

# **COASTAL RESOURCE PROTECTION: A REVIEW OF SELECT NEW JERSEY REGULATORY AND PLANNING TOOLS**

**White Paper for the  
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New Jersey's Coastal Management Program is comprised of several programs overseen by the Department of Environmental Protection ("DEP") that share responsibility for the protection and enhancement of New Jersey's coastal resources. These programs include the Land Use Regulation Program, which reviews coastal permit applications submitted to DEP under the Coastal Area Facility Review Act (CAFRA)<sup>1</sup>, the Waterfront Development Law<sup>2</sup> and the Wetlands Act of 1970<sup>3</sup>; the Bureau of Tidelands Management, which operates within the Land Use Regulation Program and provides staff and technical support to the Tidelands Resource Council in its decisions regarding the conveyance of state-owned tidelands; the Bureau of Coastal and Land Use Enforcement, which investigates potential coastal and wetlands infractions and ensures compliance with wetlands permits issued for projects throughout the coastal area; the Engineering and Construction Program, which manages coastal area dredging and shore protection projects such as beach replenishment and bulkhead installation; and the Coastal Management Office, which is part of the Commissioner's Office of Policy, Planning and Science and administers the planning and enhancement aspects of the Coastal Management Program.<sup>4</sup>

Faced with growing challenges such as increased development pressure, sea level rise and increased frequency and severity of storm surges, it is apparent that some serious changes must be made in the way we live, plan, regulate and grow in New Jersey's coastal zone.<sup>5</sup> Such changes will require a careful review of each of the individual components of the Coastal Management Program to determine the most effective ways to enhance its protections, a process that will not happen overnight. In the interim, it is imperative that we look at the coastal protection tools already provided by our Coastal Management Program and consider whether they are being used to their maximum potential. Understanding and maximizing the use of these existing tools will allow for better protection of our coastal resources today while at the same time providing a better understanding of the changes we need to make to our Coastal Management Program to protect against future challenges.

Towards that end, this paper analyzes two of New Jersey's most well-known and, at times, controversial aspects of our Coastal Management Program: (i) the Rules on Coastal Zone Management<sup>6</sup> (the Coastal Rules), the regulatory scheme that, among other things, implements

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<sup>1</sup> N.J.S.A. 13:19-1, et seq.

<sup>2</sup> N.J.S.A. 12:5-3, et. seq.

<sup>3</sup> N.J.S.A. 13:9A-1, et seq.

<sup>4</sup> [www.nj.gov/dep/cmp/czm\\_program.html](http://www.nj.gov/dep/cmp/czm_program.html).

<sup>5</sup> New Jersey Coastal Management Program, Assessment and Enhancement Strategy FY 2006-2010, prepared by the Coastal Management Office, New Jersey Department of Environmental Protection (DEP Assessment Strategy); June 2006, p. 10.

<sup>6</sup> N.J.A.C. 7:7E-1.1, et seq.

CAFRA, New Jersey's premier coastal protection statute; and (ii) CAFRA/Coastal Town Center Designations, a tool that combines the regulatory protections of CAFRA and the planning protections of the State Plan. This analysis explores the strengths and weaknesses of these tools and suggests ways in which they might be better utilized. While there are many regulatory and planning tools that contribute to coastal protection in New Jersey, the Coastal Rules and CAFRA Centers were selected because of their shared complexity, their underutilization, the many connections between them and, most important, because of their potential to provide some immediate and meaningful protections to our coastal resources.

## **PART I - THE RULES ON COASTAL ZONE MANAGEMENT**

The Coastal Rules are the substantive regulations that govern the use, protection and development of our state's coastal resources. They are just one part of New Jersey's Coastal Management Program, but their importance cannot be overstated, as is evidenced by the statutory mandates they are designed to implement. Specifically, the Coastal Rules provide the standards by which the DEP's Land Use Regulation Program reviews permit applications under CAFRA, the Waterfront Development Law and the Wetlands Act of 1970 as well as requests for Water Quality Certifications under the Federal Clean Water Act<sup>7</sup> and Federal Consistency Determinations under the Federal Coastal Zone Management Act.<sup>8</sup>

To ensure that the Coastal Rules remain effective and relevant, they exist on a five-year cycle, at which interval DEP must formally readopt them with or without amendments.<sup>9</sup> In late January, 2008, DEP announced that the current five-year cycle is winding down and that the Coastal Rules are due to expire on July 8, 2009.<sup>10</sup> DEP has invited the public to provide suggestions as to how the Rules might be amended and improved and held a public hearing in Trenton, New Jersey, on February 7, 2008, for that purpose. DEP will continue to accept written suggestions for improvements to the Coastal Rules indefinitely. Accordingly, there is no time like the present to analyze the Coastal Rules and identify ways they can be improved.

