

January 4, 2006

NJ Department of Environmental Protection  
Gary Brower, Esq.  
ATTN: DEP Docket No. 19-06-09/482  
Office of Legal Affairs  
PO Box 402  
Trenton, NJ 08625

**RE: Proposed Coastal Zone Management Rules on Public Access**

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. 7:7 and Coastal Zone Management rules, N.J.A.C. 7:7E, that the New Jersey Department of Environment Protection (NJDEP) is proposing to amend.

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.

Income to the State from the recreational marine industry, plus the contribution from boating, fishing, waterborne recreation, and the local businesses that support these activities, is significant. Additionally, marinas provide property, income, sales, and other tax revenues to state and local governments as well as employment opportunities for local citizens. The social benefits provided by our industry are also significant. Marinas not only provide social benefit to the boating public, but also to the communities into whose fabric they are sewn.

The recreational marine industry has been working hard in partnership with government, to protect our environment and New Jersey's coastal resources. Proof of these efforts can be found in such programs as the Clean Vessel Act Program, the Shrink Wrap Recycling Program and the successful Clean Marina Program to name a few. Through the NJDEP sponsored Clean Marina Program, marinas go above and beyond what is already required of them by implementing Best Management Practices targeted at reducing pollution. These businesses realize that the success of their industry relies on the health and beauty of their surroundings. This program clearly demonstrates that the marine industry and government can work together towards the same goal. Indeed, the MTA/NJ and NJDOT have been working in partnership through the I BOAT NJ Program to fund hundreds of thousands of dollars in public access improvements in New Jerseys

marinas. These are much needed improvements that could be jeopardized by these proposed rule changes.

The MTA/NJ appreciates the NJDEP's acknowledgment of the importance of boating and navigable waterways to the general public. These regulations, however, will undermine the very industry which affords much of the boating public access to marine waters. For some marinas, the proposed amendments and requirements will make it impracticable to continue in the marina business.

Marinas are a unique and essential part of our local waterfront communities that already provide an accessible service to the general public. They provide public boat-ramps, fuel service, supplies, slips, restaurants, boat maintenance, fishing access and more. They provide the important boating infrastructure and services that allow people seeking recreation on or near the water to safely begin, enjoy and end their excursions. By definition, a marina already provides and preserves public access to the water. In order to do so, however, marinas must be able to reasonably control and manage their property. These proposed regulations greatly undermine this ability.

Moreover these regulations will result in a massive taking of land from small business owners who paid for, maintained and paid taxes on the affected land. Nowhere in the history of the application of the Public Trust Doctrine, or in New Jersey Common Law, has such a direct taking of utilized land from small business persons been proposed.

Revised N.J.A.C. 7:7E-8.11 purports "to make it clear that public trust rights also includes the use of," inter alia, marina property for various uses, and the right to largely unfettered perpendicular and linear access. In fact, it creates this new entitlement to the detriment of the rights of marina owners, operators and customers.

The agency fails to provide a real economic analysis with supporting studies or data to justify these rules. The onerous provisions contained in the proposed rules will have a deleterious impact on the marine industry and the services it provides to the public.

### **Loss of Control of Business Premises**

It is unreasonable and unrealistic to force marinas to allow the general public access to their properties at all times, or in the areas covered by the "conservation restriction/easement." Marinas currently do not permit their own customers, all of whom pay for the services being provided to them, to freely roam the marina property at all times of the day, or in all areas. Marina owners require their customers to sign slip agreements which clearly detail the rules and regulations of the marina; rules and regulations that are in place to ensure the safety and security of their customers, their vessels, and the orderly and profitable management of the marina.

A marina owner will have no effective means to enforce marina rules and regulations towards the general public. A slip holder may lose the ability to moor his vessel at a marina if he/she does not abide by the rules which enhance safety and security. No sanction is available for a member of the general public unless he or she violates the law. Will law enforcement be able to handle the additional calls and requests for assistance that will arise once the public is allowed to access marina properties at all times? Who will pay for the additional costs that will be incurred to

ensure the safety and security of those accessing the marina at night with limited visibility and present hazards? These regulations will force marina owners, operators and patrons to incur these costs.

