307 (same).

Private Ownership of the Coast Closes Beaches. The rush to sell coastal properties for short-term profits sacrifices the long-term interests of the coastal zone and the State as a whole. Municipalities own approximately 51% of New Jersey's ocean beaches. See *New Jersey Beach Access Study Commission, Public Access to the Oceanfront Beaches: A Report to the Governor and Legislature of New Jersey* 3, figure 2, & App. 3 (Apr. 1977). At one time, it appeared that municipal beaches would be closed to non-residents, but judicial decisions have kept those areas open to all members of the public. See *Deal*, supra; *Avon*, supra.

Disputes over public trust rights have now moved to the private areas of the coast. As of the late 1970s, private landowners controlled at last 26% of the Atlantic Ocean coast, a larger percentage than that owned by federal government (about 13%) and the State (about 9%) combined. *Beach Access Study*, p. 3, figure 2, & App. 3. These private holdings are generally closer to roads and population centers than the remote and primitive National Wildlife Refuges, National Recreational Areas or State parks, and thus are more likely to be used on a day-to-day basis if available to the public.

Moreover, the amount of privately held coastline is growing because many municipal lands are being converted to private lands, whether by the outright sale of public properties to increase the tax base or through municipalities' failure to vigilantly assert ownership rights against the de facto or adverse possession of paper streets and other properties by private parties. For example, in a case litigated by C.R.A.B. and others, *Samson v. Bayhead Point Homeowners' Assn'*, Ocean Co. No. C-225-02, public access problems in one part of Point Pleasant Beach started with the sale of public streets and public beach access easements to a private developer, which occurred without public notice or the referendum required by law. Municipal sales were also at issue in *Matthews*, where the private Bay Head Improvement Association came to own seven strips of land from street ends to the high water mark, which it then closed to all except Association members. *Matthews*, 95 N.J. at 314. And in the *Atlantis* case several municipal properties were transferred to private condominium developers, thereby sowing the seeds of the present dispute. In the recent Atlantis case, the record showed that lower Township had abandoned actual and paper streets to Seapointe Village Condominiums, a private landowner.

The sell-off of public access property to private interests was foreseen by the 1977 *Beach Access Study*, which recommended that the Legislature "[p]rohibit municipalities from selling

municipally-owned beach property, including lots, street ends and land back to the road nearest the beach, unless there has been a public hearing and the State has been offered a right of first refusal." *Beach Access Study* at 9. The Legislature has not passed any such law, so municipalities have been free to sell off street ends or other properties used for beach access, and have even vacated such properties without holding required referenda.

The privatization of the coast is also fueled by demographic trends. An additional one million people are expected to live in New Jersey in the next 15 years. See New Jersey Department of Environmental Protection, *2003-2007 New Jersey Statewide Comprehensive Outdoor Recreation Plan* 45 (Mar. 2003), available at <http://www.dep.state.nj.us/greenacres/scorp.pdf.>. The external and internal movement of people is towards the New Jersey coast: "Four coastal counties, Atlantic, Cape May, Monmouth and Ocean, had the highest population growth in the 1990s. These four counties accounted for more than one quarter of New Jersey's population growth between 1990 and 2000. . . . . Coastal municipalities can see their summer population double and even triple." To capture the premium for oceanfront housing for this new population, private land developers have the incentive to sell homes by promising a wholly private beach, which occurred in the Point Pleasant Beach case.

The privatization trend has set the stage for disputes over public trust rights, because the increased development and privatization of coastal upland areas has made it increasingly difficult for members of the public to reach the water's edge through privately owned physical barriers. It is no answer that some commercial beachfront properties may sell access rights, because unlike municipal properties there are no guarantees that private beaches will remain open. C.R.A.B.'s point Pleasant Beach litigation, for example, had its genesis in the sale of a former commercial beach in Point Pleasant beach for private and exclusive residential development, which in turn prompted three adjacent private properties to enforce rules against public access and left at least 2,000 annual badge holders searching for another beach that would accept them. This all-too-common turn of events will deprive New Jersey citizens of a significant portion of the coast if untempered by public trust rights.

C.R.A.B. notes that current public trust obligations also reflect another twentieth-century development, the significant governmental resources devoted to cleaning up oil and sewage spills, to regulating fishing, navigation and pollution, and to providing other support for the coastlines, all actions that preserve the quality of the waterfront and immediate offshore zone and benefit private and public beach owners alike.