There are many positive aspects to the Coastal Rules, including the policies they are designed to promote, the requirement that certain important findings be made prior to the issuance of any coastal permit, their protection of "Special Areas" and their recent recognition of the public's right to access public trust lands and waters. There are also some negative aspects to the Coastal Rules, including their permit-by-permit approach to coastal management and their failure to take into account the bigger ecological picture. And, as is discussed below, even the positive provisions are only as good as DEP's willingness to apply them.

### **The Coastal Policies**

The Coastal Rules incorporate eight basic Coastal Policies that are to guide DEP in their coastal decision making process. When considering a CAFRA or Waterfront Development permit, DEP must keep in mind that the overall goals of the Coastal Rules are to "protect and enhance the

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<sup>7</sup> 33 U.S.C. § 1251, et seq.

<sup>8</sup> 16 U.S.C. § 1451 - 1464

<sup>9</sup> N.J.A.C. 7:7E-1.4.

<sup>10</sup> See, Opportunities for Public Participation/Comment Prior to Formal Rulemaking, <http://www.nj.gov/dep/rules/ipr.html>.

coastal system”, “concentrate rather than disperse the pattern of coastal...development”, “protect the health, safety and welfare of people who reside, work and visit the coastal zone” and “encourage the preservation of open space.”<sup>11</sup> The Coastal Policies also serve as a guide to DEP in its exercise of the administrative discretion and flexibility that is built into the Coastal Rules.<sup>12</sup> For example, because coastal permit decisions involve the consideration of a broad range of competing concerns, the interpretation of terms such as “prudent”, “feasible”, “minimal”, “practicable” and “maximum extent” as used in a specific rule or combination of rules may vary, depending upon the context of the proposed use, location and design being considered.<sup>13</sup> It is the Coastal Policies that must guide DEP in the interpretation of these terms to ensure that each permit decision carries out the overall purposes of the Coastal Rules. Accordingly, the Coastal Policies provide a powerful tool for DEP to consider and reject or amend projects that do not promote these important goals.

### **The CAFRA Section 10 Findings**

Another significant element of the Coastal Rules is their requirement that, even if a project meets all of the applicable Coastal Rules, DEP can issue a development permit only upon a finding that that the project also complies with certain additional criteria set forth in the CAFRA statute. Among other things, this requires a finding that the project:

- Would result in minimal feasible impairment of the regenerative capacity of water aquifers or other ground or surface water supplies;
- Would cause minimal feasible interference with the natural functioning of plant, animal, fish, and human life processes at the site and within the surrounding region;
- Is located or constructed so as to neither endanger human life or property nor otherwise impair the public health, safety, and welfare; and
- Would result in minimal practicable degradation of unique or irreplaceable land types, historical or archaeological areas and existing public scenic attributes at the site and within the surrounding region.<sup>14</sup>

These are known informally as the CAFRA Section 10 Findings and were deemed such an important part of CAFRA that they were incorporated word-for-word into the Coastal Rules. Like the Coastal Policies, these requirements provide a powerful tool for DEP to consider and reject or amend projects that meet the letter of the Coastal Rules, but are constructed in such a way or in a location that renders them too hazardous or too much of a burden on coastal resources.

### **Protection of Special Areas**

The Coastal Rules also recognize that there are circumstances when flexibility is simply not an option. Specifically, the Coastal Rules provide that development is “prohibited” in certain

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<sup>11</sup> N.J.S.A. 7:7E-1.5(a)(i), (ii) and (iv).

<sup>12</sup> N.J.A.C. 7:7E-1.5(1).

<sup>13</sup> Id.

<sup>14</sup> N.J.A.C. 7:7E-1.5(b)(1)-(7).

“Special Areas”, meaning areas that are so naturally valuable, important for human use, hazardous, or sensitive to impact that they warrant focused attention and special management.<sup>15</sup> In these areas, which include beaches, coastal high hazard areas, flood hazard areas, bay islands, wetlands, wetlands buffers and threatened and endangered species habitats, a proposed use of coastal resources is unacceptable and DEP will use its legal authority to reject or deny the proposal.<sup>16</sup> In other Special Areas, including filled waters edges, steep slopes, critical wildlife habitats and special hazard areas, development is “discouraged”, meaning that a proposed use of coastal resources is likely to be rejected or denied.<sup>17</sup>

The Special Area rules, although part of a regulatory framework, also provide a valuable planning tool for municipalities, other planning entities and persons contemplating purchasing or developing land in the coastal zone. The identification and acknowledgment of these Special Areas within the planning area or property before planning begins provides clear up-front guidance as to where development will and will not be permitted, facilitating the development of a realistic, lawful plan – whether it is a master plan, a redevelopment plan, or a project specific plan - that can actually be implemented. Conversely, it avoids the costly expenditure of time and resources on plans that will never be realized due to regulatory entanglements involving coastal resource protections that were not factored into the planning process.