N.J.A.C. 7:7E-8.11(i) prohibits activity which discourages or prevents the public from these new access rights. The word “discourage” is nebulous and invites inconsistent and unpredictable interpretation by the agency and prospective lawsuits.

### **One-Size Does Not Fit All**

One of the rationales for these radical proposals is that they would make access circumstances uniform. If the underlying premise of unfettered marina access was reasonable, which it is not, this goal is misguided and fails completely to acknowledge the unique characteristics of many of these marinas. Some of these family owned marinas have been in existence for decades or over a millennium. The proposed changes and related requirements will result in, for many of these marinas, a reconfiguration and immediate reduction in available land for boating related support activities in order to obtain necessary permits. In many instances, parking, which is already at a premium and constitutes part of the incentive for marina customers to support these marina businesses, would be further reduced by providing compelled parking for general public access use. An unrealistic and unaffordable alternative is provided for offsite parking.

In its discussion of N.J.A.C. 7:7E-8.11(f)(6) which deals with single family homes or duplexes, the agency acknowledges that “The size of the property and density of development do not lend themselves to providing public access on-site.” This same situation applies to many marinas, particularly smaller ones. Yet the agency proposes to uniformly impose these onerous access obligations on these marinas.

The proposed rules also state that “The new rule will enable better consistency in how public access is managed by different agencies within the Department.” “By providing one set of requirements to demonstrate compliance with the rule, the process by which public access is planned becomes more uniform and streamlined, which will help both the Department and those who apply for permits and funding.” That statement has no basis whatsoever and is completely untrue as clearly shown in the below examples. NJDEP staff members consistently interpret the rules differently and make permit decisions accordingly. There are those within divisions of the agency that even believed themselves that these rules only applied to certain development projects and that they did not apply to marinas applying for coastal permits. There is nothing outlined in the proposed rules to offer any assurance to the marine industry that there will be better consistency with a uniform and streamlined process. Moreover, it is impossible for that to occur when so much diversity exists within the industry.

### **New Liability for Marina Owners and Operators**

The agency rationalizes that marina owners are somehow afforded protection under the Landowner Liability Act, N.J.S.A. 2A:42A-2 et seq. In fact, these proposed regulations and requirements will greatly expand the liability to which marina owners and operators are exposed. The Landowners Liability Act affords limited protection. There are many cases in which liability has been found against landowners who thought they might be protected by this Act, such as a child who hurt herself rollerblading when she slipped and fell due to an accumulation of sand on a

roadway surface (*Toogood v. St. Andrews at Valley Brook Condominium Association*, 313 NJ Super 418 (App. Div. 1998), a man who tragically drowned while attempting to rescue two children who had fallen through an ice covered lake located on the Defendant's property (*Harrison v. Middlesex Water Company*, 80 NJ 391 (1979), a young boy injuring himself on a golf course (*O'Connell v. Forest Hill Field Club*, 119 NJ Super 317 (App. Div. 1972), and numerous other cases. Moreover, many of these marinas are located within or near residential neighborhoods or fully developed areas, which further reduces protection under the Act. Put simply, a new liability is being imposed by these regulations which will require additional exposure to liability; potentially increased employment costs associated with supervision, and increased insurance costs.

The care, custody and control of the marina, vessels, slip-holder property and attendant infrastructure is the responsibility of the marina owner and boat owner. There is significant risk of injury in certain areas of a marina facility that must be recognized. The proposed rules acknowledge the potential for risk of injury and include "such activities at energy facilities, industrial uses, port uses, airports, railroads and military facilities". Additionally, the rules state "portions of jetties and groins pose an extraordinary risk of injury" as stated in the rules. However, the proposed rules fail to acknowledge and appreciate the hazards at a marina or boatyard. Hazardous areas include travel lifts, forklifts, service areas with heavy machinery, fuel areas, etc. People who own boats are aware of the dangers a marina and the water present. Marina rules can control access to these areas and related safety. Even if the agency allowed a marina to restrict these areas, these regulations would render such rules ineffective. People who are unfamiliar with marinas and the water have less or no fear of the potential for bodily harm, or worse, that can result from a careless step or deliberate foolish act.

