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New Jersey's Public Trust Doctrine Codified: Protecting and Expanding Public Access to the Waterfront

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I. Introduction

New Jersey has long been at the forefront of public trust jurisprudence.[1] The public trust doctrine establishes that the state owns tidal waters, navigable waterways, and the lands flowed by them in trust for the people.[2] The doctrine became a controversial issue in New Jersey in the mid-20th century, during which time the state's beaches became a destination for millions of vacationers.[3] In the mid-1980s, the New Jersey Supreme Court established an unprecedented definition of the doctrine that required private and public landowners, subject to certain factors, to provide vertical and horizontal public access to tidal waterways and their adjacent shorelines.[4] It may come as a surprise, then, that the state's public trust doctrine was only codified into state statute in 2019.[5] For decades in the state, there has been persistent debate over what the public trust doctrine entails and who, if anyone, should be in charge of enforcing its mandate for public access to tidal waterways and adjacent shorelines.

New Jersey historically relied on the common law public trust doctrine as developed by case law when dealing with public access issues. As case law strengthened the common law public trust doctrine, the New Jersey Department of Environmental Protection ("DEP") began to enact

[1] *See* Jack Potash, *Comment: The Public Trust Doctrine and Beach Access: Comparing New Jersey to Nearby States*, 46 SETON HALL L. REV. 661, 662 (2016).
[2] *See* Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 119 (N.J. 2005).
[3] *See* Borough of Neptune v. Borough of Avon-by-the-Sea, 294 A.2d 47, 53 (N.J. 1972).
[4] *See Potash*, *supra* note 1, at 662; *see also infra* notes 13-22 and accompanying text. Horizontal access refers to the ability to walk along the waterfront, while vertical access (alternatively called perpendicular access) refers to the ability to cross land perpendicular to the waterfront.
[5] *See* discussion *infra* Section II.c, Section III.

regulations to effectuate public access.[6] The DEP has been at the center of debate between advocates of expansive public access rights, such as environmental groups, and industry and municipal interests in favor of more limited requirements for public access. The Appellate Division of the New Jersey Superior Court struck two iterations of the DEP's public access regulations, first in 2008 and then in 2015, leading the New Jersey State Legislature to intervene and enact statutory authorization for the DEP to regulate public access.[7] The State eventually enacted a bill, S. 1074, which enshrines the public trust doctrine in statute for the first time in New Jersey, and prescribes authorities and duties to the DEP and the State to protect and expand public access (the "2019 law" or the "new law").

This comment will examine how the 2019 law fits into New Jersey's historical public trust doctrine, how the law may affect the DEP's role in enforcing public access, and how the state might proceed in the future to ensure public access and address other public trust issues. Part II of this comment provides the background to the passage of the 2019 law, from the interpretation of the public trust doctrine by the state judiciary, to the DEP's entry into the public access debate, and finally to the promulgation of public access statutes by the state legislature in 2016 and 2019. Part III examines public trust case law in New Jersey, the legislative background of the new law, and practical considerations for enacting public access rules.

This comment will argue that the new law gives the DEP the authority to enforce many of the concerns of public access advocates, but that the language and legislative history of the new law will likely not allow the DEP to enact certain expansive regulations supported by some.

[6] *See infra* notes 24-35 and accompanying text.
[7] *See infra* notes 52-61, 77-86, 87-89 and accompanying text.

II. The Foundation of Public Waterfront Access Law in New Jersey: From Case Law to Statute

a. The Common Law Backdrop

The public trust doctrine has been part of New Jersey common law since *Arnold v. Mundy*,[8] which recognized that the sovereign owns the navigable waters in trust for the people. The Supreme Court in *Borough of Neptune v. Borough of Avon-by-the-Sea*[9] held that the people had a right under the public trust doctrine not just to fishing and navigation, but also to practice recreational activities such as bathing and swimming on both the publicly owned foreshore and the publicly owned upland dry sand area.[10] The Court held that the public trust doctrine "dictates that the beach and ocean waters must be open to all on equal terms and without preference, and that any contrary state or municipal action is impermissible."[11] The Court also observed that the doctrine "should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."[12]

The major case from which modern public trust law originates is *Matthews v. Bay Head Improvement Ass'n*.[13] In *Matthews*, the Bay Head Improvement Association, a nonprofit corporation, owned and maintained a one-and-a-quarter mile-long beach, and had 4,800-5,000 members.[14] The association restricted access to the beach to members, who were residents of the town of Bay Head, in the daytime and opened the beach to non-members during the evening and

[8] 6. N.J.L 1, 71, 78 (Sup. Ct. 1821). The origins of the doctrine extend at least as far back as the Sixth Century, when the Roman Emperor Justinian decreed that "the following things are by natural law common to all—the air, running water, the sea, and consequently the seashore. No one therefore is forbidden access to the seashore . . . ." J. INST. 2.1.1 (J.B. Moyle, trans., Oxford Clarendon Press 5th ed. 1913).
[9] 294 A.2d 47 (N.J. 1972).
[10] *Id.* at 54.
[11] *Id.*
[12] *Id.*
[13] 471 A.2d 355 (N.J. 1984)
[14] *Id.* at 358-59.

early morning hours.[15] The association allowed access to fishermen at all times and to non-members from Labor Day until mid-June.[16] Residents of the neighboring Borough of Point Pleasant sued the association, asserting that the association was denying the public its right of access to public trust lands.[17]

Overturning the trial and appellate courts, the *Matthews* court concluded that public's right to access the foreshore would be meaningless without a feasible access route.[18] After examining other contexts where nonprofit entities took on a quasi-public character, the Court deemed the Bay Head Improvement Association a quasi-public entity.[19] The Court concluded that the public's right to use the upland dry sand area should not be limited to municipally owned property.[20] While noting that the public's right to access private beaches is not co-extensive with the right to access municipal beaches, the Court held that "private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine" and that "[t]he public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand."[21] The Court alluded to factors that could determine the public's rights to access privately owned upland sand areas, namely "[l]ocation of the dry sand area in relation to the foreshore, extent and availability of publicly owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner."[22] These factors have since become known as the *Matthews* factors and continue to guide public trust jurisprudence in New Jersey.[23]

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[15] *Id.* at 359.
[16] *Id.*
[17] *Id.* at 358.
[18] *Id.* at 364.
[19] Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 368 (N.J. 1984).
[20] *Id.* at 365.
[21] *Id.* at 365-66.
[22] *Id.* at 365.
[23] *See, e.g., Potash*, *supra* note 1, at 668.

b. The DEP As Enforcer of the Public Trust Doctrine

Since before *Matthews*, the State of New Jersey had statutory guidelines for regulation of the coasts. In 1973, the State Legislature passed the Coastal Area Facility Review Act (CAFRA).[24] Recognizing the shore as a treasured resource, CAFRA aimed to protect the coastal areas of the state from environmental damage while still encouraging coastal development.[25] The act required anyone constructing a facility in a coastal area to first obtain a permit from the DEP by submitting an application with an environmental impact statement.[26] The act expressly authorized the DEP "to adopt, amend and repeal rules and regulations to effectuate the purposes of this act."[27] In 1993, the Legislature amended CAFRA to require such permits for residential and commercial developments.[28] In combination with further case law developments in public trust jurisprudence, CAFRA and similar statutes would come to establish the DEP as the primary enforcement entity of public access.