Despite the strong language used in the definition of “prohibited”, the Coastal Rules contain numerous exceptions to the prohibitions against development in Special Areas. For example, the Coastal High Hazard Areas rule prohibits development in areas identified as V-zones by the Federal Emergency Management Agency, which are described as being flood prone and subject to high velocity waters and wave run-up. However, the rule contains several exceptions to this prohibition allowing for development of certain single-family structures and duplexes in the V-zones.<sup>18</sup> Because of the dangers associated with such development and the knowledge that these dangers are only going to increase with the increase in sea-level rise and storm surges, DEP recently identified the need to direct development away from high-hazard hazardous areas, and specifically the FEMA V-zones, as a high priority for the state.<sup>19</sup> Nevertheless, DEP has also stated that, despite these dangers, it believes development in these high hazard areas will continue for the simple reason that such development is allowed under the current Coastal Rules and their exceptions.<sup>20</sup>

**The Combined Strength of Coastal Policies, CAFRA Section 10 Findings and Coastal Rules**  
DEP’s belief that it is powerless to prevent dangerous development from continuing in high hazard areas is a perfect example of the agency’s failure to recognize and apply the Coastal Rules, the Coastal Policies and the CAFRA Section 10 Findings to their maximum potential. These regulatory tools could be utilized to prevent much of the unwise and undesirable development that negatively impacts our coastal resources and undermines the natural hazard

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<sup>15</sup> N.J.A.C. 7:7E-3.1(a).

<sup>16</sup> N.J.A.C. 7:7E-1.8.

<sup>17</sup> Id.

<sup>18</sup> N.J.A.C. 7:7E-3.18(b), referring to N.J.A.C. 7:7E-7.2(e) or (f).

<sup>19</sup> DEP Assessment Strategy, p. 14.

<sup>20</sup> Id., at p. 10, 14.

mitigation they provide. Three such examples, including the high hazard area development issue, are described below.

Prevention of Development in High Hazard Areas - As discussed above, even if a permit application meets the letter of every applicable Coastal Rule, including the exceptions to the prohibition against development in high hazard areas, a permit cannot be issued unless and until DEP determines that the project is in accordance with each of the CAFRA Section 10 Findings. In addition, any administrative discretion that is exercised and permit application that is considered must be done so in accordance with the guidance offered by the applicable Coastal Policies. Thus, DEP cannot issue the permit if it cannot affirmatively find in accordance with the CAFRA Section 10 Findings that the project “is located or constructed so as to neither endanger human life or property nor otherwise impair the public health, safety, and welfare”.<sup>21</sup> Further, the rejection of such a permit application is entirely consistent with the Coastal Policy requiring DEP to “protect the health, safety and welfare of people who reside, work and visit the coastal zone.”<sup>22</sup> Clearly, the CAFRA Section 10 Findings and Coastal Policies allow for such an outcome and, in fact, were incorporated into the Coastal Rules to assure such a result when necessary.

Protection of Natural Coastal Systems - DEP has acknowledged the hazard mitigation benefits of natural coastal systems, such as beaches, dunes, wetlands and flood plains, in dealing with the high-risk hazards of storm surges, flooding, coastal erosion and sea level rise as opposed to the continued and less effective use of structural systems such as bulkheads.<sup>23</sup> Nevertheless, in accordance with its interpretation of the relevant Coastal Rule, DEP has also stated that it will continue to “promote” as opposed to require such natural systems.<sup>24</sup> The rule in question, the Coastal Engineering rule provides that “non-structural solutions to shoreline erosion problems are preferred over structural solutions” and that the “infeasibility and impracticability of a non-structural solution must be demonstrated before structural solutions may be deemed acceptable.”<sup>25</sup> The level of protection afforded under this Rule comes down to the interpretation of a few words – “preferred”, “infeasibility” and “impracticability.” Here, the CAFRA Section 10 Findings, and more specifically, the required finding that a project “is located or constructed so as to neither endanger human life or property nor otherwise impair the public health, safety, and welfare”<sup>26</sup>, combined with the plain language of the Coastal Engineering Rule gives DEP the authority to require non-structural solutions and to reject an infeasibility and impracticability assertion by an applicant when it is necessary to support a finding that the project is constructed so as to not endanger human life or property.<sup>27</sup> Again, such a decision is entirely consistent with the Coastal Policies to “protect and enhance the coastal ecosystem” and “protect the health, safety and welfare of people who reside, work and visit the coastal zone.”<sup>28</sup>

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<sup>21</sup> N.J.A.C. 7:7E-1.5(b)(6).

<sup>22</sup> N.J.A.C. 7:7E-1.5(b)

<sup>23</sup> DEP Assessment Strategy, p. 18.

<sup>24</sup> Id.

<sup>25</sup> N.J.A.C. 7:7E-7.11(b)(1).

<sup>26</sup> N.J.A.C. 7:7E-1.5(b)(6).

<sup>27</sup> N.J.A.C. 7:7E-1.5(b); N.J.S.A. 13:19-10.