Ensuring a safe environment for the general public now becomes an extremely difficult task. The marina owner will need to provide additional infrastructure and security to control where the public goes when on site beyond the access area. The number of people is finite when accommodating customers and their guests. These regulations, however, provide no restrictions on the amount of people who will gain access. At many marinas and boat yards, it is logistically impossible to secure or restrict access to dangerous areas while still providing a walkway along the entire length of the waterfront. Due the nature of marinas and the services they provide, travel lifts and forklifts must access the water to transport boats, and therefore can not be relocated. Many drydocks are on the water's edge. This heavy machinery and equipment poses a significant risk of injury when both in use and not in use.

The Landowner Liability Act also does not mitigate for the nuisance and expense caused by vandalism and general mis-use of marina property. An operator may not be liable for the actions or injury of the public on their property, but in the end it becomes their job to deal with it and mitigate for it.

The proposed rules refers to certain situations in which public access may not always be practicable on-site or for the entire shore and that an alternative route or area may be necessary. None of these situations take into account the unique nature of a marina and the services that it provides and conducts. The rules also make reference to "the quality of the experience" and "meaningful access". Therefore, it seems ridiculous to force a marina, a business that is already providing access, to deed restrict their property, face safety and security issues and increased costs when a reasonable alternative that provides a more quality and meaningful experience is nearby and available to the public. Many marinas are located on man-made lagoons surrounded by residential

communities; many communities that already offer beaches, parks, fishing piers and more to the general public.

### **Marina Owner and Operator Responsibilities**

Many marinas provide onsite dry storage or dry docking. A bailment is usually created for that paid for service and use of land, which imposes a legal responsibility on the marina owner and operator. Unfettered access by the public undermines the ability of the marina owner and operator to abide by its bailment requirements. Moreover, with the prospective reconfiguration of work and storage areas at marinas as a result of these new regulations and requirements, many marinas will lose space from which they derive essential revenues.

At a minimum, the need for restrictions on access at night are so apparent and necessary that no justification would seem necessary. Not under these proposed rules, however.

We have a number of examples and documents from NJDEP staff which clearly outline the amount of public access that was being required of marinas applying for coastal permits prior to the posting of these rules. Despite not having legislative or judicial sanction to do so, the agency created a new “proposed” rule, which has to some extent already been enforced. To the extent the agency has imposed certain of these proposed conditions on permit applicants, the agency has retrospectively implemented this new rule without going through the appropriate administrative process.

The NJDEP has improperly and unlawfully been applying the proposed Coastal Zone Management Rules without being considered by the public. For example, NJDEP staff has been improperly applying these rules pertaining to the 10 foot wide walkway/path that is being required on permit applications. Below are two examples of the implementation of the proposed rules prior to this rule making and the 10 foot wide walkway/path:

Block(s) 169 Lot(s) 9.01,9.02 & 10 is a marina located in Waretown, NJ. The marina was unable to obtain a permit to add a small building, pavilion and pool because they were physically not able to provide the access being required of them which included a 10 foot wide easement/walkway in their application for a CAFRA Individual Permit. Such an easement would have required the parking spaces to be shifted 10 feet toward the driveway though the site. The parking spaces could not be moved into the driveway. By doing so the driveway would have been reduced from 22 feet to 12 feet in width, which would not be permitted by the Township. The marina owner was, however, willing to offer 1,510 sq. ft. of more public access that the 10 foot wide easement/walkway along the waterfront would have provided. This included picnic areas, the proposed pavilion and pool, parking spaces, ADA accessible restrooms, transient moorings, a paved public road to the waterfront as well as perpendicular and linear physical and visual access to the waterfront. All of this additional public access was not acceptable and the marina owner had to withdraw their permit. They requested a meeting which was denied. This marina, is now not able to improve their facility; all improvements that would have greatly benefited the general public.

