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APPENDIX 1. OBLIGATE AND FACULTATIVE FAUNA SPECIES FOUND IN VERNAL HABITATS**SUBCHAPTER 1. GENERAL INFORMATION****7:7A-1.1 Scope and authority**

This chapter constitutes the rules governing the implementation of the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., and the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. Certain violations of the New Jersey Water Pollution Control Act are also subject to enforcement provisions at N.J.A.C. 7:14.

Amended by R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

Rewrote the section.

Case Notes

The Commissioner has no power under CAFRA to make an independent judgment as to the ability of a nuclear facility to protect against radiation hazards, as regulation in this regard is preempted by the federal government. *Public Interest Research Group of New Jersey, Inc. v. State*, 152 N.J.Super. 191, 377 A.2d 915 (App.Div.1977), certification denied 75 N.J. 538, 384 A.2d 517 (1977).

Only lots for which preliminary site plan or subdivision applications had received preliminary approvals were exempt from wetland permit requirements. *Seemar v. Department of Environmental Protection*, 95 N.J.A.R.2d (EPE) 225.

7:7A-1.2 Construction of this chapter

This chapter shall be liberally construed to allow the Department to implement fully its statutory functions pursuant to the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., and pursuant to the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.

Amended by R.1992 d.117, effective March 16, 1992.

See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

Added reference to N.J.S.A. 58:10A-1 et seq.

Amended by R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

Inserted "Freshwater Wetlands Protection" preceding the first "Act, N.J.S.A. 13:9B-1", and inserted "pursuant" preceding "to the Water Pollution".

7:7A-1.3 Forms and information; internet web site

(a) Forms or other information related to this chapter may be obtained from the Land Use Regulation Program as follows:

1. Through the Land Use Regulation Program website at www.state.nj.us/dep/landuse; or
2. By contacting the Land Use Regulation Program at:

Land Use Regulation Program
New Jersey Department of Environmental Protection
PO Box 439
Trenton, New Jersey 08625-0439
(609) 292-0060
Fax: (609) 292-8115

(b) Applications, fees, and correspondence shall be submitted to the address in (a) above, except that courier and hand deliveries shall be delivered to:

Land Use Regulation Program
New Jersey Department of Environmental Protection
5 Station Plaza
501 East State Street
Trenton, New Jersey 08609

(c) Applications or other materials sent or delivered to a Department address other than those in (a) and (b) shall not be deemed to have been received for the purposes of calculating application review deadlines or other time periods under this chapter.

(d) Other sources of information referred to in this chapter are available on the Land Use Regulation Program website at www.state.nj.us/dep/landuse, or from the Office of Maps and Publications, located at 428 State Street, Trenton, New Jersey 08625, (609) 777-1038.

Amended by R.1992 d.117, effective March 16, 1992.

See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

Added address for other sources of information.

Amended by R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

Rewrote the section.

7:7A-1.4 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise. Additional definitions specifically applicable to N.J.A.C. 7:7A-15, Mitigation, are set forth at N.J.A.C. 7:7A-15.1.

"Abandoned" means, with respect to an agricultural field, including a blueberry field or a cranberry bog, that the field was used for agriculture, but has not been used to produce a crop or product for five years or more. If an agricultural field has been abandoned for 40 or more years, it shall no longer be considered an abandoned agricultural field.

"ACOE" or "Corps" means the United States Army Corps of Engineers.

"Acid producing soils" means soils that contain geologic deposits of iron sulfide minerals (pyrite or marcasite) which, when exposed to oxygen from the air or from surface waters, oxidize to produce sulfuric acid. Acid producing soils, upon excavation, generally have a pH of 4.0 or lower. After exposure to oxygen, these soils generally have a pH of 3.0 or lower. Information regarding the location of acid producing soils in New Jersey can be obtained from local Soil Conservation District offices.

"Agency of the State" means each of the principal departments in the executive branch of the State Government, and all boards, divisions, commissions, agencies, departments, councils, authorities, offices or officers within any such departments.

"Applicant" means a person who submits an application for a permit, waiver, or any other Department decision pursuant to N.J.A.C. 7:7A.

"Aquatic ecosystem" means waters of the United States, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals.

"Atlantic white-cedar wetlands" means a type of forested freshwater wetlands where Atlantic white-cedar tree is the dominant vegetation, as described in the Federal Manual.

"Best Management Practices" or "BMPs" means methods, measures, designs, performance standards, maintenance procedures, and other management practices which prevent or reduce adverse impacts upon or pollution of freshwater wetlands, State open waters, and adjacent aquatic habitats, which facilitate compliance with the Federal Section 404(b)(1) guidelines (40 C.F.R. Part 230), New Jersey Department of Environmental Protection Flood Hazard Area Control rules, N.J.A.C. 7:13; the Department's Storm Water Management Regulations, N.J.A.C. 7:8; the Standards for Soil Erosion and Sediment Control in New Jersey, promulgated by the New Jersey State Soil Conservation Committee at N.J.A.C. 2:90; and effluent limitations or prohibitions under Section 307(a) of the Federal Act and the Department's Surface Water Quality Standards, N.J.A.C. 7:9B. Examples include practices found at 33 C.F.R. 330.6, 40 C.F.R. 233.35(a)6, the Department's Technical Manual for Stream Encroachment, and "A Manual of Freshwater Wetland Management Practices for Mosquito Control in New Jersey." The manuals included in this definition are only a partial listing, and interested persons should contact the Department for the most up to date list.

"Excavation" means to dig or remove soil, rocks, etc., resulting in a change in site elevation.

"Farmed wetland" means a freshwater wetland, as defined in this section, which was both manipulated and cropped before December 23, 1985, and has been in active agricultural use continuously since then. This term also includes a wetland that was manipulated and used for pasture or hayland before December 23, 1985, which has been in active use for pasture or hayland continuously since then. An area that lies fallow as part of a conventional rotational cycle that does not exceed five years is considered to be in active agricultural use.

"Federal act" means the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq., including any amendments and supplements, and implementing regulations. This statute is sometimes referred to as the Federal Clean Water Act.

"Federal 404 program" means the program regulating the discharge of dredged or fill materials pursuant to Section 404 of the Federal Act.

"Fill" means the deposition or placement of material such as soil, sand, earth, rock, concrete, pavement, or solid material of any kind, so as to change the ground elevation in relation to surface water or groundwater level. "Fill" also means the material deposited.

"Forested" means that tree species with an average height greater than 20 feet are the predominant vegetation present.

"FW" means the general surface water classification applied to fresh waters in the Department's Surface Water Quality Standards, N.J.A.C. 7:9B.

"FW1 waters" means waters designated as FW1 waters in the Department's Surface Water Quality Standards, N.J.A.C. 7:9B. As of September 4, 2001, N.J.A.C. 7:9B-1.15 defines FW1 waters as those fresh waters wholly within Federal or State lands or special holdings, that are preserved for posterity, and are not subject to wastewater discharges of human origin.

"FW2 waters" means waters designated as FW2 waters in the Department's Surface Water Quality Standards, N.J.A.C. 7:9B.

"Freshwater wetland" or "wetland" means an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation; provided, however, that the Department, in designating a wetland, shall use the three-parameter approach (that is, hydrology, soils and vegetation) enumerated in the 1989 Federal Manual as defined in this section. These include tidally influenced

wetlands which have not been included on a promulgated map pursuant to the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq.

"Freshwater wetlands permit" means a permit to engage in a regulated activity in a freshwater wetland issued pursuant to the Freshwater Wetlands Protection Act and this chapter.

