

ANJEC Note: This draft FAQ document was distributed by NJDEP staff at ANJEC's 10/20/12, Environmental Congress, at the Community Planning for Waterfront Access Workshop. NJDEP will post the final version of this document on its website under the "Public Access to NJ's Shoreline" page: www.state.nj.us/dep/cmp/access/

MUNICIPAL PUBLIC ACCESS PLANS Frequently Asked Questions

What is "Public Access"?

The public's right to access tidal waters and their shorelines is a concept that existed since Roman times and continues to this day. Public access is a right expressed in the Public Trust Doctrine, in the many court cases that have interpreted and implemented its strictures, and implicitly in the many legislative acts and regulatory provisions that have sought to protect and enhance access.

Specifically, the Coastal Zone Management Rules at 7:7E-8.11(a) Public Trust Rights, say: "Public trust rights to tidal waterways and their shores (public trust rights) established by the Public Trust Doctrine include public access which is the ability of the public to pass physically and visually to, from and along lands and waters subject to public trust rights as defined at N.J.A.C. 7:7E-3.50, and to use these lands and waters for activities such as swimming, sunbathing, fishing, surfing, sport diving, bird watching, walking and boating. Public trust rights also include the right to perpendicular and linear access. Public accessways and public access areas provide a means for the public to pass along and use lands and waters subject to public trust rights."

What is the Public Trust Doctrine?

The common law rule of the Public Trust Doctrine was first codified by the Roman Emperor Justinian around 500 AD as part of Roman civil law. The Public Trust Doctrine establishes the public's right to full use of the seashore as declared in the following quotation from Book II of the Institutes of Justinian:

"By the law of nature these things are common to all mankind – the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations."

The tenets of public trust were maintained through English Common Law. Following the American Revolution, the royal rights to tidal waterways and their shores were vested in the states, and have been part of law and public policy into the present. Tidal waterways and their shores always were, and remain, subject to these public trust rights.

What lands are affected by public access rights?

Traditionally, the physical jurisdiction of public trust lands includes all lands below the mean high tide line and out to three (3) nautical miles offshore. These are referred to as "flowed" lands. They are held in trust by the State and it is the State's duty to protect the public's rights. Over the past few decades the New Jersey courts expanded the boundaries to include "where use of dry sand is essential or reasonably necessary for the enjoyment of the ocean, the doctrine

warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner." In New Jersey, the coast is usually considered to be the Atlantic coastline from northern Monmouth County south to the tip of Cape May County. However, the Public Trust Doctrine specifically addresses lands that are, or historically have been, below the mean high tide line. Thus, these also include the Atlantic coast back bays, Delaware Bay and the urban northeast coast. Furthermore, as tides can reach far up rivers and streams, these areas also include the Delaware, Passaic, Raritan and Hackensack rivers up to the head of the tide, as well as all minor rivers affected by the tides. Wherever land is, or has been below the mean high tide line, it is public trust land and the public's right to use these resources is protected by the doctrine.

Why is Public Access important in New Jersey?

Public access is vital to both New Jersey's quality of life and its economy. Due to New Jersey's proximity to the Atlantic Ocean and other coastal and tidal waterways, including rivers, streams and bays, public access provides opportunities for a wide range of recreational activities. Tourism, mostly linked to the Atlantic shore communities at this time, is a \$38 billion a year industry. Clearly, the ocean, shore and tidal waterways are inextricably tied to the state's economic health and well-being. Enhancing public access to the greatest extent practicable and in all reasonable manners is in the public's best interest.

Don't we have Public Access to our coast now?

There are currently over 1000 public access points to New Jersey beaches and the rule amendment (see below) should result in more. While nearly all New Jersey oceanfront municipalities do provide reasonable public access opportunities, improvements can and should be made in all regions of the state where tidal waterways flow. There are numerous opportunities for enhanced public access in the Delaware Bay region, the Newark and Raritan Bay areas, the Arthur Kill and the tidal portions of the Rahway, Hackensack and Passaic rivers.

For example, recently, the City of Newark and Essex County opened up the 12-acre Riverfront Park, the first public green space on the Passaic River waterfront in Newark. It is the beginning of the implementation of Newark's Public Access and Redevelopment Plan. Similarly, the City of Linden in Union County, in conjunction with the State Green Acres Program and the Audubon Society, created the Hawk Rise Sanctuary, a 95-acre ecological preserve and wetland complex, from a former landfill on the Rahway River and Arthur Kill. It is the centerpiece of the Linden Municipal Public Access Plan.

Why are the Public Access Rules changing now?

In 2007 DEP adopted a new set of Public Access Rules, significantly expanding DEP authority over public access to municipal beaches and tidal waterways. In 2008, the Borough of Avalon challenged the rules as they applied to municipalities. The Superior Court of New Jersey held that the regulations were invalid based on the fact that the DEP did not have legislative authority to regulate municipally owned beaches. In response to this ruling, DEP has re-written the Public Access Rules in manner that will allow public access to be provided by applying a common sense principle of governing, working with local governments, eliminating unnecessary burdens on residents, business, and governmental entities, and by brining other resources to bear to create a comprehensive public access program that is beyond merely imposing proscriptive regulatory requirements.

What is DEP doing to maintain and enhance Public Access?

The Department is committed to upholding our historical role in protecting and promoting the public's right of access to New Jersey's tidal waters, and has restructured *how* we require public access under the Coastal Zone Management rules, for several reasons:

- The DEP believes we can continue to provide exceptional public access by enforcing reasonable regulations, and by employing additional measures, such as working with local governments, eliminating unnecessary burdens on residents, businesses, and governmental entities and by bringing other resources to bear to create a comprehensive public access program.
- The courts have struck down some provisions of the existing rules.
- The Legislature has put a moratorium on implementation of provisions requiring marina access.