For all of these reasons, C.R.A.B. supports more stringent protections of access to public trust lands.

DEP's Authority to Adopt Rules Regarding the Public Trust Doctrine

DEP relies upon CAFRA and the public trust doctrine as authority to adopt the proposed rules. In the past, the New Jersey Builders Association, among others, has challenged DEP's regulatory authority that was not explicit in one statute, but rather resulted from a combination of statutorily delegated powers. See *In re Stormwater Mgmt. Rules*, 384 N.J. Super. 451 (App. Div.

2006).

To determine "whether a particular regulation is statutorily authorized, a 'court may look beyond the specific terms of the enabling act to the statutory policy sought to be achieved'" and to the relevant "legislative scheme" in its entirety. *Stormwater*, 384 N.J. Super. at 461 (citing *N.J. Guild of Hearing Aid Dispensers v. Long*, 75 N.J. 544, 562 (1978); *Kimmelman v. Henkels & McCoy, Inc.*, 108 N.J. 123, 129 (1987)). In addition, "the grant of authority to an administrative agency is to be liberally construed in order to enable the agency to accomplish its statutory responsibilities." *N.J. Guild*, 75 N.J. at 562. "[C]ourts should readily imply such incidental powers as are necessary to effectuate fully the legislative intent." Id. Accordingly, "regulations which fall within the scope of the statutorily delegated authority" are presumed valid. *Soc'y for Envtl. Econ. Dev. v. N.J. Dep't Envtl. Prot.*, 280 N.J. Super. 1, 4 (1985).

In *Stormwater*, the court upheld a DEP regulation that created a buffer on each side of certain waters, despite lack of express statutory authority for the agency to do so. 384 N.J. Super. at 464. In reaching its conclusion, the court considered the "broad scope of water quality and pollution concerns voiced by the Legislature" and "the totality of powers vested in the DEP to enable it to address these concerns." Id. Similarly in *SEED*, the court determined that DEP had the power to enact a certain comprehensive set of regulations by combining (1) DEP's "broad powers of conservation and ecological control"; (2) some more specific powers of DEP; (3) "[t]he broad scope of environmental concerns expressed by the Legislature in various enactments"; and (3) "the totality of powers accorded by the Legislature to DEP to enable it to address those concerns." 280 N.J. Super. at 7-8.

Moreover, in *Atlantis*, the Court held that the scope of DEP's authority included jurisdiction to review beach-use fees proposed by a beach club. 185 N.J. at 61 (noting that the defendant's upland sands had to "be available for use by the general public under the public trust doctrine). The Court similarly adopted an expansive view of DEP's interstitial powers, finding authority to oversee beach fees in a combination of (1) CAFRA, since the defendant's walkway over the dunes consisted of a development, and as such, triggered the Act; and (2) "DEP's general 'power to promote the health, safety and welfare of the public.'" Id. at 61 (quoting *In re Egg Harbor*, 94 N.J. Super. 358, 372 (1982)). The Court also took into account the public trust doctrine and that "the use of dry sand has long been a correlate to use of the ocean and is a component part of the rights associated with the public trust doctrine." *Atlantis*, 185 N.J. at 54.

Under the principle that the DEP may adopt rules under its broad authority to protect the environment, and may blend statutory and other authority to so do, it is clear that the agency has ample authority to adopt the proposed rules under the broad powers delegated by CAFRA, the requirements of the public trust doctrine, Legislative concerns regarding coastal resources, and public policy.

General Legislative Purpose and Public Policy to Provide Access to the Coast. Beach access is promoted by extensive case law, state policy and legislation, including CAFRA's intent, inter alia, to protect the "recreational interest of all people of the State" and promote public welfare. *N.J.S.A.* 13:19-2. Additionally, "CAFRA mandates DEP to utilize, in

performing its statutory role, all relevant considerations of an enlightened public policy" and to "advance the 'best long term, social, economic, aesthetic and recreational interest of all people of the State.'" *Egg Harbor*, 94 N.J. at 371. Considering that the shore has unique characteristics, which are desirable for "'bathing and other recreational activities,'" it is the state policy to "encourage[e] maximum access to the ocean beach" and to "afford[] recreational opportunities along the Atlantic seacoast for as many citizens as possible. *Lusardi*, 86 N.J. at 227, 231 (quoting *Deal*, 78 N.J. at 180). Accordingly, concerns about "the reduced 'availability to the public of its priceless beach areas,'. . . is reflected in a statewide policy of encouraging, consonant with environmental demands, greater access to ocean beaches for recreational purposes." *Lusardi*, 86 N.J. at 227 (finding that local officials must consider CAFRA and state policies "for the use of coastal resources," when making zoning decisions. Id. at 227-29. Therefore, public access to New Jersey beaches is one such "enlightened public policy" that DEP must consider while performing its statutory function and protecting the "interest of all people of the State." See *Egg Harbor*, 94 N.J. at 371 (citations omitted).