The New Jersey Supreme Court extended the applicability of the public trust doctrine to commercially-owned private property in *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*[29] In *Raleigh*, Atlantis Beach Club, Inc. ("Atlantis") owned and operated a private beach in Lower Township, access to which it limited to purchasers of either $700 seasonal badges or $10,000 easements.[30] The DEP had issued construction permits for the properties in question pursuant to

[24] P.L. 1973, c. 185.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] P.L. 1993, c. 190. Although CAFRA did not mention public waterfront access, the U.S. Congress had in 1972, through the Coastal Zone Management Act, required states to adopt coastal management programs that included "[a] definition of the term 'beach' and a planning process for the protection of, *and access to*, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value." 16 U.S.C. 1455(d)(2)(G) (emphasis added).
[29] 879 A.2d 112 (N.J. 2005).
[30] *Id.* at 115. The club later increased the easement price to $15,000, *Id.* at 117.

CAFRA and included in the permits requirements for the public to be able to access the beach.[31] A court battle ensued when Atlantis sought to enjoin members of the neighboring Raleigh Avenue Beach Association from crossing Atlantis property, prompting the Raleigh Avenue Beach Association to file a separate suit against Atlantis claiming violation of the public trust doctrine.[32] The Court noted that while *Matthews* concerned beach ownership by a private but quasi-municipal entity, the case established a framework for applying the public trust doctrine to privately-owned upland sand beaches.[33] Applying the *Matthews* factors, the Court held that the upland dry sand area of the Atlantis beach must be available for use by the general public.[34]

At the time of the *Raleigh* decision, DEP regulations had required coastal developments to provide "permanent perpendicular and linear access to the waterfront to the maximum extent practicable, including both visual and physical access."[35] The regulations also required publicly funded waterfront developments to provide "[p]ublic access, including parking where appropriate" and discouraged development that prohibited public access.[36] *Raleigh*'s unprecedented application of the public trust doctrine to commercially-owned private property would soon come to serve as the DEP's justification for regulations aimed at significantly expanding public access.

The DEP began to focus on public access issues after the election of Jon Corzine as Governor of New Jersey in 2006 and the appointment of Lisa Jackson as DEP Commissioner.[37] In 2006, the DEP proposed a revision of the public waterfront access rules, citing CAFRA and

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[31] *Id.* at 114-15.
[32] *Id.* at 116.
[33] *Id.* at 120-21.
[34] *Id.* at 124.
[35] N.J. ADMIN. CODE § 7:7E-8.11(b) (2003).
[36] *Id.* § 7:7E-8.11(b)(6).
[37] *See Governor Jon S. Corzine Timeline: 2006*, RUTGERS CENTER ON THE AMERICAN GOVERNOR, http://governors.rutgers.edu/on-governors/nj-governors/governor-jon-s-corzine-administration/governor-jon-s-corzine-timeline-2006/ (last accessed Apr. 10, 2020 at 6:05 p.m.).

Raleigh as authority.[38] The DEP stated that it had an obligation to protect the public's right to use public trust resources and to ensure that the public had adequate access to these resources.[39] The proposal was a radical expansion of the DEP's public waterfront access regulations. The DEP proposed to change the title of the public access rule itself from "Public access to the waterfront" to "Public trust rights," a change the DEP stated more accurately reflected the derivation and intent of the rules.[40] The proposal also moved to expand the rule to prohibit, rather than merely discourage, coastal development adversely affecting or limiting public trust rights.[41] The proposed rules excised the language requiring availability of public access to the greatest extent practicable and inserted requirements that developments "on or adjacent to all tidal waterways and their shores . . . provide on-site, permanent, unobstructed public access to the tidal waterways and its shores at all times, including both visual and physical access."[42] The proposal included exceptions to the "at all times" rule for "unique circumstances" during late night hours and for other circumstances, such as to protect habitats or for sensitive facilities like ports and military installations.[43] The proposal also would any municipality seeking appropriations from the Shore Protection Fund to provide parking and restrooms in proximity to the shore before it could receive funding by way of a State Aid Agreement.[44] Another rule required the municipality to acquire land, by eminent domain if necessary, to provide such parking areas and restroom facilities.[45]

[38] 38 N.J.R. 4570(a) at 1 (2006).
[39] *Id.* at 4.
[40] *Id.* at 25.
[41] *Id.* at 26-7, 99.
[42] *Id.* at 26, 99.
[43] *Id.* at 101.
[44] *Id.* § 7:7E-8.11(p)(7)(v); *Id.* § 7:7E-8A.2(c)(2)(i).
[45] *Id.* § 7:7E-8.11(p)(7)(i)(I).

The proposal received 559 comments during the review period.[46] Supporters of the proposal applauded the Department for protecting public trust rights,[47] while opponents criticized the proposed rules as statutorily unauthorized and beyond the scope of *Matthews* and *Raleigh*, which the commenters argued prescribed review of public access on a case-by-case basis rather than a "one-size-fits-all cookie cutter approach."[48] The DEP countered by arguing that *Raleigh* recognized the DEP's authority under CAFRA to "adopt rules and regulations governing land use within the coastal zone 'for the general welfare,'" and that therefore it had statutory and judicial authority to enact the proposed rules.[49] Despite the opposition, the DEP adopted the proposed rules with few changes.[50] The adopted rules added exceptions to the requirement to provide access "at all times" if a municipality obtained permission from the DEP to close the area during "late night hours" based on "unique circumstances" threatening "public safety" or at other times for "exigent circumstances."[51] For developments at which on-site public access would not be practicable for risks from hazardous operations or substantial or permanent obstructions, the adopted rules required the development to provide comparable off-site access at a nearby location.[52]

The 2007 regulations lasted less than a year. The Borough of Avalon sued the DEP in *Borough of Avalon v. N.J. Dep't of Envtl. Prot.*,[53] claiming that the 2007 regulations were *ultra vires,* or outside of the agency's statutory authority.[54] The Appellate Division agreed with the