"Gabion" means a shore or stream bank protection structure, that is made of wire mesh basket(s) or mattress(es) filled with rocks and usually used in multiples as a structural unit installed to withstand the forces of waves and currents.

"General permit" means a permit, adopted as a rule, under which the Department issues authorizations. A general permit may authorize regulated activities in freshwater wetlands, State open waters, and/or transition areas. An authorization issued under a general permit satisfies the requirement for a freshwater wetlands permit, open water fill permit, and/or transition area waiver, as applicable.

"Government agency" means any department, division, authority, board, commission, office, bureau, agency, committee or other instrumentality of the United States, or of the State or any political subdivision thereof.

"Harvesting" means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads or other engineering practices such as drainage which would alter the existing character of the farm, forest or ranch land.

"HUC 11" or "hydrologic unit code 11" means an area within which water drains to a particular receiving surface water body, which area is identified by an eleven digit hydrologic unit boundary designation, as shown on the map included in the United States Geological Survey, Water Resources Investigations Report 95-4134, 1995, entitled "Development of a 14-digit Hydrologic Coding Scheme and Boundary Data Set for New Jersey." The HUC codes for New Jersey can be downloaded from www.njgeodata.state.nj.us. The HUC 11 data is entitled "subwatersheds." Software designed for use with Geographic Information Systems (GIS) will be required to view the downloaded data.

"Hydric soil" means a soil that in its undrained condition is saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions that favor the growth and regeneration of hydrophytic vegetation. These soils may be described in several places, including New Jersey's Official List of Hydric Soils, developed by the Natural Resources Conservation Service; the National Wetlands Inventory, entitled "The Wetlands of New Jersey," published in 1985 by the United States Fish and Wildlife Service; or in the 1989 Federal manual. Alluvial land, as

mapped on soil surveys, or other soils exhibiting hydric characteristics identified through field investigation as described in Part III of the 1989 Federal Manual may also be considered a hydric soil for the purposes of wetland classification. Also, wet phases of somewhat poorly drained soils not on New Jersey's Official List of Hydric Soils may be associated with a wetland and therefore for the purposes of this chapter shall be considered a hydric soil.

"Hydrophyte" means plant life adapted to growth and reproduction under periodically saturated root zone conditions during at least a portion of the growing season. A listing of these plants can be found in the "National List of Plant Species that Occur in Wetlands: 1988-New Jersey" and amendments thereto, compiled by the USFWS, ACOE, EPA and the Natural Resources Conservation Service.

"Impervious surface" means any structure or surface which prevents absorption of stormwater into land. Examples of impervious surfaces are pavement, rooftops, sidewalks, driveways, tennis courts and swimming pools.

"Individual permit" means a freshwater wetlands permit or open water fill permit that is issued by the Department after an alternatives test and other site-specific and project-specific reviews required at N.J.A.C. 7:7A-7.

"Individual transition area waiver" means a transition area waiver issued by the Department under N.J.A.C. 7:7A-6, which is not granted as part of a general permit authorization. The following are the types of individual transition area waivers:

1. An averaging plan transition area waiver;
2. A special activity transition area waiver;
3. A matrix type width reduction transition area waiver;
4. A hardship transition area waiver; and
5. An access transition area waiver.

"Intermittent stream" means surface water drainage channels with definite bed and banks in which there is not a permanent flow of water. Most intermittent streams are shown on Soil Conservation Service county soil surveys.

"Isolated wetlands" means a freshwater wetland that is not "part of a surface water tributary system," as defined in this section.

"Lake, pond, or reservoir" means any impoundment of water, whether naturally occurring or created in whole or in part by the building of structures for the retention of surface water.

"Letter of interpretation" or "LOI" means the document issued by the Department under N.J.A.C. 7:7A-3, indicating the presence or absence of wetlands, State open waters, or transition areas; verifying or delineating the boundaries of freshwater wetlands, State open waters, and/or transition areas; or assigning a wetland a resource value classification.

"Linear development" means land uses such as roads, drives, railroads, sewerage and stormwater management pipes, gas and water pipelines, electric, telephone and other transmission lines and the rights-of-way therefor, the basic function of which is to connect two points. Linear development shall not mean residential, commercial, office, or industrial buildings, improvements within a development such as utility lines or pipes, or internal circulation roads.

"Loss" means, with respect to freshwater wetlands or State open waters, an alteration of a wetland or water to the extent that the wetland or water, or portion thereof, no longer retains the functions and characteristics of a wetland or water.

"Major discharge" means a discharge or activity that the Department must transmit to EPA for review in accordance with the Department's 1993 MOA with EPA regarding assumption of the Federal 404 program. Provisions regarding EPA review of major discharges are found at N.J.A.C. 7:7A-12.2. The following are major discharges:

1. A draft general permit;
2. A discharge with reasonable potential to affect Federally listed or proposed endangered or threatened species as determined by the U.S. Fish and Wildlife Service;
3. A discharge of dredged or fill material which has the potential for adverse impacts on the waters of a state other than New Jersey;
4. A discharge known or suspected to contain:
 - i. Toxic pollutants as identified by Section 307(a)(1) of the Federal act;
 - ii. Hazardous substances identified pursuant to Section 311 of the Federal act and Section 101(14) of the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601 et seq.;
 - iii. Toxic substances as defined by Section 3 of the Toxic Substances Control Act, 15 U.S.C. §§ 2601 et seq. or
 - iv. Hazardous waste as defined by Section 1004(5) of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq.;
5. A discharge located in the proximity of a public water supply intake;

"Transition area" means an area of upland adjacent to a freshwater wetland which minimizes adverse impacts on the wetland or serves as an integral component of the wetlands ecosystem.

"Transition area waiver" or "waiver" means a waiver issued by the Department under this chapter, authorizing any of the regulated activities enumerated at N.J.A.C. 7:7A-2.6 in a transition area.

"Tree" means a woody plant which is five inches or greater in diameter at a height of four and one half feet above the ground.

"Trout production waters" means waters designated in the Department's Surface Water Quality Standards, N.J.A.C. 7:9B, for use by trout for spawning or nursery purposes during their first summer.

"USEPA" or "EPA" means the United States Environmental Protection Agency.

"USFWS" means the United States Department of the Interior, Fish and Wildlife Service.

"USGS" means the United States Geological Survey.

"USGS quad map" means a topographic quadrangle map issued by the USGS, 7.5 minute series, drawn at a scale of 1:24,000, available from the Department's Maps and Publications Office at the address listed in N.J.A.C. 7:7A-1.3.

"Utility line" means a pipe, cable, line, conduit, or wire for the transport or transmission of gases, liquids, electrical energy or communications. This term includes a tower or pole required to support a utility line, but does not include a tower or pole that only transmits waves through the air, such as for radio, television, or telephone transmission. The term "utility line" does not include a stormwater pipe, or a pipe that drains a wetland or State open water, such as a drainage tile.

"Vernal habitat" means a wetland or water that meets all of the criteria at 1 through 4 below. Evidence of breeding by an obligate species under 2i below creates a rebuttable presumption that the criteria at 3 and 4 below are met:

1. Occurs in a confined basin depression without a permanent flowing outlet;

2. Features evidence of breeding by one or more species of fauna adapted to reproduce in ephemeral aquatic conditions, identified in N.J.A.C. 7:7A, Appendix 1, incorporated herein by reference. The following shall constitute evidence of breeding by such a species:

i. One or more obligate species listed in Appendix 1, or evidence of such a species, is found in the area of ponded water; or

ii. Two or more facultative species listed in Appendix 1, or evidence of the presence of such a species, are found in the area of ponded water;

3. Maintains ponded water for at least two continuous months between March and September of a normal rainfall year; and

4. Is free of fish throughout the year, or dries up at some time during a normal rainfall year.

"Water-dependent activity" means an activity that cannot physically function without direct access to the body of water along which it is proposed. An activity that can function on a site not adjacent to the water is not considered water dependent regardless of the economic advantages that may be gained from a waterfront location.