DEP's Authority under CAFRA. CAFRA authorizes DEP "to regulate land use within the coastal zone for the general welfare." *Egg Harbor*, 94 N.J. at 364 (holding that the DEP had the power to condition a construction permit within a coastal zonal upon the inclusion of a fixed percentage of affordable housing in the construction project). Through CAFRA, the Legislature intended to preserve "those multiple uses which support diversity and are in the best long-term, social, economic, aesthetic and recreational interests of all people of the State." N.J.S.A. 13:19-2. Accordingly, the Legislature found that "all of the coastal area should be dedicated to those kinds of land uses which promote the public health, safety and welfare, protect public and private property." Id.

CAFRA requires that DEP "adopt rules and regulations to effectuate the purposes of the Act." N.J.S.A. 13:19-17(a). DEP has the authority to "deny permit applications," or to "issue a permit subject to such conditions as the commissioner finds reasonably necessary to promote the public health, safety and welfare, to protect public and private property," among other things. N.J.S.A. 13:19-11. The Court has recognized these powers of DEP as broad. See *Atlantis*, 185 N.J. at 61; *Egg Harbor*, 94 N.J. at 364.

In *Egg Harbor*, the court found that DEP had the authority to condition construction permits upon a "mandatory set-aside" for affordable housing. *Egg Harbor*, 94 N.J. at 372. In reaching this conclusion, the Court considered that: (1) the condition was consistent with other DEP rules, including rules encouraging the construction of affordable housing; (2) CAFRA considers the need for "'residential growth within the coastal area'"; (3) CAFRA "expressly empowers [DEP] either to deny or grant conditionally a permit for construction of a facility that violates the purposes of the statute"; and (4) "land use regulation, as one aspect of the State's police power, should be used to promote the general welfare." Id. at 363-66. In summary, the Court found that the conditional permit was within the powers delegated by CAFRA, which "[a]lthough primarily an environmental act, . . . requires that DEP use its power to promote the health, safety and welfare of the public." Id. at 372.

The proposed changes to N.J.A.C. 7:7E-8.11, requiring that permit holders set aside an

area for public access to the shore is comparable to the set-aside for affordable housing in *Egg Harbor*. First, the proposed amendments are consistent with the existing public access rules promulgated by DEP. N.J.A.C. 7:7E-8.11. Second, CAFRA considers "those multiple uses" of the coastal area which "are in the best long-term . . . interests of all people of the state." N.J.S.A. 13:19-2. Third, the same powers expressly delegated to DEP, which the Court considered in Egg Harbor, equally apply. See 94 N.J. at 365. Finally, public access falls within land use regulation, which as the Court noted, is tied to general welfare. See id. at 366. In addition, like concerns surrounding affordable housing, the right to public access to the shore has a history of case law and public policy considerations.

The broad nature of CAFRA also allows DEP to deny a permit for aesthetic reasons. *Toms River Affiliates v. Dep't Envtl. Prot.*, 140 N.J. Super 135, 150 (App. Div. 1976). In *Toms River*, DEP denied a permit application for the construction of a ten-story building in a low-building neighborhood, for reasons that included aesthetic concerns. Id. at 149. The Coastal Area Review Board affirmed DEP's decision to prevent "an aesthetic intrusion upon the existing characteristics of the involved coastal area." Id. at 150 (affirming the Board's decision). The proposed rule, set forth in N.J.A.C. 7:7E-8.11, requiring visual access to the shore appeals to the same senses as aesthetic interests.