<sup>28</sup> N.J.A.C. 7:7E-1.5(b)(i) and (iv).

Protection Against Wetlands Inundation - DEP has recently identified the inundation of coastal wetlands as one of the many problems that will occur as a result of sea level rise.<sup>29</sup> DEP has further concluded that the most likely adaptation of coastal wetlands in response to sea level rise would be inland migration, which would occur as the hydrology of the inland area becomes suitable for wetland species.<sup>30</sup> However, DEP has also concluded that the continuation of “inappropriate development” in areas suited to inland migration of coastal wetlands will likely preclude this adaptation and the wetlands will either diminish in extent or will be lost to inundation.<sup>31</sup>

The relevant Coastal Rule, the Wetlands Buffer Rule, states that DEP can require a wetlands buffer of “up to” 300 feet in all wetlands in the State except for those regulated under the Freshwater Wetlands Protection Act Rules, for which DEP can require a buffer of “up to” 150 feet.<sup>32</sup> In essence, the level of protection afforded under this rule comes down to the interpretation and application of the phrase “up to.” The CAFRA Section 10 findings state that, prior to issuing a permit, DEP must first find that the project “would cause minimal interference with the natural functioning of plant...life processes at the site and within the surrounding region” and that it “is located or constructed so as to neither endanger human life or property or not otherwise impair the public health, safety and welfare...” Thus, under the CAFRA Section 10 Findings, DEP could, at the very least, require the maximum wetlands buffers in areas potentially affected by sea level rise and, in areas where sea level rise is deemed likely, deny the project or that portion of the project that would impact wetlands or encroach on wetlands buffers. Such an outcome would be entirely consistent with the Coastal Policies to “protect and enhance the coastal ecosystem” and “protect the health, safety and welfare of people who reside, work and visit the coastal zone”, particularly since these Policies are to serve as guidance in DEP’s interpretation of the key phrase “up to”.<sup>33</sup> In exercising this authority, DEP will serve the dual purpose of protecting wetlands as they exist today and ensuring future protection by preserving areas suitable for the landward migration of coastal wetlands in response to sea level rise.

The discretion built into the Coastal Rules is only as good as DEP’s willingness to use it to better protect coastal resources. In the face of new and significant challenges to our dwindling coastal resources, DEP should take advantage of the powerful tool it has in the CAFRA Section 10 Findings used in combination with the Coastal Policies and the Coastal Rules to prevent development decisions that may endanger the public health and welfare and/or place an unacceptable burden on our coastal resources.

### **The New Public Trust Rights Rules**

On December 17, 2007, DEP adopted several new Coastal Rules that govern the public’s rights and ability to access New Jersey’s public trust lands and waters (Public Trust Rules).<sup>34</sup> Among other things, the Public Trust Rules create an important link between the millions of public dollars spent on beach nourishment projects and public access. More specifically, any

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<sup>29</sup> DEP Assessment Strategy, p. 11.

<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> N.J.A.C. 7:7E-3.28

<sup>33</sup> N.J.A.C. 7:7E-1.5(b)(i) and (iv).

<sup>34</sup> Lands and Waters Subject to the Public Trust Rights Rule, N.J.A.C. 7:7E-3.50; Public Trust Rights Rule, N.J.A.C. 7:7E-8.11; N.J.A.C. 7:7E-8A, Information Required to Demonstrate Compliance with the Public Trust Rights Rule.

municipality that wishes to enter into a State Aid Agreement to receive shore protection funding for beach nourishment or other shore protection construction projects must provide public access to its beaches, including perpendicular accessways, public restrooms and public parking.<sup>35</sup> The Public Trust rules initially required that municipalities receiving shore protection funding provide access to all of their beaches; however, in response to comments from municipalities, public officials and the public, DEP has proposed that this provision be amended so that municipalities must meet the public access requirements only for those beaches on which the beach nourishment or shore protection project actually occurs and only for the physical length of the nourishment project.<sup>36</sup>

To implement the public access goals of the new rules, before a permit for a shore protection project can be issued, a municipality must submit a draft public access plan to DEP demonstrating the manner in which the public access requirements will be met, along with a draft ordinance adopting the public access plan and a draft public access instrument detailing each public access point and pathway.<sup>37</sup> A significant part of the public access plan is the identification of all public accessways, public restrooms and public parking that already exist within the municipality so DEP can determine the extent to which the municipality already meets the public access requirements.<sup>38</sup>

To assist municipalities with the costs associated with meeting the public access requirements, the State of New Jersey has committed to providing municipalities 5% of the total cost of the beach nourishment project to help local governments pay for public access.<sup>39</sup> In addition, the Public Trust rules provide that the fees municipalities charge for the use of bathing and recreational facilities can include the costs of providing public restroom facilities, parking and any additional safety measures.<sup>40</sup>

One factor behind DEP's adoption of these particular provisions is the significant cost of beach nourishment projects, particularly that portion of the cost that is borne by state and federal taxpayers that do not live in or even near the municipality receiving the aid.<sup>41</sup> But there are other important reasons to allow reasonable public access to natural resources, including New Jersey's beaches. Increased public access to natural resources has been found to create an increased

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<sup>35</sup> N.J.A.C. 7:7E-8.11(p).