"Water Pollution Control Act" means the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.

"Waters of the State" means the ocean and its estuaries, all springs, streams, wetlands, and bodies of surface or ground water, whether natural or artificial, within the boundaries of the State of New Jersey or subject to its jurisdiction.

"Waters of the United States" means:

1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

2. All interstate waters including interstate wetlands;

3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), wetlands, mudflats, sandflats, sloughs, wet meadows, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

i. Which are or could be used by interstate or foreign travelers for recreational or other purposes;

ii. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

iii. Which are used or could be used for industrial purposes by industries in interstate commerce;

iv. Which are or would be used as habitat by birds protected by Migratory Bird Treaties;

v. Which are or would be used as habitat by other migratory birds which cross state lines;

vi. Which are or would be used as habitat for endangered and threatened species; or

vii. Which are used to irrigate crops sold in interstate commerce;

4. All impoundments of waters otherwise defined as waters of the United States under this definition;

5. Tributaries of waters identified in paragraphs 1 through 4 of this definition;

6. The territorial seas; and

7. Wetlands adjacent to waters identified in paragraphs 1 through 6 of this definition other than those that are themselves wetlands.

The following waters are generally not considered "waters of the United States." However, the right is reserved to determine on a case by case basis, if particular watercourses or waterbodies are "waters of the United States":

1. Non-tidal drainage and irrigation ditches excavated on dry land;

2. Artificially irrigated areas which would revert to upland if the irrigation ceased;

3. Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

4. Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons;

5. Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the above definition of "waters of the United States";

6. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling ponds); and

7. Erosional channels less than two feet wide and six inches deep in upland areas resulting from poor soil management practices.

"Water quality certificate" means a Department determination issued for a proposed activity which requires a Federal license or permit, pursuant to 33 U.S.C. § 1341 of the Federal Act and N.J.S.A. 58:10A-1 et seq.

"Working day" means a day upon which the offices of the New Jersey Department of Environmental Protection are open for business.

Amended by R.1989 d.362, effective July 3, 1989.
See: 21 N.J.R. 596(a), 21 N.J.R. 1858(a).

Deleted old definition and added new for "Documented habitat for threatened or endangered species." Added new definition for "Transition area waiver."

Amended by R.1992 d.117, effective March 16, 1992.
See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

Changes initiated to create a program that is as stringent as that of the U.S. Army Corps of Engineers under the Clean Water Act (33 U.S.C. 1251 et seq.) in order to secure the assumption of the permit jurisdiction.

Amended by R.1993 d.159, effective April 19, 1993.

See: 24 N.J.R. 912(b), 25 N.J.R. 1755(b).

Added definitions for "advanced stages of construction."

Amended by R.1993 d.646, effective December 20, 1993.

See: 25 N.J.R. 1642(a), 25 N.J.R. 5954(a).

Amended by R.1999 d.352, effective October 4, 1999.

See: 31 N.J.R. 1562(a), 31 N.J.R. 2964(a).

Inserted definitions of "Abandoned", "Atlantic white-cedar wetlands", "Federal Manual", "Forested", "Loss", and "Tree".

Amended by R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

Rewrote the section.

Amended by R.2003 d.44, effective January 21, 2003.

See: 34 N.J.R. 2388(a), 35 N.J.R. 418(a).

Added "Property as a whole".

Case Notes

INVALIDITY ANNOTATION: Validity of definition of "residential development project" affected. In the Matter of Freshwater Wetlands Protection Act Rules, 180 N.J. 478 (2004).

Township's land use ordinance reducing permissible development area and requiring documentation was not preempted by Freshwater Wetlands Protection Act. *Crow-New Jersey 32 Ltd. Partnership v. Township of Clinton*, D.N.J.1989, 718 F.Supp. 378.

Regulation was not invalid on the theory that it permitted regulation outside freshwater wetlands. *New Jersey Chapter of Nat. Ass'n of Indus. and Office Parks v. New Jersey Dept. of Environmental Protection*, 241 N.J.Super. 145, 574 A.2d 514 (A.D.1990) certification denied 122 N.J. 374, 585 A.2d 379, certification denied 122 N.J. 374, 585 A.2d 380.

Projects that received preliminary approval prior to July 1, 1989 were exempt from compliance with transition-area provisions of Freshwater Wetlands Protection Act. *Appeal of Adoption of N.J.A.C. 7:7A-1.4 (Definition of "Documented Habitats for Threatened and Endangered Species" and "Swale")*, 7:7A-2.5(b)(2), and 7:7A-2.7(f), 118 N.J. 552, 573 A.2d 143 (1990).

7:7A-1.5 Severability

If any subchapter, section, subsection, provision, clause, or portion of this chapter, or the application thereof to any person, is adjudged unconstitutional or invalid by a court of competent jurisdiction, such judgment shall be confined in its operation to the subchapter, section, subsection, provision, clause, portion, or application directly involved in the controversy in which the judgment was rendered and it shall not affect or impair the remainder of this chapter or the application thereof to other persons.

Amended by R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

Substituted "the" for "such" following "the controversy in which", and "was" for "shall have been" preceding "rendered".

7:7A-1.6 Other statutes and regulations

(a) The powers, duties and functions vested in the Department under this chapter shall not limit in any manner the powers, duties and functions vested therein under any other law except as specifically set forth in this chapter.

(c) If a pre-application conference is to be held, the Department shall schedule the pre-application conference within 15 days after receiving a request for one. If a pre-application conference is not scheduled within this deadline, the applicant may apply directly for a permit.

Amended by R.1992 d.117, effective March 16, 1992.
See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

Further delineated information which should be part of the pre-application conference request.

Amended by R.2001 d.312, effective September 4, 2001.
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

7:7A-9.3 through 7:7A-9.4 (Reserved)

7:7A-9.5 (Reserved)

Amended by R.1992 d.117, effective March 16, 1992.
See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

Changes initiated to create a program that is as stringent as that of the U.S. Army Corps of Engineers under the Clean Water Act (33 U.S.C. 1251 et seq.) in order to secure the assumption of the permit jurisdiction.

Repealed by R.2001 d.312, effective September 4, 2001.
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

Section was "Application for activities under Statewide General Permits".

7:7A-9.6 (Reserved)

New Rule: R.1992 d.117, effective March 16, 1992.
See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).
Repealed by R.2001 d.312, effective September 4, 2001.
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).
Section was "Hearings and appeal".

7:7A-9.7 (Reserved)

New Rule: R.1992 d.117, effective March 16, 1992.
See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).
Repealed by R.2001 d.312, effective September 4, 2001.
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).
Section was "Duration of permit authorizations".

7:7A-9.8 (Reserved)

New Rule: R.1992 d.117, effective March 16, 1992.
See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).
Repealed by R.2001 d.312, effective September 4, 2001.
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).
Section was "Cancellation, withdrawal, resubmission and amendment of applications".

