



February 14, 2008

NJ Department of Environmental Protection
Gary Brower, Esq.
ATTN: DEP Docket No. 26-07-11/663
Office of Legal Affairs
401 East State Street, Floor 4
PO Box 402
Trenton, NJ 08625

RE: Proposed Coastal Zone Management Rules on Public Access; New Amendments

Dear Mr. Brower:

The following comments are being submitted on behalf of the Marine Trades Association of New Jersey (MTA/NJ) in response to the Coastal Permit Program rules, N.J.A.C. 7:7E-8.11(f) that New Jersey Department of Environment Protection (NJDEP) concurrently proposed with the adoption of the public access rules.

The Marine Trades Association of New Jersey (MTA/NJ), established in 1972, is a non-profit trade organization comprised of over 300 marine-related businesses dedicated to promoting and protecting the marine industry and waterways in the State of New Jersey. We represent hundreds of marinas, both small and large, working hard to sustain their businesses and prosper in the State of New Jersey.

Included with these comments is a copy of our previous comments on the original rule. Much of our position regarding the proposed amendments and adopted rules is reflected in those comments and we incorporate them in this letter on the proposed rule changes.

These proposed amendments address only one small element of the public access rules and do nothing to provide relief or protection for marinas in New Jersey. The rules still require a surrender of property rights and force a business owner to make decisions about their operations which they may not be able to afford or cannot reasonably implement. The rules are impracticable and violate the very principles of affording access which they purportedly support. These proposed amendments do not address the problems associated with unlimited access; the practical problems and financial costs associated with the rules and proposed amendments, the requirement of a deed restriction and the additional parking requirement.

The NJDEP is continuing to demand unlawful and unsustainable obligations on property owners through permit conditions and doing so under the guise of implementing the Public Trust Doctrine. In fact, the rules and proposed amendments represent an unlawful expansion of the Public Trust Doctrine. These proposed rules, and those that have been adopted, result in the general public being afforded greater rights to privately owned marinas than the customers and marina owners. A marina owner and customer has to pay for upkeep, taxes, insurance and other costs for property over which they will have limited use.

As stated in our original comments, it is unrealistic and unreasonable for a marina, a seasonal small business, to allow access onto its property 24 hours a day, 7 days week, 365 days of the year to anyone who wishes to enter the property. Marinas currently do not permit their own customers, who pay for the services being provided to them, to have access to the marina property at all times of the day, or in all areas. Do we now have to waive the marina restrictions and regulations otherwise imposed on our customers for that section of land? With implementation of the new rules and proposed amendments, a marina owner will have no effective means to enforce marina rules and regulations towards the general public for a significant portion of the marina. They create a potentially hazardous and costly situation, make marina security impracticable and will negatively affect the upland operations of many marinas. Stating that signage will suffice as a control measure to keep the public away from hazardous or restricted areas is unrealistic.

Additionally, the suggestion from the NJDEP that piers can be gated to prevent the public from gaining access to them is a vain attempt to address the security issue raised by many marinas and the MTA/NJ in previous comments and hearings. Not only is that option logistically impossible for many marinas, installing a gate clearly contradicts the supposed goals of this rule and the department's effort to provide quality access to the public. It creates a new obstacle for those that are paying for the services of a marina and those that are able to access the piers. It also adds yet another financial burden on the marina owner making operating a marina business in New Jersey even more difficult. If a gate or fencing is able to be installed, the marina and its customers would have to incur additional costs for the installation and maintenance of this barrier to accommodate the NJDEP's expansive access rules. As is the case throughout these rules, despite an obligation (both legal and ethical) to assess the costs of implementing a rule, or the cumulative cost of implementing all of the rules, the NJDEP arbitrarily and capriciously declares or implies that there will be little to no cost.

These proposed amendments, which allow marinas to reconfigure the required walkway, do nothing to address the many problems created by these rules and appear to be nothing more than an ineffective attempt to appease the industry. Walkways dedicated to unlimited public access undeniably present many problems for marina owners. Marina owners will still lose valuable storage space, have to reconfigure their operations and implement additional security measures. There will most definitely be additional costs to the marina owner in addition to a loss in revenue from reduced storage space and a change in operations. Again, the NJDEP fails to account for those costs.

The NJDEP claims that a conservation restriction is necessary to preserve public access rights. What the NJDEP fails to recognize is that marinas already provide public access by the

very nature of their business operations. It is not reasonable to argue that marinas do not afford the public one of the best opportunities to access the waterway AND recreate ON them. There is absolutely no justification to force a marina owner to deed restrict his/her property if the operations of the marina will remain the same. Deed restrictions can be enforced at any time and can severely affect a marina owner's ability to make changes and/or improvements, or to run their businesses. A deed restriction is immediately enforceable under the condition of the permit and the proprietary right given to the state can be enforced immediately, therefore directly impacting current property owners. Moreover, if the right so clearly flows from the Public Trust Doctrine, as alleged by the state, then no deed restriction should be necessary.