<sup>36</sup> See, <http://www.nj.gov/dep/rules/proposals/121707a.pdf>, p. 9-10.

<sup>37</sup> N.J.A.C. 7:7E-8.11(p)(1).

<sup>38</sup> N.J.A.C. 7:7E-8A.2(b)(1)(ii), -8A.2(c)(2)(i) and -8A.2(d)(3).

<sup>39</sup> See "State OK With Plan to Extend Pumping", Asbury Park Press, Saturday, December 16, 2006.

<sup>40</sup> N.J.A.C. 7:7E-8.11(m).

<sup>41</sup> Consider, for example, a beach nourishment project that costs \$75 million dollars, an entirely realistic figure for such an undertaking. Like all nourishment projects, the funding is allocated according to the following formula: The federal government contributes 65% of the project cost, while the remaining 35% is divided into a cost-share between the state and local government, with the state contributing 75% and the local government contributing 25%. (See, [www.state.nj.us/dep/shoreprotection/nourishment.htm](http://www.state.nj.us/dep/shoreprotection/nourishment.htm).) Based on this cost-share allocation, the federal contribution will be \$48.75 million, the state contribution will be \$19.69 million and the local contribution will be \$6.56 million. Thus, \$68.44 million of the cost is being borne by taxpayers, most of whom do not live anywhere near the project.

awareness of their value, and in turn, an increased willingness and effort to protect them.<sup>42</sup> In addition, more public access means more visitors to an area, which translates into more customers for local stores, restaurants, gas stations, hotels and the summer rental market, in support of a strong shore economy.

Because they are newly adopted and not yet implemented, it is simply not known whether the Public Trust Rules as they pertain to municipalities receiving shore protection funding will be successful in achieving their goals. The continued participation, input and cooperation of interested stakeholders in the DEP's efforts to implement the rules will certainly increase the chances of their success. Accordingly, stakeholders, including residents of the municipalities at issue and the general public who will be gaining more access to beaches nourished with their tax dollars, should remain involved and assist with the development and review of the public access plans prepared by each participating municipality. Such a process should include consulting with other states that have faced similar issues and have had some success in the development of their own public access plans, such as California, Oregon, Rhode Island and Connecticut.<sup>43</sup>

### **Silo-Based Management Approach to Coastal Protection**

A significant problem with the Coastal Rules is their use of a silo-based or compartmentalized approach to coastal resource management. Each permit application is looked at individually, with the focus being the potential for direct impacts to coastal resources caused by that development project on that project site. Little or no consideration is given to the coastal resources outside of the boundaries of the property for which the permit is sought, even if they are physically and ecologically connected. In addition, this approach provides little insight into the cumulative impacts to our coastal resources caused by the numerous CAFRA and Waterfront Development permits issued in a given year, or even a given decade. While it can typically be discerned from a permit application the number of acres of wetlands or critical habitat the specific development project will impact, there is no map or database to which this acreage can be added in order to identify the total number of acres of wetlands or critical habitat that has been developed or impacted to date.

The better method would be an ecosystem-based management approach to coastal resource management, an approach that looks at the bigger picture and takes into account the fact that natural systems that comprise our coastal resources, and the impacts caused by human activities, are not divided by property lines. Although there are many definitions for such an approach, ecosystem-based management is generally an approach that:

- Integrates ecological, social, and economic goals and recognizes humans as key components of the ecosystem;
- Considers ecological, not just political, boundaries;

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<sup>42</sup> See, e.g., Laitos, Jan G.; Reiss, Rachael B.; *Recreation Wars for our Natural Resources (Public Lands Management at the Crossroads: Balancing Interests in the 21<sup>st</sup> Century*, Environmental Law, September 22, 2004; See, also Odyssey Maritime Discovery Center, [www.odyssey.org/exhibits.htm](http://www.odyssey.org/exhibits.htm).

<sup>43</sup> See, Surfrider Foundation, State of the Beach Report, [www.surfrider.org](http://www.surfrider.org)

- Addresses the complexity of natural processes and social systems and uses an adaptive management approach in the face of resulting uncertainties;
- Engages multiple stakeholders in a collaborative process to define problems and find solutions;
- Incorporates understanding of ecosystem processes and how ecosystems respond to environmental perturbations;
- Is concerned with the ecological integrity of coastal-marine systems and the sustainability of both human and ecological systems.<sup>44</sup>

In addition, any management approach, whether it is ecosystem based or the interim continuation of the current system, must include a methodology for tracking the cumulative impacts, both in terms of acreage and systemic losses, of development and other activities affecting coastal resources. Existing cost-free mapping technology, such as Google Earth, makes the tracking of natural resources that exist and that are lost to development both possible and feasible.