7:7A-9.9 through 7:7A-9.23 (Reserved)

SUBCHAPTER 10. APPLICATION CONTENTS AND PROCEDURE

7:7A-10.1 Basic application information

(a) This subchapter describes the application contents and procedures required for most Department permits, waivers, and authorizations.

(b) This subchapter applies to an application for all of the following:

1. A letter of interpretation, including an extension or modification of a letter of interpretation;

2. Authorization to act under a general permit, except that the following activities are subject to application requirements in the general permits listed below, and are not subject to any of the application requirements in this subchapter except for the public notice requirements at N.J.A.C. 7:7A-10.9:

i. The ongoing maintenance of an off-stream storm-water management facility created in uplands under general permit 1;

ii. The repair or modification of an individual subsurface disposal system (septic system) under general permit 25; and

iii. Minor channel or stream cleaning performed by a local government agency under general permit 26;

3. A combined flood hazard area permit and general permit authorization;

4. An individual transition area waiver;

5. An individual open water fill permit;

6. An individual freshwater wetlands permit; and

7. A minor modification, major modification, or extension of a permit, including a transition area waiver or general permit authorization.

(c) This subchapter does not apply to the following:

1. An exemption letter. Application requirements for an exemption letter are found at N.J.A.C. 7:7A-2.10; or

2. A mitigation proposal. Application requirements for a mitigation proposal are found at N.J.A.C. 7:7A-15.12.

(d) An application shall be submitted by the owner of the site which is the subject of the application, or by a person who has the legal authority to perform the activities proposed in the application on the site, and to carry out all requirements of this chapter. Others may assist the owner in preparing an application, and may submit reports or other information in accordance with N.J.A.C. 7:7A-10.10.

(e) An applicant shall include on an application all planned activities which are related to the proposed project.

(f) Failure to provide all required information of which the applicant, its consultants, or agents is aware may result in denial or termination of the permit under N.J.A.C. 7:7A-14.5, and may subject the applicant to penalties for submittal of false information under N.J.A.C. 7:7A-16.9.

(g) For each application, the applicant shall provide all information necessary for the Department to determine if the requirements of this chapter are met. The Department will provide an application checklist setting forth the infor-

mation required for an administratively complete application. Each application checklist will require different information depending on the type of approval sought.

(h) Application checklists and application forms for Land Use Regulation Program approvals can be downloaded and/or printed from the Land Use Regulation Program website at www.state.nj.us/dep/landuse, or they can be obtained by contacting the Department at the address in N.J.A.C. 7:7A-1.3.

(i) In general, the level of detail and documentation required for an application shall be reasonably commensurate with the size and impact of the proposed project, its proximity to critical areas, and its potential to adversely affect freshwater wetlands, transition areas, and/or State open waters. The Department shall, upon request, provide applicants with guidance regarding the appropriate level of detail.

(j) An applicant shall supply each required document in multiple copies as specified in the application checklist. In some cases, the application checklist shall also specify the size or material (such as mylar) of a document, and may require the document to be folded for easier handling.

(k) To minimize permit processing time, an applicant should carefully review the application checklist and make sure the application includes all required information. Following are the Department's average application processing times for 2000, from the date an application is submitted until the Department's final decision on the application. An applicant should assume that at least this amount of time will be required for Department review of the application. Some applications will take longer, depending on how quickly the applicant responds to Department requests for additional information, and on the size and complexity of the application:

1. For a letter of interpretation, approximately 69 calendar days;
2. For an authorization under a general permit, approximately 65 calendar days;
3. For an individual transition area waiver, approximately 71 calendar days; and
4. For an individual permit, approximately 161 calendar days.

(l) If a project requires more than one permit or waiver under this chapter, one application may be submitted for all permits or waivers.

(m) If a project requires approvals from the Land Use Regulation Program under other chapters, the Department encourages, but does not require, the applicant to submit one application for all project approvals. If an application covers more than one Land Use Regulation Program approval, the application shall:

1. Comply with the application requirements of each permit program;
2. Include the application fee required at N.J.A.C. 7:7A-11 for multiple approvals; and
3. Include a comprehensive environmental plan, showing all activities on the site that are regulated by the Land Use Regulation Program.

(n) An applicant shall keep all data used to complete an application, and any information submitted to the Department during the application review process, for three years after the application is submitted to the Department, or for the duration of the permit if one is issued, whichever is longer.

(o) If a project requires mitigation, the applicant shall submit a mitigation proposal complying with the mitigation proposal requirements at N.J.A.C. 7:7A-15 with the application, or alternatively, the applicant shall submit the mitigation proposal later, during the application review process or after a permit is approved. Regardless of when the mitigation proposal is submitted, regulated activities shall not begin on a site for which mitigation is required until the Department approves the mitigation proposal and the mitigation is also begun.

(p) An application for regulated activities in an area under the jurisdiction of the Pinelands Commission shall be submitted to the Pinelands Commission rather than to the Department, except for an application for an individual freshwater wetlands permit, which shall be submitted to the Department in accordance with this subchapter.

New Rule, R.2001 d.312, effective September 4, 2001.
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

7:7A-10.2 Basic content requirements for all applications

(a) This section includes basic information required for every approval covered by this subchapter (see N.J.A.C. 7:7A-10.1(b)). Each application checklist will require this information and in addition will require information specific to the type of approval sought. The additional information required for each specific approval is set forth below at N.J.A.C. 7:7A-10.3 through 10.8.

(b) The application checklist for every application covered by this subchapter shall require the following:

1. An application form, including a certification of truth and accuracy that meets the requirements at N.J.A.C. 7:7A-10.10, completed as directed in the instructions and/or application checklist. The application form will include basic information regarding the site, the applicant, and the activities proposed;
2. Unconditional written consent from the owner of the site, as defined at N.J.A.C. 7:7A-1.4, for Department representatives to enter the site to conduct site inspections;

3. The appropriate fee, set forth at N.J.A.C. 7:7A-11;

4. Visual materials, including, but not limited to, maps, plans, surveys, diagrams, or photographs as necessary to accurately portray the site, existing conditions on the site, and any activities proposed on the site;

5. Written narrative information and/or reports as necessary to accurately describe the site, its location (including State plane coordinates), site conditions, and any planned activities, including schedules for performing regulated activities, if appropriate;

6. Documentation that the applicable requirements at N.J.A.C. 7:7A-10.9, Public notice requirements for applications, have been met;

7. Information and/or certifications regarding the presence or absence of endangered or threatened species habitat, historic or archaeological resources, or other features on the site that are relevant to determining compliance with the requirements of this chapter. Failure to provide all such information of which the applicant, its consultants, or agents is aware may result in denial or termination of the permit under N.J.A.C. 7:7A-14.5, and may subject the applicant to penalties for submittal of false information under N.J.A.C. 7:7A-16.9;

8. The names and addresses of all consultants, engineers, and other persons providing technical assistance in preparing the application; and

9. Any other information not listed in this subsection, if necessary to ensure compliance with the Federal rules governing the Department's assumption of the Federal 404 program at 40 CFR § 233.30.

(c) In addition to the information required at (b) above, the Department may require any information necessary to clarify information previously submitted, to ensure compliance with State and/or Federal law, or to determine whether an application meets State and/or Federal standards.

(d) Whenever the Department requires a construction plan or other visual depiction of proposed activities, the Department may require that certain information pertinent to the construction work be placed directly on the plan in order to provide notice of Department construction requirements to the workers who will carry out the permitted activities.

New Rule, by R.2001 d.312, effective September 4, 2001.
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

7:7A-10.3 Additional application requirements for an LOI

(a) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2, an application checklist for an LOI shall require the information specified in this section.