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[46] 39 N.J.R. 5222(a) (2007).
[47] *Id.* at 23-28.
[48] *Id.* at 32-33, 35-39.
[49] *Id.* at 33-35.
[50] *See* N.J.R. 5222(a) at 333-44 (2007).
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[52] *Id.* § 7:7E-8.11(f)(3).
[53] 959 A.2d 1215, 1218 (N.J. Super. Ct. App. Div. 2008). While the *Avalon* litigation was underway, Governor Corzine approved legislation placing a moratorium on the public access regulations only as they applied to marinas. P.L. 2008, c. 92.
[54] *Avalon*, 959 A.2d at 1218-19.

municipality and struck the regulations on the grounds that they were not statutorily authorized.[55] The court stressed that the New Jersey Legislature had granted municipalities broad general police powers "to adopt such ordinances as they 'may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its residents.'"[56] The court also noted that the Legislature had expressly recognized that municipalities have "exclusive control" over municipally owned beaches.[57] The court rejected an argument by the DEP that its regulations were authorized by CAFRA.[58] The court noted that CAFRA allowed the DEP broad authority to regulate coastal zone land uses, but did not authorize the DEP to preempt municipal power to maintain and control municipally-owned beaches.[59] Notably, the court rejected the DEP's arguments that public trust doctrine case law gave it the requisite authority, noting that the cases it cited recognized that the Legislature left authority to municipalities to regulate and operate public beaches.[60] The court thus held that the public trust doctrine, as developed by case law, did not authorize the DEP to enforce public access by means of such regulations.[61] After the court struck these rules, the DEP adopted amendments to the public access rules in 2009 to comply with the court's ruling.[62]

The DEP revisited its public access rules under the administration of Governor Chris Christie, who took office on January 19, 2010.[63] Immediately after taking office, Gov. Christie

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[55] *Id.* at 1219.
[56] *Id.* at 1220 (quoting N.J. STAT. ANN. § 40:48-2).
[57] *Id.* (quoting N.J. STAT. ANN. § 40.61-22.20).
[58] *Id.* at 1221-22.
[59] Borough of Avalon v. N.J. Dep't of Envtl. Prot., 959 A.2d 1215, 1222 (N.J. Super. Ct. App. Div. 2008).
[60] *Id.* at 1221, 1224-25.
[61] *Id.* at 1225.
[62] 39 N.J.R. 5145(a) (Jan. 20, 2009).
[63] *N.J. governor Chris Christie says 'change has arrived' during inauguration speech*, NJ.COM (Jan. 19, 2010), https://www.nj.com/news/2010/01/governor_chris_christie_says_c.html.

sought to overhaul the state's administrative agencies, issuing an executive order directing all state agencies to enact "common sense principles."[64] Per the executive order, these principles were to ease regulatory burdens on economic development by requiring agencies to, *inter alia*, subject rulemaking to a cost-benefit analysis and create waivers for new and existing regulations.[65] Gov. Christie issued another executive order appointing members his cabinet, including newly-appointed DEP Commissioner Bob Martin, to a "Red Tape Review Group" that was to "undertake a review of certain rules, regulations and processes that are a burden on New Jersey's economy."[66] The Red Tape Review Group thereafter submitted a report to Gov. Christie identifying regulations in need of revision.[67] These included the DEP's public access rules, which the report included under the heading "Examples of Rules that Appear to Offend Common Sense."[68]

In 2011, under the direction of Commissioner Bob Martin, the DEP proposed revisions to the Coastal Zone Management rules.[69] Acknowledging both the *Avalon* court's invalidation of the 2007 regulations and Gov. Christie's executive order, the Department characterized the new proposed rules as an application of "common sense principles" of cooperation with municipalities, residents, and businesses instead of "proscriptive regulatory requirements."[70] The central change to the rules was to allow municipalities to create Municipal Public Access Plans ("MPAPs"), which would detail existing public waterfront access in the individual community and provide plans for expanding access.[71] Although municipalities could choose not to adopt MPAPs under the new regulations, municipalities that declined to adopt MPAPs would be ineligible for Green Acres and

[64] 42 N.J.R. 577(a) (Jan. 20, 2010).
[65] *Id.*
[66] Exec. Order No. 3 (Jan. 20, 2010), https://nj.gov/infobank/circular/eocc3.pdf.
[67] Red Tape Review Group Findings & Recommendations 3-5 (Apr. 19, 2010), https://naiopnj.org/Resources/Documents/Red%20Tape%20Review%20report%20Apr%2019%202010.pdf.
[68] *Id.* at 37.
[69] 43 N.J.R. 772(a) (Apr. 4, 2011).
[70] *Id.* at 3.
[71] *Id.* at 6-7.

Blue Trails funding and may rank lower in preference for shore protection funds.[72] The proposed rules included less substantive changes, such as changing the title of N.J.A.C. § 7:7E-8.11 from "Public trust rights" to "Public access."[73]

Environmentalists and other supporters of the 2007 rules criticized the proposed 2012 regulations, expressing concern that the rules relegated too much authority to municipalities and would allow them to block access without consequence.[74] Critics of the regulations argued that Jersey Shore municipalities had a history of driving people off beaches and limiting parking, and should not have authority from the DEP to continue doing so.[75] Municipal authorities praised the new rules as a relief from the prior rules, which they called "adversarial" and "unreasonable."[76] The DEP adopted the proposed rules in 2012, changing some of the mechanics of the MPAP system in place to allow the DEP more authority, but keeping the general MPAP regime in place.[77]

The 2012 rules prompted a 2015 lawsuit against the DEP by two environmental groups, Hackensack Riverkeeper, Inc. and NY/NJ Baykeeper.[78] The groups, which were advocates of expanded public access and supported the 2007 regulations,[79] argued along the lines of the plaintiffs in *Avalon* that the 2012 regulations were *ultra vires*.[80] As in *Avalon*, the complainants alleged that the regulations improperly sought to preempt municipal authority and were not

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[72] *Id.*
[73] *Id.* at 17, 76.
[74] *Id.*
[75] *Proposed N.J. beach access rules are debated in Galloway*, ASSOCIATED PRESS (May 17, 2011), https://www.nj.com/news/2011/05/proposed_nj_beach_access_rules.html.
[76] *Id.*
[77] 44 N.J.R. 2559(a) (Nov. 5, 2012).
[78] Hackensack Riverkeeper, Inc. v. N.J. Dep't of Envtl. Prot., 128 A.3d 749, 751-52 (N.J. Super. Ct. App. Div. 2015).
[79] *See* 39 N.J.R. 5222(a) at 26-27 (Comment 5).
[80] *Hackensack*, 128 A.3d at 751-52. Hackensack Riverkeeper stated in a press release that it was suing because the DEP did "not have legal authority to *allow* municipalities to restrict public access to tidal waters." *NY/NJ Baykeeper and Hackensack Riverkeeper Sue NJ DEP Over New Public Access Rule*, HACKENSACK RIVERKEEPER (Jan. 18, 2015), https://www.hackensackriverkeeper.org/nynj-baykeeper-and-hackensack-riverkeeper-sue-nj-dep-over-new-public-access-rule/ (emphasis added).