### **Coastal Rules - Summary**

The Coastal Rules, when utilized to their maximum potential, provide a powerful means of protecting our coastal resources and of dealing with the challenges New Jersey will face with the onset of sea-level rise and increased storm surges. As demonstrated below, they also play a vital role in the success of New Jersey's other coastal protection tools, such as the proper establishment of CAFRA Centers.

## **PART II - THE ESTABLISHMENT OF CAFRA CENTERS**

In 1973, New Jersey adopted CAFRA to “encourage the development of compatible land uses” in the coastal area, “improve the overall economic position of its inhabitants” while at the same time preserving “the most ecologically sensitive and fragile areas from inappropriate development...”<sup>45</sup> In 1992, pursuant to the State Planning Act, the State Development and Redevelopment Plan (“State Plan”) was adopted to “conserve [New Jersey’s] natural resources, revitalize its urban centers, protect the quality of its environment and provide needed housing and adequate public services at a reasonable cost while promoting beneficial economic growth, development and renewal...”<sup>46</sup>

### **The Overlapping Responsibilities of CAFRA and the State Plan**

To accommodate the overlap of jurisdiction between CAFRA and the State Plan, the respective statutes were amended to acknowledge and cross-reference each other. Specifically, CAFRA provides that its implementing regulations, the Coastal Rules, must be “closely coordinated” with the provisions of the State Plan.<sup>47</sup> Similarly, the State Planning Act authorizes the State Planning

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<sup>44</sup> Ecosystem Based Management Tools Network, About Ecosystem Based Management, [www.ebmttools.org/](http://www.ebmttools.org/).

<sup>45</sup> N.J.S.A. 13:19-2.

<sup>46</sup> N.J.S.A. 52:18A-196.

<sup>47</sup> N.J.S.A. 13:19-17(b).

Commission, the agency charged with implementation of the Plan, to adopt DEP's Coastal Rules as the "State Development and Redevelopment Plan for the coastal area..."<sup>48</sup> In furtherance of this mandated spirit of cooperation, DEP and the State Planning Commission share in the responsibility for the designation of and changes to the boundaries of CAFRA Centers and Planning Areas.

The Coastal Rules provide that, whenever the State Planning Commission formally approves a new or changed CAFRA Center or Coastal Planning Area boundary, DEP must evaluate each boundary to determine whether it is consistent with CAFRA and the Coastal Rules.<sup>49</sup> DEP has the authority to reject or revise a boundary, but it cannot exercise this authority unless it finds that accepting the State Planning Commission's approved boundary would "result in unacceptable harm to the coastal ecosystem or the resources of the built or natural environment" or would otherwise be "clearly inconsistent with" the purposes of CAFRA or the Coastal Rules.<sup>50</sup> DEP is required to publish a notice of its determination to accept, reject or reject and revise the State Planning Commission's recommendation in the New Jersey Register.<sup>51</sup>

### **The Organizational Concepts of State Planning Areas and Centers**

The concept of Centers as a core element in a large scale development and redevelopment plan like the State Plan is a sound one. The State Plan divides New Jersey into five broad "Planning Areas": (1) The Metropolitan Planning Area, PA1, consisting of urban centers and older suburbs with little vacant land; (2) the Suburban Planning Area, PA2, mixed-use areas where much of the future development will occur; (3) the Fringe Planning Area, PA3, which provides a buffer between the more developed Planning Areas and the less developed Planning Areas; (4) the Rural Planning Area, PA4, which consists of countryside or farmland with large areas of cultivated or open land; and (5) the Environmentally Sensitive Planning Area, PA5, which contains valuable natural resources that must be preserved.<sup>52</sup> The key organizing principal to the State Plan and its Planning Areas are the Centers, which are designated areas of compact development designed to consume less land, deplete fewer natural resources and be more efficient in the delivery of public services.<sup>53</sup>

Centers are also the key component to the ability of both the State Plan and CAFRA to meet their respective mandates of accommodating necessary growth while preserving natural resources. The State Plan and Coastal Rules are designed to steer development into the Centers and promote natural resource preservation in their "Environs", meaning those areas outside of the Center boundaries. This is accomplished by allowing for the highest levels of development density in the Centers and increasingly lower levels in the other five Planning Areas. In the CAFRA zone, these levels, measured in percentage of impervious coverage permitted, are as follows:<sup>54</sup>

<sup>48</sup> N.J.S.A. 52:18A-206(b).

<sup>49</sup> N.J.A.C. 7:7E-5B.3(b).

<sup>50</sup> N.J.A.C. 7:7E-5B.3(b).

<sup>51</sup> Id.

<sup>52</sup> See also In the Matter of Protest of Coastal Permit Program Rules, 354 N.J. Super. 293 (App.Div. 2002).