(b) The application checklist for a presence/absence LOI for a portion of a site under N.J.A.C. 7:7A-3.2 shall require

information identifying the portion(s) of the site which is the subject of the application.

(c) No additional information is required for an application for a line delineation LOI issued under N.J.A.C. 7:7A-3.3.

(d) The application checklist for a line verification LOI issued under N.J.A.C. 7:7A-3.4 shall require the following:

1. A proposed delineation of all freshwater wetlands, transition areas, and State open waters on the site, or portion thereof, which is the subject of the application. The delineation shall be clearly marked in the field as required by the application checklist;

2. Soil borings and/or other physical indicators of the presence or absence of freshwater wetlands, transition areas, and/or State open waters;

3. Data sheets or other materials that explain and support the delineation; and

4. If the LOI is for a portion of a site, documentation that the site and portion meet the requirements at N.J.A.C. 7:7A-3.4(b)2i through iii, and information identifying the subject portion of the site in accordance with N.J.A.C. 7:7A-3.4(b)2iv.

New Rule, R.2001 d.312, effective September 4, 2001.
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

7:7A-10.4 Additional application requirements for a general permit authorization

(a) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2, the application checklist for a general permit authorization shall require:

1. Any information specified as an application requirement in the general permit itself at N.J.A.C. 7:7A-5, if not included in N.J.A.C. 7:7A-10.2;

2. A line delineation LOI issued under N.J.A.C. 7:7A-3.3, or a line verification LOI issued under N.J.A.C. 7:7A-3.4, if an LOI of either type has been issued. A presence/absence LOI issued under N.J.A.C. 7:7A-3.2 is not sufficient. If no LOI has been issued, or if only a presence/absence LOI has been issued, the application checklist shall require all information required for an application for a line delineation LOI or line verification LOI, covering the portion of the site that will be affected by the general permit activities;

3. Information regarding whether other approvals are required for the activities by Federal, interstate, State and local agencies for the activity; information regarding whether any such approvals or denials have been received; and information regarding whether the proposed activities are consistent with the rules, plans, or policies of other Federal, interstate, State and local agencies; and

4. If a site is known or suspected to be contaminated with toxic substances, and if the Department requests it, a laboratory analysis of representative samples of the soil or sediment on the site.

New Rule, R.2001 d.312, effective September 4, 2001.
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

7:7A-10.5 Additional application requirements for an individual transition area waiver

(a) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2, an application checklist for an individual transition area waiver, as defined at N.J.A.C. 7:7A-1.4, shall require the following:

1. A line delineation LOI issued under N.J.A.C. 7:7A-3.3, or a line verification LOI issued under N.J.A.C. 7:7A-3.4, if an LOI of either type has been issued. A presence/absence LOI issued under N.J.A.C. 7:7A-3.2 is not sufficient. If no LOI has been issued for the site, or if only a presence/absence LOI has been issued, the application checklist shall require all information required for an application for a line delineation LOI or line verification LOI;

2. Information regarding whether other approvals are required for the activities by Federal, interstate, State and local agencies for the activity; information regarding whether any such approvals or denials have been received; and information regarding whether the proposed activities are consistent with the rules, plans, or policies of other Federal, interstate, State and local agencies; and

3. If a site is known or suspected to be contaminated with toxic substances, and if the Department requests it, a laboratory analysis of representative samples of the soil or sediment on the site.

(b) In addition to the information required at (a) above, the application checklist for a hardship transition area waiver under N.J.A.C. 7:7A-6.5 shall require the information required for an individual freshwater wetlands permit application at N.J.A.C. 7:7A-10.6(b).

New Rule, R.2001 d.312, effective September 4, 2001.
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).
Amended by R.2003 d.44, effective January 21, 2003.
See: 34 N.J.R. 2388(a), 35 N.J.R. 418(a).
Added (b).

7:7A-10.6 Additional application requirements for an individual freshwater wetlands or open water fill permit

(a) In addition to the basic information required for all applications in N.J.A.C. 7:7A-10.2, the application checklist for an individual freshwater wetlands or open water fill permit shall require the following information:

1. The basic project purpose of the proposed activity, including whether it is water-dependent, as defined at N.J.A.C. 7:7A-1.4;

2. A line delineation LOI issued under N.J.A.C. 7:7A-3.3, or a line verification LOI issued under N.J.A.C. 7:7A-3.4, if an LOI of either type has been issued. A presence/absence LOI issued under N.J.A.C. 7:7A-3.2 is not sufficient. If no LOI has been issued for the site, or if only a presence/absence LOI has been issued, the application checklist shall require all information required for an application for a line delineation LOI or line verification LOI;

3. Information regarding whether other approvals are required for the activities by Federal, interstate, State and local agencies for the activity; information regarding whether any such approvals or denials have been received; and information regarding whether the proposed activities are consistent with the rules, plans, or policies of other Federal, interstate, State and local agencies; and

4. If a site is known or suspected to be contaminated with toxic substances, and if the Department requests it, a laboratory analysis of representative samples of the sediment on the site.

5. A copy of the deed and/or other legal documents pertaining to the site;

6. Information regarding special aquatic sites, public lands, critical habitat, and other relevant environmental features of the site; and

7. An alternatives analysis that meets the requirements at (b) below.

(b) To ensure that the Department can evaluate all potential alternatives to a proposed project, the application checklist for an individual freshwater wetlands permit shall require an alternatives analysis that allows the Department to evaluate whether the requirements of N.J.A.C. 7:7A-7.2 are met, including, at a minimum the following:

1. A description of all alternatives considered, including offsite alternatives as well as onsite alternatives that could minimize environmental impacts on the site, and the reasons for rejecting each alternative;

2. Information regarding the history of the property as a whole, as necessary to evaluate the cost to the property owner of various alternatives. Such information may include:

i. Document(s) showing when the property as a whole, as defined at N.J.A.C. 7:7A-1.4, was acquired and its purchase price;

ii. Documentation of any investments made to maintain and/or develop the property as a whole;

iii. Documentation of attempts by the property owner to sell the property or to obtain other property; and

3. Documentation of the environmental impacts of the proposed project, and of ways to minimize those impacts.

New Rule, R.2001 d.312, effective September 4, 2001.
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).
Amended by R.2003 d.44, effective January 21, 2003.
See: 34 N.J.R. 2388(a), 35 N.J.R. 418(a).
Rewrote (a)7; added (b).

7:7A-10.7 Additional application requirements for a combined flood hazard area permit and general permit authorization

(a) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2, the application checklist for a combined freshwater wetlands general permit 2 authorization and flood hazard area permit authorizing an underground utility line shall require both of the following:

1. All information required under N.J.A.C. 7:7A-10.4 for an application for authorization under general permit 2; and

2. Any additional information necessary to demonstrate compliance with N.J.A.C. 7:7A-5.2A.

(b) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2, the application checklist for a combined freshwater wetlands general permit 10A authorization and flood hazard area permit authorizing a very minor road crossing shall require both of the following:

1. All information required under N.J.A.C. 7:7A-10.4 for an application for authorization under general permit 10A; and
2. Any additional information required under N.J.A.C. 7:13 to demonstrate compliance with the Department's Flood Hazard Area Control Act rules.

(b) The burden of proof and degrees of knowledge or intent required to establish a violation of the Freshwater Wetlands Protection Act or of any permit, order, rule or regulation promulgated pursuant thereto shall be no greater than the burden of proof or degree of knowledge or intent which USEPA must meet in establishing a violation of the Federal Act or implementing regulations.