authorized by CAFRA or any other statute.[81] The American Littoral Society joined as an amicus curiae to defend the rules.[82] The court once again agreed, and reiterated that the common law public trust doctrine alone could not authorize the DEP to preempt municipalities without express authorization from the Legislature.[83] The court distinguished previous New Jersey public trust doctrine cases on the grounds that none of the cases ever delegated public trust authority to the DEP.[84]

Hackensack Riverkeeper and NY/NJ Baykeeper applauded the *Hackensack* decision, while the Littoral Society and DEP described it as a setback for public access.[85] While the Littoral Society acknowledged the appellants' intent to expand public access via the suit, it stressed that the decision stripped the DEP of its authority to regulate public access at all.[86] The Supreme Court denied certification in 2016.[87]

c. The Legislature Takes Action

Shortly after the *Hackensack* decision invalidated the 2012 DEP rules, the State Legislature in January 2016 passed a bill to delegate express authority to the DEP to require a person or municipality to give, as a condition of approval of a development plan, "on-site public access to the waterfront and adjacent shoreline, or off-site public access to the waterfront and adjacent shoreline if on-site public access is not feasible as determined by the [DEP]."[88] The bill also amended CAFRA to require the Commissioner of Environmental Protection to approve a permit

[81] *Hackensack*, 128 A.3d at 752, 755.
[82] *Id.* at 752.
[83] *Id.* at 755.
[84] *Id.* at 757-58.
[85] Claire Lowe, *Public access debate on hold after DEP plan rendered invalid*, PRESS ATLANTIC CITY (Jan. 1, 2016), https://www.pressofatlanticcity.com/news/public-access-debate-on-hold-after-dep-plan-rendered-invalid/article_d08d7fa0-b102-11e5-9a1b-cf68e6c82a30.html.
[86] *Id.* (statement of Tim Dillingham).
[87] Hackensack Riverkeeper v. N.J. Dep't Envtl. Prot., 2016 N.J. LEXIS 658 (Jun. 14, 2016).
[88] N.J. STAT. ANN. § 12:5-3(d) (2016).

for development only if the proposed development provides the aforementioned public access.[89] The bill passed the assembly and senate with bipartisan support and was signed into law by Gov. Christie.[90] The DEP thereafter adopted new rules that acknowledged the Legislature's delegation of authority to the department, but amended the 2012 rules to ensure, in line with *Hackensack*, that MPAPs would be entirely voluntary for municipalities and to relax some of the requirements for MPAPs.[91]

With the 2016 amendment in force, State Senator Bob Smith (D-Middlesex), chair of the Senate Environment and Energy Committee, appointed a task force composed of representatives of environmental and industrial interest groups to discuss and propose public access issues for the Legislature to consider for a future bill.[92] The task force documented its discussions of the issues and noted whether all members of the task force reached a consensus on each issue.[93] The task force discussed sixteen issues.[94] All members of the task force agreed on the need for legislation to direct the DEP and to ensure its policies are consistent with the public trust doctrine.[95] The task force also agreed that critical infrastructure, such as federally-designated sties of national security concern, should not be subject to onsite public access requirements.[96] All members also broadly agreed that public access policies and standards should recognize the diversity of the state's coastal shorelines and avoid "cookie-cutter" requirements.[97]

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[89] *Id.* § 13:19-10(h) (2016).
[90] S. 3321, 2014-2015 Leg., Reg. Sess. (N.J. 2016).
[91] 48 N.J.R. 1752(a) (Aug. 22, 2017). These regulations are current as of the time of this writing. *See infra* note 133.
[92] Report to Senator Robert Smith from the Public Access Task Force 2 (Apr. 2016) (unpublished report) (on file with author), included in e-mail from Michael Egenton, Exec. Vice Pres., Gov. Rel., N.J. Chamber of Commerce, to Daniel McCann, J.D. Candidate, Seton Hall University School of Law (Jan. 14, 2020, 09:31 EST) (on file with author) [hereinafter Task Force Report].
[93] *Id.*
[94] *Id.* at 6-27.
[95] *Id.* at 8.
[96] *Id.* at 10-11.
[97] *Id.* at 23.

Non-consensus items were more numerous. Key contested items included whether the law should require landowners to provide twenty-four-seven access as in the 2007 regulations, whether the law should require shore communities receiving state funds for coastal repair to provide expanded access, the extent to which laws and regulations should require landowners to provide perpendicular access to the shoreline, and whether the law should require facilities exempt from access requirements to provide for offsite public access.[98] The task force also discussed the prospect of creating a fee-shifting statute for plaintiffs to more readily bring suits to enforce public access.[99] While all members agreed on the need for better enforcement of public trust rights, they did not agree that a fee-shifting statute was an appropriate way to address the issue.[100]

Based on the comments of the public access task force, Sen. Smith proposed a draft bill in August 2016 as S. 2490.[101] The bill was primarily to amend Title 13, the CAFRA statute, to codify "the longstanding and inviolable public rights under the public trust doctrine" and to "ensure that the State, through the [DEP], protects the public's right of access to public trust lands …"[102] The bill began by defining the public trust doctrine essentially as defined in *Avon-by-the-Sea* and subsequent cases.[103] It then declared that the State "has a duty to promote, protect, and safeguard the public's rights and to ensure reasonable and meaningful public access to tidal waters and adjacent shorelines."[104] The bill delegated to the DEP the authority and duty to protect public access to tidal waters and adjacent shorelines and

> to make all tidal waters and their adjacent shorelines available to the public to the greatest extent possible, provide public access in all communities equitably, maximize different experiences provided by the diversity of the State's tidal waters and adjacent shorelines, ensure that the expenditure of public moneys maximizes public use and access where

[98] Task Force Report at 9,12-15, 18-22, 23-26.
[99] *Id.* at 25-26.
[100] *Id.*
[101] S. 2490, 2015-2016 Leg., Reg. Sess. (N.J. 2016). The bill was not formally introduced until Sep. 2016.
[102] *Id.* at 7-8.
[103] *Id.* §1(a) – (c). *See supra*, notes 8-11.
[104] *Id.* §1(d).