DEP's Authority under the Public Trust Doctrine. The public trust doctrine places the sea, and other natural resources, "in the hands of the [State], to be held, protected, and regulated for the common use and benefit." *Arnold v. Mundy*, 6 N.J.L. 1, 71 (1821). In New Jersey, the public trust doctrine has evolved to include public access to the sea and public use of dry sand, such as for recreational purposes. *Atlantis*, 185 N.J. at 52-53 (citing *Avon,* 61 N.J. 296m and *Matthews*, 95 N.J. 306). In *Matthews*, the Court established that the "rights under the public trust doctrine to use of the upland dry sand area," and to access the beach, extents to private property when "reasonably necessary." 95 N.J. at 325-26. Implementation of the Public Trust Doctrine will avoid the plodding, haphazard case-by-case judicial analysis that *Matthews* requires.

Because the State holds shore resources in trust for the public, the State is responsible for regulating these resources. Cf. *State, Dep't of Envtl Prot. v. Jersey Cent. Power & Light Co.*, 133 N.J. Super. 375, 392 (App. Div. 1975) ("The State has not only the right but also the affirmative fiduciary obligation to ensure that the rights of the public to a viable marine environment are protected."). The Legislature may delegate state powers to state agencies. See, e.g., *Egg Harbor*, 94 U.S. at 366. Moreover, "the statutory grant of power by the Legislature to an agency can be implied." *Stormwater*, 384 N.J. Super. at 461 (citing N.J. Dep't of Labor v. Pepsi-Cola Co., 170 N.J. 59, 61 (2001); N.J. Guild, 75 N.J. at 562).

Given DEP's longstanding and broad role of regulating the State's environment, and coastal resources in particular, DEP is the most appropriate state agency to regulate the public trust doctrine. The public trust doctrine presents questions that are similar in kind to those that DEP has a long history of considering. Under CAFRA, for instance, DEP is required to manage the coastal area in a way that considers both environmental protections and public interest. N.J.S.A. 13:19-2. Similarly, the public trust doctrine requires the State to hold, protect and regulate shore resources for the benefit of the public. *Arnold*, 6 N.J.L. at 71.

In addition to regulating coastal development under CAFRA, DEP is responsible for other coastal matters, such as: (1) reviewing "[a]ll plans for the development of any waterfront upon any navigable water or stream of [New Jersey]," such as "a dock, wharf, bulkhead, [or] bridge" N.J.S.A. 12:5-3; (2) "develop[ing] a priority system for ranking shore protection projects and establish[ing] appropriate criteria thereof" N.J.S.A. 13:19-16.2; (3) granting approval for the State "to lease or otherwise permit county or municipal . . . use of riparian lands," under certain conditions; and (4) "mak[ing] an inventory and maps of all tidal wetlands within the State," the boundaries of which "define the areas that are at or below high water" N.J.S.A 13:9A-1. DEP also has the broader role of "formulat[ing] comprehensive policies for the conservation of the natural resources of the State." N.J.S.A. 13:1D-9. Thus, regulation of the public trust doctrine pertains to the same subject as several of DEP's existent statutory functions.

Comments on Specific Provisions of the Rules

In general, C.R.A.B. supports the rules for the reasons described in the joint comments submitted with other environmental groups.

No Limitation of Common Law Public Trust Rights by Rules. The DEP does not have the authority to limit the Public Trust Doctrine in any way, which it acknowledges through . We note that the proposed Public Trust Rights rule contains the following disclaimer: "No authorization or approval under this chapter shall be deemed to relinquish public rights of access to and use of lands and waters subject to public trust rights." N.J.A.C. 7:7E-8.11(o). In addition, the proposed amendments to the Coastal Permit Program Rules would incorporate the following statement: "Authorization of construction shall not constitute a relinquishment of public rights to access and use tidal waterways and their shores." N.J.A.C. 7:7-1.5(b)(19). A similar relevant disclaimer stating that "the Department recognizes that the rights of the public under the Public Trust Doctrine are inalienable and that the incorporation of these common-law principles into the Coastal Permit Program Rules and the Coastal Zone Management Rules in no way diminishes or relinquishes any of those rights" should be added to each of the four (4) aforementioned sections in which the Public Trust Doctrine is defined or explained (N.J.A.C. 7:7-1.3, N.J.A.C. 7:7E-3.50(a), N.J.A.C. 7:7E-3.50(e), and N.J.A.C. 7:7E-8.11(r)). As described above, these changes are particularly relevant to public trust rights along tidal bays and rivers, as well as oceanfront landowners such as grandfathered houses, hotels and motels that may not need a CAFRA permit.