In a letter from Vivian Fanelli, Project Manager of the Bureau of Coastal Regulation, received on April 7, 2006, the following statement was included:

- *7:7E-8.11 Public Access to the Waterfront: Please be advised that the provision of public access parallel and perpendicular to the waterfront must be shown on revised plans. A gravel/paved path shall be a minimum of 10 feet in width, shall extend the entire length of the waterfront area and shall be clearly marked. The public access to the waterfront rule is in place to allow the general public at large to have both physical and visual access to all waterfront areas. Both perpendicular and parallel access to the site should be provided within the confines of the site. Appropriate parking must be provided but not limited to cars and boat trailers. In addition, the applicant must post and maintain "Waterfront Open to the Public" signage.*

There is no mention in the proposed rules or in the Grant of Conservation Restriction/Easement document a requirement for a 10 foot wide walkway. Therefore, it is clear that the NJDEP had not only applied these proposed rule changes prior to the November 8<sup>th</sup>, 2006 posting but established a 10 foot wide walkway requirement without any notification to the public or the businesses impacted by this change.

Block 112 Lot 65, is a marina located in Point Pleasant. They recently applied for a permit to install floating docks to replace damaged docks caused by excessive boat wakes; an upgrade that is needed to fix a problem that is out of their control but necessary in order to continue to operate. Once again, prior to the posting of these rule changes, they were told they needed a conservation/restriction easement for public access including a 10 foot wide access easement along the entire length of the bulkhead. For this marina, that would be 480 feet of their property.

In a letter from Andrew Heyl, Supervisor, Bureau of Coastal Regulation, received August 18, 2006, the following item was included in the terms and conditions of the permit:

*4. Within 60 days of the issuance date of this permit, the permittee must submit to the Program for review and approval a Conservation/Restriction easement for public access including a 10' public access easement along the length of the bulkhead. This Conservation/Restriction easement must include the site being accessible to the public 24 hours a day, 365 days of the year. The approved easement is to be recorded in the office of the County Clerk (the REGISTRAR OF DEEDS AND MORTGAGES in the applicable counties) in the county wherein the lands included in the permit are located within ten (10) days.*

Many of these family owned and operated businesses are trying to maintain, improve or expand their facilities so that they remain economically viable businesses. Yet, they only continue to get caught up in an already time consuming, complicated and expensive permitting process. They are told over and over that assistance is available from NJDEP and a staff person is available to help, only to find phone calls unanswered, meetings and permits denied. The new proposals add insult to injury. Now, the complicated regulatory process will not only be time consuming and expensive, but will result in a loss of property rights.

The current rules are already extremely difficult for these small business owners to comply with in order to upgrade or improve their properties. These new rules only add new layers to the permitting process requiring marina owners to seek additional professional services and increased costs. In addition, there are significant space constrictions for many marinas. Every marina property is different in size and scope with some properties having very real physical limitations

and restrictions. Many of these businesses are just not able to physically provide the space required for additional walkways and parking.

The rules as presented represent or may lead to a partial “taking” of private property suggestive of egregious eminent domain policies and, therefore, warrant legal challenge. Marinas provide public access by virtue of the nature of their business. To force additional access upon them increases financial burdens and reduces many of their property rights and value. Many of these obligations never could have been foreseen by the prior generations who ran these businesses, and thereby afforded access to marine waters to the public. The proposed rules offer no compensation for the loss of private property, the management of access, additional security and staff, and everything else that will be needed to ensure the safety and protection of all those entering the property.

### **Economic Review and Analysis**

The notice of proposed rules contains a section that is entitled “Economic Impact”. That section begins by providing economic information on the tourism industry. After discussing these general points, however, conclusory and baseless statements are made to imply that this significant expansion of public access to privately owned commercial property will enhance or protect tourism dollars and employment. Those statements are an exercise of imagination rather than empirical research or substantive findings.

The economic impact section is void of any substantive analysis of the impact on marina owners and operators property rights, on the experience and impact of prospective expenditures by marina customers, or the additional costs and burdens on marina owners and operators. It is, in fact, not an economic impact review but simply a statement made in support of these radical regulations.