> public investment is made, and that remove physical and institutional impediments to public access to the maximum extent possible …[105]

The draft legislation also defined public access to include "visual and physical access," "sufficient perpendicular access from upland areas," and "necessary support amenities to facilitate public access for all, including public parking and restrooms."[106] The bill required the DEP to ensure any coastal permit or funding it issues is consistent with the public trust doctrine.[107] Consistent with the agreements of the task force, the bill also prohibited the DEP from requiring on-site access at sites designated exempt by the New Jersey Office of Homeland Security.[108] The bill did not, however, provide any guidance as to whether such locations should provide off-site public access, an issue on which the task force did not reach consensus.[109] The bill also required the DEP to condition the approval of any permit for a change in the footprint of an existing structure on the provision of additional public access.[110] Finally, the bill amended Title 40, the Municipal Land Use Law, to give municipalities the option of adopting a master plan that would be required to contain, among other things, a public access element.[111]

The Senate Environment and Energy Committee held a public hearing in August 2016 to discuss the draft legislation.[112] Sen. Smith emphasized at this hearing that S. 2490 would consist only of consensus items from the task force.[113] Smith stressed that only future legislation would address non-consensus items.[114] Despite Sen. Smith's attempt to draft a bill consisting only of

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[105] *Id.* §1(e).
[106] *Id.* §1(f).
[107] S. 2490 §2.
[108] *Id.* §3.
[109] *See* Task Force Report at 14-15.
[110] S. 2490 §4.
[111] S. 2490 §6.
[112] *J. Comm.* Meeting on S. 311, S. 2490, and A. 2954 Before the S. Environment and Energy Comm. and Assemb. Environment and Solid Waste Comm., 2016-2017 Sess. 2 (N.J. 2016) (statement of Sen. Bob Smith, Chair, S. Environment and Energy Comm.) [hereinafter Aug. J. Comm. Hearing].
[113] Aug. J. Comm. Hearing at 61-62 (statement of Sen. Bob Smith).
[114] *Id.* at 62. (statement of Sen. Bob Smith).

consensus items, the bill as drafted was not uncontroversial, as Smith himself acknowledged in the hearing.[115] The DEP, still under the leadership of Gov. Christie-appointee Bob Martin, was critical of language in the bill that required the DEP to make "all tidal waters and their adjacent shorelines available to the public to the greatest extent possible."[116] Representing the DEP at the hearing, Raymond Cantor stated that the "greatest extent possible" language would unduly burden shore homeowners, marinas, and businesses by requiring twenty-four-seven public access.[117] The New Jersey State League of Municipalities also voiced its opposition to language in the bill.[118] It criticized the language requiring the DEP to ensure permits or funds are consistent with the public trust doctrine as vague.[119] It also expressed concern that the language amending the Municipal Land Use Law did not specify any funding mechanism for municipalities to pursue when expanding public access.[120]

The bill remained in committee for nearly two more years. Between February 2018 and March 2019, the Legislature amended the language of the bill largely to address concerns of groups that had criticized the bill's earlier language, such as the New Jersey State League of Municipalities.[121] The most significant change was to the language requiring access to the "greatest extent possible," which the enacted bill changed to "greatest extent practicable."[122] The Legislature also added language to 13:1D-153 to expand the requirement on the DEP to require provision of public access for approval of permits for developments that change the use or footprint

[115] *Id.* at 2 ("We are not releasing a bill today, all right? We're taking testimony; the consensus bill -- with the topics that everybody agrees on -- is now controversial.") (statement of Sen. Bob Smith).
[116] *Id.* at 67 (statement of Raymond E. Cantor, Chief Advisor, N.J. Dep't Envtl. Prot.).
[117] *Id.* at 67-68. Mr. Cantor subsequently departed the DEP and now is Government Affairs VP of the New Jersey Business & Industry Association.
[118] New Jersey League of Municipalities, *Public Access Bill Flawed, S-2490*, THE TOWN CRIER (Aug. 23, 2016), https://njlmblog.wordpress.com/2016/08/23/public-access-bill-flawed-s-2490/.
[119] *Id.*
[120] *Id.*
[121] P.L. 2019, Chapter 81.
[122] N.J. STAT. ANN. § 13:1D-150(e) (2019).

of an existing structure to also include cases that involve beach or dune maintenance.[123] The bill also added requirements that the DEP enact the required changes within 18 months after passage of the bill.[124] The law eventually passed both chambers of the state legislature in March 2019 as S. 1074.[125] Governor Phil Murphy then signed it into law in May 2019.[126]

Despite the last-minute changes to the bill's broad language on access, environmental groups generally praised the passage of the bill. The Surfrider Foundation and NY/NJ Baykeeper praised the legislation's passage.[127] The Surfrider foundation stated the new law would prevent courts from striking down new DEP rules in the future.[128] The American Littoral Society also praised the passage of the bill.[129] The New Jersey chapter of the Sierra Club, however, criticized the new law as weak, particularly the change from "greatest extent possible" to "greatest extent practicable."[130] The Sierra Club claimed that this change would allow municipalities to sue to block access.[131]

III. Implications of the New Law for Public Waterfront Access Issues in New Jersey

This section will describe the implications of the statute for the present and for the near future. It argues that the Legislature intended the 2019 law to delegate significant but limited authority to the DEP to regulate public access. It also argues that future regulations, in order to

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[123] *Id.* § 13:1D-153.
[124] *Id.*
[125] S. 1074, 2018-2019 Leg., Reg. Sess. (N.J. 2019).
[126] *Governor Murphy Signs Legislation Protecting Public Access to Beaches*, Office of the Governor (May 3, 2019), https://www.nj.gov/governor/news/news/562019/approved/20190503c.shtml.
[127] *NJ Access Bill Passes After Years of Work*, SURFRIDER FOUNDATION (May 30, 2019), https://www.surfrider.org/coastal-blog/entry/nj-access-bill-passes-after-years-of-work; *Our Role in Securing Public Access in New Jersey*, NY/NJ BAYKEEPER (last accessed Nov. 14, 2019 at 5:18 P.M.), https://www.nynjbaykeeper.org/campaigns/legal/public-access/.
[128] *NJ Access Bill Passes After Years of Work*, *supra*, note 108.
[129] *Littoral Society Applauds NJ Governor's Signature on Beach & Waterfront Access Bill*, American Littoral Society Blog (May 3, 2019), https://www.littoralsociety.org/blog/society-applauds-waterfront-access.
[130] *Murphy Signs Weak Beach Access Bill*, SIERRA CLUB (May 3, 2019), https://www.sierraclub.org/new-jersey/blog/2019/05/murphy-signs-weak-beach-access-bill.
[131] *Id.*

survive judicial scrutiny, will have to strike a balance between the 2007 regulations, which broadly mandated access, and the 2012 regulations, which deferred to municipalities.

a. The new law recognizes the DEP as the primary enforcer of the public trust doctrine, but limits its authority