Public Trust Rights Along Tidal Rivers and Bays. The proposed rules states that public access is not required where a single family home, duplex, associated accessory development or shore protection structure is proposed that does not include beach or dune maintenance activities and is on a site does that not include a beach on or adjacent to the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and their shores. The rules also propose modifying public trust rights for two or three unit residential unit developments, associated accessory developments or shore protection structures on bays and tidal rivers other than the Atlantic Ocean, Sandy Hook Bay, Raritan Bay, the Arthur Kill, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, and select portions of the Kill Van Kull, the Delaware River, the Cohansey River and the Maurice River. Thus, the rules provide an exception for the very type of small-scale

development that is likely to occur on the remaining bay shores and tidal rivers, and will exacerbate the problem of restricted access rights on those tidal areas. The distinction between tidal beaches on the one hand and tidal rivers and bays on the other hand is arbitrary and capricious. The Public Trust Doctrine applies to all tidally-flowed lands, not just those along the ocean beaches. Indeed, public trust rights in New Jersey were described in the context of disputes over fishing rights in oyster beds, and many of these beds lay in tidal bays and rivers. If theses limitations spring from the limited permit jurisdiction under CAFRA (see our joint comments regarding the limited jurisdictional triggers for the rules), then the DEP should say so but should not purport to impose those statutory limitations upon the broader, common law public trust rights.

Accordingly, the DEP should (1) amend the Public Trust Rights rule at N.J.A.C. 7:7E-8.11(f)(6) to remove the exception stating public access is not required for the development of a single family home, duplex, associated accessory development or shore protection structure on sites adjacent to bays or tidal rivers other than the Atlantic Ocean, Sandy Hook Bay, Raritan Bay and their shores, and (2) amend the Public Trust Rights rule at N.J.A.C. 7:7E-8.11(f)(7) and N.J.A.C. (f)(5) to remove the exceptions stating public access can be modified (lessened) for the development of a two or three unit residential unit, associated accessory development or shore protection structure on bays and tidal rivers other than the Atlantic Ocean, Sandy Hook Bay, Raritan Bay, the Arthur Kill, Elizabeth River, Hackensack River, Passaic River, Rahway River, Raritan River, and select portions of the Kill Van Kull, the Delaware River, the Cohansey River and the Maurice River.

We are not necessarily asking that parallel public access be required for all new single family homes on the water, which may be impractical and unnecessary to protect access rights. Upon revision, a more practical solution might be to acknowledge that the construction of single-family homes has a deleterious cumulative effect on public trust rights and to require some creative compensation or mitigation for infringement of rights such as opening community bay/riverfront beaches and ramps to public access.

Width of Public Trust Land for Parallel Access Rights. We note that the default rule for access provides only the general requirement that tidal development shall provide (a linear area along the tidal waterways and its entire shore." N.J.A.C. 7:7E-8.11(d)(1). C.R.A.B. foresees that the generality of this statement will create more disputes that it resolves, and is little better than the case-by-case adjudication available now. The DEP should amend the section to provide for a certain, minimum width of access rights. We note that for some specific areas, the proposed rules require a strip of land for parallel access to public trust lands of between 10 and 16 feet. N.J.A.C. 7:7E-8.11(e). That range is patently insufficient for the exercise of public trust rights. In *Matthews*, supra, and *Avon*, supra, the Court forced the entire beach open for the public. In *Deal*, the Court imposed public trust rights on private land that was located more than 50 feet from the water. *Deal,* 78 N.J. at 176, 180. And in *Nat'l Ass'n of Home Builders v. New Jersey Dep't of Envtl. Protection*, 64 F. Supp.2d 354, 359-60 (D.N.J. 1999), a Federal court held that a 30-foot wide public walkway was reasonably necessary to protect the public's right to access tidelands and was fully justified under New Jersey's public trust doctrine. Ten feet is barely wide enough to spread out a beach blanket or a long surf-board, and is certainly

insufficient to accommodate the back-cast from a surf-fishing rod. At high tide, a 10-foot strip would be completely inundated. These effects will certainly be worse with global warming, which will erode the coast. Accordingly, DEP should amend the rules to clarify that it has the ability to increase the width of parallel access if it becomes necessary for the full enjoyment of public trust rights. In addition, the default rule should be at least 30 feet wide.