(c) If the Department finds that a person is or has been violating any applicable law and/or condition, the Department may take one or more of the following actions:

1. Issue an administrative order under N.J.A.C. 7:7A-16.3;
2. Bring a civil action under N.J.A.C. 7:7A-16.4;
3. Assess a civil administrative penalty under N.J.A.C. 7:7A-16.5 through 7:7A-16.12;
4. Bring an action for a civil penalty under N.J.A.C. 7:7A-16.13; and/or
5. Bring a criminal action under N.J.A.C. 7:7A-16.14.

(d) For all violations under this subchapter, each day during which each violation continues shall constitute an additional, separate, and distinct violation for which a separate penalty may be assessed.

(e) Each violation of any applicable law and/or condition shall constitute an additional, separate, and distinct violation for which a separate penalty may be assessed.

(f) The Department's pursuit of any of the remedies available under this subchapter shall not preclude the Department's pursuit of any of the other remedies for the same or another violation. Compliance with any Department enforcement order, including payment of a penalty, shall not preclude the Department from pursuing any of the other remedies available under this subchapter in connection with the violation for which the order was issued.

Amended by R.1992 d.117, effective March 16, 1992.
See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

Stylistic changes only.

Amended by R.2001 d.312, effective September 4, 2001.
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

Case Notes

Dredging private property on lagoons in violation of prescribed setback for bulkheads rendered dredger strictly liable for penalty. *Hoeh v. Department of Environmental Protection*, 95 N.J.A.R.2d (EPE) 210.

7:7A-16.2 USEPA review

The Department shall make available without restriction any information obtained or used in the implementation of the Freshwater Wetlands Protection Act, the Water Pollution Control Act, and/or this chapter, to USEPA upon request.

Amended by R.1992 d.117, effective March 16, 1992.

See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

Stylistic changes only.

Amended by R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

Former N.J.A.C. 7:7A-16.2, Fees for review of requests for letters of interpretation, was repealed.

7:7A-16.3 Administrative order

(a) Whenever, on the basis of available information, the Department finds a person in violation of any applicable law and/or condition, the Department may issue an order:

1. Specifying each provision of the applicable law and/or condition which has been, or is being violated;
2. Citing the action which constituted the violation;
3. Requiring immediate compliance with the provision or provisions violated;
4. Requiring the restoration or rehabilitation of the freshwater wetlands, State open waters or transition area which is the site of the violation; and
5. Providing notice of the right to a hearing on the matters contained in the order.

Amended by R.1992 d.117, effective March 16, 1992.

See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

Editorial changes only.

Amended by R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

Former N.J.A.C. 7:7A-16.3, Fees for review of individual freshwater wetlands and open water fill permits, was repealed.

7:7A-16.4 Civil action

(a) Whenever, on the basis of available information, the Department finds a person in violation of any applicable law and/or condition, the Department may institute a civil action in Superior Court for appropriate relief. Such relief may include, singly or in combination:

1. A temporary or permanent injunction;
2. Assessment of the violator for the costs of any investigation, inspection, or monitoring survey which led to the establishment of the violation, and for the reasonable costs of preparing and bringing legal action under this section;
3. Assessment of the violator for any costs incurred by the State in removing, correcting, or terminating the adverse effects upon the freshwater wetlands, State open waters or transition areas resulting from any unauthorized regulated activity for which legal action under this section may have been brought;
4. Assessment against the violator for compensatory damages for any loss or destruction of wildlife, fish or aquatic life, and for any other actual damages caused by an unauthorized regulated activity. Assessments under this section shall be paid to the State Treasurer except that compensatory damages shall be paid by specific order

of the court to any persons who have been aggrieved by the unauthorized regulated activity; and/or

5. A requirement that the violator restore or rehabilitate the site of the violation to the maximum extent practicable, as defined in N.J.A.C. 7:7A-1.4. If the violator does not do so, the Department may take corrective action, and will assess the violator pursuant to this chapter.

Amended by R.1992 d.117, effective March 16, 1992.

See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

Reference made to "transition areas" in (a)3.

Amended by R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

Former N.J.A.C. 7:7A-16.4, Fees for review of Statewide general permit authorization applications, was repealed.

7:7A-16.5 Civil administrative penalty

(a) Whenever, on the basis of available information, the Department finds a person in violation of any provision of the Freshwater Wetlands Protection Act, or of any permit, waiver, order, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto, the Department may assess a civil administrative penalty of no more than \$10,000 for each violation. The amount of the civil administrative penalty for a violation of the Freshwater Wetlands Protection Act shall be determined under N.J.A.C. 7:7A-16.8 through 16.12.

(b) Whenever, on the basis of available information, the Department finds a person in violation of any provision of the Water Pollution Control Act, or of any permit, approval, waiver, order, exemption, or rule promulgated or approved pursuant thereto, the Department may assess a civil administrative penalty of no more than \$50,000 for each violation. The amount of the civil administrative penalty for a violation of the Water Pollution Control Act shall be determined under the Department's rules implementing the enforcement provisions of that law at N.J.A.C. 7:14-8.

(c) The Department may, in its discretion, settle a civil administrative penalty assessed under this subchapter, in accordance with N.J.A.C. 7:7A-16.6(c). However, if the Department settles a penalty for a violation of the Water Pollution Control Act, the settlement is subject to N.J.A.C. 7:14-8.

Amended by R.1992 d.117, effective March 16, 1992.

See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

"Commissioner" changed to "Department" throughout.

Amended by R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

Former N.J.A.C. 7:7A-16.5, Fees for review and processing of transition area waiver applications, was repealed.

Case Notes

Placement of fill on property with freshwater wetland status warranted civil administrative penalty assessment. Division of Coastal Resources v. Angel of the Sea Development, 95 N.J.A.R.2d (EPE) 167.

Mowing of vegetation, though a regulated activity requiring permit, did not warrant monetary penalty when unintentional. Department of Environmental Protection and Energy v. Juliano, 95 N.J.A.R.2d (EPE) 147.

Filling protected wetland without permit; penalty assessed. Bala v. New Jersey Department of Environmental Protection. 93 N.J.A.R.2d (EPE) 164.

7:7A-16.6 Assessment, settlement and payment of a civil administrative penalty

(a) To assess a civil administrative penalty, the Department shall notify the violator by certified mail (return receipt requested) or by personal service. This notice of civil administrative penalty assessment shall:

1. Identify each section of the applicable law and/or condition violated;
2. Concisely state the facts alleged to constitute the violation;
3. Specify the amount of the civil administrative penalty; and
4. Advise the violator of the right to request an adjudicatory hearing under N.J.A.C. 7:7A-16.7.

(b) The violator shall pay a civil administrative penalty immediately upon receipt of the Department's final order in a contested case, or as soon as a notice of civil administrative penalty assessment becomes a final order as follows:

1. If no hearing is requested under N.J.A.C. 7:7A-16.7, a notice of civil administrative penalty assessment becomes a final order on the 21st day after the violator receives the notice of civil administrative penalty assessment;
2. If the Department denies a hearing request under N.J.A.C. 7:7A-16.7(c) or (d), a notice of civil administrative penalty assessment becomes a final order upon the violator's receipt of the denial; or
3. If the Department grants a hearing, a notice of civil administrative penalty assessment becomes a final order upon the violator's receipt of a final order in the contested case.