At its core, the statute reflects the intent of the Legislature, in cooperation with environmental, commercial, and municipal interest groups, to ensure that the DEP has express statutory authority to regulate public access to tidal waters and adjacent shorelines. Although, as Sen. Smith stressed, the 2019 law is meant to be a placeholder for future legislation that incorporates non-consensus items,[132] this legislation is still in the distant future. The Senate and Assembly environmental committees have not begun to draft this legislation, nor have they indicated a timeline as to when the legislative process would begin. Further, the DEP is currently drafting regulations per the terms of the 2019 law.[133] The 2019 law will therefore be the major relevant statute for the foreseeable future. Statutory interpretation of the 2019 law will be central to questions of the DEP's future actions regarding public access. The lack of statutory authorization for the DEP's access regulations was essential to the Appellate Division's decision in both *Avalon* and *Hackensack* on the grounds that the Legislature had not authorized the DEP to enact such rules.[134] Now that the Legislature has granted the DEP express authority—and indeed the duty—to enforce the public trust doctrine, a major issue in a future court battle over DEP public

[132] *See supra* note 114 and accompanying text.
[133] As of the time of this writing, the DEP is still in the process of drafting a proposal for new public access rules. Several stakeholder meetings have already been held. Per the terms of the 2019 law, the DEP must enact new regulations for coastal permits by Winter 2021. N.J. STAT. ANN. § 13:1D-153(b). The DEP stated in September 2019 that it planned to post proposed rules in the winter of 2020. *See Public Access Rules: Stakeholder Meeting September 23, 2019*, N.J. DEP'T ENVTL. PROT. (Sep. 23, 2019), https://www.nj.gov/dep/workgroups/docs/access-20190923-pres.pdf. As of April 2020, however, the DEP has yet to post a proposal. This Comment will therefore undergo significant revisions when the proposed regulations are posted, and again when the regulations are enacted.
[134] *See supra*, notes 58-60, 83-83.

access regulations will be whether the Legislature intended to allow the DEP to enforce public access in the manner at issue. The key question, then, is what does the 2019 law authorize the DEP to do?

i. The law's "greatest extent practicable" language reflects the Legislature's intent to balance differing interests in expanding public access

As a preliminary matter, the statute does not define the term "practicable" or the phrase "greatest extent practicable," meaning that the DEP will likely define the appropriate level of access that a permit holder must give in its implementing regulations. Under New Jersey law, a reviewing court "must give great deference to an agency's interpretation and implementation of its rules enforcing statues for which it is responsible."[135] A party challenging the enacted regulation carries the burden of proving that the rule contravenes the enabling statute.[136] A reviewing court will strike a rule if the rule is "inconsistent with the statute it purports to interpret."[137] The courts will therefore analyze any new standard of public access that the DEP promulgates against the language of the 2019 statute. In the administrative law context New Jersey courts have interpreted language similar to "greatest extent practicable" in a limiting manner rather than in a manner that gives the agency broad discretion. The Appellate Division interpreted "practicable" in the context of public access in *In re Riverview Dev., LLC, Waterfront Dev. Permit No. 0908-05-004.3 WFD 060001*,[138] which partially concerned the DEP's post-*Avalon* public access rules that encouraged coastal developments to provide physical and visual access "to the

[135] In re Freshwater Wetlands Prot. Act Rules, 852 A.2d 1083, 1090 (N.J. 2004) (citing *In re Distrib'n of Liquid Assets*, 773 A.2d 6, 11-12 (N.J. 2001)).
[136] *Id.* (citing *Bergen Pines County Hosp. v. New Jersey Dep't of Human Servs.*, 476 A.2d 843, 846 (N.J. 1987).
[137] *Id.* (citing *Smith v. Director, Div. of Taxation*, 527 A.2d 843, 846 (N.J. 1987) (internal quotation marks omitted).
[138] 986 A.2d 714 (N.J. Super. Ct. App. Div. 2010).

maximum extent practicable."[139] The court stressed that the "maximum extent practicable" language qualified the regulation's broader goal of protecting visual waterfront access and reflected the DEP's pragmatic concerns affecting waterfront development.[140]

A twenty-four-seven or "at all times" access rule would exceed the terms of practicable access. Municipalities and commercial interests argued that providing such access required near-constant security and lifeguards.[141] The cost of such services would have to be imposed either on residents through taxes or through beach fees. There are, however, compelling reasons for requiring provision of twenty-four-seven access. Certain species of fish can only be caught at night, for instance.[142] Anglers therefore need nighttime access to waters that house these fish.[143] The issue of fishing as relates to the public trust doctrine is complicated. While the public trust doctrine guarantees the right to fish in navigable waters, fishing is subject to regulations that are important for protecting fish populations and underwater habitats. For recreational use as well, many people using the beach after dark or in the early morning hours. Again, however, there are legitimate safety and resource concerns in requiring twenty-four-seven access short of a few exemptions, as in the 2007 rules. There are other concerns with providing twenty-four-seven access as well. For example, conservation groups began to deny Green Acres funds after the enactment of the 2007 rules because it was not feasible for them to give twenty-four-seven access to the public on their parks.[144] Thus, even given the compelling reasons for including a twenty-four-seven access requirement, practical considerations make such a requirement unfeasible.

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[139] *Id.* at 728.
[140] *Id.* at 729.
[141] *See* Task Force Report 19-20.
[142] *See* Jennifer C. Daetsch, et. al., *Guide to New Jersey's Saltwater Fishing*, N.J. DEP'T ENVTL. PROT. DIV. FISH AND WILDLIFE (last accessed Nov. 14, 2019 at 1:38 P.M.), https://njfishandwildlife.com/pdf/saltwater_fishing_guide.pdf.
[143] *See* Task Force Report at 19.
[144] Aug. J. Comm. Hearing at 68-69 (statement of Ray Cantor).

The legislative history also shows that the Legislature initially sought to grant authority to the DEP to maximize access to the greatest extent possible, but amended this language before the bill's passage to require access only to the greatest extent practicable.[145] This change happened after certain stakeholders opposed the "greatest extent possible" language at the August hearing and subsequent closed hearings.[146] Indeed, the DEP had originally inserted the "at all times" access requirement in the 2007 regulations after excising language that required access only to the greatest extent practicable.[147]

Further, other language in the law reflects the Legislature's intent to balance differing interests and avoid sweeping mandates for access. The findings and declarations section of the law, for example, prescribes the duty to the DEP to provide access in all communities equitably and "maximize different experiences provided by the diversity of the State's tidal waters and adjacent shorelines."[148] In another part of the law, the Legislature borrows language from *Avon-by-the-Sea* and stresses that the public trust doctrine is "not fixed or static," but is meant to change based on "changing conditions and the needs of the public it was created to benefit."[149] This language is both broad and limiting. The public trust doctrine in its most basic form can be seen as quite broad: the state owns the land up to the mean high water line in trust for the people, and the people have a right of access across the upland dry sand area.[150] But there exist valid limitations on access, including in this law. Under this law, for example, access is not allowed to areas sensitive to homeland security, and may be blocked where there are sensitive wildlife habitats.[151] The Matthews factors, too, take into account reasons why a landowner might limit