A key part of the rule amendment empowers New Jersey municipalities to develop a plan for public access to the tidal waters within their borders through the creation of a voluntary Municipal Public Access Plan.

What is a Municipal Public Access Plan?

A Municipal Public Access Plan (MPAP) is the documentation and review of existing public access, the needs assessment of new or improved public access opportunities, and the plan for meeting those needs through implementation of enhancements. The rule amendment allows municipalities to develop their own individual Municipal Public Access Plans. Municipalities that develop plans will have greater opportunities to align public access within their boundaries with other municipal priorities. The Department is providing professional staff to work with municipal officials to formulate MPAPs to ensure public access to tidal waters in all areas of the state.

What are the benefits of developing a Municipal Public Access Plan?

Although the creation of a MPAP is voluntary, the Department encourages municipalities to develop their own public access plans for several reasons.

1. Municipalities that develop a public access plan will have greater opportunities to plan and implement public access within their boundaries, suited specifically to the wants and needs of their constituency while also recognizing the municipality's broader obligation to provide public access to all. When a MPAP is completed, and the DEP deems it consistent with the rule, development along tidal waterways within the municipality will be required to provide public access consistent with the plan.
2. Municipalities that develop a public access plan will also have the opportunity to create a municipal public access fund (fund). In those cases where a municipality deems it appropriate, developers may make a monetary contribution to the fund in lieu of providing onsite public access. These contributions can then be used by the municipality to further the goals outlined in its municipal public access plan.

3. In the absence of a MPAP, all development-generated public access requirements will be met on a property-by-property basis rather than according to a municipally-determined comprehensive and cohesive vision.

4. All municipalities with tidal waterways that complete an Approved Municipal Public Access Plan within three (3) years of adoption of the amendment to the Coastal Zone Management Rules will be eligible for a Beach Maintenance General Permit. Those municipalities without an Approved Plan will not be eligible. General Permits are less expensive than Individual Permits.

Can a Municipality remove existing public access sites?

New Jersey regulations state that no entity can remove an existing public access site to a tidal waterway. Existing access locations must be maintained to the maximum extent practicable. However, as part of a Municipal Public Access Plan, the municipality inventories and assesses their existing public access sites to determine if they are appropriate for public use. Based on this, an existing public access location may be deemed inappropriate for public use due to public health and safety concerns, such as sites adjacent to major roadways or unofficial boat launches. An existing public access location may also be deemed inappropriate for public use due to environmental constraints, such as sensitive wetlands and protected dune areas, State and Federal environmental regulations, restoration plans and remediation plans for contaminated sites, or Homeland Security concerns. In these cases, it is beneficial for a municipality to develop a Municipal Public Access Plan in order to highlight that these locations are not appropriate for public use, will not be improved, and municipal resources will be directed to other preferred public access locations and facilities.

Who must provide public access?

If a municipality has a MPAP, new or expanding residential and commercial developments are required to provide public access either on or off-site, or to contribute into a Municipal Public Access Fund if a municipality has created one. New industrial facilities as well as redevelopment sites also have this requirement. Marinas will have an obligation to provide for reasonable public access on-site consistent with the operation of their businesses.

Who does not have to provide public access?

New or existing port facilities will have no public access obligation. They are exempt because they are already meeting their Public Trust Doctrine obligation by providing access points for navigation. Existing and expanding industrial facilities are exempt because public access is generally incompatible with their operations and it is unfair to impose a public access obligation on an existing facility where no obligation was previously required. Homeland security facilities will not have to provide public access on-site but may have an obligation to provide off-site access or pay into a municipal access fund if they are a new facility. Single family residences and duplexes do not have a public access obligation.

What will a public access plan cost?

As local communities typically have detailed knowledge of public access needs, they are in the best position to select the most cost-effective means to achieve the desired objectives. Recognizing this, the rule amendments encourage local authorities to create their own municipal public access plans (MPAPs). The work involved in creating such plans can be

performed by municipal employees, by outside consultants engaged by municipalities, or with the help of Department staff.

The cost of plan implementation will depend on the measures included in the plan and on local and site-specific circumstances, and no generalizations can be made regarding such costs. Some municipalities may already have a considerable level of public access and may require little or no incremental expenditure. Some municipalities may adopt plans that require the acquisition or rezoning of privately-owned land, and such plans may be more expensive to implement.

How long will the plans be valid?

A Municipal Public Access Plans do not expire, however, a report must be sent to the DEP every five years detailing the status of the public access projects proposed in the plan, information on all monies associated with the municipal public access fund (if applicable), and any issues that have been encountered with plan implementation. Any failure in implementing the MPAP, as listed in the plan, may result in the DEP revoking its approval of the MPAP.

What Rules govern Public Access and Municipal Public Plans?

The Coastal Zone Management Rules at N.J.A.C. 7:7E govern public access to all tidal waterways within the State of New Jersey and authorize the creation and adoption of Municipal Public Access Plans. The rules can be found on the Departments website at http://www.nj.gov/dep/rules/rules/njac7_7e.pdf

When will these Rules be in effect?

The rules are set to take effect in October 2012.

Whom do I contact for more information or assistance regarding Public Access and Municipal Public Access Plans?

For more information or assistance regarding Public Access and Municipal Public Access Plans, please contact the Division of Coastal and Land Use Planning at 609-984-0058, mpap@dep.state.nj.us or online at <http://www.state.nj.us/dep/cmp/access/>.