There are very real liability concerns that the NJDEP is also refusing to acknowledge. The landowner liability act does not apply in many circumstances. A simple oversight on the part of a marina owner could be deemed as an act of negligence and therefore they can be held liable for an injury. We have also consulted with a number of insurance organizations since the original proposal was published in November that have confirmed that insurance premiums will increase for marinas that are required to provide unlimited access to their properties. No where is it shown that the agency fulfilled its obligation to study and set forth the financial impact. Again, another increase in operational costs, despite the agency's refusal to acknowledge or study it.

Contrary to the Economic Impact statement, the proposed rules fail to give consideration to the negative impact to the small businesses and owners that will result from these regulations. The reality is that there was no true economic analysis done on these rules. Instead, incorrect assumptions and summary conclusions were made by the state with little or no actual data on the regulations' impact on the affected small businesses and property owners. These failures have contributed to the implementation of the new rules, and issuance of the proposed rules, both of which are arbitrary, capricious, unreasonable and contrary to law.

Additionally, the Regulatory Flexibility Analysis states that the proposed amendments are intended to provide greater flexibility to marinas to meet the public access requirements. The fact is they take away flexibility to marinas and restrict their ability to control their operations and, in some cases, attain necessary permits. There are no studies to support these statements and analyses and, contrary to the NJDEP's statements, these rules do not add clarity and predictability.

We stated in our original comments that a true economic and regulatory flexibility analysis must be performed and submitted to the public and that the law and fundamental fairness requires this. The NJDEP never responded to these concerns and once again, with the issuance of these proposed amendments, failed to fulfill this legal obligation under the Administrative Procedures Act.

The US Supreme Court decision, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), prohibits the improper imposition of public access as a permit condition. We feel that these rules, as adopted and proposed, are in contravention of the Nollan holding.

As the Executive Director of the industry's only recreational boating trade association in the State of New Jersey, I can tell you with all certainty that these rules will have severe

consequences for everyone that seeks to enjoy the waterways of NJ. Over 70 marinas provided written comments in opposition of these rules and nearly every comment was ignored or trivialized. Business owners that have been operating for decades were told by the NJDEP that these rules will not add additional burdens and that they will not have a negative impact on their businesses. Saying something which is false many times does not make it true. A policy decision appears to have been made by the NJDEP to ignore the realities of this situation and fabricate its own rationale and reality. The rules and proposed amendments are still arbitrary, capricious, unreasonable and contrary to law.

Every marina owner that has commented has stated that these rules will have a serious and negative impact on their livelihood and property rights; and many of them are already in the process of selling. Yet, the NJDEP still refuses to acknowledge this and accept the fact that there WILL be marinas that will be unable to comply with these rules. They will simply choose to never upgrade or maintain their properties or they will simply sell to a private developer if they can no longer remain in business. Yet, again, in light of its stated rationale in support of these rules, the NJDEP seems willing to allow this to happen and place another hurdle in front of small business persons trying to run the very businesses that afford access to our marine resources. If, on the other hand, there is a desire or willingness to eliminate more marinas, then these rules will have their intended effect.

When we lose a marina, we lose a place where people seeking to recreate on the water can gain access to that water. We lose a place for the general public to moor their vessels, have their vessels serviced, stored and more. We lose a place for family and friends to gather to enjoy the natural resources that living in New Jersey provides us. **We ultimately will lose public access to the water.** The losses are enormous and they will forever change the quality of life for all of us.

The MTA/NJ respectfully requests that existing marinas, businesses that already provide meaningful and quality access to the public, be immediately exempted from these rules. Thank you for your time.

Sincerely,



Melissa Danko
Executive Director

Copy List Attached

C. Lisa Jackson, NJDEP Commissioner
Governor Jon Corzine
Congressman Frank A. LoBiondo
Congressman Frank Pallone
Congressman James Saxton
Congressman Christopher H. Smith
Senator Jefferson Van Drew
Assemblyman Nelson Albano
Assemblyman Matthew Milam
Senator Jim Whelan
Assemblyman John Amodeo
Assemblyman Vince Polistino
Senator Stephen Sweeney
Assemblyman John Burzichelli
Assemblyman Douglas Fisher
Senator Diane Allen
Assemblyman Herb Conaway
Assemblyman Jack Connors
Senator Christopher Connors
Assemblyman Brian Rumpf
Assemblyman Daniel Pelt
Senator Andrew Ciesla
Assemblyman James Holzapfel
Assemblyman David Wolfe
Senator Sean Kean
Assemblyman David Ribble
Assemblywoman Mary Pat Angelini
Senator Jennifer Beck
Assemblyman Declan O'Scanlon
Assemblywoman Caroline Casagrande
Senator Joseph M. Kyrillos
Assemblywoman Amy Handlin
Assemblyman Samuel Thompson
Senator Joseph Vitale
Assemblyman Joseph Vas
Assemblyman John Wisniewski
Jay Watson, NJDEP Deputy Commissioner
Mark Mauriello, NJDEP Assistant Commissioner
Tom Micai, Director, Land Use Regulation
Jeanne Herb, Director, Planning Policy & Science
Ruth Ehinger, Coastal Management Program
Thom Dammrich, MMA
Phil Keeter, MRAA
Woody Arenas, AMI
Rob Nixon, Princeton Public Affairs Group
Margaret Podlich, BOATUS
MTA/NJ Membership