[145] *See supra*, note 122 and accompanying text.
[146] *See supra*, note 117 and accompanying text.
[147] *See supra*, notes 35, 42.
[148] N.J. STAT. ANN. § 13:1D-150(e) (2019).
[149] *Id.* § 13:1D-150(c).
[150] *See* Potash, *supra*, note 1 at 661.
[151] N.J. STAT. ANN. § 13:1D-152, 155 (2019).

access.[152] Such limitations reflect the reality that the public trust doctrine, in order to be effective, must be flexible and able to be applied without disrupting society.

ii. By vesting the DEP with the authority and duty to protect public trust rights, the new law affirms the DEP's place as regulator of public access and makes it accountable to environmental organizations and the public on public access issues

An essential aspect of the new law is that it officially establishes the DEP as the entity responsible for protecting and expanding public access. The law states:

> The Department of Environmental Protection has the authority and the duty to protect the public's right of access to tidally flowed waters and their adjacent shorelines under the public trust doctrine and statutory law. In so doing, the department has the duty to make all tidal waters and their adjacent shorelines available to the public to the greatest extent practicable …[153]

This language makes clear the Legislature's intent to ensure that courts do not have broad leverage to restrict the DEP's ability to act under the public trust doctrine. A sweeping holding such as that in *Hackensack Riverkeeper*, which all but prohibited the DEP from regulating public access, will now be less likely.[154] This language is significantly broader than the 2016 law, which only gave the DEP authority to condition approval of development permits on provision of public access.[155] Although the DEP has been involved in public access issues since the 1990s,[156] its place in the public access debate has been questioned, with some suggesting that public access is not an "environmental" question at all and therefore should not be the purview of the DEP.[157] The new

[152] *See supra*, note 21 and accompanying text.
[153] N.J. STAT. ANN. § 13:1D-150(e) (2019).
[154] *See supra*, notes 83-83 and accompanying text.
[155] *See supra*, notes 88-88 and accompanying text.
[156] *See supra*, notes 24-27 and accompanying text.
[157] *See* Claire Lowe, *Public access debate on hold after DEP plan rendered invalid*, PRESS ATLANTIC CITY (Jan. 1, 2016), https://www.pressofatlanticcity.com/news/public-access-debate-on-hold-after-dep-plan-rendered-

law makes it clear that ensuring public access to the waterfront is to be one of the DEP's tasks. Vesting this authority in the DEP through statute ensures that it will be able to enact regulations to protect and effectuate access without courts questioning its basic authority to do so.

The statute signals that the DEP is to protect and effectuate access through regulations, rather than through less intrusive means such as MPAPs. In stakeholder meetings, municipalities and property owner interest groups have encouraged the DEP to favor an approach that delegates all or most authority to municipalities, essentially keeping the rules as they currently exist.[158] While the new law does direct the DEP to consider department-approved MPAPs or municipal land use plans when determining the level of access required at a property,[159] the new law in general instructs the DEP to enforce public access through direct measures, such as regulations. In the section where it outlines the considerations the DEP must undertake when reviewing coastal permits, the new law requires the DEP to adopt regulations to which these public access considerations are to apply.[160] Thus, the statute's guidelines to the department can only be operative with new regulations, which the DEP will apply to review of coastal permits. The statute does not exclude MPAPs from this consideration, but MPAPs are to be merely a part of what the department must consider when reviewing a permit.

Effectuating access through regulations is a much more effective means of protecting public trust rights than MPAPs. As the critics of the 2012 rules (on which the current public access rule is based) emphasized, MPAPs are not effective at protecting public trust rights because they leave too much room for municipalities to block access and the DEP cannot effectively use them

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invalid/article_d08d7fa0-b102-11e5-9a1b-cf68e6c82a30.html ("I think [DEP] should focus on what they're established to do: environmental issues.") (statement of J. Scott Abbot, Solicitor, Margate Township).

[158] *See* Public Access Stakeholder Meeting Webinar, YOUTUBE (Oct. 9, 2019), https://www.youtube.com/watch?v=HDhxuESNWxs.

[159] *See* N.J. STAT. ANN. § 13:1D-153(a).

[160] *See id.*

as a means of requiring access.[161] DEP Land Use Assistant Commissioner Ginger Kopkash, who is overseeing the DEP's new public access rulemaking, has described the current MPAP submissions from municipalities as "underwhelming."[162] Regulations, on the other hand, will allow the department to ensure that, under its authority through CAFRA and similar statutes, it can ensure that new coastal developments provide access.[163]

All of this is not to say that the DEP should not make municipalities part of the public access conversation. While the new law is clear in its mandate to the DEP to enact regulations, the new law's amendment to the Municipal Land Use Law (MLUL) giving municipalities the option to include public access plan elements indicates that the Legislature intends to ensure that municipalities have a means of contributing.[164] Further, the laws upon which the *Avalon* court relied to strike this regulation are still in place.[165] While the law has new requirements for municipal land use plans,[166] it only requires an assessment of public access needs and does not preempt municipal authority.

While the DEP now has official authority to protect and expand public access under the law, it also now is accountable to environmental organizations and individuals on issues of public access. Under the 2019 law, the DEP has not only the authority, but also the duty to protect and expand public access. Recall that the appellants in *Hackensack Riverkeeper* sued the DEP under a theory that its regulations were *ultra vires*.[167] The appellants, in fact, favored the much more expansive 2007 regulations and criticized the 2012 regulations for deferring too much to

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[161] *See supra*, notes 69-77 and accompanying text.
[162] *See* Public Access Stakeholder Meeting Webinar, *supra*, note 158.
[163] *See* discussion *infra*, Section III.b.
[164] *See supra*, note 111 and accompanying text.
[165] *See* N.J. STAT. ANN. § 40:48-2 (2019) (delegating municipalities broad general police powers); N.J. STAT. ANN. § 40:61-22.20 (2019) (stating that coastal municipalities have "exclusive control" over municipally-owned coastal land).
[166] N.J. STAT. ANN. § 40:55D-28(19) (2019).
[167] *See supra*, note 80 and accompanying text.

municipalities.[168] Although the 2019 public access law does not contain a cause of action, it is foreseeable that a plaintiff could state a valid cause of action against the DEP pursuant to the clause of the statute defining the DEP's duty to protect the public's rights of access. Such a suit might arise, for instance, if the DEP promulgates a rule that contravenes the public trust doctrine or if it neglects to enforce a public access regulation. Claimants in favor of expansive public access, like the appellants in *Hackensack Riverkeeper*, may therefore be able to plead for judicial striking of rules without needing to show the rules are *ultra vires*. There would, of course, be limits to such claims. The court would look to the whole statute and the legislative history to determine if the particular claim falls within the DEP's duty to protect rights of public access.