<sup>53</sup> State Plan, <http://www.nj.gov/><sup>54</sup> N.J.A.C. 7:7E-5B.4.

| <b>Planning Area in Which Project is Located</b>           | <b>Percentage of Impervious Coverage</b> |
|--|--|
| CAFRA Town Center or Urban Center                          | 70-90%                                   |
| CAFRA Metropolitan Planning Area (PA1)                     | 80%                                      |
| Coastal Suburban Area (within a sewer service area) (PA2)  | 30%                                      |
| Coastal Suburban Area (outside a sewer service area) (PA2) | 5%                                       |
| Coastal Fringe Planning Area (PA3)                         | 5%                                       |
| Coastal Rural Planning Area (PA4)                          | 3- 5%                                    |
| Coastal Environmentally Sensitive Planning Area (PA5)      | 3-5%                                     |

Consistent with the principals of Center-based development, the Coastal Rules also provide that certain natural resources cannot be considered part of a CAFRA/Coastal Center, including areas mapped as endangered or threatened wildlife habitat on DEP’s Landscape Maps; areas mapped as Natural Heritage priority sites for unique plant or animal species; Category One surface waters; areas identified on the DEP CAFRA overlay maps as Coastal Critical Environmental Sites; and wetlands.<sup>55</sup>

**The Wrongful Inclusion of Environmentally Sensitive Areas in CAFRA Centers**

The single most prevalent weakness in the CAFRA Center Designations process is the failure of the agencies overseeing the process to adhere to the principals of Center-Based development or to follow the Coastal Rules. In several instances, municipalities have requested approval for CAFRA Centers that include environmentally sensitive areas within their boundaries and, despite the aforementioned principals and Rules, several of these requests have been approved by both the State Planning Commission and DEP.<sup>56</sup>

For example, DEP recently reviewed a request for new Planning Area boundaries and a changed CAFRA Center boundary that was previously reviewed and approved by formal resolution of the State Planning Commission.<sup>57</sup> The Center boundary changes incorporated approximately 200 acres of threatened and endangered species habitat and changed the designation of this habitat from a Coastal Environmentally Sensitive Planning Area (PA5) to a Coastal Suburban Planning Area (PA2).<sup>58</sup> These changes increased the impervious cover limits for the habitat from 5% to 70%.<sup>59</sup>

<sup>55</sup> N.J.A.C. 7:7E-5B.6

<sup>56</sup> See, e.g., New Jersey Coastal Growth Center Maps

<sup>57</sup> Notice of Acceptance of New and Changed Planning Area Boundaries and Designated Town Center Community Development Boundary, (Notice of Acceptance), 39 N.J.R. 768(b); NJ Department of Community Affairs, State Planning Commission Resolution No. 2005-03, Endorsing the Petition for Initial Plan Endorsement Submitted by Township of Ocean and Designating Waretown as Town Center, December 7, 2005.

<sup>58</sup> See, DCA SPC Resolution, par. 9, stating that portion of area within proposed Town Center amended from Environmentally Sensitive Planning Area 5 to a Suburban Planning Area 2; See, also NJ DEP Landscape Project Maps, <http://www.state.nj.us/dep/fgw/ensp/mapbook.htm>.

<sup>59</sup> Notice of Acceptance, p. 2

In its Notice of Acceptance, DEP stated that it had evaluated the boundaries and determined that they were consistent with the purposes of the CAFRA and the Coastal Rules.<sup>60</sup> While DEP acknowledged the resultant changes to the impervious cover limits, it made no mention whatsoever of the 200 acres of endangered and threatened wildlife habitat. Further, it provided no explanation as to how the boundaries could possibly be consistent with the Coastal Rule negating the inclusion in Coastal Centers of areas mapped as endangered or threatened wildlife habitat.<sup>61</sup> Nor was there any analysis or explanation as to how the boundary was consistent with the Coastal Rule prohibiting the development of endangered or threatened wildlife habitat unless it has been demonstrated that the endangered or threatened wildlife species would not be adversely affected.<sup>62</sup> According to the applicable Coastal Rule, such a demonstration could only be made through the preparation of an Endangered or Threatened Wildlife Species Impact Assessment, a complex and thorough scientific assessment using accepted ecological principles and scientific literature on habitat requirements and life history of each species.<sup>63</sup>

In support of its decision, DEP contended that it is not required to consider whether the boundaries are in accordance with specific applicable Coastal Rules but must only make a general determination of consistency with the overall goals of CAFRA and the Coastal Rules. In accordance with this interpretation, DEP was satisfied that the new CAFRA Center was designed to “concentrate, rather than disperse the pattern of coastal, residential, commercial, industrial, and resort development” and that it encouraged “the incorporation of smart growth designs into development... projects and in more compact forms due to the higher impervious cover limits possible in a CAFRA Town Center.”<sup>64</sup> DEP also argued that an analysis of compliance with the specific applicable Coastal Rules would occur when an applicant seeks a permit to develop in the Center.<sup>65</sup>

DEP’s interpretation of its responsibilities and its arguments in support of that interpretation are flawed for several reasons. First, its reasons for finding that the proposed CAFRA Center was consistent with CAFRA and the Coastal Rules are true of every Center, no matter what it includes within its boundaries. All Centers are designed to concentrate rather than disperse development and all Centers promote development in more compact forms due to their higher impervious cover limits.