Access Fees. We support the transferability of badges and other attempts to restrain the abuse of fees to restrain public trust rights. Until the middle of the twentieth century, beaches were free in New Jersey. *Secure Heritage*, 361 N.J. Super. at 289 (citing *Avon*, 61 N.J. at 300). In 1955, the Legislature granted municipalities bordering the Atlantic Ocean the authority to charge the public for access to their beaches and bathing facilities in order to cover their then-new costs, not to raise general municipal revenues. N.J.S.A. 40:61-22.20. Municipal beach fees were strictly limited to covering the cost of beach services and were authorized only "in order to provide funds to improve, maintain and police the same and to protect the same from erosion, encroachment and damage by sea or otherwise, and to provide facilities and safeguards for public bathing and recreation, including the employment of lifeguards." Id.; see generally *Avon*, 61 N.J. at 311; *Secure Heritage*, 361 N.J. Super. at 310; *Slocum,* 238 N.J. Super. at 192. The DEP's Access Rule has emphasized the limited nature of these fees, which "shall be no greater than that which is required to operate and maintain the facility . . . ." N.J.A.C. 7:7E-8.11(4).

New Jersey courts have struck down attempts to shift non-beach related expenses into beach access fees on both statutory and public trust doctrine grounds, ruling that "commercial" fees are inappropriate. E.g., *Slocum*, 238 N.J. Super. at 190-193. The Slocum court found that Belmar had "operated the beach area as though it were a commercial business enterprise for the sole benefit of its taxpayers . . . in violation of the borough's duties under the public trust doctrine." Id. at 188 (emphasis added). The *Slocum* court closely scrutinized the record, taking testimony from six experts over an eight-day trial, id. at 196-208, disallowed all costs save for those reasonably related to actual beach services, and allocated the costs of 30 different categories between beach and non-beach use, id. at 196-208. New Jersey courts have similarly scrutinized beach fees by non-municipal entities operating both privately owned and municipal beaches. See *Matthews*, 95 N.J. at 332 (allowing "reasonable fees to cover its costs of life guards, beach cleaners, patrols, equipment, insurance and administrative expenses.").

Definition of the Mean High Water Line. Current CAFRA rules define the Mean High Water Line by referring to "tidal datum that is the arithmetic mean of the high water heights observed over a specific 19-year Metonic cycle." N.J.A.C. 7:7-1.3. That definition is impractical, as it cannot be determined in the field or by members of the general public. The current rules recognize that a more practical definition is required, and provide that

> for practical purposes, the mean high water line is often referred to as the "ordinary" high water line, which is typically identified in the field as the limit of wet sand or the 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 Act, the surveyed mean high water

elevation will be utilized.)

Id. For purposes of defining parallel access rights along the shore in the upland area above tidally-flowed lands, the DEP should change the definition of "Mean High Water Line" to include the practical field usage. In defining ancillary public trust rights in adjacent upland areas, the DEP has some leeway to determine how far upland to extend parallel access. Nor is such precision required for CAFRA jurisdiction either by statute or as a practical matter, because it is without question that the areas discussed are above water and within CAFRA jurisdiction. C.R.A.B. suggests that the DEP should build in a margin of error by starting the public access area at the wrack line, which is readily apparent to beachgoers and property owners alike. Use of the tidal datum line as the starting point will only mire the DEP is many small disputes about the location of the public access areas and will tie up the agency's technical GIS resources. Moreover, use of the tidal datum point will in many cases fail to provide for sufficient parallel access, as the average is, by definition, under water for significant periods of time.

Loopholes to Avoid the Need for CAFRA Permits. Some private beach associations and homeowners have been able to get around the general permit procedure that triggers DEP regulatory control by using a municipality's general permit. By contracting with a town or just performing maintenance under the blanket permit these groups have been able get around access provisions in the current rule. We are aware of this happening in Point Pleasant Beach, and in the stretch from Ortley Beach to Brick Township, where municipalities have provided beach maintenance services to private beach associations, who are thereby freed from the need to obtain a CAFRA general permit and to comply with access requirements. The new rules should close that loophole and end the practice.

Educational Efforts. For the rules to succeed, DEP must educate the public about the Public Trust Doctrine. C.R.A.B. suggests that this effort focus, in the first instance, on developers, real estate agents and municipalities. All too often, potential owners are promised that shorefront homes have a "private" beach, and this becomes a flawed expectation on their part. From a takings point of view, that expectation carries no weight because it is not a reasonable investment-backed expectation. Nevertheless, it is understandable that homeowners who relied upon such representations would be upset about the prospect that their "private" beach is actually public. C.R.A.B. respectfully suggests that any education efforts to realtors and developers include a strong warning that any claims that properties have access to a "private beach" may be false representations if the properties are impressed with public trust rights.