(c) The Department may, in its discretion, settle any civil administrative penalty assessed under this subchapter, based on an evaluation of the factors at (c)1 through 4 below. As provided at N.J.A.C. 7:7A-16.5(c), this subsection does not apply to penalties assessed for violations of the Water Pollution Control Act:

1. Mitigating or extenuating circumstances not previously considered in the assessment of penalties;
2. The violator's timely implementation of measures leading to compliance, which measures were not previously considered in the assessment of penalties, including measures to clean up, reverse or repair environmental damage caused by the violation, or to remove the violation;

Amended by R.1992 d.117, effective March 16, 1992.

See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

Changes made in (b).

Amended by R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

7:7A-16.10 Civil administrative penalty amount for failure to allow entry and inspection

(a) When the Department assesses a civil administrative penalty under the FWPA against a person who refuses, inhibits or prohibits immediate lawful entry and inspection of any premises, building or place by any authorized Department representative, the Department shall use the procedures in this section to determine the amount of the civil administrative penalty. The amount of a civil administrative penalty for refusal of entry and inspection under the WPCA shall be determined under N.J.A.C. 7:14-8.7.

(b) Each day that a person refuses, inhibits or prohibits immediate lawful entry and inspection shall be an additional, separate, and distinct violation.

(c) The daily civil administrative penalty for a violation under this section shall be assessed at the midpoint of the following ranges, except as adjusted under (d) below:

1. For refusing, inhibiting or prohibiting immediate lawful entry and inspection of any premises, building or place for which the Department has issued an administrative order, freshwater wetlands permit, transition area waiver, approved mitigation proposal or general permit authorization, the civil administrative penalty shall be no more than \$10,000 nor less than \$7,000; and

2. For any other refusal, inhibition or prohibition of immediate lawful entry and inspection, the civil administrative penalty shall be no more than \$7,000 nor less than \$1,500.

(d) The Department may adjust the daily civil administrative penalty amount, within the applicable range at (c) above, based on the following factors:

1. The violator's compliance history;
2. The nature, timing and effectiveness of measures the violator takes to remedy the effects of the violation;
3. The nature, timing and effectiveness of measures the violator takes to prevent future similar violations;
4. Any unusual or extraordinary costs or impacts directly or indirectly imposed on the public or the environment as a result of the violation; and/or
5. Other specific circumstances of the violator or violation.

Amended by R.1992 d.117, effective March 16, 1992.

See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

Language changes in (b).

Amended by R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

7:7A-16.11 Civil administrative penalty for failure to pay a civil administrative penalty

(a) The Department may assess a civil administrative penalty under this section against each violator who fails to pay a civil administrative penalty when due under this chapter.

(b) The daily civil administrative penalty amount assessed under this section shall be equal to the unpaid civil administrative penalty, but shall not exceed the maximum allowed at N.J.A.C. 7:7A-16.5(a) and (b).

(c) Each day that a civil administrative penalty assessed under this subchapter is not paid after it is due shall constitute an additional, separate and distinct violation.

Amended by R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

7:7A-16.12 Economic benefit factor

(a) The Department may add to a civil administrative penalty assessed under this subchapter the amount of economic benefit in dollars that the violator has realized as the result of not complying, or by delaying compliance with, an applicable law and/or condition.

(b) The Department may use the economic benefit factor to increase a civil administrative penalty to an amount no greater than the maximum allowed at N.J.A.C. 7:7A-16.5(a) and (b).

(c) If the total economic benefit was derived from more than one violation, the Department may apportion the total economic benefit amount among the violations from which it was derived, so as to increase each civil administrative penalty to an amount no greater than the maximum allowed at N.J.A.C. 7:7A-16.5(a) and (b).

Amended by R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

7:7A-16.13 Civil penalty

(a) Each person who does any of the following shall be subject, upon the order of a court, to a civil penalty:

1. Violates the Freshwater Wetlands Protection Act, the Water Pollution Control Act, or this chapter;
2. Violates an administrative order or a court order issued pursuant to the Freshwater Wetlands Protection Act, the Water Pollution Control Act, or this chapter; or
3. Fails to pay in full a civil administrative penalty assessed under this chapter.

(b) A civil penalty imposed under this section shall not exceed the maximum allowed at N.J.A.C. 7:7A-16.5(a) and (b).

(c) A civil penalty imposed under this section may be collected, with costs, in a summary proceeding pursuant to the Penalty Enforcement Law, N.J.S.A. 2A:58-1 et seq. The Superior Court shall have jurisdiction to enforce the penalty enforcement law in conjunction with the Freshwater Wetlands Protection Act, the Water Pollution Control Act, and this chapter.

Amended by R.1992 d.117, effective March 16, 1992.

See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

Editorial changes only.

Amended by R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

Case Notes

Construction occurred within the transition area; violation of the Freshwater Wetlands Protection Act; penalty. *DEPE v. Manroe Builders, Inc.*, 94 N.J.A.R.2d (EPE) 100.

Construction of bulkhead and filling in of wetlands violated permit allowing construction of bulkhead; penalty assessed. *Deschaine v. Division of Coastal Resources*, 92 N.J.A.R.2d (EPE) 9.

7:7A-16.14 Criminal action

(a) The Department, upon petition to the Attorney General, may bring a criminal action in court for certain violations of the Freshwater Wetlands Protection Act, or of a permit, waiver, order, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto.

(b) If a violation described in this section pertains to State open waters, the criminal penalty shall not be governed by this section, but shall be governed by the Water Pollution Control Act at N.J.S.A. 58:10A-10(f).

(c) A person who willfully or negligently violates the Freshwater Wetlands Protection Act, or any permit, approval, waiver, order, exemption, or rule promulgated or approved pursuant thereto, shall be guilty, upon conviction, of a crime of the fourth degree and shall be subject to a fine of no less than \$2,500 nor more than \$25,000 per day of violation.

(d) A second offense under this section shall subject the violator to a fine of no less than \$5,000 nor more than \$50,000 per day of violation.

(e) A person shall, upon conviction, be subject to a fine of no more than \$10,000 if the person:

1. Knowingly makes a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under the Freshwater Wetlands Protection Act, or under a permit, waiver, order, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto; or

2. Falsifies, tampers with or knowingly renders inaccurate, any monitoring device or method required to be maintained under the Freshwater Wetlands Protection Act, or a permit, waiver, order, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto.

Amended by R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

7:7A-16.15 Forfeiture of conveyances

All conveyances used or intended for use in the purposeful or knowing discharge into State open waters of any pollutant or toxic pollutant, in violation of the Water Pollution Control Act, are subject to forfeiture to the State under N.J.S.A. 58:10A-10(g) and N.J.S.A. 13:1K-1 et seq. A hearing shall be held prior to any forfeiture under this section. For the purposes of this section, the term "conveyance" means an aircraft, vessel, vehicle, or other equipment or container.

New Rule, R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

7:7A-16.16 Notice of violation recorded on deed to property

(a) On order of the Commissioner:

1. The clerk or register of deeds and mortgages of the county containing the property upon which the violation occurred shall record a notice of violation of the Freshwater Wetlands Protection Act on the deed of the property; and/or
2. The clerk of the Superior Court shall record a notice of violation of the Freshwater Wetlands Protection Act.

(b) The notice of violation shall remain attached to the property deed and shall remain recorded at the Superior Court until the violation has been remedied and the Commissioner has ordered the clerk to remove the notice of violation.