Standing would likely not be an issue if an environmental group sued the DEP over a public trust issue. New Jersey courts follow a "liberal" standing standard and are not bound by a "case or controversy" requirement as binds federal courts.[169] The courts have held that environmental groups can have standing to challenge agency actions when the groups broadly represent the interests of citizens throughout the state.[170] Such standing can exist even if the agency adequately represents the group's interests.[171] Organizations such as the American Littoral Society that encompass a large amount of state citizens would therefore be likely to have standing.[172]

b. The new law both codifies and supplements New Jersey's public trust doctrine, specifically as concerns private property

Matthews and *Raleigh* remain good law. The *Matthews* factors thus remain in place as the primary means for determining when a landowner must provide access. The new law incorporates

[168] *See supra*, note 79 and accompanying text.
[169] *See* In re Camden County, 790 A.2d 158, 163 (N.J. 2002).
[170] *See* New Jersey Dept. Envt'l Prot. v. Exxon Mobil Corp., 181 A.3d 257, 274 (N.J. Super. Ct. App. Div. 2018).
[171] *Id.*
[172] *See* SMB Assoc. v. New Jersey Dept. Envt'l Prot., 624 A.2d 14, 17-19 (N.J. Super. Ct. App. Div. 1993).

some elements of the *Matthews* factors when prescribing guidance to the DEP, such as by requiring an assessment of the demand for public access when a development undergoes a change in footprint or use.[173] Stakeholders and litigants debating public access will no doubt continue to refer to *Matthews* and *Raleigh* for the foundational principles of public trust jurisprudence in New Jersey.

The new law does, however, supplement *Matthews* and *Raleigh* to the extent that it implicitly applies the public trust doctrine to private property subject to the DEP's jurisdiction under CAFRA and similar statutes. The application to private property is clear from the following section of the law:

> For any application for a permit or other approval to be issued by the Department of Environmental Protection pursuant to [CAFRA], [the Wetlands Act], [the Flood Hazard Area Control Act], or [the Coastal Zone Management Act], or any other law, if the application provides for a change in the existing footprint of a structure, a change in use of the property, or involves beach replenishment or beach and dune maintenance, the department shall review the existing public access provided to tidal waters and adjacent shorelines at the property and shall require as a condition of the permit or other approval that additional public access to the tidal waters and adjacent shorelines *consistent with the public trust doctrine* be provided. In determining the public access that is required at a property, the department shall consider the scale of the changes to the footprint or use, the demand for public access, and any department-approved municipal public access plan or public access element of a municipal master plan. The requirements of this subsection shall apply to any application for an individual permit submitted on or after the effective date of [this statute]. No later than 18 months after the effective date of [this statute], the requirements of this subsection shall apply to permits-by-rule, general permits, or general permits-by-certification issued by the department as provided in rules and regulations adopted pursuant to subsection b. of this section.[174]

This language applies to both private and public property because permits-by-rule, general permits, or general permits-by-certification are required of all coastal developments, whether private or public.[175] The statute takes care to note, however, that the DEP shall issue such permits consistent

[173] N.J. STAT. ANN. § 13:1D-153(a) (2019).
[174] *Id.* § 13:1D-150(4)(a) (emphasis added).
[175] *See Coastal Areas: NJ Coastal Management Permit Options*, N.J. DEPT. ENVT'L PROT. (Aug. 26, 2019), https://www.nj.gov/dep/landuse/coastal/cp_main.html.

with the public trust doctrine. The public trust doctrine as defined in the statute closely mirrors *Matthews* and *Raleigh*.[176] Courts will therefore continue to apply the *Matthews* factors when evaluating whether a private or public landowner has provided public access consistent with the public trust doctrine under a DEP-issued permit. Additionally, the statute goes beyond *Matthews* and *Raleigh* by defining public access to include visual access and support amenities "including, but not limited to, public parking and restrooms."[177] The statute does not make clear if the DEP must condition permits on provision of this expanded definition of public access. Since the statute does not define "public access" and "public trust doctrine" to be synonymous, it appears ambiguous whether the DEP has to ensure that applicants for permits provide visual access and restroom and parking amenities. This is not to say that the statute would not authorize the DEP to condition permits upon such access, as the DEP could simply refer to the statute's expansive definition of public access if it wishes to promulgate rules requiring provision of visual access and restroom and parking amenities. Indeed, this is one area where the statute seems to authorize the DEP to return to the 2007 regulations, which had stringent requirements for provision of parking and restroom amenities.[178]

This section of the statute also requires additional public access when a coastal development undergoes reconstruction with a change in footprint or use.[179] Some stakeholders have expressed concern that property owners may close existing public access routes or block potential public access routes when rebuilding a structure or building additions to a structure or when changing the use of a development.[180] Importantly, the language of the statute only speaks

[176] *See* N.J. STAT. ANN. § 13:1D-150(1)(a) -(c) (2019).
[177] N.J. STAT. ANN. § 13:1D-150(1)(f) (2019).
[178] *See supra*, note 45 and accompanying text.
[179] *Id.*
[180] Aug. J. Comm. Hearing at 86 (statement of Tim Dillingham); *see also* Public Access Stakeholder Meeting (Nov. 6, 2019), https://www.njdepcalendar.com/calendar/events/index.php?com=detail&eID=634 (audio file) (statement of Tim Dillingham).

to changes in use or footprint. Although it states that a developer should provide "additional access" with a change in use or footprint after the DEP surveys existing access, the clause specifying that a change in use or footprint mandates this access constrains the "additional access" language.[181] Depending on how the DEP applies this language to its regulations, the proposal may trigger backlash from property owners and interest groups. The language requiring the DEP to consider factors such as the scale of the footprint or use and the demand for public access can balance these concerns.

IV. Conclusion

The 2019 codification of the public trust doctrine represents a major step in New Jersey's public trust jurisprudence. By enshrining the doctrine in statute, defining public access, and delegating express duty and authority to the State and DEP to provide public beach access, the law makes public beach access a priority in New Jersey. This comment has suggested that the DEP take a measured approach to future regulations under the new law. Returning to the 2007 regulations would likely result in a court striking down the public access rules, thereby setting back the cause of public access yet again. The law was the result of consensus between access advocates and business and municipal interests, and should therefore be implemented as such. At the same time, the new law makes clear that the DEP is to protect and effectuate public access through regulations and maintain its role as the agency in charge of public access. The current regulations, which delegate authority to municipalities to effectuate public access on their own, are therefore likely to undergo significant revision. While the DEP should consider the limiting language of the new statute, it should not neglect to exercise its authority to protect and expand access.

[181] N.J. STAT. ANN. § 13:1D-153 (2019).