The Public Access Rules Are Not a "Taking" of Private Property

C.R.A.B. also wishes to respond to public comments that access to public trust lands somehow takes private property for public use in violation of the Fifth Amendment to the U.S. Constitution. But relevant Supreme Court jurisprudence makes clear that there is no taking if the regulation at issue derives from or is a natural outgrowth of "background principles" of state law. In *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), plaintiff purchased two residential lots of shoreline property before the State of South Carolina passed a statute having the "direct effect of barring petitioner from erecting any permanent structures on his two

parcels," rendering them "valueless." 505 U.S. at 1007. In response, the plaintiff sued, alleging that the government effected a complete deprivation of his property. The Court held that "[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership," and remanded for a determination of whether such "background principles" would have prevented the proposed use of plaintiff's property. Id., 505 U.S. at 1029. This caveat reflects the fact that since at least the 19th century, the rule has been that "a prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property." *Mugler v. Kansas*, 123 U.S. 623, 628-29 (1887). The New Jersey Supreme Court agrees with that analysis. *Mansoldo v. State*, 187 N.J. 50, 60-62 (2006).

The "background principles" of New Jersey law clearly include public trust rights. The Public Trust Doctrine is part of the two-century-old law of this State. See *Arnold v. Mundy*, 6 N.J.L. 1 (1821); *Avon*, 61 N.J. at 308-309 (explaining that public trust rights "should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."). Indeed, New Jersey's highest courts recognized that the public trust doctrine as the law of the State several decades before the U.S. Supreme Court, in another case arising out of New Jersey waters, adopted the doctrine. Compare *Arnold*, 6 N.J.L. 1 (1821) with *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842). The State's strong policy of open beaches is expressed in New Jersey Supreme Court decisions, the Beaches and Harbors Bond Act of 1977, L.1977, c.208 and other legislation, and NJDEP coastal regulations. See *Lusardi*, 86 N.J. at 228-29. As the recent *Atlantis* case made clear, private land can be subject to public trust rights. See also *Matthews*, 95 N.J. at 325 (concluding that there is "no reason why rights under the public trust doctrine for use of the upland dry sand areas should be limited to municipally-owned property.") and 333-34 ("private land is not immune from a possible right of access to the foreshore for swimming or bathing purposes, nor is it immune from the possibility that some of the dry sand may be used by the public incidental to the right of bathing and swimming.")

For that reason, courts have rejected takings claims based upon regulations designed to protect access to public trust rights. In *National Association of Home Builders v. New Jersey Dep't of Environmental Protection*, 64 F. Supp. 2d 354, 358 (D.N.J. 1999), the court held that former tidally flowed lands along the Hudson River was part of the public trust, that owners did not have the right to exclude the public, and that the State could require owners to construct and maintain a walkway on that land without creating a taking. As to adjacent upland areas, takings depends upon the *Matthews* balancing factors, but the Department can balance the factors in a rulemaking and does not have to make "individualized determinations" for every parcel of property. Id. at 359-60. See also *East Cape May Associates v. State, Dep't of Environmental Protection*, 343 N.J. Super. 110 (App. Div. 2001) (regulation of riparian grant lands was not a taking because such land is impressed with a public trust); *Karam v. State, Dep't of Environmental Protection*, 308 N.J. Super. 225 (App. Div. 1998) (denial of permit to build a dock on public trust lands was not a takings). The courts of other states have similarly denied takings claims for limitations on privately-owned public trust lands. *Stevens v. City of Cannon*

Beach, 854 P.2d 449 (Or. 1993); *Orion Corp. v. Washington*, 747 P.2d 1062 (Wash. 1987); *Esplanade Properties, LLC.*, 307 F.3d 978 (9th Cir. 2002) (applying Washington law); *Marine One, Inc. v. Manatee County*, 898 F.2d 1490 (11th Cir. 1990) (applying Florida law); *Palazzolo v. Rhode Island*, 2005 WL 1645974, *6-*7 (R.I. Super. July 5, 2005).

Very truly yours,

Carter H. Strickland, Jr.

cc: Ralph Coscia, C.R.A.B.