

THIS IS A COURTESY COPY OF THIS NOTICE. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE NOVEMBER 15, 2021 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE NOTICE, THE OFFICIAL VERSION WILL GOVERN.

ENVIRONMENTAL PROTECTION

WATERSHED AND LAND MANAGEMENT

Notice of Action on Petition for Rulemaking

Coastal Zone Management Rules, N.J.A.C. 7:7-9.2, 9.6 and 12.5

Request to amend the Submerged vegetation habitat, Shellfish habitat and Recreational docks and piers rules to allow construction of structures that do not extend to a depth of four feet mean low water in certain circumstances

Petitioner: Craig and Tracy Cinelli

Take notice that the Department of Environmental Protection (Department) has determined to refer the petition for rulemaking from Craig and Tracy Cinelli (petitioners) for further deliberation. The petition, described below, was filed on August 11, 2021, with Notice of Receipt published in the September 21, 2021 issue of the New Jersey Register. (see 53 N.J.R. 1638(a))

The Petition

Petitioners request that the Department amend the Coastal Zone Management Rules, N.J.A.C. 7:7, to allow the construction of shorter and smaller recreational docks and piers in shellfish and submerged habitat areas than are currently allowed under the applicable rules provided that the

THIS IS A COURTESY COPY OF THIS NOTICE. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE NOVEMBER 15, 2021 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE NOTICE, THE OFFICIAL VERSION WILL GOVERN.

structures will not be used for the mooring of powerboats. Specifically, petitioners request that the Department amend N.J.A.C. 7:7-9.2, Submerged vegetation habitat, N.J.A.C. 7:7-9.6, Shellfish habitat, and N.J.A.C. 7:7-12.5, Recreational docks and piers.

Petitioners state that the recreational docks and piers rule, N.J.A.C. 7:7-12.5, provides that construction of recreational docks and piers is conditionally acceptable, but imposes conditions on where and how those structures may be built, including limitations when such structures are proposed in areas considered to be shellfish habitat or submerged vegetation habitat areas. The submerged vegetation habitat rule, N.J.A.C. 7:7-9.6, restricts construction to a single recreational dock or pier allowed solely if a minimum water depth of four feet at mean low water is present in the area where boats will be moored. No allowance is made for a structure where no boat mooring is proposed. Petitioners state that “This requirement, while well intended (it is designed to avoid potential adverse impacts to marine resources associated with powerboats), precludes the construction of smaller, shorter docks that afford property owners water access for activities such as fishing, swimming, crabbing and the use of non-motorized small craft.” Petitioners indicate that the rationale for the rule, at N.J.A.C. 7:7-9.6(e), explains that excluding boating activities where the water depth is less than four feet will ensure that impacts from boating are not likely to be destructive of plants or their habitat.

THIS IS A COURTESY COPY OF THIS NOTICE. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE NOVEMBER 15, 2021 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE NOTICE, THE OFFICIAL VERSION WILL GOVERN.

Petitioners assert that the Shellfish habitat rule, N.J.A.C. 7:7-9.2, allows a single recreational dock or pier associated with a single-family dwelling, but requires that the structure be designed and constructed in a manner that reduces adverse impacts to the marine ecosystem to the extent practicable. Petitioners indicate that the rule does not explicitly require docks extend to a location where a minimum water depth of four feet mean low water is present where boats are to be moored, but does include a cross-reference to the Submerged vegetation habitat rule in that regard at N.J.A.C. 7:7-9.2(d)3ii(2). Petitioners quote a portion of the rationale to the rule at N.J.A.C. 7:7-9.2(m), which indicates that there is an inherent conflict between the protection of shellfish habitat and water quality and boating related activities, such as mooring and dredging. Petitioners indicate that neither the language of the rule nor the rationale make allowance for structures where no boat mooring is proposed.

Petitioners assert that the three rule sections have been collectively interpreted and applied by the Department as meaning that recreational docks in shellfish habitat and submerged vegetation habitat area must in all cases extend to a depth of four feet at mean low water, even if an applicant has no interest in mooring powerboats. Petitioners assert that in many cases property owners are interested in constructing much shorter docks to be used for launching small boats, fishing, crabbing, swimming and simply enjoying access to the water. In some other cases, shallow water depth precludes the construction of a dock. In support of that assertion, petitioners submitted a bathymetric survey of water depths adjacent to their property indicating

THIS IS A COURTESY COPY OF THIS NOTICE. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE NOVEMBER 15, 2021 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE NOTICE, THE OFFICIAL VERSION WILL GOVERN.

that there is no point between the waterward edge of their property and the channel where a depth of four feet at mean low water is present.

For the reasons summarized above, the petitioners request that the rules be modified to allow the construction of structures that do not extend to a depth of four feet mean low water, provided that they will not be used for the mooring of powerboats. In the alternative, petitioners request that the Department clarify that the rules, as currently written, allow the construction of docks that do not reach four feet of depth at mean low water provided they are not used for the mooring of powerboats. Petitioners submit that such an amendment would not in any way undermine the Department's goal of minimizing adverse impacts to marine resources that might result from the operation of powerboats in shallow water.

The Department's Response to the Petition

The Department acknowledges that a rule amendment allowing for the construction of smaller docks in shellfish and SAV habitat may provide an avenue for the minimization of the footprint of these structures in sensitive areas, provided boat moorings are prohibited. However, as indicated in the rationales of the shellfish habitat special area rule, N.J.A.C. 7:7-9.2, and the submerged vegetation habitat special area rule, N.J.A.C. 7:7- 9.6, these areas are important environmental resources. As indicated in the shellfish habitat rationale, in addition to the value of shellfish as a harvestable resource, shellfish play an important role in the overall ecology of

THIS IS A COURTESY COPY OF THIS NOTICE. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE NOVEMBER 15, 2021 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE NOTICE, THE OFFICIAL VERSION WILL GOVERN.

the estuary, both as an important forage food source for a variety of finfish species, crabs, and migratory waterfowl, and as filter feeders helping maintain or improve water quality. Similarly, submerged vegetation in shallow water areas provides numerous important functions, including acting as suspended sediment traps, important winter forage for migratory waterfowl, and nursery areas for juvenile fin fish, bay scallops and blue crabs. Accordingly, additional time is needed to ensure that any change that may be determined to be appropriate is protective of these important areas. Among other things, the Department is currently considering whether an avenue exists in the rules as currently written to achieve the same outcome and is also considering its ability to monitor and enforce the requested rule change if it were to be made. The Department is therefore referring the matter for further deliberation to provide time for this evaluation.

This notice and the full text of the petition filed in this matter are available on the Department's website at <http://www.nj.gov/dep/rules/petition.html>.

In accordance with N.J.A.C. 1:30-4.2, the Department will subsequently mail to the petitioners and file with the Office of Administrative Law a notice of action on the petition.