Amended by R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

7:7A-16.17 "After the fact" permit

(a) The Department may issue an "after the fact" permit for a regulated or prohibited activity that has already occurred and that does not meet the standards for approval in this chapter only if all of the following are true:

1. The Department has determined that the restoration of the site to its pre-violation condition would increase the harm to a freshwater wetland, transition area, and/or State open water, or its ecology;
2. The Department has assessed and collected the costs or damages enumerated in N.J.A.C. 7:7A-16.4 from the violator;

3. The Department has required the violator to create or restore freshwater wetlands or State open waters at another location;

4. An opportunity has been afforded for public hearing and comment; and

5. The reasons for the issuance of the "after the fact" permit are published in the DEP Bulletin and in a newspaper of general circulation in the geographic area of the violation.

(b) The issuance of an "after the fact" permit or waiver under this section shall not limit the Department's ability to pursue any other enforcement action for the violation that is the subject of the "after the fact" permit or waiver.

(c) Any person violating an "after the fact" permit issued under this section shall be subject to enforcement under this chapter.

Amended by R.2001 d.312, effective September 4, 2001.
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

7:7A-16.18 Public participation

(a) To provide for public participation in the Department's enforcement process, the Department shall:

1. Investigate and provide responses to all citizen complaints submitted under Department procedures;

2. Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and

3. Publish notice of any proposed settlement of a Department enforcement action in the DEP Bulletin and provide at least 30 days for public comment on the settlement.

Amended by R.2001 d.312, effective September 4, 2001.
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

SUBCHAPTER 17. RECONSIDERATION BY DEPARTMENT OF ITS ACTION OR INACTION CONCERNING A PERMIT

Authority

N.J.S.A. 13:9B-1 et seq., 58:10A-1 et seq., 12:5-3, 13:19 et seq. and 13:9A-1 et seq.

Source and Effective Date

R.2003 d.44, effective January 21, 2003.
See: 34 N.J.R. 2388(a), 35 N.J.R. 418(a).

7:7A-17.1 Reconsideration by Department of its action or inaction concerning a permit

(a) If the issuance, modification, or denial of an individual freshwater wetlands permit would constitute a taking

without just compensation, and provided the conditions at (b) below are met, the Department may do any one or more of the following:

1. Compensate the property owner for the lost value of the property;

2. Condemn the affected property pursuant to the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 et seq.; and/or

3. Reconsider and modify its action or inaction concerning a permit so as to minimize the detrimental effect to the value of the property.

(b) The Department may reconsider and modify its action or inaction concerning a permit so as to minimize the detrimental effect to the value of the property, provided:

1. The Department has rendered a decision on a permit application under the rules in this chapter as strictly applied;

2. All administrative and judicial appeals of the permit decision have been concluded; and

3. Either of the following requirements is met:

i. A court has determined that the issuance, modification, or denial of an individual freshwater wetlands permit would constitute a taking of property, and the property owner thereupon submits a request for a reconsideration and modification of the permit action or inaction; or

ii. A takings complaint has been filed with the court or the court has determined that the issuance, modification or denial of a individual freshwater wetlands permit would constitute a taking of property, and the Department initiates the reconsideration.

(c) In making the determination to reconsider and modify its action or inaction concerning a permit so as to minimize the detrimental effect to the value of the property under (a) above, the Department shall prepare a written analysis that evaluates three factors:

1. The investments the property owner made in the property that is the subject of the individual freshwater wetlands permit application and whether the investments were reasonable, and reflected reasonable expectations, in accordance with (d) below;

2. The minimum beneficial economically viable use of the property, in accordance with (e) below; and

3. The environmental impacts of the minimum beneficial economically viable use for the property, and their consistency with the goals of the Freshwater Wetlands Protection Act, in accordance with (f) below.

(d) In determining whether the property owner's investments in the property as a whole were reasonable, and

reflected reasonable expectations, the Department shall evaluate the following information:

1. Conditions at the time of the investment. That is, the investment shall have been made in pursuit of development that would likely have been legally and practically possible on the property, considering all constraints existing and reasonably ascertainable at the time of the investment. For example, if a property owner bought property containing freshwater wetlands regulated under this chapter, it would not be reasonable to expect that the property could be developed without constraints. In determining conditions at the time of the investment, the Department shall consider, at a minimum, the following:

- i. Existing zoning and other regulatory requirements and conditions;
- ii. Historic landmarks or other historic or cultural resources;
- iii. The likelihood of obtaining other necessary approvals such as wastewater treatment approvals or approvals from other local, State or Federal agencies;
- iv. Terrain and other site conditions, and/or environmental constraints, which could affect the potential uses of the property as a whole;
- v. The existence of, or likelihood of obtaining, services to the property such as sewers or electricity; and
- vi. Land uses on adjacent properties and in the area where the property is located;

2. Costs actually incurred in pursuit of development of the property as a whole;

3. Costs incurred in furtherance of a lawful action. For example, if the property owner began the project without the necessary permits, the cost of defending against an enforcement action for this violation would not constitute a reasonable investment that reflects reasonable expectations;

4. Costs relating only to the specific property as a whole that is the subject of the individual freshwater wetlands permit application, and not including costs related to other properties; and

5. Any other factor affecting the property or the property owner, which is related to the reasonableness of the investments, the expectations, and/or the proposed use of the property.

(e) In determining the minimum beneficial economically viable use of the property, the Department shall consider existing legal precedent at the time of the determination. A use shall not be excluded from consideration as a minimum beneficial economically viable use merely because it diminishes the value of the property as a whole, does not result in a profit, reduces the marketability of the property as a whole, or does not allow the property owner to recoup all reasonable investments identified under (c) above.

(f) In determining the environmental impacts of any minimum beneficial economically viable uses of the property and the consistency of those impacts with the goals of the Freshwater Wetlands Protection Act, in accordance with (c) above, the Department shall evaluate whether the minimum beneficial economically viable use would:

1. Adversely affect the quality and resource value classification of the wetland, pursuant to N.J.A.C. 7:7A-2.5, and the quantity of freshwater wetlands, transition areas, and/or State open waters to be disturbed;
2. Adversely affect other protected resources, for example, historic or cultural resources, ecologically unique areas or critical wildlife habitat;
3. Result in irreversible losses of values and functions provided by freshwater wetlands, transition areas, and/or State open waters, for example, flood control, endangered species habitat, or water quality and whether such losses could be mitigated; and
4. Adversely affect public health, safety and welfare, and fish and wildlife.

(g) The Department shall not modify its action or inaction concerning a permit and approve a minimum beneficial economically viable use as the result of a reconsideration under this section if that use would cause any one of the following:

1. Irreversible losses of values and functions provided by freshwater wetlands, transition areas and/or State open waters that provide essential breeding, spawning, nesting, feeding, resting, or wintering habitats for fish and wildlife, including migratory birds, endangered species, and commercially and recreationally important wildlife. For the purposes of this section, "irreversible losses" means an alteration to the wetland, transition area or State open water that would eliminate one or more of the essential characteristics which provides the breeding, spawning, nesting, feeding, resting or wintering habitat for the species in question, and that could not be mitigated;

2. Irreversible losses in water quality of FW-1 or FW-2 trout production waters and their tributaries, resulting in degradation of ground or surface waters, in violation of Federal, State or local water quality standards; or

3. Irreversible losses of wetlands and/or State open waters, providing essential flood and storm damage protection by absorption, the storage of water during high runoff periods and the reduction of flood crests, resulting in creation of a public nuisance.

(h) A property owner may request that the Department reconsider and modify its action or inaction concerning a permit under (a) above only after:

1. The conclusion of any administrative and/or judicial appeal of the permit decision; and