A true economic and regulatory flexibility analysis must be performed and submitted to the public. The law and fundamental fairness requires this.

Likewise, a purported federal standards analysis concludes “Therefore, the department has concluded that the proposed new rules and amendments do not exceed any federal standards or requirements.” This is patently false. The requirements greatly exceed the federal requirements by partially taking property and by the creation of a misleadingly titled “Conservation Easement”. The Army Corp of Engineers is involved in many dredging projects which impact these marinas. No where do they require that these marina owners and operators surrender property to the general public.

Marina owners and operators pay taxes on the land which will be impacted by these proposed changes and requirements. Despite the increased costs and obligations imposed on these tax payers, no where is it suggested by the agency that there will be effort on its part to reduce the tax burden to these property owners.

The Regulatory Flexibility Analysis states that there will be minimal impacts to small businesses. There is no substantive basis for the conclusions outlined in this section. There has been no study conducted, or evidence produced, to justify this analysis, which is unfounded and presumptuous. Marina owners will face significant increases in their costs to comply with the new rules and maintain and operate their properties for the use of general public. Insurance costs will

increase. Some marinas will need to reconfigure their operations in order to comply. Capital investments that will never be recouped. Engineering costs will increase for compliance. None of these additional burdens and additional costs are adequately explored or acknowledged. Perpetual and constant access creates undue economic hardship on an already stressed and overregulated industry thereby significantly impacting small businesses.

The proposed actions constitute a diminution of the rights of the marinas, owners, operators and customers and an expansion of the general public's rights. This proposed action constitutionally exceeds the authority afforded the executive branch. No where is there constitutional or legislative sanction for these proposals.

The proposed regulations also state that these rules "will have little to no effect on the total amount of development in the waterfront development area or the CAFRA area, but rather will affect how development is done." As can be seen from the above examples, and there are many more, they already have.

Should these proposed rules be adopted, there are significant consequences that impact everyone that enjoys the waterways of New Jersey. It is very simple. Certain marinas will be forced or choose NOT to upgrade or they will SELL. These proposed rules will discourage marinas from improving their facilities resulting in a degrading marine infrastructure. This will ultimately result in the loss of even more access to the water for recreation and enjoyment. For many marina operators, the idea of complying with this proposal would be the impetus they need to get out of the business altogether and sell to developers. This will further result in the loss of public access. The difference is, this loss will forever change the quality of life and recreation for the citizens that boat, fish, play on the water and enjoy the charm of the Jersey Coast. The charm, which in many communities, centers on their local marina not a condominium development.

In closing, the MTA/NJ supports reasonable public access to the water. In fact, the marine industry thrives on it. Therefore, the MTA/NJ formally requests that the one-size-fits-all approach as outlined in the Coastal Zone Management public access rule proposal and the verbiage presented be retracted until a partnership oriented approach, joint-discussion and sensible solution for our industry can be accomplished.

I would be happy to meet and discuss this issue in further detail. In the meantime, if you have any questions, please feel free to contact me at 732-292-1051.

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 Nicholas Asselta  
Assemblyman Nelson Albano  
Assemblyman Jefferson Van Drew  
Senator William Gormley  
Assemblyman Francis Blee  
Assemblyman Jim Whelan  
Senator Stephen Sweeney  
Assemblyman John Burzichelli  
Assemblyman Douglas Fisher  
Senator Diane Allen  
Assemblyman Herb Conaway  
Assemblyman Jack Connors  
Senator Leonard Connors  
Assemblyman Christopher Connors  
Assemblyman Brian Rumpf  
Senator Andrew Ciesla  
Assemblyman James Holzapfel  
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Senator Joseph Palaia  
Assemblyman Steven Corodemus  
Assemblyman Sean Kean  
Senator Ellen Karcher  
Assemblywoman Jennifer Beck  
Assemblyman Michael Panter  
Senator Joseph Kyriillos, Jr.  
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  
Thom Dammrich, NMMA  
Phil Keeter, MRAA  
Rob Nixon, Princeton Public Affairs Group  
Margaret Podlich, BoatUS  
MTA/NJ Membership