Second, DEP’s interpretation creates a “boot-strapping” or reliance argument for any applicant that seeks a permit to build in the habitat in question. The facts available to an applicant are as follows: the area is undeveloped; it is located in the CAFRA Center, the very area where the Township wants to steer development; the designation of the Center was reviewed and approved by both the State Planning Board and the DEP; it has an impervious cover limit of 70%; and by virtue of its inclusion in the CAFRA Center, the municipality has expressed its desire and intent to develop the area. Certainly, any applicant that goes through the lengthy permit process would not expect to find that, in fact, development is prohibited in this area.

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<sup>60</sup> Notice of Acceptance, p. 5.

<sup>61</sup> N.J.A.C. 7:7E-5B.6(e).

<sup>62</sup> N.J.A.C. 7:7E-3.38(b); N.J.A.C. 7:7E-3C.2.

<sup>63</sup> Id.

<sup>64</sup> Notice of Acceptance, p. 5, 7.

<sup>65</sup> Id., at p. 7.

Third, for these same reasons, DEP's actions defeat the very purpose of planning, which is to instill predictability into an otherwise complex and unpredictable process. Finally, DEP's argument simply makes no sense. There will undoubtedly be many decisions regarding the details of a development application in CAFRA Centers that will require significant analysis by DEP staff and are therefore better left until the permit application process. However, whether or not to include 200 acres of threatened and endangered species habitat in an area designated for 70% impervious cover is not one of them. With no analysis at all, it is clear that according to the letter, spirit, purpose and goals of CAFRA and the Coastal Rules, and the purposes and goals of Center-based development, this particular boundary was not consistent.

### **Placing the Burden on Those Seeking to Include Environmental Resources in Centers**

The better course of action under such circumstances would be to place the burden on the municipality seeking to incorporate the environmentally sensitive resources in the CAFRA Center. In other words, the Township should have been required to demonstrate compliance with the applicable Coastal Rules, including through the preparation of an Endangered or Threatened Wildlife Species Impact Assessment, before DEP even considered including the area in the CAFRA Center. If the Township, or the developer that the Township has lined up to build in that area, cannot make such a demonstration or does not want to exert that effort up front, then the area should not be included in the Center. Under this scenario, when an applicant does seek a permit for development on the property, the application will be considered in its proper context – as a request to develop land designated as an Environmentally Sensitive Planning Area (PA5) with a development potential of 5% – and not on land designated as a Suburban Development Area capable of sustaining 70% impervious cover. This approach should be followed in every instance where a Township or municipality seeks to include in its Center natural resources that the Coastal Rules specify should not be included in Centers or for which the Coastal Rules state that development is prohibited or discouraged. Such an interpretation is not only permissible, but it is preferred as it is the interpretation most consistent with the purposes and goals of CAFRA, the Coastal Rules, the State Plan and Center-Based Development.

### **CAFRA Centers - Summary**

When the principals of Center-Based Development are followed and result in the proper establishment of CAFRA Centers and meaningful Coastal Planning Areas, it can be a successful way to accommodate for future growth in the coastal zone, while at the same time protecting our diminishing resources. To ensure success, DEP need only adhere to its own Coastal Rules, which are designed to exclude sensitive environmental resources from areas designated for the most dense development and growth.

## **SUMMARY AND CONCLUSIONS**

Currently, New Jersey is not using its existing coastal resource protection tools to their maximum potential. While these tools are not perfect, many of the weaknesses they exhibit are caused by a lack of understanding of their potential and a failure to utilize their most powerful provisions. Faced with increased development pressures in the coastal zone in combination with increasing sea level rise, storm surges and related coastal hazards, there is no question that we

must make some serious changes in the way we manage the use and protection of our coastal resources. Nevertheless, a better understanding and maximum use of the regulatory and planning mechanisms New Jersey already has in place will go a long way towards holding the line in the interim. The built-in flexibility of the Coastal Rules, the prohibitions they incorporate and the added protections of the CAFRA Section 10 Findings and Coastal Policies provide the means for DEP to modify its strategy in response to the increasing frequency and intensity of coastal hazards and make reasonable, safe permit decisions in the face of these challenges. The Coastal Rules also provide the means and support for DEP to implement the principals of Center-Based Development to establish appropriate and defensible CAFRA Centers and Coastal Planning Areas, steering development into the Centers and away from sensitive environmental resources.